NOTE

PRENUPTIAL AGREEMENTS AND FRAUD ON THE WIDOW'S SHARE: A LOOK AT VIRGINIA'S LAW ON PREMARITAL AGREEMENT ENFORCEMENT AT DEATH

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PRENUPTIAL AGREEMENTS AND FRAUD ON THE WIDOW'S SHARE: A LOOK AT VIRGINIA'S LAW ON PREMARITAL AGREEMENT ENFORCEMENT AT DEATH

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"The contract of marriage is the most important of all human transactions; it is the very basis of the whole fabric of civilized society."

~Lord Robertson

"Finding good partners is the key to success in anything: in business, in marriage and, especially, in investing."

~Robert Kiyosaki

Each year over 50,000 Virginia residents get married. Before many of these marriages, couples decide that they will enter into a contract, known as a premarital agreement. This agreement determines their rights to each other's assets. While these contracts are usually formed due to the contemplation of a future divorce, a premarital agreement also becomes important at another marital event—the death of a spouse. In this note, I analyze the importance of premarital agreements during the probate process and examine the Supreme Court of Virginia's case law on premarital agreements at the death of a spouse. The case law is surveyed to show that the court provides significant uncertainty that could ultimately allow couples to enter into an agreement that renders the surviving spouse helpless to obtain sufficient funds to survive. This helplessness occurs all while neither spouse truly understands the importance of these agreements. After providing this background, and exploring the problems that a surviving spouse could face, I suggest a new framework that the court could adopt that is supported by both common-law principles and the goal of protecting the surviving spouse.[1]

INTRODUCTION

THIS hypothetical story begins in Charlottesville, Virginia.[2] A couple, Sandy and Jim, has decided to make the important relationship

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[1] For the statistics used, see https://www.vdh.virginia.gov/healthstats/stats/htm.

[2] This fact pattern is entirely fictional. However, the facts were adapted from a New York case. *See* Bloomfield v. Bloomfield, 764 N.E.2d 950 (N.Y. 2001). This case provides a clear example of how premarital agreements can be

commitment of marriage. A prominent Trusts and Estates professor at the University of Virginia School of Law, Sandy understands that the new marriage could possibly prevent her child from receiving the full value of her inheritance, since the child resulted from a previous marriage. As will be explained in more depth below, if Jim survived Sandy, he could elect to take a share of Sandy's estate and prevent her child from obtaining the entire estate. In order to proactively address this situation, Sandy elects for the couple to enter into a premarital agreement.[3] Jim does not object, and they sign a premarital agreement the day before their marriage.[4] The agreement, in relevant part, states that, "[t]he parties agree to keep each of their property separate." In an independent section, the agreement states that it "is the sole enforcement mechanism for the disposition of property at divorce and death."[5]

After getting married, Jim and Sandy go on to have a child together, Henry. Jim understands that Sandy's income is more important to the household, so he decides to quit his job and become the primary caregiver for Henry. After Henry becomes an adult and moves away for college, Jim tries to return to the workforce, but he fails to secure employment equivalent to his prior job. However, this failure does not discourage Jim, as he always knew he could rely on Sandy's income.[6]

Unfortunately, tragedy strikes. Around the couple's thirty-year wedding anniversary, Sandy is killed in an accident. After overcoming his initial grief, Jim begins to sort through the disposition of Sandy's estate. Unbeknownst to him, Sandy had written her will thirty-five years prior, stating that all her property was to be disposed to her first child.[7] The problem is only exacerbated when Jim learns that the premarital agreement he signed on the eve of his wedding would prevent him from recovering a state-imposed percentage of Sandy's property, the elective share.[8] Now, the reliance on Sandy's income and support is gone, and Jim is left with nothing.

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signed years prior to their enforcement, when times have changed—both legally and socially.

[3] For the purposes of this paper, pre-marital, prenuptial, antenuptial, and post-nuptial agreements will all be considered interchangeable. The distinction of these agreements is outside the scope of this paper.

[4] For the purposes of this fact pattern, Jim is not educated in the law.

[5] This agreement is deemed to be enforceable under Virginia law. *See* VA. CODE ANN. § 20-151 (2014) (discussing the enforcement of these premarital agreements).

[6] Sandy would keep all her earnings in a private account solely in her name, but she would give Jim money anytime that he needed it. Furthermore, she would pay all the bills and debts that the couple incurred.

[7] This note is not concerned with if Henry can recover from this prior will by being a pretermitted child.

[8] VA. CODE ANN. § 64.2-304 (2014) (discussing the rights obtained by the surviving spouse under the elective share).

Is the enforcement of this contract upon Sandy's death equitable? According to some legal scholars, a premarital agreement controlling property at the death of a spouse is the "most conventional premarital agreement, and the least controversial."[9] To support this rationale, these scholars argue that death does not provide the enforcement problems of divorce and the "trust in the marriage is preserved."[10] However, upon further analysis of this principle, this position may not be entirely correct.

This note analyzes the proposition that premarital agreements should be unquestionably enforced at death. It will also provide a rebuttable framework to prove that they should not be enforced. In order to provide such framework in an easy to understand form, this note will focus entirely on the relevant case law and statues of Virginia.[11] Part II will provide relevant background principles to give a common level of knowledge, introducing both common-law and Virginia statutory principles of the elective share and premarital agreements. Part III will analyze the relevant case law of the Supreme Court of Virginia.[12] These cases will show that the Supreme Court of Virginia originally sought a "legal certain"[13] standard in interpreting these premarital contracts at death.[14] However, the court eventually settled on what might be termed a "metaphysically certain"[15] rule.[16] Part IV will call for the court to overrule its interpretation and provide a rule that is both "legally" and "metaphysically" certain. Part V will prove that this new rule is supported by both common-law principles and the goal of protection for the surviving spouse, plus it will also provide easy enforcement.

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[9] Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 72 (1998). *See also*, Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 352 (2007) (claiming that these type of premarital agreements "prescribing consequences upon death of a spouse won early acceptance").

[10] *Id.*

[11] Due to the fact that Virginia is a separate property state that recognizes the elective share, this paper will not focus on the unique problems of community property states. The problem of community property states would be subject to different analysis, because it can be argued that the surviving spouse would be giving up the right to their "own property." Therefore, an analysis of community property is outside the scope of this note.

[12] Pysell v. Keck, 263 Va. 457 (2002); Dowling v. Rowan, 270 Va. 510 (2005).

[13] As described in this paper, the term "legal certain" is used to denote a situation where the court seeks to ensure that the surviving spouse has clearly and explicitly denoted a waiver of his or her rights as a surviving spouse.

[14] *Pysell*, 263 Va. at 457.

[15] In this note, the term "metaphysically certain" denotes a situation where the court provides a holding that only concerns the situation that would trigger the waiver of the surviving spouse's rights not necessarily the insurance that the surviving spouse meant to waive those rights.

[16] *Dowling*, 270 Va. at 510.

I. RELEVANT BACKGROUND PRINCIPLES AND STATUTORY COMPONENTS

A. The Elective Share

1. Common-Law Principles

While the American law of Trusts and Estates is based around the idea of freedom of disposition, this freedom has some substantial limitations.[17] One of the major limits is the idea that a surviving spouse is entitled to an elective share.[18] An elective share is the ability of a "surviving spouse [] [to] elect to take under the decedent's will or to renounce the will and take a fractional share of the decedent's estate."[19] In order to understand the rationale for such "forced share," one must analyze two competing justifications.[20]

The first justification for the elective share is often referred to as the partnership theory[21] and is based on two dependent propositions. First, the theory takes into consideration that the economic benefit of the marriage is the result of both spouses, even if one is the income earner.[22] Second, the theory concludes that this economic partnership is "an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage."[23] However, when the dying partner chooses to disinherit the surviving spouse, the theory is upended and the dying spouse is deemed to have "reneged on the bargain."[24] In order to ensure that the surviving spouse is rightfully compensated, they are given an opportunity to renounce the will and claim the elective share.[25]

The second justification for the elective share is the idea of the support obligation,[26] in which spouses are deemed to owe the mutual duty of

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[17] JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 511 (9th ed. 2013).

[18] *See id.*

[19] *Id.* at 513 (also discussing the idea that the fractional share can range but typically is one-third of all the decedent's probate property plus certain nonprobate transfers").

[20] *Id.* at 514.

[21] *Id.* According to Dukeimer and Sitkoff, this is the "primary justification."

[22] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §18.8 (8th ed. 2011) ("The husband's wealth at death is likely, as we know, to be a product, in part, of the wife's work even if she never had any pecuniary income."); *see also* Unif. Probate Code Art. II, Part 2, General Comment (amended 2010) [hereinafter UPC General Comment] ("[H]usbands and wives to pool their fortunes on an equal basis, share and share alike.").

[23] UPC General Comment, *supra* note 22.

[24] *Id.*

[25] *See id.*

[26] DUKEIMER & SITKOFF, *supra* note 17, at 514 (the authors call this theory "an older and narrower" justification).

support.[27] This duty is not dismissed upon the death of one spouse, and it continues in favor of the surviving spouse.[28] In order to ensure that the duty is fulfilled, the surviving spouse is ensured support, usually through the elective share.[29]

Regardless of differences in underlying rationale, both the partnership theory and the support obligation maintain that the surviving spouse is entitled to an elective share.[30] Under both theories, the ability of the dead spouse to disinherit the surviving spouse is extremely limited.

2. Virginia Statutory Provision

Now that the basic principles underlying the elective share have been explained, it is necessary to look to the specific statutory provision enacted by the Virginia General Assembly concerning the elective share. The Virginia Code begins by stating that, regardless of whether the surviving spouse was included in the will or the decedent died intestate, the surviving spouse can claim an elective share.[31] Furthermore, the provision states that the surviving spouse must choose this election, in person or through appropriate documentation, within six months of the will being probated or the qualification of the administrator for the estate.[32]

In addition to the procedural mechanism, the Virginia Code also provides, in relevant part, "[i]f a claim for an elective share is made, the surviving spouse is entitled to (i) one-third of the decedent's augmented estate if the decedent left surviving children or their descendants or (ii)

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[27] *See, e.g.*, *In re* Estate of Antonopoulos, 268 Kan. 178, 182 (1999) (citing Timothy P. O'Sullivan & Joan M. Bowen, *New Spousal Elective-Share Rights: Leveling the Playing Field*, 65 J. KAN. B. ASS'N 18, 19 (1996) (giving a good overview of the two theories' interplay)).

[28] *Id.*

[29] Some scholars propose that the partnership theory and the support theory are in tension regarding the exact amount that is subject to the election. DUKEIMER & SITKOFF, *supra* note 17, at 514 ("Both theories justify the existence of an elective share. But they are often in tension when it comes to designing *the* elective share."). Designing the exact percentage of the elective share is outside the scope of this paper.

[30] *Id.*

[31] VA. CODE ANN. § 64.2-302 (2014). The elective share provides a major protective mechanism for the surviving spouse. The Supreme Court of Virginia has decided twelve cases where the "elective share" has been at issue. Showalter v. Showalter, 107 Va. 713 (1908); Caine v. Freier, 264 Va. 251 (2002); Pysell v. Keck, 263 Va. 457 (2002); Flanary v. Milton, 263 Va. 20 (2002); Chappell v. Perkins, 266 Va. 413 (2003); Jones v. Peacock, 267 Va. 16 (2004); Crawford v. Haddock, 270 Va. 524 (2005); Dowling v. Rowan, 270 Va. 510 (2005); Haley v. Haley, 272 Va. 703 (2006); Sexton v. Cornett, 271 Va. 251 (2006); Purce v. Patterson, 275 Va. 190 (2008); Tuttle v. Webb, 284 Va. 319 (2012).

[32] VA. CODE ANN. § 64.2-302 (2014).

one-half of the decedent's augmented estate if the decedent left no surviving children or their descendants."[33]

B. Premarital Agreements

1. Common-Law Principles

Questions concerning enforcement of prenuptial agreements began in England in the sixteenth century.[34] Many cases from this time period sought relief from the chancery and common-law courts to enforce the agreements.[35] Not only did the courts recognize the importance of these agreements, the public began to understand their importance, even including them in theatrical performances.[36]

In America, premarital agreements started on shaky turf,[37] due to the idea that premarital agreements would encourage divorce and destroy the sanctity of marriage.[38] Therefore, "courts held them *void ab initio* as contrary to public policy."[39] This policy view, however, had one distinction: death versus divorce.[40] According to some scholars, the use of premarital agreements for the death of one spouse was both widely accepted and never challenged, because these agreements were thought to preserve the trust of marriage.[41]

2. Virginia Statutory Provision

Due to the common-law rule of voiding premarital agreements as against public policy, few individuals entered into these agreements. However, the policy rationale surrounding the common-law rule began to break down as divorce became "easier and more commonplace."[42] In order to ensure the ability of citizens to use premarital agreements, state

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[33] VA. CODE ANN. § 64.2-304 (2014).

[34] Younger, *supra* note 9, at 352 (discussing the enforcement of these agreements in England).

[35] *Id.*

[36] *Id.* (citing Shakespeare's *The Taming of the Shrew* as an example of premarital agreements in theater).

[37] *See, e.g.*, Posner v. Posner, 233 So. 2d 381, 382 (Fla. 1970) (discussing the early views of premarital agreements).

[38] Silbaugh, *supra* note 9, at 72–73.

[39] Younger, *supra* note 9, at 352 (saying premarital contracts were treated as "void ab initio," to wit, treated as invalid from the outset).

[40] Silbaugh, *supra* note 9, at 72.

[41] Silbaugh, *supra* note 9, at 72; Younger, *supra* note 9, at 352. *See also*, Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R. 4th 22, 2(a) (1987) (stating that premarital agreements taking effect after death were generally viewed favorably by courts).

[42] Younger, *supra* note 9, at 352.

legislatures, including Virginia's General Assembly in 1985, began to pass laws that upheld the validity of these contracts.

Today, the relevant code sections, concerning the use and enforcement of premarital agreements, can be found at Va. Code §§ 20-147–155.[43] The code section states that it shall only apply to agreements "executed on or after July 1, 1986."[44] Furthermore, the section states that, "[a] premarital agreement shall be in writing and signed by both parties. Such agreement shall be enforceable without consideration and shall become effective upon marriage."[45]

In addition, and most significant to this paper, the code states, "[p]arties to a premarital agreement may contract with respect to . . .[t]he disposition of property upon separation, marital dissolution, *death*, or the occurrence or nonoccurrence of any other event."[46] This language proves that the General Assembly not only wanted to change the common-law understanding of non-enforcement of premarital contract for divorce, but also to accept the notion that these contracts were enforceable at death.[47]

II. SUPREME COURT OF VIRGINIA CASE LAW ON PREMARITAL AGREEMENTS CONCERNING DEATH

A. Pysell v. Keck: Call for Legal Certainty

Although the Virginia General Assembly has provided for enforcement of all premarital agreements executed since July 1, 1986,[48] the Supreme Court of Virginia has only been presented with two cases concerning the use of premarital agreements at the death of a spouse.[49]

On January 25, 2000, Tony and Debra Pysell were married.[50] On the day of their wedding, the couple entered into an agreement concerning their property.[51] The agreement stated, in relevant part, that "[it is] the intention and desire of the parties that their respective rights to each other's property acquired by operation of law shall be solely determined and fixed by this agreement."[52] Less than two months after their wedding,

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[43] These sections were codified using the "Premarital Agreement Act" as a framework. Premarital Agreement Act, ch. 434, 1985 Va. Acts 603–05.

[44] VA. CODE ANN. § 20-147 (2014).

[45] VA. CODE ANN. § 20-149 (2014).

[46] VA. CODE ANN. § 20-150 (2014) (emphasis added).

[47] *See, e.g.*, Silbaugh, *supra* note 9, at 72 (showing the concern was primarily with the trust of marriage).

[48] VA. CODE ANN. § 20-147 (2014).

[49] Pysell v. Keck, 263 Va. 457 (2002); Dowling v. Rowan, 270 Va. 510 (2005).

[50] Brief of Appellant at 3, Pysell v. Keck, 263 Va. 457 (2002) (No. 010506), 2001 WL 34831850, at *3.

[51] *Id.*

[52] *Pysell*, 263 Va. at 458 (alteration in original).

Tony died.[53] In his Last Will and Testament, Tony "made no provision for Debra."[54] Relying on the elective share provision, Debra timely selected to take her elective share.[55] In order to combat that election, Angelia Keck, the appointed executor of Tony's estate, sought summary judgment for a declaratory order asserting that Debra had waived her right to the elective share through the prenuptial agreement.[56] On December 1, 2000, the trial court granted the summary judgment holding "that the [pre]nuptial agreement barred Debra's claims against the Estate[.]"[57]

Unhappy with this outcome, Debra appealed. On appeal, the Supreme Court of Virginia began by framing the question as whether Debra had waived her right to the elective share.[58] In order to solve this question, the court held that normal contract construction rules applied.[59] Furthermore, the court stated that a "waiver must be express, or, if it is to be implied, it must be established by clear and convincing evidence."[60] Relying on these principles, the court held that "the only marital rights determined and fixed by the agreement were those of the husband and wife while they were living."[61] In addition, the court held that to find that the surviving spouse elective share had been waived would "require[] an unwarranted addition to the plain meaning of the language contained in the agreement" resulting in an "unjustifiable expansion of the scope of any explicit waiver."[62]

This decision shows that the *Pysell* court was concerned about legal certainty. Understanding the importance of the elective share, the Court wanted to ensure that the agreement provided clear legal principles that the surviving spouse waived the right to the elective share.[63] Accordingly, broad language providing that the premarital agreement shall control the rights to property was not enough. In order to satisfy the *Pysell* court's

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[53] *Pysell*, Brief of Appellant at *3.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at *4.

[58] *Pysell*, 263 Va. at 460 ("Both parties agree that the wife is asserting rights against the husband's estate that would normally accrue to a surviving spouse by operation of law. . . . They disagree, however, whether those rights were waived in the provisions of the three quoted paragraphs.").

[59] *Id.* ("Antenuptial agreements, like marital property settlements, are contracts subject to the rules of construction applicable to contracts generally, including the application of the plain meaning of unambiguous contractual terms.").

[60] *Id.* (citing McMerit Const. Co. v. Knightsbridge Dev. Co., 235 Va. 368 (1988)).

[61] *Id.* at 461.

[62] *Id.*

[63] This can best be shown by the court's acceptance of the normal waiver principle. *Id.*

concerns, the surviving spouse would have to clearly and unequivocally waive the elective share through express language.[64]

B. Dowling v. Rowan: Settling for Meta-Physical Certainty

Three and a half years later, the Supreme Court of Virginia was presented another opportunity to determine the applicability of premarital agreements at the death of a spouse.[65] On July 10, 1993, Daniel and Wilma Dowling entered into a premarital agreement prior to their marriage.[66] This agreement stated its purpose as "to settle the rights and obligations of each of them, during their marriage, upon the death of either or both of them, or in case of dissolution of the marriage."[67] Furthermore, the agreement noted, "the property currently belonging to each party and titled in his or her name shall remain his separate property."[68] During her lifetime, Wilma used numerous estate planning mechanisms such as revocable trusts and insurance trusts.[69]

On February 16, 2002, Wilma died.[70] Accordingly, Daniel timely filed his intention to claim the elective share.[71] After submitting the matter to the commissioner in chancery, the trial court held that the premarital agreement was "unambiguous and constituted a waiver" of the property sought through the elective share.[72] Unhappy with this result, Daniel appealed the decision. The Supreme Court of Virginia, upholding the trial court's holding, reviewed the decision in *Pysell* and stated that it must "revisit the issue that was before [them] in *Pysell* and determine whether this particular premarital agreement operates as a waiver of the surviving spouse's rights to property in the decedent's estate."[73] The court held that "the plain language of the Agreement in this case contains an express waiver."[74] To bolster this position, the court pointed specifically to the language "upon the death" of a spouse.[75] This language, ac-

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[64] While the court did not provide what would constitute a valid waiver, it is clear that the court would require explicit language concerning the elective share. Taking this holding seriously, it would require more than just language stating that the agreement concerned the death of the spouse, as described below.

[65] Dowling v. Rowan, 270 Va. 510 (2005).

[66] *Id.* at 514.

[67] *Id.*

[68] *Id.* at 514–15. From other sources, it seems that Daniel helped to draft this premarital agreement; however, the court does not touch on that issue.

[69] *Id.* at 515.

[70] Brief of Appellant at 3, Dowling v. Rowan, 270 Va. 510 (2005) (No. 050181), 2005 WL 4051509, at *3.

[71] *Dowling*, 270 Va. at 515. It is also important to note that Daniel, an attorney in Virginia, represented himself in this litigation.

[72] *Id.*

[73] *Id.* at 517.

[74] *Id.*

[75] *Id.*

cording to the court, "is precisely the language that was lacking in *Pysell*."[76]

In the end, Daniel was denied his rights to the elective share due to his waiver of the rights in the premarital agreement.[77] As the next section will explain, this jurisprudential shift regards "metaphysical certainty" as more important than the "legal certainty" that concerned the *Pysell* court.

III. CALL FOR ACTION: RECOGNIZING A CORRECT RULE

Was the "upon the death" operative language truly the "legal certainty" that the *Pysell* court wanted? It can be argued that the *Dowling* court completely abandoned the *Pysell* decision and its concerns. For example, the *Dowling* premarital agreement stated that its purpose "is to settle the rights and obligations of each"; this statement is entirely speculative and legally indeterminate.[78] However, the *Dowling* court ignores this legal uncertainty. Instead, it settles for the "metaphysical certainty" that is provided by the phrase "upon the death."[79] This phrase alone does nothing but trigger the elective share, which occurs at the death of the spouse. It states nothing about the legal prerogative[80] of the elective share or the rights that the surviving spouse is waiving.[81] Therefore, in order to take the *Pysell* court seriously,[82] the *Dowling* decision must be corrected.[83]

So what should the correct rule be?[84] While this question has a wide array of answers, one rule will provide recognition to both the *Pysell* and *Dowling* courts, as well as garner support through other policy con-

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[76] *Id.* at 517. While the Court claims that this is the language that the *Pysell* court was requiring, this understanding would truly fail to take the *Pysell* court seriously. *See supra* note 64. The court also touches on the fact that the agreement included specific language that kept some of the property from being waived. However, this part of the opinion is outside the scope of this paper and ultimately has no bearing on the decision, as the elective share value of this property is below the value that Daniel had already received.

[77] *Id.*

[78] *Id.* at 514.

[79] *Id.* at 514.

[80] *See supra* Part I.A.

[81] *See supra* Part I.B.

[82] As discussed previously, the *Pysell* court required the elective share to be waived through clear and unequivocal language concerning the elective share, rather than simply providing overarching language of when the elective share would become operative (i.e., the trigger).

[83] This note presents a call to action for the court to reinterpret its view of a correct waiver. Because the court has already taken the initiative, no action will be needed on the part of the Virginia General Assembly.

[84] While this note concerns only the elective share, its analysis could be extended to other varying state rights, such as the omitted spouse and homestead provisions. It is likely that these provisions would require the same outcome in which an explicit waiver is required, however, such determination is outside the scope of this note.

cerns.[85] The new rule would require that a waiver could only occur if the premarital agreement contained the precise language of "waiving the elective share."[86] First, this rule would provide the easy enforceability that the *Dowling* court sought. Just as the terms "upon the death" are precise, the terms "waiving the elective share" are as well. Second, this rule would provide the legal certainty that drove the *Pysell* court's decision. Since the "elective share" is a legal phrase that has meaning provided by the General Assembly, it would provide the legal certainty to exactly the scope of the surviving spouse's waiver. It also would provide the surviving spouse with notice as to exactly the scope of his or her waiver.[87] Finally, it would provide the metaphysical certainty that the *Dowling* court's rule provided. The term "elective share" is only relevant upon the "death of a spouse," so it would provide the same trigger certainty.

Overall, the Supreme Court of Virginia should review its decision in *Dowling* and craft a new rule that properly takes into account its prior jurisprudence and policy rationales dating back to early common law.[88]

IV. SUPPORT FOR THE NEW STANDARD

A. Common-Law Theories' Support

The new rule, as articulated in Part III, would support policy concerns surrounding the elective share and premarital agreements. The first policy preferences that this new rule supports are the common-law principles that surrounded the adoption of the elective share. As Part I.A explained, two theories, partnership and support, are the underpinnings of the elective share. These two theories are supported by the use of a strict rule requiring an explicit waiver of the elective share in premarital agreements through the precise language stating that the surviving spouse is "waiving the elective share."[89]

With respect to the partnership theory, the new rule provides a precise mechanism to ensure that the surviving spouse is ultimately waiving the "unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage."[90] If the waiver is required to include the term "elective share," the surviving spouse will be allowed to inquire into the meaning of this term, ensuring that he or

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[85] Part IV, *infra*, will discuss the other policy rationales that support the new rule.

[86] Throughout the rest of this note, the phrase "waiving the elective share" will be referred to as the new rule. This shorthand will provide the reader with an easy format to follow and understand without unnecessarily repeating the same phrase continuously.

[87] Part IV.C, *infra*, will discuss the importance of this notion in more detail.

[88] This note provides an example of a clear rule below.

[89] This is clearly the precise rule that Part III, *supra*, supports.

[90] UPC General Comment, *supra* note 22.

she is willing to forego that future economic benefit. Furthermore, the new rule would ensure that the premarital agreement is not considered to have "reneged on the bargain."[91] If the premarital agreement states the waiver in precise language, a court will not be as concerned about possible fraud on the surviving spouse. The language should provide that the surviving spouse was capable of determining the scope of the waiver. Finally, this new rule would provide the spouse with the same ability to make the decision of whether to waive the elective share as the elective share itself provides.[92] Under the elective share, the spouse is given the ability to elect or not. By having the ability to not elect, the surviving spouse is ultimately given a waiver power on the backend. This new rule would just allow the spouse to knowingly make that determination on the front end.[93]

With respect to the support theory, the new rule would ensure that the surviving spouse is given the ability to make the decision of whether he or she would need the support after the death of his or her partner.[94] By requiring the terms "waiving the elective share," the surviving spouse would be given the opportunity to make an educated decision on his or her possible support needs, or to seek help in this decision and choose to waive these needs if applicable.[95] As mentioned above, this waiver would not be against the policies of the elective share, as the elective share itself provides the choice of the spouse to not elect.

In addition, the distinctions between divorce and marriage exacerbate these principles. First, divorce nullifies the partnership theory by ending the partnership between the couple.[96] Second, divorce undermines the support theory because, post-divorce, both individuals will need support throughout the remainder of their life. However, this is not the case with death. One spouse, the decedent, will no longer have to worry about supporting his or herself. This makes the support of the sur-

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[91] *Id.*

[92] *See supra* note 8.

[93] The ability to waive the elective share is important to a surviving spouse for numerous reasons. For example, a third party, such as Medicaid, could exercise the elective share right and ensure repayment of any benefits. *See, e.g.*, *In re* Estate of Shipman, 832 N.W.2d 335 (S.D. 2013).

[94] DUKEIMER & SITKOFF, *supra* note 17, at 514 (The authors call this theory "an older and narrower" justification.).

[95] This would ultimately ensure that some flimsy language, like in *Pysell*, could not be used to prevent the support and partnership rights of the surviving spouse. This precise language would ensure the surviving spouse the ability to an educated decision and not to be surprised later. However, it is possible that even this precise language would not trigger the surviving spouse to become educated on the topic. While this is true, this would be a counterargument to any rule that could be made.

[96] It can still be argued that the spouse should receive the funds that were gained up until the partnership is dissolved. This issue is outside the scope of this paper.

viving spouse much more significant. Lastly, divorce and death can be distinguished due to fault. In divorce, the couple has decided to end their relationship due to some differences or fault. At death, it is hard to argue that the decedent, or the surviving spouse, was at fault or any differences accounted for the death.[97]

In the end, the new rule would support both theories that underlie the common-law implementation of the elective share. Under the new rule, the surviving spouse would not be deprived of his or her elective share without having had the opportunity to consider the theories underlying the elective share and to make an educated decision on whether to waive his or her right to one. If this process is followed, and the operative language is included, both of these theories would support the voluntary and educated waiver of the elective share.

B. Evidentiary Problems Resolved

The new rule will also prevent inherent evidentiary problems that occur with premarital agreements. This is illustrated by the famous case concerning professional baseball player, Barry Bonds.[98] In 1988, a few hours prior to leaving Phoenix for their wedding, Barry Bonds and Susann Margreth entered into a premarital agreement.[99] In the agreement, Susann waived all of her rights to Barry's current property and to future property that Barry would obtain.[100] According to the facts presented by Barry, his lawyers explained the agreement to Susann.[101] In 1994, the couple separated after having two children together.[102] After realizing that the premarital agreement would prevent her from obtaining support, Susann brought suit, arguing that the agreement was not entered voluntarily because her limited English skills prevented her from understanding the scope of the agreement.[103] Ultimately, the court's decision hinged on whether Susann was required to have independent counsel in order to enter the agreement voluntarily, because there was other evidence from Barry's lawyers that proved that they had explained the agreement. In the end, the court held that Susann had knowledge of the importance of independent counsel, so the absence of such counsel did not result in the agreement being involuntary.[104]

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[97] This assumes that the surviving spouse was not at fault. Otherwise, the individual state's slayer statute, the statute preventing a party who caused a death from recovering from the decedent's estate, will nullify this entire paper's topic.

[98] *In re* Marriage of Bonds, 5 P.3d 815 (Cal. 2000).

[99] *Id.* at 817. The couple would fly to Las Vegas for their wedding. *Id.*

[100] *Id.* at 817.

[101] *Id.* at 819.

[102] *Id.* at 817.

[103] *Id.* at 818.

[104] *Id.* at 837 ("These circumstances support the inference that any inequality in bargaining power–arising primarily from the absence of independent coun-

As this case shows, witnesses to premarital agreements can become important when one party suggests that he or she did not voluntarily, or was fraudulently forced to, enter into these agreements. Some states have addressed this by requiring that, for a premarital agreement to be enforceable, the spouses must obtain independent counsel or "knowingly waive" their right to independent counsel.[105] However, other states, including Virginia, have failed to require such action and only require that the agreement be in writing, signed by both parties, and entered voluntarily.[106]

With Virginia's minimal requirements, it is permissible for a couple to execute an enforceable premarital agreement in private. This privacy can result in major evidentiary problems. While neither the *Pysell* nor *Dowling* cases questioned the voluntariness or unconsciousness of the agreement, it is very common that such arguments are used to combat the enforcement of premarital agreements.[107] When a marriage is ended by the death of one spouse and the surviving spouse contests the premarital agreement for lack of voluntariness, the fact that the original agreement was executed in private presents a significant evidentiary issue. In this situation, the court would only be presented with the surviving spouse's rehearsal of the facts.[108] Thus, the surviving spouse would be able to clearly argue that he or she did not voluntarily enter into the agreement to waive the elective share, without any party being able to offer rebuttal testimony.[109]

The surviving spouse's voluntariness objection to the premarital agreement presents major evidentiary problems for the court. However, the new rule would minimize these problems.[110] By requiring the opera-

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sel who could have advised Sun not to sign the agreement or urged Barry to abandon the idea of keeping his earnings separate–was not coercive."). As a result of this case, the California legislature amended its code to require "independent counsel or a written, knowing waiver, and seven days advance notice." DUKEMINIER & SITKOFF, *supra* note 17, at 540.

[105] *See, e.g.*, CAL. FAM. CODE § 1615(C) (West 2012).

[106] VA. CODE ANN. § 20-149 (2014); VA. CODE ANN. § 20-151 (2014).

[107] Chaplain v. Chaplain, 54 Va. App. 762 (Va. Ct. App. 2009) (wife argued that the premarital agreement was involuntary and unconscionable during a divorce).

[108] The ability of the surviving spouse to allege that the agreement was not entered into voluntarily could give the surviving spouse a clear advantage, because the dead spouse would have no chance to rebut these claims. This is very different than what happens in the divorce setting.

[109] As can be seen in the Bonds' case, rebuttal testimony can become very important. *See In re* Marriage of Bonds, 5 P.3d at 815.

[110] This note does not suggest that the new rule would not still have its own problems, but these problems would be inherent in any rule. For example, the spouse could still argue that the agreement was involuntary due to the fact that he or she did not understand the legal importance of the elective share. However, this problem would be inherent in any waiver context. At least for this argument,

tive language "waiving the elective share," the court can become confident that the surviving spouse was put on notice that signing the agreement would ultimately waive the elective share. This language would prevent the court from needing to seek other parol evidence in order to determine if the idea of an elective share was even mentioned to the surviving spouse. Furthermore, while not requiring independent counsel explicitly, this language could have the effect of triggering the surviving spouse to seek outside counsel before entering the agreement.

C. Protects the Surviving Spouse's Lack of Legal Knowledge

The third, and final, policy reason to favor the new rule is that it ensures protection for the surviving spouse. Returning to the hypothetical presented in the Introduction, Jim's situation poses three imperative problems. First, Jim was not educated in the law, and arguably had no idea the scope of the premarital agreement. Second, Jim decided to forego his career in order to care for his and Sandy's child. In doing so, he relied on Sandy's income for support. Furthermore, he explicitly relied on Sandy's income when he was unable to reenter the workforce after his extended absence. Lastly, and relatedly, Jim will be left with nothing if the premarital agreement is held valid.

Now, compare Jim to Daniel Dowling, the plaintiff in *Dowling*.[111] First, Daniel clearly understood the possible scope of the premarital agreement. As the court noted, Daniel "is an attorney licensed in Virginia and he represented himself in the elective share litigation."[112] If Daniel felt competent enough to represent himself in the litigation, he surely was competent enough to recognize the possible scope of the premarital agreement. Second, Daniel did not forego his career to help support his marriage with Wilma. Furthermore, the Court noted, "[b]oth of them [Daniel and Wilma] came into the marriage with significant assets that were listed in appendices to the Agreement."[113] This suggests that Daniel did not rely on Wilma for support. Lastly, Daniel would not be left with nothing if the premarital agreement were held valid, as he had already received a substantial amount of assets from Wilma through other estate planning means.[114]

While these two scenarios represent opposite ends of the spectrum, the new rule would help ensure that each party would be given an equal playing field to do research and seek help. If the operative language

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the court can be confident that the surviving spouse was given ample opportunity to seek out the meaning of the term—elective share—before entering the agreement.

[111] This comparison may shed some light on one possible reason why the *Dowling* court seemed less concerned about legal certainty.

[112] Dowling v. Rowan, 270 Va. 510, 515 (2005).

[113] *Id.*

[114] *Id.* at 516 (The court noted that he "had already received assets from the estate totaling $52,806").

"waiving the elective share" were required, Jim would receive the same notice as Daniel, who had received his notice through his legal training, to seek understanding of this term through independent counsel. Furthermore, it would allow Jim to be on notice that the document contains the clear specified language, rather than some broad precatory language[115] deemed an express waiver. Once he is equipped with the exact language to question, hopefully his wife Sandy would be willing to explain to Jim exactly what he is waiving.[116]

In the end, the new rule supports three separate policy rationales. First, it bolsters the two common-law theories, partnership and support, which underpin the elective share. Second, it would alleviate significant evidentiary problems facing courts.[117] Lastly, it would place the legal knowledge of a surviving spouse on the same playing field as other legally educated surviving spouses, and it would ensure the same notice.

V. CONCLUSION

In 1964, the Court of Appeals of Maryland first coined the phrase "fraud on the widow's marital rights[.]"[118] The phrase, "fraud on the widow's" share, denotes any legal mechanism that can be used to prevent the surviving spouse from inheriting property that one could reasonably argue that he or she is entitled.[119] With that phrase in mind, this note's objective is to cast doubt on the conventional wisdom that premarital agreements are automatically enforceable as a waiver of the surviving spouse's elective share rights.[120] Using Virginia's law as a case example, this note sought to accomplish three goals. First, the note intended to provide the necessary framework of the elective share and premarital agreement doctrines as distinct legal phenomena.[121] This required a study of both common-law origins and Virginia statutory enactments. Second, the note analyzed the two Supreme Court of Virginia decisions on the interplay of premarital agreements and the elective share.[122] Lastly, the note provided a new rule and support for this rule.[123] By implementing this new rule, both the historical origins of the elective share and other policy concerns can be vindicated.

This note intends to provide the first academic analysis regarding use of premarital agreements at death. Since this use has been widely accepted with little debate, this note hopes to spark some discussion and

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[115] This is referring to the language "on the death."

[116] If not, Jim could still have voluntariness or unconsciousness arguments as discussed in Part V.B, *infra*.

[117] *See supra* note 108.

[118] Gianakos v. Magiros, 234 Md. 14, 17 (1964).

[119] *Id.*

[120] *See supra* Introduction.

[121] *See supra* Part I.

[122] *See supra* Part II.

[123] *See supra* Parts III and IV.

change the law for the best moving forward. As Lord Robertson famously stated, "The contract of marriage is the most important of all human transactions; it is the very basis of the whole fabric of civilized society."[124] If this is true, the second most important contract that spouses may enter into is a premarital agreement. This agreement can have results even after the death of one spouse. In order to ensure that these contracts are advancing the policy goals of the nation, we must revisit these basic notions and make the necessary changes.

[124] *See, e.g.*, Herring v. Wickham, 70 Va. 628 (1878) (referring to Lord Robertson's language).