

FILED

05/03/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 14, 2023 Session

JAMES L. HENRY, JR., ET AL. v. ELIZABETH P. CASEY ET AL.

Appeal from the Chancery Court for Hamilton County
No. 21-0876 Pamela A. Fleenor, Chancellor

No. E2022-00933-COA-R3-CV

This appeal stems from the trial court’s dismissal of two creditors’ claims against the personal representatives of the decedent debtor’s estate. The creditors claimed that the personal representatives breached their fiduciary duties to the estate by failing to exercise the decedent’s statutory right, as a surviving spouse, to take an elective share of his deceased wife’s estate when the time limit for doing so had not yet expired at the time of the decedent’s death. The creditors also asserted claims against other parties associated with the personal representatives for conspiracy and inducement. In dismissing the creditors’ complaint, the trial court determined that (1) Tennessee statutory law provides that a personal representative of the surviving spouse’s estate “may” take an elective share on behalf of the surviving spouse who has died, (2) “may” indicates that the decision is discretionary, (3) the personal representative maintains the same discretion to elect that the surviving spouse held, (4) the personal representative owes no duty to creditors of the estate to make the election, and (5) the right to elect is not an asset of the estate that can be deemed “wasted” if unexercised. The creditors have appealed. Discerning no reversible error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

David L. Moss, Signal Mountain, Tennessee, for the appellants, James L. Henry, Jr., and J. Robert Wheat, Jr.

Sam D. Elliott and Michael M. Thomas, Chattanooga, Tennessee, for the appellees, Elizabeth P. Casey, Lynn P. Casey, Lee W. Patten, and Bethany Patten Neal.

Lauren Paxton Roberts and Johnathan D. Burnley, Nashville, Tennessee, for the appellees, Jennifer Kent Exum and Chambliss, Bahner & Stophel, P.C.

OPINION

I. Factual and Procedural Background

On December 2, 2021, James L. Henry, Jr., filed a complaint in the Hamilton County Chancery Court (“trial court”) against Elizabeth P. Casey; Lynn P. Casey; Z. Cartter Patten, III; Jennifer Kent Exum; and Chambliss, Bahner & Stophel, P.C. (collectively, “Defendants”), concerning his claims filed against the estate of B. Allen Casey, Jr. (“Allen’s Estate”).¹ Mr. Henry stated that he was a creditor of Allen’s Estate, which was currently pending probate in the Hamilton County Chancery Court, Probate Division (“probate court”).

In his complaint, Mr. Henry explained that Elizabeth P. Casey (“Elizabeth”) was the administrator and personal representative of Allen’s Estate as well as a co-executor and personal representative of the estate of Emma P. Casey (“Emma’s Estate”), which was also pending probate in the probate court.² Lynn P. Casey (“Lynn”) and Mr. Patten were also co-executors and personal representatives of Emma’s Estate. According to Mr. Henry, Ms. Exum is a Hamilton County attorney who had been named administrator *ad litem* and personal representative of Allen’s Estate “during the period March 3, 2021 through at least April 1, 2021.” Chambliss, Bahner & Stophel, P.C. (“Chambliss Bahner”) is a professional corporation of attorneys in Hamilton County and the employer of Ms. Exum.

Mr. Henry asserted that he sought recovery on behalf of Allen’s Estate and its creditors and beneficiaries for the economic damages caused by the “wrongful acts, omissions, failure of administration and breaches” of Defendants. Mr. Henry explained that Emma Patten Casey (“Emma”) and B. Allen Casey, Jr. (“Allen”), had been married in 1963 and that Elizabeth and Lynn were born of the marriage. When Emma died in May 2020, she left an estate purportedly worth fifteen million dollars. Mr. Henry attached a copy of her will, which left all of her property to a revocable living trust (“Emma’s Trust”). Elizabeth and Lynn were named the primary beneficiaries of the trust. According to Mr. Henry, Allen was only to receive “a fraction of the trust income during his life.” Emma’s will appointed Elizabeth, Lynn, and Emma’s brother, Mr. Patten, as co-executors (“Co-Executors”), and the appellate record demonstrates that Co-Executors had petitioned the probate court in May 2020 to probate Emma’s will. Co-

¹ Mr. Patten passed away during the pendency of these proceedings, and the personal representatives of his estate, Lee W. Patten and Bethany Patten Neal, were subsequently substituted as parties.

² Because several of the parties in this matter share the same surname, we will refer to those parties by their first names as designated herein. No disrespect is intended.

Executors were subsequently appointed personal representatives of Emma's Estate by the probate court.

Mr. Henry claimed that Allen was entitled to take an elective share equal to forty percent of Emma's Estate, pursuant to Tennessee Code Annotated § 31-4-101(a)(1), because Allen was a surviving spouse and Emma and he had been married for more than nine years. According to Mr. Henry, no one informed Allen of that right or of the size of Emma's Estate, and Allen never waived or disclaimed his right to take an elective share before his death.

Allen passed away in July 2020, shortly after Emma's death. Mr. Henry noted that at the time of Allen's death, Allen owned very little personalty and no real property. Allen had several unpaid creditors, however, including Mr. Henry. According to Mr. Henry, Allen's creditors' claims totaled more than four million dollars.

Mr. Henry posited that because Allen's right to elect against Emma's will did not expire until nine months following Emma's death, this right became an asset of Allen's Estate that his personal representative held the right and power to exercise. Moreover, Mr. Henry asserted that the administrator of Allen's Estate had a fiduciary duty to preserve and collect the elective share and administer it along with any other property in Allen's Estate.

Mr. Henry claimed that Co-Executors had acted in concert to delay or defeat appointment of an administrator for Allen's Estate or to secure control of it themselves in order to prevent the elective share right from being exercised. Co-Executors hired attorney John R. Buhrman to file an affidavit under Tennessee Code Annotated § 30-4-103 (2021), then known as the Small Estates Act, stating that Allen's Estate only contained approximately \$9,000 in property.³ A copy of Allen's will was attached to the affidavit. According to Mr. Henry, Allen's will left his entire estate to a revocable trust ("Allen's Trust"), for which the sole beneficiary was EduSource Unlimited, a charitable organization.

Subsequently, Mr. Henry, who had a claim pending in circuit court against Allen before his death, filed a motion in the circuit court matter seeking the appointment of an administrator to administer Allen's Estate. The circuit court referred the issue to the trial court and stayed the circuit court case.

In December 2020, Mr. Henry filed a motion in probate court concerning Allen's Estate, asking the court to convert the small estate into a full probate proceeding due to

³ Effective March 18, 2022, the General Assembly amended this statutory section and renamed it "The Small Estate Affidavit Limited Letter Authority Act." See 2022 Tenn. Pub. Acts, Ch. 665, § 1 (H.B. 1362).

the existence of the elective share right. Mr. Henry also requested that the probate court appoint a disinterested third party as administrator of Allen's Estate. Mr. Henry's motion was set for hearing on January 19, 2021. According to Mr. Henry's complaint:

As the January 19, 2021 hearing approached, the Co-Executors and their attorney agents knew that Allen's Estate owned a very valuable asset in the Elective Share worth approximately \$6 million; that the election would almost certainly require Elizabeth and Lynn to disgorge \$6 million that they had received or expected to receive from Emma's Estate; that these funds would be given to Allen's Estate; that those funds would be used first to pay Allen's Creditors; and that the remainder (after debts and costs) would be paid to the Charitable Beneficiary under Allen's Will. In other words, Elizabeth and Lynn faced the prospect of having to transfer \$6 million that they received under Emma's Will to Allen's Estate with no chance of getting any of it back because they were not beneficiaries under Allen's Will.

Further, they realized that if Allen's Estate were declared to be "intestate" (*i.e.* without a will), Elizabeth and Lynn would be heirs-at-law and entitled to receive at least the remainder of Allen's Estate (after debts and costs) rather than the Charitable Beneficiary under Allen's Will.

Finally, they realized that if they could gain appointment as the personal representative of Allen's Estate, they might prevent the election altogether and avoid losing any part of the \$6 million.

Mr. Henry asserted that Elizabeth and Lynn had instructed and authorized their agents to carry out a plan to prevent Allen's Estate from exercising the elective share right and bringing more assets into the estate. Mr. Henry claimed that in furtherance of this plan, Elizabeth had filed a petition stating that Allen died intestate and requesting appointment as administrator of his estate. Once appointed, Elizabeth gave notice to Allen's creditors. Several creditors filed claims in Allen's Estate.

Mr. Henry further averred that following a hearing, the probate court determined that Elizabeth's interest might be adverse to the creditors and appointed Ms. Exum administrator *ad litem* for the purpose of determining whether to make the spousal election against Emma's will. Ms. Exum subsequently declined to make the election and, according to Mr. Henry, did so shortly after the time limit had expired.

Mr. Henry propounded that Elizabeth and Ms. Exum breached their fiduciary duties to Allen's Estate and wasted assets that could have rendered the estate solvent. Mr. Henry further advanced the position that Chambliss Bahner was liable for Ms. Exum's actions under a theory of vicarious liability. Moreover, Mr. Henry asserted a

claim of civil conspiracy against Co-Executors as well as claiming that they aided, abetted, and induced the purported breaches of fiduciary duty by Elizabeth and Ms. Exum. Mr. Henry additionally sought a constructive or resulting trust in the funds that “rightly belonged to Allen’s Estate” based on Elizabeth’s and Lynn’s purported unjust enrichment. He also sought compensatory and punitive damages and attorney’s fees. Mr. Henry attached copies of several documents, including Emma’s will, Emma’s Trust, pleadings filed in the probate matter, Allen’s will, Allen’s Trust, and pleadings filed in the circuit court action. Mr. Henry filed an amended complaint on December 30, 2021, *inter alia*, adding J. Robert Wheat, Jr., as a plaintiff. Mr. Wheat had also filed a claim as a creditor of Allen’s Estate.

On February 1, 2022, Co-Executors filed a motion seeking dismissal of the complaint pursuant to Tennessee Rule of Civil Procedure 12.02(6). In support, Co-Executors postulated that “an election to take under or reject a will is a personal right of the surviving spouse, which cannot be reached by creditors who can claim no right or interest in the estate contrary to their debtor’s election.” Co-Executors filed a brief attendant to their motion.

Ms. Exum and Chambliss Bahner concomitantly filed a separate motion to dismiss, arguing in pertinent part:

Plaintiffs attempt to hold Exum, and vicariously [Chambliss Bahner], liable for breach of fiduciary duties that Exum simply did not owe Plaintiffs as Administrator *ad litem*. Regarding any duties that Exum did owe as Administrator *ad litem*, the Amended Complaint is devoid of any factual allegations demonstrating that Exum breached such duties. Additionally, the Amended Complaint attempts to impose new, unfounded duties upon Exum in her role as Administrator *ad litem* which have no basis in law and which are unsupported by the factual allegations in the pleadings and the exhibits thereto.

A memorandum of law was filed in support of the motion.

On February 18, 2022, Mr. Henry and Mr. Wheat (collectively, “Plaintiffs”) filed a motion seeking recusal of the trial court judge, Chancellor Jeffrey Atherton. In support, Plaintiffs attached an affidavit from Mr. Henry and numerous other documents. Plaintiffs subsequently filed separate responses to the respective motions to dismiss filed by Co-Executors and by Ms. Exum and Chambliss Bahner. On February 25, 2022, the trial court judge entered an order of recusal. The case was subsequently reassigned to Chancellor Pamela A. Fleenor.

The trial court conducted a hearing on May 24, 2022, concerning the pending motions to dismiss. On June 13, 2022, the court entered an order granting the motions to

dismiss, attaching and incorporating a transcript of its oral ruling. In that transcript, the court stated in pertinent part:

The entire premise underlying Plaintiffs' causes of action all hinge on two theories regardless of how it was pled. Number One, that the personal representative's choice to elect against the Will is an asset of the estate and; Two, that the personal representative owed the creditors of the estate a duty to elect against the Will. In other words, the personal representative was mandated to elect the elective share and that the personal representative had no discretion.

The Court concludes as a matter of law this is not Tennessee Law. I refer first to T.C.A. 31-4-102(a)(1) entitled Proceeding for Elective Share and Time Limit. The surviving spouse may elect to take the spouse's elective share in decedent's property by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of death. That's the pertinent part.

Then we go to T.C.A. 31-4-105, Death of Surviving Spouse, in the event the surviving spouse dies before the time for electing the elective share expires, the personal representative of the decedent's surviving spouse may, and I emphasize may, in like manner and every respect, make the election on behalf of the deceased spouse. In like manner, the personal representative may, again emphasis on may, withdraw a demand for an elective share at any time before entry of a final determination by the Court.

What the Court finds is the word "may" in the statute, T.C.A. 31-4-105, is discretionary. It is not mandatory. Shall is mandatory in Tennessee statutes. May is always elective or discretionary. And the legislature knows when they mean "may" and when they mean "shall." And the Court in statutory construction is to take the statute verbatim on its face and the clear and plain language and meaning of the wording in the statute. So, the Court finds that "may" is a choice in T.C.A. 31-4-105.

The Court further finds that, if you read on, the personal representative may in like manner, and every respect, which the Court reads as in like manner and in every respect as the surviving spouse in 31-4-102(a) makes the election.

Now, in like manner may mean, as Plaintiffs argue, procedural, but in "every respect" the Court says is substantive. So, the Court concludes as a matter of Tennessee law that the [personal representative] has all the discretion that the surviving spouse did.

* * *

Further, while the moving parties have the burden of proof on their Rule 12 motions, the Plaintiffs have to state a cause of action that's within Tennessee law. And the Plaintiffs have cited no authority that the election against the Will is an asset of the estate. . . . At most, it would be an inchoate interest; or it's not a cognizable right until the election is made. . . . It follows then, if it's not an asset of the estate, it can't be wasted by the personal representative or the Attorney ad Litem.

Further, since the election is totally within the discretion of the personal representative, then the [personal representative] is not mandated to choose or elect against the Will. In other words, the personal representative has no fiduciary duty to have to take against the Will. It certainly doesn't have a fiduciary duty to the creditors to take against the Will. That entirely would change the wording of the statute and; therefore, is not Tennessee Law.

* * *

The Court concludes that taking the facts of the Complaint as true but not the legal conclusions that are contrary to Tennessee law, and giving the Plaintiffs the benefit of all the reasonable inferences that can be drawn from the facts, the Plaintiffs can prove no set of facts in support of a claim that would entitle them to relief under Tennessee Law. Accordingly, the Motions to Dismiss are both granted.

Plaintiffs timely appealed.

II. Issues Presented

Plaintiffs present the following issues for this Court's review, which we have restated slightly:

1. Whether the trial court erred in determining that the personal representatives of Allen's Estate maintained complete discretion concerning exercise of the right to take an elective share.
2. Whether the trial court erred in determining that the elective share right was not an asset of Allen's Estate that could be wasted.

3. Whether the trial court erred in determining that Ms. Exum's appointment as administrator *ad litem* relieved Elizabeth from liability for her breaches of fiduciary duty and waste during her time serving as personal representative.
4. Whether the trial court erred by dismissing the causes of action against the co-defendants of the personal representatives.

III. Standard of Review

Regarding the review of a dismissal pursuant to Rule 12.02(6), our Supreme Court has elucidated:

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010) (quoting *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005)).

In considering a motion to dismiss, courts "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007) (quoting *Trau-Med [of Am., Inc. v. Allstate Ins. Co.]*, 71 S.W.3d [691,] 696 [(Tenn. 2002)]). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002). We review the trial court's legal conclusions regarding the adequacy of the complaint *de novo*.

Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 426 (Tenn. 2011) (other internal citations omitted).

The issues presented by this appeal involve the proper interpretation of certain statutory provisions. Statutory construction is a question of law that is reviewable on a *de novo* basis without any presumption of correctness. *In re Est. of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009); *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 802 (Tenn. 2000).

IV. Discretion of the Personal Representative Regarding the Surviving Spouse's Right to Take Elective Share

The controversy in this action arises from the fact that when Emma died in May 2020, she purportedly possessed an estate worth several million dollars. Due to the fact that she and Allen had been married for more than nine years, Tennessee Code Annotated § 31-4-101 (2021) provides that Allen would have had the right to take an elective share rather than taking under her will, with the applicable elective share being forty percent of Emma's net estate. Tennessee Code Annotated § 31-4-102 (2021) permits a surviving spouse nine months from the date of the deceased spouse's death to make such an election.

At the time of Allen's death in July 2020, he had not exercised his right to elect against Emma's will, and the time for doing so had not expired. As such, this matter hinges on the proper interpretation of Tennessee Code Annotated § 31-4-105 (2021), which provides:

In the event the surviving spouse dies before the time for electing the elective share expires, the personal representative of the decedent's surviving spouse may, in like manner and every respect, make the election on behalf of the deceased spouse. In like manner, the personal representative may withdraw a demand for an elective share at any time before entry of a final determination by the court.

Plaintiffs urge that the above-quoted language did not provide Allen's personal representative with unfettered discretion concerning whether to exercise the right to elect against Emma's will. They also argue that had she chosen to exercise the right to elect against Emma's will, Allen's personal representative could have rendered his estate solvent, paid his creditors, and likely provided some distribution to his specified charitable beneficiary. However, in the absence of receiving property from Emma's estate, Plaintiffs posit that Allen's estate is insolvent and his creditors and distributees will receive nothing.

The trial court determined that inasmuch as the relevant statute, Tennessee Code Annotated § 31-4-105, states that a personal representative "may" make the election on behalf of the deceased spouse, that decision is "elective or discretionary." The court determined that when considering the statutory provision "verbatim on its face and the clear and plain language and meaning of the wording in the statute," it was clear that the personal representative had discretion regarding whether to exercise the right to elect against Emma's will. In addition, the court looked to the statute's language, "in like manner and every respect," concluding that just as Allen had complete discretion regarding whether or not to exercise the election, his personal representative would

“stand[] in the shoes of [Allen] and [have] the same discretion.” Upon thorough review, we agree with the trial court’s determination of this issue.

The parties agree that up to the time of his death, Allen maintained complete discretion regarding whether to exercise his right as a surviving spouse to elect against Emma’s will pursuant to Tennessee Code Annotated § 31-4-101. Plaintiffs contend, however, that when Allen died before the time for exercising this right had expired and the right passed to his personal representative, who is a fiduciary, the personal representative was bound by her fiduciary duties to the estate “to marshal and collect the assets of the estate.” *See In re Est. of Ladd*, 247 S.W.3d 628, 637 (Tenn. Ct. App. 2007) (explaining that the executor of an estate is a fiduciary and “owes specific duties to the estate and the beneficiaries”); *McFarlin v. McFarlin*, 785 S.W.2d 367, 369 (Tenn. Ct. App. 1989) (explaining that an executor “occupies a fiduciary position” and “has a duty to marshal and collect the estate’s assets within a reasonable time”). In other words, although Plaintiffs recognize that a personal representative maintains some amount of discretion concerning the choice of whether to exercise the deceased surviving spouse’s right to an elective share, they argue that this discretion is constricted by the personal representative’s fiduciary duties to the estate.

Although a personal representative clearly owes fiduciary duties to the estate being served and to its beneficiaries, we do not determine the existence of such duties to be dispositive of the issue here. Rather, the issue of the proper interpretation of Tennessee Code Annotated § 31-4-105 is controlled by “well-defined precepts” of statutory construction. *See Est. of Tanner*, 295 S.W.3d at 613. As our Supreme Court elucidated in *Tanner*:

Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but “should be construed, if practicable, so that its component parts are consistent and reasonable.” *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any

interpretation of the statute that “would render one section of the act repugnant to another” should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

Id. at 613-14.

In this case, Tennessee Code Annotated § 31-4-105 provides in pertinent part that if a surviving spouse dies before the time for electing to take against the decedent spouse’s will expires, “the personal representative of the decedent’s surviving spouse may, in like manner and every respect, make the election on behalf of the deceased spouse.” We find the language of this statute to be clear and reiterate that our goal should be to enforce the language as written and according to its plain meaning. *See Est. of Tanner*, 295 S.W.3d at 614.

As the trial court noted, Tennessee Code Annotated § 31-4-105 utilizes the permissive term, “may,” in referring to the personal representative’s ability to exercise the right of election on behalf of the deceased surviving spouse. As such, the legislature’s use of “may” when referring to the personal representative’s decision to make the election indicates an element of discretion. *See State v. McCoy*, 459 S.W.3d 1, 10 (Tenn. 2014) (determining that a statute’s use of “may” is permissive); *North v. Westgate Resorts, Ltd., L.P.*, No. E2017-01560-COA-R3-CV, 2018 WL 4405547, at *3 (Tenn. Ct. App. Sept. 17, 2018) (“The statute’s use of the term ‘may’ is permissive, not mandatory”); *Totty v. Totty*, No. W1999-02426-COA-R3-CV, 2000 WL 527699, at *5 (Tenn. Ct. App. May 2, 2000) (determining that a statute’s use of “may” is permissive).

In addition, the statute provides that the personal representative “may” make the election on behalf of the deceased spouse “in like manner and every respect.” As previously explained, Plaintiffs acknowledge that Allen, as surviving spouse, maintained complete discretion as to whether to exercise his right to take against Emma’s will. As this Court has clarified:

[T]he doctrine of election requires a person to either accept a benefit under a will and adopt the whole contents of the instrument, conforming to all its provisions, or renounce the will and exercise rights inconsistent with the testator’s intent. *Colvert v. Wood*, 93 Tenn. 454, 25 S.W. 963, 965 (Tenn. 1894). The doctrine of election applies to a surviving spouse because he or she has the right to either accept the benefits under the will or exercise his or her right to an elective share of the deceased spouse’s estate. Thus, the surviving spouse must elect either to receive the elective share or the

benefits under the will, but the surviving spouse cannot elect to receive both.

In re Est. of Grass, No. M2005-00641-COA-R3-CV, 2008 WL 2343068, at *11 (Tenn. Ct. App. June 4, 2008), *overruled on other grounds by In re Est. of Fletcher*, 538 S.W.3d 444 (Tenn. 2017). Ergo, Allen maintained the unrestricted ability to choose whether to receive an elective share or to receive the benefits provided under Emma's will. It follows that after his death, Allen's personal representative, who the statute provides could make that election "in like manner and every respect," would have that same unrestricted ability to choose. *See* Tenn. Code Ann. § 31-4-105.

We note that this Court has previously interpreted Tennessee Code Annotated § 31-4-105 on two occasions: *In re Est. of Murphy*, No. E2001-01112-COA-R3-CV, 2001 WL 1657209 (Tenn. Ct. App. Dec. 27, 2001), and *McElroy v. Jones*, No. 1, 1985 WL 3445 (Tenn. Ct. App. Nov. 5, 1985). In *McElroy*, the executor of the surviving spouse's estate sought to exercise the right of the surviving spouse, who had died before the time limit expired, to take against his deceased wife's will. *McElroy*, 1985 WL 3445, at *1. The *McElroy* Court reviewed the history of Tennessee Code Annotated § 31-4-105, noting that the prior version of the statute had required court approval before a personal representative could exercise the right of election on behalf of a deceased surviving spouse. *Id.* at *2. The *McElroy* Court explained that the statutory scheme had been changed in 1977 when Tennessee Code Annotated § 31-4-105 was enacted in its present form. *Id.* The Court therefore determined that in doing so, the legislature had "intended to and did enlarge the power of the personal representative and eliminated any necessity for Court approval of the personal representative's choice." *Id.* In so ruling, the *McElroy* Court stated:

Accordingly, it is our opinion that a personal representative has the unfettered right to make the election on behalf of the deceased.

Therefore, it must follow that the 'equities' of the case now have no more to do with an election that they would have if the husband were not dead and made the election himself.

Id.

Similarly, in *Estate of Murphy*, this Court stated that the "question presented" by the appeal involved whether the executor of an estate, who was the decedent's son, "had an absolute right under T.C.A. 31-4-101 and 31-4-105 to take an elective share of the Estate of her husband . . . that his mother would have been entitled to take had she not died." *See Est. of Murphy*, 2001 WL 1657209, at *1. Looking at the plain language of Tennessee Code Annotated § 31-4-105, the *Estate of Murphy* Court determined that "it was the legislative intent that the Probate Court should play no part in determining the

right of a personal representative to claim an elective share.” *Id.* at *2. This Court then quoted with approval from *McElroy*, including the portion stating that a personal representative had an “unfettered right to make the election on behalf of the deceased.” *Id.* This Court therefore ruled that the executor in *Estate of Murphy* had the discretion to exercise the decedent’s elective share right, despite the fact that the Court could not find “one single equity favoring” the executor’s position and that allowing him to exercise the elective share right would enable the executor to “reap where he ha[d] not sown.” *Id.* at *2, *5.⁴

We agree with the trial court’s determination that this Court’s decisions in *McElroy* and *Estate of Murphy* support the position that the personal representative’s discretion to exercise the deceased surviving spouse’s elective share right is “unfettered” and without restriction. *See Est. of Murphy*, 2001 WL 1657209, at *2; *McElroy*, 1985 WL 3445, at *2.⁵ As these cases illustrate, the plain and unambiguous language of the statute provides that the personal representative of the deceased surviving spouse has the discretion to choose whether to exercise the surviving spouse’s right of election and that this discretion is “in like manner and every respect” the same as that enjoyed by the surviving spouse during his or her life. *See* Tenn. Code Ann. § 31-4-105. Accordingly, we decline to impose additional restrictions upon that discretion as Plaintiffs urge. Instead, our duty is to “simply to enforce the written language” and “apply the plain meaning without complicating the task.” *See Est. of Tanner*, 295 S.W.3d at 613-14. We therefore affirm the trial court’s ruling on this issue.

V. Alleged Waste by Personal Representatives

Plaintiffs further postulate that Allen’s right to take an elective share of Emma’s Estate was a property right or an asset that belonged to his estate, such that by failing to exercise that right, his personal representatives “wasted” an asset of the estate that could have been used to satisfy his debts and render his estate solvent. Plaintiffs rely on Tennessee Code Annotated § 31-1-101(9) (2021), found within Tennessee’s descent and distribution statutes, which provides in pertinent part that “property” as related to estates “includes both real and personal property or any interest therein.” Plaintiffs contend that

⁴ According to the *Estate of Murphy* Court, the executor had provided no aid to his deceased mother or to her husband in their declining years, and he was not the intended beneficiary of the husband’s 75-acre family farm, which had been in the husband’s family for over 100 years. *See id.* Despite these facts, this Court determined that the statute had to be enforced as written such that the executor was allowed to exercise the right to take an elective share at his discretion. *See id.* As such, this case clearly undercuts Plaintiffs’ arguments concerning alleged “self-dealing” by Elizabeth with regard to her failure to exercise the elective share right on behalf of her deceased father.

⁵ We note that in *In re Estate of Soard*, 173 S.W.3d 22, 29 (Tenn. Ct. App. 2005), this Court also discussed that under the current statutory scheme “the right to elect is still unconditional.”

the surviving spouse's right to seek an elective share should be considered a "chose in action," which they assert is a property right, relying on *Parsons v. Am. Tr. & Banking Co.*, 73 S.W.2d 698, 701 (Tenn. 1934) ("A right of action is property.").⁶ Plaintiffs have provided this Court with no authority, however, establishing that a right of election constitutes a chose in action or a property right.

In *Hamilton Nat'l. Bank v. Haynes*, 174 S.W.2d 39, 40 (Tenn. 1943), our Supreme Court stated that "the right of dissent is a personal right and must be exercised strictly and within the time prescribed by the statute." See *Pinkerton v. Turman*, 268 S.W.2d 347, 350 (Tenn. 1954) (stating that the surviving spouse's right to dissent from the deceased spouse's will is a personal right).⁷ Although this Court has not located any Tennessee case law specifically addressing the question of whether an elective share right, as a personal right, can be considered an asset of the surviving spouse's estate, we find persuasive several cases from federal bankruptcy courts and other state courts that have answered this question in the negative. See *In re Jahrling*, 514 B.R. 565, 575 (Bankr. N.D. Ill. 2014), *aff'd sub nom. Jahrling v. Est. of Cora*, 530 B.R. 679 (N.D. Ill. 2015), *aff'd sub nom. In re Jahrling*, 816 F.3d 921 (7th Cir. 2016) (holding that because the elective share right is a personal right belonging to the surviving spouse, until the spouse makes the election, "the property that he could receive cannot be claimed by his creditors or become property of his bankruptcy estate"); *In re McCourt*, 12 B.R. 587, 589 (Bankr. S.D.N.Y. 1981) (holding that a bankruptcy trustee could not compel the bankruptcy debtor to exercise his statutory elective share right with respect to his deceased wife's estate because "the unexercised statutory right is not a property interest" but is rather a personal right pursuant to state law); *Kearley v. Crawford*, 151 So. 293, 294 (Fla. 1933) ("[E]lection to take under or against a will is a personal right of the legatee or devisee, and that it is one that cannot be controlled by his creditors."); *Robertson v. Schard*, 119 N.W. 529, 531 (Iowa 1909) (holding that a surviving spouse cannot be compelled by creditors to exercise his elective share right even though, under the will, he would take nothing); *Bottom v. Fultz*, 98 S.W. 1037, 1038 (Ky. 1907) (holding that a surviving spouse could not be compelled to elect to take against his deceased spouse's will to benefit his creditors because the right to renounce the will "is a personal privilege given to the husband, and it is one which he may exercise or not, at his pleasure"); *In re Fleming's Est.*, 66 A. 874, 876 (Pa. 1907) (holding that "the right of the husband to elect to take against the provisions of his wife's will is simply a personal privilege, and is not

⁶ See also *Can Do, Inc. Pension & Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 866 (Tenn. 1996) (defining a "chose in action" as "a right of proceeding in a court of law to procure payment of a sum of money or to recover a debt"); *Childress v. Childress*, 569 S.W.2d 816, 818 (Tenn. 1978) (stating that a chose in action is a form of intangible personal property), *overruled on other grounds by Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983).

⁷ We note that in earlier cases, the right of election was referred to as a surviving spouse's right to dissent from the deceased spouse's will. See, e.g., *In re Est. of Montesi*, 682 S.W.2d 906, 911 (Tenn. 1984); *Hamilton Bank of Upper E. Tennessee v. Milligan Coll.*, 821 S.W.2d 591, 592 (Tenn. Ct. App. 1991).

an asset for the payment of his debts, or a right which he can be compelled to exercise so as to discharge his trust liabilities”).

Similarly, here, we determine that inasmuch as the surviving spouse’s right of election is a personal right that the surviving spouse may choose to exercise or not, such unexercised right cannot constitute an asset or property of the surviving spouse’s estate upon his or her death. *See Pinkerton*, 268 S.W.2d at 350; *see, e.g., In re Jahrling*, 514 B.R. at 575; *In re McCourt*, 12 B.R. at 589; *Kearley*, 151 So. at 294; *Robertson*, 119 N.W. at 531; *Bottom*, 98 S.W. at 1038; *In re Fleming’s Est.*, 66 A. at 876. As such, the surviving spouse’s personal representative, who holds the same discretion concerning whether to exercise the right, cannot be held liable on the basis of wasting estate assets for declining to exercise that right. We therefore affirm the trial court’s ruling on this issue as well.

Having determined that the personal representatives had complete discretion concerning whether to exercise Allen’s elective share right, we further determine that Plaintiffs’ remaining issues are pretermitted as moot. Accordingly, we affirm the trial court’s grant of Defendants’ motion to dismiss.

VI. Conclusion

For the foregoing reasons, we affirm the trial court’s dismissal of Plaintiffs’ claims. Costs on appeal are assessed to the appellants, James L. Henry, Jr., and J. Robert Wheat, Jr. This case is remanded to the trial court for collection of costs assessed below.

s/Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE