

Florida's New Elective Share Statute

Florida has long fostered a strong public policy of protecting the surviving spouse in the event of death or divorce. For example, when a surviving spouse does not receive a sufficient share of the deceased spouse's estate, the surviving spouse may "elect" to take a dollar amount equal to thirty percent (30%) of the deceased's estate (the "elective share") in lieu of receiving any benefits provided under the deceased's will or intestacy statutes.

Unfortunately, this public policy is often at odds with and frustrates even the most sophisticated of estate plans. First, contrary to the deceased's wishes, his property may not end up in the hands of the intended beneficiary. Second, circumstances may exist where the surviving spouse will be forced to take the elective share amount. For example, the failure to claim an elective share is considered a transfer of assets that may disqualify the surviving spouse for Medicaid benefits.

Additionally, it can affect other family members as well as the married couple. Consider Jeff who has married his second wife, the independently wealthy Ann. Jeff and Ann have verbally agreed that on his passing, all of his premarital assets will pass to his children from his first marriage. At the time of Jeff's passing, his premarital assets constitute ninety-five percent (95%) of his estate. Ann, contrary to their verbal agreement, takes the elective share and effectively reduces Jeff's children's inheritance to seventy percent (70%) of Jeff's estate.

In the past, this election applied only to probate assets. Thus it was possible to simply establish a revocable trust to avoid the elective share. However, a new statute became effective October 1, 2001. Under the new statute, assets previously not considered will be included, such as assets held in a revocable trust and other probate avoidance vehicles.

Fortunately, there are a number of steps you can take to carry out your wishes, and protect your surviving spouse and beneficiaries from the adverse effects of the new elective share statute. The most important step is to maintain an open relationship with your financial advisor, attorney, and accountant as to both the extent of your assets and your wishes. They can advise you as to the appropriate planning techniques to achieve your goals. Here are some ideas.

Gifting is a familiar and relatively easy technique to implement. It can be used to reduce the value of your estate subject to the elective share statute. Qualifying gifts include an annual gift of up to \$12,000 per individual, and all gifts that qualify for the tuition and medical gift tax exceptions. However, a period of years may be required for a gifting program to have an impact.

Life insurance is similarly easy to implement and provides an immediate benefit. A policy with a low net cash surrender value will only minimally increase your estate subject to the elective share statute; yet will provide certainty that the intended recipient is fully benefiting. It is best to consult your financial advisor to determine the proper policy for your situation.

Additional techniques available run from the simple written marital agreement to the use of individually drafted, special qualifying trusts. Your professional advisors can assist you in the timely implementation of the appropriate techniques to protect your assets from the potentially adverse effects of Florida's new elective share statute.

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