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Primer: Rights of a Surviving Spouse in Florida

In Florida, a surviving spouse has many rights upon the passing of a spouse. These rights are available even if the survivor is unaware of such rights. However, it is important to be mindful of certain time limitations in exercising these rights.

Intestate or Testate

The first step in evaluating a surviving spouse's rights is determining whether the decedent died with or without a will or trust. If the decedent did not have a will (therefore, died intestate), a spouse will inherit based on Florida's intestacy statutes. A surviving spouse receives 100% of assets provided there are no other descendants or all of the descendants are descendants only of both spouses. If there are other descendants of the surviving spouse or the deceased spouse who are not descendants of the other, then the surviving spouse is entitled to 50% of the assets while 50% is divided among the decedent's descendants, *per stirpes*.¹

However, if the decedent did have a will, one needs to evaluate:

- (1) When the will was executed;
- (2) Whether there are any provisions providing for the surviving spouse.

If a will was executed prior to marriage and fails to include any provision for the surviving spouse, then the surviving spouse is entitled to a pretermitted spouse share. Essentially, in the aforementioned situation, the surviving spouse receives what he or she would have received had the decedent died intestate.² If the will was executed after marriage or provides for the spouse, then the surviving spouse receives those assets that pass under the will (subject to any elective share).

Elective Share

The only person who cannot be completely excluded from an individual's will is his or her spouse. In situations where there is a surviving spouse and nothing is devised to him or her, the surviving spouse has a right to 30% of the "elective estate."³ The following assets are included when calculating the decedent's elective estate:

- (1) The probate estate;
- (2) Decedent's interest in accounts with payable-on-death or transferable-on-death designations, or assets held in trust;
- (3) Decedent's ownership of property titled as tenants by the entirety or joint tenants with right of survivorship;

- (4) Any revocable transfer by decedent;
- (5) Assets of the decedent that he or she had at death with the right of possession or income therefrom;
- (6) Decedent's interest in cash surrender value of insurance (does not include the death benefit amount);
- (7) Amounts payable by reason of survivorship for pension, retirement, or deferred compensation;
- (8) Any property transferred in the last year of decedent's life; and
- (9) Property transferred for elective share.

The elective share right may be exercised even where a decedent did include his or her spouse in the will. Usually, the elective share would be invoked if the surviving spouse is receiving by will less than he or she would receive from the elective share. Fla. Stat. § 732.2075 provides very specific rules for how the elective share is satisfied (specifying which assets are used to pay it). Only certain expenses of administration may be charged against the surviving spouse's interest.⁴ Attorney fees spent by the personal representative are not a permissible charge against the elective share.⁵

The surviving spouse, his or her attorney-in-fact, or guardian may make the election. However, the election must be filed during surviving spouse's lifetime and within 6 months of notice of administration or 2 years from death, whichever occurs first.⁶

Exempt Assets

The surviving spouse has certain rights to particular assets which are exempt:

1. Household furniture & furnishings (not to exceed \$20,000);
2. Two motor vehicles; and
3. All IRC § 529 plans of decedent.⁷

Exempt assets are free from all creditors except those with a security interest. The exempt property is in addition to homestead and other statutory entitlements.⁸ Therefore, the exempt property claimed is not included in the value of decedent's estate for purposes of the residuary, intestate, pretermitted, or elective share calculation.⁹ However, assets specifically devised pass according to the terms of the will and only remain exempt if passing to spouse or legal heirs.¹⁰ It is important to

note that any exempt property claim will be deemed waived unless the claim was filed within 4 months of the date of service of administration.¹¹

Family Allowance

The surviving spouse or lineal descendants, who were supported by decedent, may file a petition for family allowance providing for a reasonable allowance of money from the estate for maintenance during administration. The family allowance cannot exceed \$18,000.¹² The family allowance is not chargeable against any other amounts passing to the surviving spouse, unless otherwise specified in the will. However, the right to family allowance terminates upon the death of the individual claiming it; therefore, it is best to make the claim early if it will be made at all.

Real Property

Rights to real property depend on the type of property and how it was titled. If the real property was titled in both spouses' names as tenants by the entirety (which is presumed if purchased while married), then the surviving spouse becomes the sole owner by operation of law (note – a death certificate should be recorded in the county where the property is located). If the property was owned by the decedent and surviving spouse as joint tenants with right of survivorship ("JTROS"), then the surviving spouse becomes the sole owner of the property upon the death of the decedent. If the real property was held as JTROS between the decedent and parties other than the surviving spouse, then the property shall pass to the other surviving owners and not to the surviving spouse (see elective share above).

Homestead

If the real property was the decedent's homestead, then the surviving spouse has rights in that property even if his or her name is not on the deed or mortgage. The Florida Constitution and related Florida statutes provide restrictions on devise of homestead.¹³ Homestead property may not be devised if the decedent is survived by a spouse or minor child. However, if there is no minor child, then the decedent may devise a fee simple interest to the surviving spouse (anything less than a fee simple interest will fail).¹⁴ If the decedent makes an impermissible devise, then:

1. The surviving spouse receives a life estate and the decedent's descendants are the remainderman, *per stirpes*; or
2. The surviving spouse may elect to take an undivided ½ interest as tenants in common with the remaining ½ interest vesting in the decedent's de-

scendants, *per stirpes*.¹⁵ It is important to note, the election must be made during the surviving spouse's life and within 6 months of the death of the decedent (statute runs from date of death and not from date administration is opened).

Where the surviving spouse waived homestead (see below) or the decedent is not survived by a spouse or minor child, the decedent may devise the homestead to anyone of his or her choosing. This restriction on devise does not apply to property owned as tenants by the entirety or joint tenants with right of survivorship.¹⁶

Other Practice Points

Nuptial Agreements

- Keep in mind, pre- and post-nuptial agreements may be used to waive any of the spousal rights outlined above.¹⁷ However, if the nuptial is entered into after marriage, then full, fair disclosure of all of each spouses' assets are required. Otherwise, the nuptial may not be enforceable.¹⁸

Retirement Accounts

- A surviving spouse has rights to certain retirement accounts under federal law. It is important to review them to make sure the surviving spouse receives what he or she is entitled under the law.

Social Security Benefits

- A surviving spouse may make certain elections for Social Security benefits of a deceased spouse.

Community Property

- Florida is not a community property state, but be mindful that married couples may have acquired community property in another state. The out-of-state acquired assets retain their community property status in Florida, unless

an election is made to convert it. Decedent's share of community property is not included in elective estate.¹⁹

Disclaimer

- Beneficiary, including surviving spouse, may disclaim some or all of the interest devised to him or her from the estate. However, a disclaimer may not be made if the beneficiary has already accepted or benefited from the devised asset or is insolvent.²⁰

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¹ Fla. Stat. §§ 732.102, 732.104.

² Fla. Stat. § 732.301.

³ Fla. Stat. § 732.2065.

⁴ Fla. Stat. § 732.2055.

⁵ *Blackburn v. Boullis*, 2016 WL 231405 (Fla. 4th DCA Jan. 20, 2016).

⁶ Fla. Stat. § 732.2135.

⁷ See Fla. Stat. § 732.402.

⁸ Fla. Stat. § 732.402(3)-(4).

⁹ Fla. Stat. § 732.401(7).

¹⁰ Fla. Stat. § 732.402(5).

¹¹ Fla. Stat. § 732.402(6).

¹² Fla. Stat. § 732.403.

¹³ Fla. Const. art. X § 4(a); Fla. Stat. § 732.401.

¹⁴ *In Re Finch's Estate*, 401 So. 2d 1308 (Fla. 1981).

¹⁵ Fla. Stat. § 732.401(2).

¹⁶ *Id.*

¹⁷ Fla. Stat. § 732.702(1).

¹⁸ Fla. Stat. § 732.702(2).

¹⁹ See Fla. Stat. §§ 732.216-228.

²⁰ Fla. Stat. § 739.402.



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