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RIGHTS OF A SURVIVING SPOUSE

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Rights of a Surviving Spouse

by David Silver

The most common estate plan that I create in my NC law practice leaves everything to spouse if spouse is then living, otherwise everything to kids. However, I occasionally have clients who don't want everything or anything to go to their spouses. This is particularly common when there is marital discord, blended families after a second marriage, or one spouse is suffering from health issues. We can draft a Will to say anything, but what rights does a disinherited surviving spouse have against their deceased spouse's estate?

Some property may go to a surviving spouse despite what is written in a Will (this is referred to as "non-Probate," while items received pursuant to a Will are called "Probate"). If a couple has been deeded real estate while they were married, the property is most likely going to be owned by them as "Tenants by the Entireties." At one spouse's death, all property owned as Tenants by the Entireties becomes automatically and instantly owned by the surviving spouse no matter what is written in a Will. This also occurs with financial accounts titled to both spouses as "Joint with Right of Survivorship" or mobile homes titled to both spouses. However, if both

spouses' names are on the title to a vehicle, boat, or other personal property, then the ownership of the deceased spouse's 50% interest in said title does not automatically transfer to the surviving spouse. Also, if the surviving spouse is still the designated beneficiary of a life insurance policy, a bank account, IRA, etc, then that spouse will receive those funds even if a contrary intent is stated in a Will. Anyone can change their beneficiary designation on his or her own life insurance policy, a bank account, IRA, etc., but both spouses will have to sign in order to change titles to land, mobile homes or vehicles.

A surviving spouse is entitled to request a "Year's Allowance" of up to \$30,000 out of the Probate personal property of the deceased spouse. This Year's Allowance is available even if a Will attempts to disinherit spouse completely, and it can be paid to the surviving spouse even before any claims against the estate are paid. Typically, a Year's Allowance is used to transfer deceased spouse's 50% interest in a vehicle to the surviving spouse, but it could also include bank accounts, furniture, jewelry, or other personal items.

A surviving spouse also has the right to claim an "Elective Share" against the deceased spouse's estate. This means that the surviving spouse is entitled to receive a certain percentage of the deceased spouse's "total assets." The percentage is dependent upon the length of marriage:

15% if married under 5 years, 25% if married 5 to 10 years, 33% if married 10 to 15 years, and 50% if married for 15 years or more. The deceased spouse's total assets include Probate assets and non-Probate assets (like life insurance, transfers made within one year of death, etc), but everything that the surviving spouse has received from the deceased spouse (Probate, non-Probate, Year's Allowance and lifetime gifts) counts towards the surviving spouse's percentage.

In lieu of an Elective Share, a surviving spouse may opt to take a Life Estate in the marital residence (even if it was owned solely by the deceased spouse) and 1/3 of all real estate owned by the deceased spouse (the value of a marital residence would be included in this calculation). If the surviving spouse opts for this Life Estate, that spouse also gets full ownership of all household furnishings and is still eligible for a Years Allowance.

Any spouse can create a Will leaving nothing to a surviving spouse, and frequently the surviving spouse would not object if it is part of a well-conceived estate plan. However, a dissatisfied surviving

spouse could thwart the deceased spouse's intentions by filing for a Year's Allowance and an Elective Share or a Life Estate. A pre-nuptial agreement that merely deals with the eventuality of a divorce and doesn't discuss what occurs in the event of death will not prevent a surviving spouse from claiming these rights. Short of a formal separation or a divorce, the only way to ensure that a surviving spouse can't thwart the intentions stated in a Will is for both spouses to enter into a well-drafted pre-nuptial or post-nuptial agreement that specifically waives the rights of a surviving spouse against the estate of a deceased spouse.

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