

Changes to Florida's Elective Share

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The Florida Legislature has made another revision to the Elective Share for the benefit of a spouse who was not considered (disinherited) in their deceased spouse's estate. The Elective Share is ordinarily selected as a remedy following the death of a spouse when the surviving spouse is not included in the deceased spouse's Will or Trust and the property of the deceased spouse is not jointly held. The law provides that when this occurs the surviving spouse is entitled to 30% of the deceased spouse's estate provided the surviving spouse petitions the court to recognize his or her entitlement to a share of the deceased spouse's estate.

So what has changed; the procedural actions to petitioning for an elective share has changed giving the surviving spouse greater options when filing and the ability to easily determine the amount of funds due him or her by changing the calculation techniques used to determine the 30% elective share.

Previously the timing involved in calculating the elective share was exceptionally rigid. That rigidity became evident in 2015 in the case of Richardson v. Perez. Under the old law if a surviving spouse were to timely file for the elective share he or she would be entitled to 30% of the probate and non-probate assets of the deceased spouse. The problem arose when the surviving spouse failed to withdraw their petition for the elective share once they found out that the amount they would receive without the elective share exceeded 30%. When this occurred, the surviving spouse was limited to the 30% and no more. Thus, if a decedent's estate were calculated at \$100,000.00 and the surviving spouse filed the elective share petition, they would receive \$30,000.00. However, suppose it was later determined that the surviving spouse was entitled to receive the full \$100,000.00. Under the old law, she would only inherit the \$30,000.00 because he or she failed to timely withdraw her petition.

The new law, grants the surviving spouse the full amount of his or her inheritance even if the election is made and not withdrawn. In essence, there is no downside to petitioning for the elective share except for an increase in attorney fees and time.

Another change is the time to file for the elective share. Under the old law, the surviving spouse had either: 1) six months after service of the notice of administration; or, 2) two years after the decedent's death. This ordinarily resulted in a petition being filed for an extension of time to file for the elective share because the amount the surviving spouse was eligible to receive may not be known until the six month period following the notice of administration has passed; or, in adverse situations, the parties deliberately contested the will causing the 6 month period following the notice of administration to pass. The new law granting an extension of time to file the elective share is now the later of: 1) 6 months following the service of the Notice of Administration; 2) 40 days after the termination of any proceeding effecting the amount that the surviving spouse is to receive for the elective share (where a will is being contested or what

assets are specifically directed such as life insurance policies); or, 3) two years following the death of the deceased spouse.

A change was also made when it came to including a couple's homestead property in determining the value of all elective share assets. Historically, if property were titled in the name of the husband only, the surviving spouse would receive 30% of the non-homestead assets along with either a life estate or tenants in common interest in the homestead property which was not counted towards meeting the 30% elective share. In essence, the surviving spouse was receiving a windfall. The new law makes the homestead property part of the total amount of assets countable towards the elective share. The homestead amount of the value added to the elective share calculation would be ½ of the property's value. From that number, 30% is calculated setting the minimum amount the surviving spouse would inherit under the elective share.

Suppose the calculated elective share due the surviving spouse is not satisfied with the immediate assets flowing through the deceased spouse's estate. In that event, those beneficiaries who may have received non-probate assets such as annuity or transfer on death proceeds will have to make up the difference.

What about those pesky attorney fees. It's not unusual for litigation involving an elective share to last for years causing attorney fees to quickly eat into the surviving spouse's share he or she will be receiving. The old law did not include a clear mechanism for the surviving spouse to collect attorney fees from the residual beneficiaries. The classic tactic would be for the adverse side to threaten the surviving spouse with attorney fees which could exceed any amount they would receive.

The new law grants attorney fees involving any proceeding where an objection to: 1) the entitlement to, or amount of, the elective share; 2) the property interest included in the elective estate or its value; or, 3) the satisfaction of the elective share. The satisfaction of the attorney fees can come from the estate, a party's interest in the elective share or other property of a party. The court has full discretion in making that decision.

The changes in the laws affecting the elective share clearly equalize the field for the spouse who has been disinherited. No longer is the disinherited spouse materially limited as to when to file for the elective share or its calculation. Moreover, the disinherited spouse will no longer be funding his or her fight out of their personal proceeds by adverse parties determined to delay the closure of an estate causing the surviving spouse to settle in order to stop the continuous drain on his or her share.

If you believe, as a spouse, you have lost value in an estate because assets were passed out to other beneficiaries inappropriately, you should contact the attorney of your choice and discuss what options you have. Whatever you do, don't wait until it's too late to do anything. Start the process as early as possible.

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