

## FLORIDA'S NEW ELECTIVE SHARE

by **STEVEN D. BERES**

Board Certified Wills, Trusts & Estates Lawyer

The surviving spouse of a person who dies domiciled in Florida has the right to claim a portion of the deceased spouse's estate known as the "elective share." The elective share is an amount equal to 30% of the elective estate as discussed in further detail below. A spouse may waive the right to the elective share by a marital agreement entered either before or after marriage.

A new elective share statute will apply to the estates of persons dying on or after October 1, 2001. The prior elective share statute will continue to apply to persons dying before that date. The new statute allows additional time for making the election to take the elective share, significantly expands the types of property which are subject to the elective share and provides new options for satisfying the elective share by transfers in trust.

### *MAKING THE ELECTION*

To be entitled to receive the elective share the surviving spouse must file an election with the probate court in a timely fashion. Under the prior statute the election ordinarily must be filed within four months of the first publication of the notice of administration of the estate. The new statute generally requires that the election must be filed within the *earlier* of six months of service of a copy of the notice of administration on the surviving spouse or two years after the date of death. The new statute also now clearly provides that an election may be withdrawn, subject to certain time limits.

Once an election has been made, the first step in the process is to determine the amount of the elective share. The elective share is a right to receive a dollar amount, not a right to any specific assets of the estate. The second step is to determine the sources from which the elective share is satisfied.

If an election is made by the surviving spouse, the assets remaining in the estate after payment of the elective share are distributed as though the surviving spouse had predeceased the deceased spouse.

### *AMOUNT OF THE ELECTIVE SHARE*

Under the prior statute the elective share is equal to thirty percent (30%) of the fair market value of the decedent's assets subject to probate, computed after deducting all claims payable from the estate and all mortgages or liens on assets of the estate. Typically, only assets held in the decedent's individual name at death will be subject to probate and the elective share. Under the prior statute the elective share may be avoided by transferring assets to a revocable trust or into joint names with a non-spouse beneficiary prior to death, since such assets are not owned by the deceased spouse individually at death and are, therefore, not subject to probate.

Under the new statute, the elective share is equal to thirty percent (30%) of the "elective estate," which includes property subject to probate, but in addition includes:

© 2008 Steven D. Beres. All rights reserved.

- The deceased spouse's ownership interest in property passing by right of survivorship at death;
- Property held in a trust which was revocable by the deceased spouse;
- Property irrevocably transferred by the deceased spouse if the deceased spouse retained the right to income from the property, the use of the property, or if another person (other than the surviving spouse) had the power to distribute the property to the deceased spouse;
- The deceased spouse's ownership interest in the cash surrender value of life insurance on the deceased spouse's life;
- Death benefits payable under most retirement plans (such as IRA's, 401(k)'s, pension or profit sharing plans) on account of the deceased spouse's death; and
- Certain property transferred during the one-year period preceding death.

The elective estate does **not** include:

- Irrevocable transfers which occur prior to the effective date of the new statute or after that date but before the marriage to the surviving spouse.
- A transfer made with the informed written consent of the surviving spouse. An election to split a gift for federal gift tax purposes does not constitute consent for this purpose.
- The deceased spouse's half of community property.

#### *SATISFACTION OF THE ELECTIVE SHARE*

Unless otherwise specifically provided in the deceased spouse's will, an elective share determined under the prior statute is first paid from assets passing under the will which, but for the election, would have passed outright to the surviving spouse. To the extent those assets are insufficient the elective share is then paid from the other assets of the probate estate. Probate assets which are not specifically gifted to any beneficiary are consumed next, and finally assets specifically gifted to beneficiaries other than the spouse are used to satisfy the elective share. Assets which pass to the spouse outside the will are not considered in either the computation or satisfaction of the elective share.

The new statute provides that once the amount of the elective share is determined as described above, the share is satisfied as provided in the deceased spouse's will or revocable trust. If there is no such provision, then the elective share is satisfied in the following order:

- First from property that passes to or for the benefit of the surviving spouse. This includes items such as life insurance or retirement assets which are designated directly to the surviving spouse, property interests which pass to the surviving spouse as surviving joint tenant, and property held for the benefit of the surviving spouse in certain trusts discussed further below.
- Next from assets in the deceased spouse's probate estate and revocable trusts.

- And last from assets included in the elective estate which pass to other recipients.

#### VALUATION OF ASSETS SATISFYING THE ELECTIVE SHARE

Under the prior statute, assets distributed to the surviving spouse were counted toward the elective share based on their values at the time of distribution from the estate to the spouse. The new statute provides new valuation rules which differ depending on the type of asset involved.

An asset which passes to the surviving spouse outright is valued at its fair market value as of the date the surviving spouse takes possession of the asset. An asset which passes to the surviving spouse by right of survivorship is valued at its fair market value as of the deceased spouse's date of death.

The new statute now provides the option of satisfying the elective share in whole or in part by the creation of an "elective share trust." To qualify as an elective share trust, the trust must require payment of all income to the surviving spouse at least annually for his or her life, must allow the spouse to require the trustee to make the trust property productive of income within a reasonable time and must not allow distributions to any other person during the surviving spouse's lifetime. These requirements parallel the requirements for a qualified terminable interest property (QTIP) trust, for which a marital deduction is allowable under federal tax law.

Assets passing to an elective share trust are valued at their fair market value on the date the trust is funded, and count toward the elective share in varying percentages, depending on the interest provided for the surviving spouse:

- If the surviving spouse has only the right to income from the trust, 50% of the trust value is counted in satisfaction of the elective share.
- If, additionally, the surviving spouse or the trustee has the right to invade trust principal for the health, support and maintenance of the spouse, 80% of the trust value is counted in satisfaction of the elective share.
- If, in addition to both of the foregoing, the surviving spouse has the right, without the consent of any other person, to direct by his or her will that the remaining trust property be distributed in favor of the surviving spouse or the surviving spouse's estate, then 100% of the trust value is counted in satisfaction of the elective share.

**This publication is designed to provide accurate and authoritative information in regard to the subject matters covered. It is published with the understanding that in this publication the author is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. (From a Declaration of Principles jointly adopted by a committee of the American Bar Association and a committee of Publishers and Associations.)**