FLORIDA’S ELECTIVE SHARE

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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.

The current elective share law, which applies to the estates of persons dying on or after October 1, 2001, significantly expanded the types of property which are subject to the elective share and provides 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. Current law 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 The election may be withdrawn, subject to certain time limits.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

The elective share is equal to thirty percent (30%) of the “elective estate,” which includes property subject to probate, but in addition includes:

- 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;

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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**

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**

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 elective share may be satisfied 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.

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