

## **GUIDE TO SURVIVING SPOUSE RIGHTS IN FLORIDA**

Florida law grants surviving spouses a number of important rights and benefits. With short deadlines in probate, it is important to effectively secure the rights of a surviving spouse within the timelines provided by statute to ensure the surviving spouse is protected and receives all he or she is entitled to under Florida law. The failure to meet one of the probate deadlines can cause a surviving spouse to lose one or more spousal entitlements.

### **What if a Spouse Dies Without a Will?**

- **INTESTATE.** If a person dies without a Will, he or she is considered to die intestate.
- **INTESTATE SHARE.** If a spouse dies without a Will, the surviving spouse receives an intestate share. (If a couple is separated at the time of death, the surviving spouse is not barred from inheriting).
- **SHARE OF SURVIVING SPOUSE - NO CHILDREN OR ALL DESCENDANTS OF SURVIVOR AND SPOUSE.** If the only survivor is a surviving spouse, or if all the lineal descendants are also lineal descendants of the surviving spouse and the decedent, then the surviving spouse receives the entire estate of the decedent.
- **SHARE OF SURVIVING SPOUSE IF THERE ARE SURVIVING DESCENDANTS NOT FROM BOTH DECEDENT AND SURVIVING SPOUSE.** If there are descendants of the decedent who are not also of the surviving spouse, or if there are descendants of the deceased, but the surviving spouse has descendants not also from the decedent, then the surviving spouse receives one-half of the intestate estate.

### **What is a Pretermitted Spouse?**

- **PRETERMitted SPOUSE.** If a person makes a Will and then marries a person not provided for in the Will, the surviving spouse is called a pretermitted spouse. Under Florida law, a pretermitted spouse is entitled to receive a share of the estate as if the decedent died intestate, unless the will clearly provides to the contrary. (It is unusual for a will to name a person as a potential future spouse and fix that person's inheritance in the will. If the will does this, the surviving spouse can consider whether he or she would be better off with the elective share.)
- **PRETERMitted SPOUSE WITH A WILL AND NO DESCENDANTS.** If there are no lineal descendants and only a pretermitted spouse, under Florida law, the pretermitted spouse receives the entire estate notwithstanding that a Will may leave assets to other heirs of the decedent.

### **Homestead Rights**

- **HOMESTEAD RIGHTS.** Article X Section 4(c) of the Florida Constitution limits who can receive Homestead property upon the death of an owner if he or she is survived by a spouse or a minor child. A surviving spouse is entitled to no less than a life estate in any property used as a homestead by the deceased spouse in Florida.
- **DEADLINE TO FILE FOR HOMESTEAD ELECTION AS TENANT IN COMMON.** If a surviving spouse is left a life estate, he or she has six months from the decedent's date of death to make an election under Florida Statutes Section 723.401 to take a one-half interest in the Homestead as a tenant in common. This is a very important election, because in Florida, owning a life estate can often be more costly to maintain than the benefit is worth, given the high cost of ownership of real estate in Florida as a result of property taxes, insurance, and homeowner association dues. By making the election a spouse can force the sale of the property and receive 50% of the sales proceeds. Homestead rights are protected by the Florida Constitution and are in addition to any elective share, family allowance, or exempt property rights discussed below. No notice of the tenant in common election right needs to be given to the surviving spouse, making this six month deadline easy to miss.

## **Elective Share or Election Against a Will**

- **ELECTIVE SHARE.** Under Florida probate law, a Surviving Spouse has a right to a 30% elective share of the estate of the deceased spouse valued as of the date of death. Florida Statutes Section 732.2035 is an all encompassing statute that includes in the elective estate the following items: Probate estate, pay on death (POD), transfer on death and similar accounts; jointly owned accounts or securities based on the amount the decedent could withdraw, jointly owned real estate, ½ of tenants by the entirety property, certain revocable transfers, including revocable living trusts, retained life estates and income interests, most retirement benefits, cash value of life insurance immediately prior to the death of the decedent, most gifts one year prior to death, and property transferred in satisfaction of the elective share prior to death. While debts of the decedent reduce the elective share, expenses of administration do not reduce the value of the elective share. The value of the elective share is initially satisfied from assets that have already passed to the surviving spouse, next from the probate estate, and finally from other assets included in the elective estate. For a more detailed calculation of the Florida Elective Share, [go here](#).
- **DEADLINE FOR FILING FOR THE ELECTIVE SHARE.** The elective share election must be made within the earlier of 6 months from the service of a Notice of Administration on the surviving spouse or, if no Notice of Administration is given, within two years of the date of death of the decedent pursuant to Florida Statutes Section 732.2135; Florida Probate Rule 5.360. If a temporary election is made it must be withdrawn within 8 months from the decedent's date of death or prior to the order for contribution. The personal representative shall serve all parties within 20 days of receipt of an Election to Take Elective Share along with a copy of the Election. An interested party then has 20 days of receipt of the Formal Notice to object.

## **Family Allowance**

- **FAMILY ALLOWANCE.** In addition to Homestead rights and the right of elective share, a surviving spouse of a Florida decedent is entitled to a Family Allowance of up to \$18,000 payable in lump sum or installments. The family allowance provides support for the decedent's spouse and lineal heirs that the decedent was supporting, pursuant to Florida Statutes Section 732.403. The amount paid in the Family allowance cannot be offset against the share otherwise passing to the surviving spouse unless the Will provides otherwise. If a personal Representative is recalcitrant in paying the allowance after a petition is filed pursuant to Probate Rule 5.407, the estate may even be required to pay attorneys fees for getting the allowance, since a benefit has been provided by the estate.
- **DEADLINE FOR FILING THE FAMILY ALLOWANCE.** The Family Allowance can be filed at any time during the pendency of the administration of the estate.

## **Exempt Property**

- **EXEMPT PROPERTY.** In addition to Homestead and Family Allowance, testate and intestate property and Elective Share, the surviving spouse of a decedent domiciled in Florida at the time of death is entitled to certain items of tangible personal property including household furniture and appliances up to \$20,000 as of the date of death, two personal automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as personal automobiles under 15,000 pounds. This property is called Exempt Property under Florida Statutes section 732.404. Exempt property has an additional advantage of being exempt from all creditors of the estate except perfected security interests. However, property that is specifically bequeathed in a decedent's will is not subject to the exemptions of Florida Statutes section 732.402. Furthermore, if Exempt property is specifically devised to a person who otherwise would receive the exempt property, one can petition the court to determine the property to be exempt, and therefore not subject to creditors with non-perfected security interests under Florida Probate Rule 5.406. Furthermore, exempt property is excluded from the value of the estate before residuary, intestate, or pretermitted or elective shares are determined.
- **DEADLINE FOR FILING FOR EXEMPT PROPERTY.** An Exempt property petition must be filed no later than either four months after the date of service of the Notice of Administration or the date that is 40 days after the date of termination of any proceedings involving the construction, admission to probate, or validity of the Will or involving any other matter selecting part of the estate subject to Florida Statutes section 732.403.

## **Community Property**

- **COMMUNITY PROPERTY.** A decedent's surviving spouse is entitled to one-half of all community property acquired during the marriage, and this is not an elective estate, and is not subject to testamentary distribution under the decedent's estate. While Florida does not recognize community property as a property ownership form for its residents, it will respect community property acquired while such person was a resident of a community property state and continually held as community property.
- **DEADLINE FOR FILING FOR COMMUNITY PROPERTY.** Florida Statutes sections 732.221 and 732.233 allow a surviving spouse or a beneficiary to perfect title in Community Property by order of the Probate Court or by an instrument executed by the personal representative or the beneficiaries with approval by the Probate Court. The personal representative has no requirement to search for community property, unless the surviving spouse, beneficiary or a creditor files a written demand to the personal representative within three months of the filing of a Notice of Administration on the surviving spouse or such beneficiary. A creditor has three months from first publication of the notice to creditors to make a written demand.

## **Social Security Death Benefit**

- **SOCIAL SECURITY DEATH BENEFIT.** Applying for a Social Security lump sum death benefit (currently \$255) must be filed within 2 years of the date of death.
- **SOCIAL SECURITY BENEFITS FOR A SURVIVING SPOUSE.** It is also important to ensure you receive any and all payments you may be entitled to as a surviving spouse from Social Security.

## **Marital Agreements**

- **MARITAL AGREEMENTS.** Marital Agreements which are often referred to as prenuptial agreements, ante-nuptial agreements, and post-nuptial agreements, can waive or create rights upon the death of a spouse. It is imperative to have a lawyer review these agreements who is familiar with the probate process to properly address any rights you may have at death or as a surviving spouse. It is also important to have these documents properly reviewed by experienced probate lawyers to ensure any death time provisions are properly addressed prior to signing any of these agreements. Many of the rights of a surviving spouse can be waived or increased in properly drafted agreements.
- **TIMELINE TO FILE A CREDITOR CLAIM.** If a surviving spouse of a Florida decedent has a Marital Agreement, it is imperative that his or her attorney file a protective creditor claim to preserve these contract rights of the surviving spouse, within three months of filing the Notice of Publication to Creditors or thirty days from the date of service of a known creditor, even if the surviving spouse is the personal representative. A common mistake of probate lawyers in handling marital agreements is the failure to file such a creditor claim. There is no harm in filing a protective claim, and often filing a protective creditor claim results in the payment of benefits to a surviving spouse which may otherwise be lost. The Florida Supreme Court has even ruled that filing such a claim is necessary to enforce a surviving spouse's right under a marital agreement. *Spohr v. Berryman*, 589 So. 2d 225 (Fla. 1991). The consequence of failing to timely file a creditor claim for a spouse with rights under a marital agreement can be severe.

## **Requirement to File a Known Will**

- **FILE A KNOWN WILL.** A known will must be filed with the court within 10 days of the decedent's death. Florida Statutes section 732.901. A surviving spouse also has a right to a copy of the will.

## **Court Documents**

- **COURT DOCUMENTS.** A surviving spouse is entitled to all the documents filed with the court in their spouse's probate proceedings. This includes the Petition for Administration, Letters of Administration, Notice to Creditors, Petition for Administration, Inventory, Final Accounting, Order for Discharge, and any and all other pleadings regarding the estate.

## **What If I Cannot Afford a Probate Lawyer to Represent Me In Procuring My Surviving Spouse Rights?**

- Some probate lawyers in Florida who handle a large volume of surviving spouse cases will be flexible and consider arrangements on a contingency basis or on a pay-at-the-end basis, where the surviving spouse client has no up-front payment obligation.