## 'Till Death Do Us Part

Right of Election Planning



# What is the Right of Election?

- Prevents Spouse from being Disinherited
- Codified in NY EPTL § 5-1.1-A
- What does it say?



## How Much is the Surviving Spouse Entitled to?

- Decedents Estate
- Plus, Testamentary Substitutes
- Less, Debts, Administration Expenses and Reasonable Funeral Expenses
- Equals the Elective Share
- Less, assets passing to Spouse
- Equals the Net Elective Share



### Decedent's Estate

- Value of Assets in Decedent's Sole Name
- DOD Value



### **Testamentary Substitutes**

- Gifts causa mortis
- Transfer of property for less than fair market value made within one year of death
- Money in a joint account that is payable on death to someone else
- Accounts held in JTWROS or POD to someone else
- Trust Asset
- Money or securities payable under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan
- Any interest under which the decedent had a general power of appointment or held at the time of death or released within 1 year prior to death.
- Transfer on Death Accounts



## Less, Debts, Administration Expenses and Funeral Expenses

Gets us the

Net Estate



### How much is the Elective Share?

- The greater of \$50,000
- Or One-Third of the Net Estate



## Elective Share is reduced by:Assets passing to the Spouse

• Arrive at the Net Elective Share



## How much does the spouse get?

#### • The Net Elective share

- Calculated by taking the Elective Share and deducting the value of any interest which passes absolutely to the spouse by intestacy, by testamentary substitute or disposition under the will.
- Is it automatic?
- When?



## Does it Happen Automatically?

NO!

## Spouse Must elect to take, by the later of

- 6 months after letters issue
- 2 years after DOD



How does Separation Affect the Right of Election?

 Separation Can Lead to Disqualification

• Fact Specific Analysis





## Disqualification of spouse



- Final Decree of Divorce
- Annulment
- Declaration of Nullity
- Dissolving Marriage on
  - the ground of Absence
- Abandonment
  - Without Consent
- Failure to support

## Waiver of Election

#### CAN IT BE WAIVED?

• Yes!

#### WAIVER

 In writing and acknowledged like a conveyance of real Property THIS CAN BE DONE ...

- Before or after Marriage
- Unilaterally or Bilaterally
- With or Without Consideration
- Absolue or Conditional



## Waiver Can be Done Many Different Ways

- Standalone
- Separation Agreement
- Pre-Nuptial Agreement



## How to Spot Additional Value for your Clients?

- Planning Strategies
  - Waiver
  - Minimization of Elective Share
  - QTIP Trust
  - Annual Exclusion Gifts
  - Fund Educational and Medical Expenses



## Waiver Can be Done Many Different Ways

- Standalone
- Separation Agreement
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## Minimization Strategies

- Outright Gifts
- Trusts
- Will QTIPs Work?
- Give IRA to Spouse
- Estate Tax Apportionment
- Allocation of Assets



## Outright Gifts

- Annual Gift Tax Exclusion
- Gifts not causa mortis
- Gifts made 1 year before death



## Trusts

- GRAT
- QPRT



## QTIPS?

- Will not Work
- Asset is Not Passing Absolutely to Spouse



### IRA to Spouse

- Differing Schools of Thought
- IRA Withdrawals are Taxable Vs
- Money Can Grow Tax-Free



### Estate Tax Apportionment

- Generally apportioned equally
- Apportion against Spouse to Reduce Elective Share



## **Buy-Sell Agreement**

- Generally apportioned equally
- Apportion against Spouse to Reduce Elective Share



## Allocation of Assets

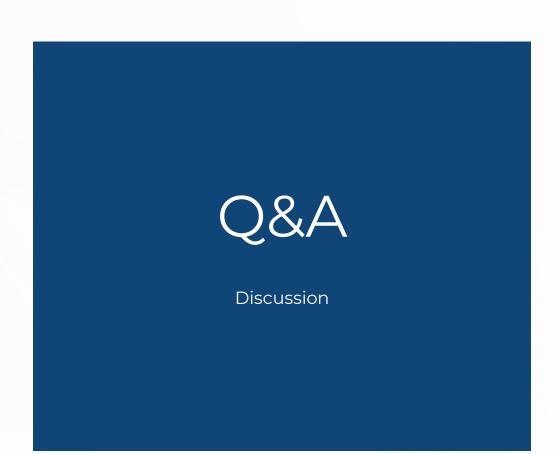
- Generally apportioned equally among beneficiaries
- Can be changed to be satisfied from a source that would discourage the Spouse from electing.



## Protecting Businesses

- Partnership Agreement
- Shareholders Agreement
- Buy Sell Agreement
- Must Provide
  - Right of Purchase
  - Funding Source
  - Methodology to Determine Price









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