

'Till Death Do Us Part

Right of Election Planning



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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



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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



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Disqualification of spouse

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



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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
- Absolute 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



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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



Q&A

Discussion



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