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'Till Death Do Us Part — The Surviving Spouse's Rights in the Deceased Spouse's Estate (Part 1 of 2)

In the simplest of cases, a decedent leaves the entire estate to the surviving spouse and names the spouse as personal representative or trustee. However, occasions do arise where the decedent does not leave the entire estate to the spouse or there is no estate plan at all. The purpose of this letter is to go over various rights available to a surviving spouse under Florida law.

Valid Marital Agreement?

If the parties entered into a valid pre- or post-nuptial agreement, this instrument would typically waive the surviving spouse's rights in the decedent's estate. However, a careful reading of the agreement is imperative, as it may not address every right that is otherwise available to a surviving spouse under Florida law, especially if it was drafted in another state.

Decedent Had No Will Or The Will Was Created Before Marriage

When a person dies without a will, that person is deemed to have died "intestate." If all the decedent's assets are jointly titled, they pass according to the joint ownership arrangement and will not be subject to probate. However, if there are assets that were in the decedent's name alone (with no named beneficiary or joint owner), they will have to go through an intestate probate administration.

Determining how much of the intestate estate the surviving spouse will receive is dictated by the existence and status of descendants. If the only descendants involved are descendants of both the decedent and the surviving spouse, then the surviving spouse takes the entire estate. However, if there are other descendants in the mix—e.g. the decedent has descendants who are not descendants of the surviving spouse—then the surviving spouse takes one half of the estate and the decedent's descendants take the other half.

If the will was created before the marriage, the spouse is referred to as a "pretermitted spouse." Simply stated, 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. If the will did make provision for a would-be spouse, then the surviving spouse will need to consider whether instead to pursue her or his elective share rights (discussed later).

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Homestead

In many cases, husband and wife own the homestead as an estate by the entireties, whereupon title will pass to the surviving spouse upon the first spouse's death. However, if the title is in one spouse's name alone, Article X, Section 4 of the Florida Constitution provides that a married person may do one thing with his or her homestead at death—leave it outright to the surviving spouse. Anything short of an outright gift of the property to the spouse is an invalid devise of the homestead. When the homestead has not been properly devised at death, the Florida Statutes tell us what interest the surviving spouse has in the property. This can be a trap for the unwary—particularly in the case of second marriages or in the case of married couples who utilize a "two-trust" estate plan.

When the homestead is not properly left to the spouse at death, the default rule is that a surviving spouse takes a life estate in the property. A life estate gives the surviving spouse the right to live in the decedent's homestead for the duration of the surviving spouse's lifetime. Interestingly, this is not limited by the spouse's remarriage. The decedent's lineal descendants hold what is known as the remainder interest. The surviving spouse will be responsible for all routine expenses, taxes, insurance, as well as the interest portion of any mortgage that may be on the property. The remainder holders will be responsible for any capital improvements and the principal portion of any mortgage on the property. Should the property ever be sold, it will be necessary for the surviving spouse and the remainder holders all to join in the deed. Those proceeds would then be divided between the surviving spouse and the decedent's lineal descendants based on the life expectancy of the surviving spouse as determined by the Internal Revenue Services' actuarial tables.

Alternatively, a surviving spouse may elect to take a one-half interest in the property. The other half will go to the decedent's lineal descendants. In some cases, this may be advantageous as it allows the spouse to seek a partition of the property to force its sale in an effort to address unwanted or unexpected costs that would otherwise be borne by the spouse for the duration of her or his life. However, the time for making this election is within six months from the date of the decedent's passing and may be extended in only limited circumstances.

This is the first installment in a two-part newsletter. Look for the next installment which will address the surviving spouse's rights to elective share, exempt property, family allowance, preference in appointment as personal representative, and other rights.

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