



# Your Estate Plan: The Legal Rights of Surviving Spouses.

Under Florida law, a surviving spouse is entitled to certain rights in the property of his or her deceased spouse. Although these rights can be waived by executing a valid pre- or post-nuptial agreement, legal rights of surviving spouses should be considered when developing an estate plan, especially with second marriages.

Oftentimes, a husband and wife own their homestead property and all of their other property as a tenancy by the entireties, that is, as husband and wife. In that situation, when one spouse passes away, the other spouse owns the entire property and can transfer that property as the survivor wishes in his or her estate. Sometimes, however, the home may be owned in one spouse’s name alone, or perhaps in one of the spouse’s trusts alone. In that situation, even though the surviving spouse’s name is not on the deed, the surviving spouse has rights to that property under Florida’s constitution.

If homestead is in one spouse’s name, and that spouse passes away, the surviving spouse has the right to a life estate in the homestead property, with the remainder of the property vested in the descendants of the deceased spouse. So, for example, in a second marriage, the surviving spouse would own a life estate in the homestead and the stepchildren would be the “remaindermen,” that is, they would own the remainder interest. Instead of a life estate, the surviving spouse may elect to take a one-half interest as tenants in common with the remaindermen. The surviving spouse will have six months within which he or she may make this election.

As one can imagine, the value of a life estate declines with age such that the value of a life estate for an 80 year old would be less than that of a 40 year old. In addition, a life tenant is required to pay certain expenses, and can not force a sale of the property. Thus, the surviving spouse would have to consider his or her circumstances before making this election.

A life tenant and the remaindermen have certain rights and obligations. The life tenant is responsible for paying property taxes and maintaining the property.



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The life tenant cannot cause the property to waste, or deteriorate. The remaindermen are responsible for certain capital improvements. This can be a complicated way to own property.

In addition to homestead property, the surviving spouse is entitled to receive, at a minimum, 30% of the "elective estate" of the decedent. The elective estate includes basically all of the property interests the decedent had while living. First, it will include the probate estate, that is, all assets which were titled in the deceased spouse's name alone. It will also include any property which the decedent owned with beneficiary designations, or in ownership with others as with rights of survivorship. The elective estate also includes the descendant's fractional interest in tenancy in common property, as well as certain transfers of property made during the one year period preceding his or her death.

The surviving spouse will be entitled to 30% of the total amount reached after totaling all of the property included in calculating the elective estate. In certain circumstances, this can mean contacting parties who received property as a joint tenant or as a payable-on-death beneficiary and requiring those persons to hand that over to the surviving spouse.

If the surviving spouse's share is not given outright but instead is held in a marital trust, depending on the restrictions included in the trust, the value of the spouse's interest may qualify from between 100% to 50% of the value of the assets, depending on the restrictions included in the terms of the trust.

Rights of surviving spouses are provided under Florida's constitution and laws to ensure that, upon losing one's spouse, the surviving spouse has sufficient assets for his or her maintenance. A trust and estate attorney can provide advice with calculating the amount of the elective share and petitioning the court for enforcement of these rights.

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