Navigate the Complex World of Spousal Entitlements at Death

Elective share and similar laws restrict testamentary planning, but strategies can be implemented to limit their impact.

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Individuals in the U.S. generally have significant freedom at death in how they dispose of their property, whether probate or nonprobate. However, every state imposes some restrictions on the freedom to dispose of assets at death, especially with regard to the ability to disinherit a surviving spouse (and in some cases, surviving children). These restrictions on testamentary freedom operate differently from the laws of intestate succession. Intestacy laws are only default rules that determine who receives property in the absence of a will, whereas the restrictions discussed in this article can override a will or other estate planning documents.

Common concerns

Several common spousal-entitlement considerations are described below.

Elective shares. In the U.S., the vast majority of states, as well as the District of Columbia, provide that a surviving spouse can elect to take a portion of a decedent's estate, regardless of the provisions of the will (and in some cases other documents, such as revocable trusts or beneficiary designations). Elective share laws generally provide for only the spouse, and not for children.[1] Elective share statutes vary widely and along many dimensions and must be examined carefully state by state. Foreign countries also frequently have complex elective or forced share rules, which may or may not resemble the statutes in the U.S.

This article will focus primarily on planning around U.S. elective share laws, although many of the planning points discussed may also apply to other forms of testamentary restrictions.

Amounts for support—homestead and family exemptions. Several jurisdictions provide a surviving spouse, and sometimes minor children, the right to an amount needed to support the protected persons for a period. Frequently, this period is one year, but the period may also be extended to the duration of the administration of the estate in some cases.

Similarly, some states provide a surviving spouse or minor children with certain entitlements as "homestead exemptions," "family exemptions," or other similar concepts. Depending on the state, these exemptions may relate to dollar amounts, specific categories of property, or both.

Community property. With the exception of Georgia,[2] every state that does not provide an elective share for a surviving spouse has some form of community property laws.[3] Community property laws affect not only the division of property in divorce but also the disposition of property at the death of the first spouse.

Community property laws do not restrict testamentary dispositions

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specifically. Rather, such laws are a limitation on ownership of property acquired during marriage. Community property laws generally provide that each spouse is a one-half owner in marital property, regardless of formal titling. Thus, a decedent may

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not have the right to dispose of more than the decedent's one-half interest in community property, not because the law requires the decedent to leave a portion of the other half to the decedent's spouse (as would be the case with an elective share), but because the decedent does not own the other half.

Dower and courtesy. Dower and courtesy are common-law rights providing the surviving spouse with a life estate in a portion (generally one-third) of the decedent spouse's property.[4] Dower and courtesy have been repealed in most states (typically in favor of an elective share) but still exist in a handful of jurisdictions.[5] Many elective share states continue to use the one-third fraction as the amount of the elective share, even if dower and courtesy have been repealed

Reasons for protecting (or restricting) the surviving spouse's share

The general motivation behind these types of restrictions has been to protect family members, and, in particular, spouses, from being disinherited when a spouse or parent dies. In addition to the interest of fairness, jurisdictions may have an interest in mandating that decedents provide for surviving family members to prevent those survivors from becoming dependent on government assistance. An additional rationale for such protections is that divorce laws generally provide each spouse with certain property rights, and it seems reasonable to conclude that a surviving spouse should generally be treated at least as well as a divorcing spouse.

Notwithstanding valid reasons for enacting spousal protection laws, there are also several legitimate reasons why a client may wish to limit the amount, or at least the form, of property passing to the surviving spouse. For example, the spouse could have significant assets of his or her own; each spouse may have children from prior marriages that they wish to provide for; the client's assets may consist largely of a family business that the client wishes (or may be required) to keep in the client's family; and planning to limit the spouse's share may be advantageous for tax reasons or for eligibility for government benefits such as Medicaid. When these types of considerations arise, practitioners must be equipped to help clients navigate the complex waters of elective share and other spousal entitlement laws.

Why practitioners should be aware of other states' elective share laws

Of course, practitioners must have a firm understanding of elective share and other family protection rules in their own state. Yet, it is also important for practitioners to familiarize themselves with elective share and community property laws in other states, for several reasons.

First, clients move. Clients may relocate for work, family, tax, or other reasons, and those clients will generally be subject to some form of elective share or community property regime wherever they go (unless moving to Georgia). Moving from one state to another can either open up planning opportunities to limit a spouse's share that were not previously available, or result in tighter restrictions on how much a client can leave to non-spouse beneficiaries.

Understanding the different state laws can be particularly important in situations where a client moves from a community property state to a separate property/elective share state, or vice versa. Community property will generally retain its character as such when the owners move from a community property state to a separate property state, and separate property will also generally remain separate property when owners move to a community property state. However, practi-

1 The exception is Louisiana, which provides that children age 23 or younger, and children over 23 and disabled, cannot be deprived of their forced share (generally up to one-fourth of the estate) "unless the decedent has just cause to disinherit [them]." See La. Civ. Code art. 1493 *et seq*. Interestingly, Louisiana is also a community property state.

2 Georgia only provides that a decedent's spouse and minor children are entitled to a year's support under O.C.G.A. 53-3-1 *et seq.*

3 The states that have some form of community property laws are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

4 Rampino, "Spousal Disinheritance in Rhode Island: *Barrett v. Barrett* and the (De)evolution of the Elective Share Law," 12 Roger Williams U. L. Rev. 420, 427 (2007), available at: http://docs.rwu.edu/rwu_LR/vol12/iss2/5.

5 See, e.g., Ark. Code Ann. § 28-11-101 *et seq.*

6 Section 1014(b)(6).

7 North Carolina and New York both provide limited exceptions. North Carolina permits a "year's allowance" of $60,000 to the surviving spouse. The North Carolina Supreme Court has held that if the surviving spouse is a resident of North Carolina, he or she can claim this year's allowance from the decedent's North Carolina property, even if the decedent was domiciled elsewhere. See Jones v. Layne, 44 N.C. 600, 57 S.E. 372 (1907).
New York permits a nonresident testator to elect the application of New York law with respect to property located in New York. See N.Y. Est. Powers & Trusts Section 3-5.1(h); Estate of Renard, 56 N.Y.2d 973 (1982).

tioners working with such clients will want to understand how property can be converted from one type to the other, and the implications of such a change, in order to help clients decide whether to preserve or alter the existing property status.

For example, community property is often desirable for income-tax planning because both halves of community property generally receive a basis step-up on the first spouse's death.[6] On the other hand, community property may impose greater restrictions on the ability to minimize the surviving spouse's share.

Second, spouses may live in different states. In such cases, the client's entitlement will generally be governed by the laws of the decedent spouse's domicile, not the laws of the survivor's domicile.

Third, a client may be a nonspouse beneficiary of an out-of-state decedent (such as a child of the decedent). The decedent's spouse (e.g., the client's step-mother) may be entitled to an elective share, which could significantly affect the child's share of the parent's estate.

Finally, clients may own property located in other states. Although elective share laws typically apply only based on the decedent's domicile, a few states apply their laws to property located in the state, at least in limited circumstances.

Variation among state laws

Although all states provide some form of protection for spouses, those laws vary significantly from state to state. Of course, community property laws differ from elective share laws, but even among states that have the same general regime the specifics can differ. For example, community property states vary in the extent to which they apply the concept of "quasi-community property" to approximate community-property treatment for property acquired while the couple lived in a non-community property state.

There is even greater variation among elective share laws, including such variables as:

- The fraction or percentage to which the spouse is entitled (this typically ranges from 30% to 50%, although in some states the share may also depend on the duration of the marriage or other family circumstances).
- The extent, if any, to which the elective share applies to nonprobate assets (typically referred to as an "augmented estate").
- The extent, if any, to which the surviving spouse's own assets are considered.
- The valuation, for elective share purposes, of interests passing in trust for the spouse's benefit.
- The extent to which family exemptions and other assets count toward the surviving spouse's elective share.
- The time frame in which the election against the estate must be made.
- Whether the surviving spouse must be living at the time the elective share claim is made.

There are, however, two areas where at least most elective share states agree. First, with a few specific exceptions,[7] the law of the decedent's domicile (rather than the location of property or the surviving spouse's domicile) is used to determine the spouse's elective share. Second, the elective share may generally be waived through a prenuptial or post-nuptial agreement.

Tips, tricks, and traps for the unwary

As discussed above, a client may wish to minimize the surviving spouse's share of the estate for any of a number of reasons, and elective share laws can interfere with the client's goals. Below are several ways to minimize the impact of the elective share on a testamentary plan.

Obtain a waiver in a binding agreement prior to death. Generally, states permit the spouse's elective share or other forms of spousal protections to be waived in a prenuptial agreement. It may be incumbent on advisors to raise the possibility of a prenuptial agreement, especially since, at the time

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of marriage, a prenuptial agreement may not be foremost in the minds of the happy couple. This is especially likely to be true for marriages where neither spouse is wealthy entering the marriage, but the couple builds up significant wealth during the marriage.

Obtaining a waiver of the spouse's elective share in a postnuptial agreement is also possible. However, postnuptial agreements are often subjected to greater scrutiny under state law. Further, as a practical matter, it is generally more difficult to obtain a postnuptial agreement than a prenuptial agreement.

Even if the client must provide an incentive for the spouse to agree to waive elective share or similar rights, a current transfer of assets, property, or income by way of an outright gift or through a trust could be less costly than ultimately having one's estate resolve an elective share claim, especially if the claim results in litigation. At a minimum, by having the spouse waive the spouse's right to make a claim, greater certainty can be achieved.

Make lifetime gifts strategically. In addition to playing an important part in estate and gift tax planning, lifetime gifts can also serve a significant role in minimizing the spouse's elective share. Lifetime gifts fall outside of the probate estate. Accordingly, lifetime gifts are generally not subject to the elective share in states that look only to the probate estate to measure the elective share. For states that apply the elective share to an augmented estate, there is typically a look-back period of one or more years for lifetime gifts; however, gifts made before the look-back period will generally not be subject to a surviving spouse's elective share claim.

In some instances, it may also be possible to obtain a waiver of the look-back period from the spouse. For example, Florida specifically excludes gifts made within the look-back period if the spouse consents in writing to the gift. However, consent to gift-splitting on a gift tax return is not sufficient to waive the look-back for purposes of the Florida elective share laws.[8]

When making gifts to reduce the size of the elective share, clients should be careful to ensure that they do not give away assets that they would prefer to use in funding an elective share. For example, this concern could arise in a situation in which a family business constitutes a large share of the estate.

For illustration purposes, assume that a Florida testator has $35 million of assets in total, consisting of $15 million of liquid investments and a $20 million interest in a family business. It may not be appropriate for the testator in this example to make a large gift of liquid assets. If the testator gave away $10 million of liquid assets during the testator's lifetime, such a gift would reduce the elective share of the spouse from $10.5 million (30% of $35 million, as Florida applies a 30% elective share) to $7.5 million (30% of $25 million), assuming the gift was outside the one-year look-back period (or consented to in writing by the non-donor spouse). However, the testator would only have $5 million of remaining liquid assets to fund a $7.5 million elective share at death, thus necessitating that the elective share be funded at least partly with an interest in the family business. As such, if the testator's primary goal was to leave the family business to non-spousal beneficiaries, making substantial lifetime gifts of liquid assets would thwart that objective,

8 Fl. Stat. § 732.2045(c).

9 See, e.g., Dreher v. Dreher, 370 S.C. 75, 634 S.E.2d 646 (2006) (South Carolina); Sullivan v. Burkin, 460 N.E.2d 572 (1984) (Massachusetts). See also 76 Am. Jur. 2d Trusts section 29 (“While a trust instrument may purport to name a beneficiary, if the settlor reserves a substantial interest or unbridled control over management of the operations that is not for the benefit of the purported beneficiary, the trust may be found to be illusory.”).

10 See, e.g., Fl. Stat. § § 732.2035 and 732.2055.

11 See e.g. Estate of Grass, 2008 WL 2343068 (Tenn. Ct. App.) (overruled on another issue); and In re Will of Shepherd, 761 S.E.2d 221 (N.C. App. 2014)

12 See Fl. Stat. § 732.201; see also Detzel and Malec,:91 Fla. B.J. 24 (Sep/Oct 2017) (discussing the legislative history and the Richardson v. Perez case, decided in 2015, which held that by making an elective share claim the surviving spouse forfeited her right to receive assets in excess of 30% to which the spouse would have otherwise been entitled if she had not made the elective share claim and merely accepted the bequest under the decedent's will).

even though such gifts reduced the spouse's entitlement.

A second consideration in making strategic lifetime gifts, where a potential elective share claim is a concern, centers on the potential difficulty in valuing or dividing an asset. Retention of property that is difficult to value could lead to a more significant dispute in the determination of the elective share and the satisfaction of the elective share (if hard-to-value assets are used in funding). Further, an asset that is not conducive to division or co-ownership, such as improved real property or voting stock (or other ownership interest) in a closely held business, can pose challenges in funding the spouse's share.

Life insurance may be useful in cases where there are concerns about liquidity or about the imposition of a look-back period for gifts (and may provide additional benefits as described below). However, in many instances the life insurance proceeds will also be included in the augmented estate, thus increasing the spouse's elective share. It is important to take this increased share into account when determining the appropriate amount of life insurance coverage.

Retitle assets to fall outside of the elective estate. Retitling assets to minimize the elective share entitlement can be especially effective for clients in states that apply only the elective share to probate property. In those states, assets that have transfer-on-death designations or that are titled jointly with right of survivorship will generally not be included in determining the size of the spouse's elective share.

However, simply moving assets to a revocable trust may not be sufficient to exclude such assets from the spouse's elective share, as courts in many probate-only states have extended the elective share to revocable trusts.[9]

Opportunities for excluding assets are more limited in augmented-estate jurisdictions, but there may still be some gaps that can be exploited, such as life insurance trusts. In some jurisdictions, a standard irrevocable life insurance trust that is not includable in the insured's estate for estate tax purposes will likewise be excluded from the augmented estate.[10] Gifts to insurance trusts may get pulled into the augmented estate under the look-back period for gifts, but these gifts are likely to be small in comparison to the death benefit under a life insurance policy.

If divorce is inevitable, get divorced. Because marriage to the decedent is a condition to making a claim based on marital status, divorce terminates the elective share rights of a would-be surviving spouse. Thus, if the marriage is likely to end anyway, it may be advantageous to end the marriage sooner rather than later, especially if the spouse's entitlement in divorce is less than the spouse's entitlement as a widow or widower.

In divorce, the separate property of one spouse (such as inherited assets or property owned by the party prior to the marriage) is generally not subject to equitable division. However, elective share laws often do not take into account the source of the decedent's property in determining the elective estate. Hence, a surviving spouse may be entitled to a portion of the value of separate property under an elective share statute, even if the spouse would have no share of such property in divorce. Accordingly, if the client's assets consist primarily of separate property, then the spouse might receive less in divorce than by way of an elective share claim.

Offer the spouse a carrot for waiving the elective share after the client's death. Typically, this strategy will mean including in the will a bequest for the spouse, as well as a provision that the spouse forfeits the bequest if the spouse files an elective share claim. If the bequest is large enough such that the spouse is dissuaded from claiming an elective share, then the estate may save the difference between the bequest and the elective share, as well as the time and expense of resolving an elective share claim. This notion of requiring a spouse to elect to take under the will or forfeit such amounts and take the elective share is generally called the "doctrine of election."[11]

Note, however, that not all states allow testamentary provisions for a spouse to be waived if the spouse makes an elective share claim. For example, recent changes to Florida law make clear that making an elective share claim does not reduce what the spouse receives if the election were not made.[12] In other words, if the spouse makes the elective share claim but would have received a greater amount if no claim had been made, then under Florida law the spouse would still receive the greater amount.

Satisfy the elective share in the most advantageous way possible. Even if a client is required to satisfy the elective share, carefully choosing the assets used to fund the elective share can provide significant benefits, including minimizing taxes to the estate or the non-spouse beneficiaries and maximizing amounts available to other beneficiaries.

Clients may be able to reduce the impact of elective share laws by moving to (or remaining in) a state with a smaller elective share.

Using retirement accounts to fund the spouse's share may be particularly tax efficient, as a spousal rollover provides both maximum income-tax deferral and a federal estate tax deduction. Further, the built-in income-tax liability in a traditional retirement account generally does not reduce the value of the account for purposes of determining how much of the elective share has been satisfied.[13]

Life insurance can also provide an efficient method of funding the elective share. In Florida, for example, only the net cash surrender value of a life insurance policy immediately before death is included in the determination of the "elective estate." However, *all* of the death benefit payable to the surviving spouse (measured as of the date of death) counts toward satisfaction of the elective share,[14] thus potentially making life insurance an attractive asset with which to fund the elective share in that state. Further, naming the insured's estate as beneficiary may be preferable to naming the spouse as beneficiary directly, since, under Florida law, the death benefit in excess of the net cash surrender value immediately prior to death never counts as a part of the elective estate regardless of who is named as beneficiary. By naming the estate, the executor could control the timing and selection of property.

Providing the spouse's elective share in trust can allow the client to control the disposition of property at the surviving spouse's death and may also provide transfer tax advantages. Although the estate tax exemption is portable if the spouse's elective share reduces the amount available to fund a credit shelter trust, GST exemption is not similarly portable. Thus, it may be desirable to use a QTIP trust to provide for the spouse's share, so that the decedent's executor has the option of making a reverse QTIP election and applying the decedent's GST exemption to the marital trust.

When using a trust to fund an elective share, it is important to keep in mind how the trust will be valued for purposes of the elective share. For example, in South Carolina, the full value of a QTIP-able trust (whether or not the QTIP election is actually made) will be treated as passing to the spouse in determining whether the elective share is satisfied.[15] However, in Florida, a typical QTIP trust will be valued at only 50% to 80% of the value of the corpus when determining how much the spouse is deemed to receive for elective share purposes.[16] Under Alabama law, property passing to a trust for the surviving spouse (unless the surviving spouse is given a general power of appointment) is presumed to count 50% toward satisfying the elective share claim, but either the surviving spouse or the estate can establish that the trust should be counted at a higher or lower percentage.[17]

Finally, difficult-to-value assets can pose challenges or opportunities in funding, depending on the estate. A higher value for an asset subject to an elective share claim will increase the amount of the elective share and may also increase estate tax liability. On the other hand, a higher value for an asset passing to the spouse will mean that more of the elective share has been satisfied, and that the asset will have a higher income tax basis (assuming the asset is includable in the decedent's estate for estate tax purposes). Because of the tax and elective share implications, it is possible that the estate may prefer one value while the spouse would prefer another.

Make sure the funding is recognized for elective share purposes. Whether a transfer will be applied toward the elective share or in addition to the elective share will often depend on whether the state applies

13 See, e.g., Fl. Stat. § 732.2055.

14 See Fl. Stat. § 732.2095.

15 S.C. Code § 62-2-207(c).

16 In some states, such as Florida, the value deemed to pass to the spouse for purposes of the elective share may be increased if the trust also provides the spouse a qualifying general power of appointment. Fl. Stat. section 732.2095(1)(b). However, a general power of appointment in the spouse will preclude a reverse QTIP election from being effective.

17 Ala. Code § 43-8-75; see also Reynolds v. Reynolds, 837 So. 2d 847 (Ct. App. Ala. 2002) (involving a dispute over how much a testamentary QTIP trust should count toward satisfaction of the elective share).

18 Section 401(a)(11).

19 See Pennell, "Minimizing the Surviving Spouse's Elective Share," C032 ALI-CLE 291 (2014).

the elective share to the probate estate only or to an augmented estate. Generally, in states where only the probate estate is considered in determining the size of the elective share, only probate transfers are counted in satisfying the elective share. Thus, a decedent may, all else being equal, prefer to fund the elective share by naming the spouse as the beneficiary of an IRA or 401(k), but the decedent should be sure that such a nonprobate transfer by beneficiary designation will count toward satisfaction of the elective share. Otherwise, the spouse may receive the retirement asset and a fraction of the probate estate.

If a client in a probate-only state intends to use nonprobate assets to satisfy an elective share, he or she may be able to convert otherwise nonprobate assets to probate assets by naming the estate as the beneficiary. This way, the asset passing to the surviving spouse will be recognized as satisfying the elective share. Naming the decedent's estate will also increase the probate estate and the amount to which the surviving spouse is entitled, but may nonetheless decrease the spouse's entitlement to other assets.

For example, if a $100,000 asset that would otherwise pass to the surviving spouse (such as by beneficiary designation) is "converted" to a probate asset, it might increase the spouse's elective share by $33,333 (if the elective share is 1/3). If that asset then passes to the spouse from the probate estate, $100,000 will count toward satisfying the elective share. Thus, the spouse will receive $66,667 less from the other assets of the probate estate. Of course, advisors must also consider the potential consequences of naming the estate as a beneficiary, such as increased income or estate taxes, accelerated withdrawal schedules for retirement plan assets, and the ability of creditors of the estate to reach probate assets that might otherwise have been exempt from such claims.

Similarly, advisors with clients domiciled in augmented-estate jurisdictions should be aware of what transfers are already going to be counted against the elective share claim. For example, since a 401(k) must pass to the spouse anyway (absent the spouse's consent),[18] the client may not want to provide a bequest to the spouse in addition to the 401(k) if the 401(k) alone would satisfy the spouse's elective share claim.

Choose domicile carefully. Because the law of the decedent's domicile generally controls the surviving spouse's entitlement to an elective share or other statutory protection, clients should take into account the effects of elective share laws when choosing a domicile. For example, while Florida may be an attractive jurisdiction from an income tax standpoint as it imposes no income tax, its elective share laws provide a 30% elective share entitlement to the surviving spouse based on the decedent's augmented estate, even if the decedent was only recently married. Clients may be able to reduce the impact of elective share laws by moving to (or remaining in) a state with a smaller elective share.

Practitioners should be careful about advising clients to avoid the elective share by moving to a community property state late in life. Although community property states do not have an elective share, most such states do provide for "quasi-community property." Generally, quasi-community property is any property that would have been community property had the couple acquired it while living in a community property state. Thus, the spouse will have a one-half interest in quasi-community property (as well as the one-half interest in actual community property acquired while living in the community property state), and the decedent spouse will not accomplish the intended goal of minimizing the spouse's share.

Texas, Arizona, and New Mexico do not apply the quasi-community property concept in the context of a decedent's estate (although quasi-community property may apply in other contexts, such as divorce). Louisiana, California, Idaho, Nevada, Washington, and Wisconsin all apply quasi-community property to a decedent's estate.[19]

Do not forget about property location. In most cases, the domicile of the decedent, rather than the location of property, determines which state's laws control the surviving spouse's entitlement. However, planners should nonetheless consider whether property might be located in a jurisdiction the laws of which might apply, even if the decedent was not domiciled there. For example, New York permits nondomiciliary testators to elect to have New York law apply to property located in New York. This could be relevant if, for example, a client moves from New York to another jurisdiction, as it might be quite natural for the client's existing will to provide that New York law applies to assets located in New York. Depending on the relevant elective share laws, such a provision could either increase or decrease the spouse's elective share if the client has significant assets in New York.

Conclusion

Elective share and similar laws can pose challenges when planning the disposition of a client's assets at death. Nonetheless, with a strong understanding of spousal inheritance protections and proper planning, practitioners can lessen the impact of these restrictions, improve both tax and nontax outcomes, and maximize a client's freedom to dispose of assets as he or she chooses. ■