

Can a Spouse be Disinherited?

Pyle & Dellinger, PL

Can a husband disinherit his wife? Can a wife disinherit her husband? Maybe, but not easily. The Florida Constitution and Florida statutes offer protection for spouses so that one can not be left penniless if his or her spouse decides to leave the estate to somebody else.

One such protection is the constitutional provision protecting homestead. This has nothing to do with the homestead tax exemption that we all rely upon for a reduction in our real property taxes. And it is not applicable to property that is owned as husband and wife, which passes to the survivor when one dies. Sometimes one spouse owns the home, and never adds the other spouse to the title. The Florida Constitution provides that the spouse who owns the home cannot convey or mortgage homestead real property without the other spouse joining in the deed or mortgage. This is not because of ownership, but because of the constitutional protection for the spouse.

The Florida Constitution also provides that if a deceased person leaves a spouse or minor child, the spouse cannot leave the home to anybody, but if there is no minor child, the deceased person can leave the property to the surviving spouse. This is true whether the deceased spouse attempts to leave the property by a will or even by a revocable trust. Instead, the Constitution provides that the surviving spouse receives a life estate, and the children of the decedent (whether or not they are minors and whether or not they are also children of the surviving spouse) receive the remainder interest, meaning the children own the property once the surviving spouse dies.

The other major impediment to disinheriting a spouse is the Elective Share law. This Florida statute provides that the surviving spouse receives thirty percent of the decedent's estate if the surviving spouse "elects" to take that instead of what is left for the spouse by will.

Thus, if a deceased spouse attempts to disinherit the surviving spouse by will, the surviving spouse can elect to take the 30% instead.

The Florida Legislature has just revised this law dramatically. Whereas the law used to affect only assets subject to probate, now the property included in the elective estate (that is the property subject to the elective share) has been expanded to include property that is not subject to probate. Probate is the court supervised administration of an estate. It affects property that is held in the decedent's name alone. The probate estate does not include property held in a trust, property held in a P.O.D or T.O.D. account, jointly owned property, property that has a designated beneficiary and other types of ownership where the property passes automatically upon death. Up until the statute changed, a spouse could avoid the ramifications of this law by holding the property in a living trust or creating one of the types of accounts mentioned above.

Not any more. The elective estate has now been expanded to include property held jointly, property transferring to a beneficiary, and other types of property that would not have been included under the prior law. Can a spouse still evade the effects of this law? Of course, but it has become much more difficult to do so.

Sometimes we talk to a client who is unimpressed by the homestead law or the elective share law, because the client says that he or she has been separated for many years, has no idea how to reach the prior spouse and does not consider that he or she is married. Long periods of separation are irrelevant. The homestead law and the elective share law apply when there is a spouse, regardless.

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The homestead provision and the elective share provision are equally applicable regardless of whether the surviving spouse is the husband or wife. A competent spouse can waive his or her right to elective share and homestead by signing a valid waiver, prenuptial agreement or postnuptial agreement. The new elective share statute also permits a decedent to create an elective share trust or a special needs trust, which places money aside in a trust for the other spouse's use; the amount placed in such a trust can reduce the percent of the estate that is subject to the elective