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What You Need to Know About Automatic Spousal Entitlements Under Virginia Law

Every married person should be aware of the statutory claims available for a surviving spouse under Virginia law. Essentially, the law provides that you cannot disinherit your spouse without your spouse's consent. Many clients who married in later years or who have children from prior relationships tell me they have agreed not to leave anything to each other but rather to leave their entire estates to their respective children upon death, regardless of which spouse dies first. What most of them don't know, however, is that unless the agreement is in writing, and unless that writing conforms with the requirements for a valid marital agreement under Virginia law, the surviving spouse could still end up with a significant portion of the deceased spouse's estate.

The Statutory Allowances

There are three (3) statutory allowances in Virginia: the Family Allowance, the Exempt Property Allowance, and the Homestead Allowance.

The Family Allowance[1] provides the surviving spouse (and any minor children) with money for support during the estate administration process. The Family Allowance cannot exceed $24,000, but the interesting thing is that there is no required demonstration of need. All the surviving spouse has to do is file a claim for the allowance within one year of the decedent's death, and it is awarded…the entire $24,000. The Family Allowance takes precedence over all other beneficiaries, and even creditors and most expenses of the estate.

[1] VA Code § 64.2-309.

The Exempt Property Allowance[2] entitles the surviving spouse (and any minor children) to up to $20,000 in value of household furnishings, personal effects, appliances, vehicles, and any other form of tangible personal property. Like the Family Allowance, no demonstration of need is required. The surviving spouse must simply file a claim within one year of the decedent spouse's death. Then, the spouse is entitled to select whatever he wants of the deceased spouse's tangible personal property. And, the spouse gets first choice. If you have designated a specific item to one of your children, the spouse could elect to take that item instead. Finally, if there is not $20,000 worth of tangible personal property, any deficiency can be satisfied with other assets of the estate. The Exempt Property Allowance takes precedence over all other claims except the Family Allowance.

The Homestead Allowance[3] entitles the surviving spouse (and any minor children) to $20,000 from the decedent spouse's estate. The Homestead Allowance is in lieu of any share that is to pass to the spouse under the decedent's will or by intestate succession and is applicable where the spouse would receive less than that amount under the will or by intestate succession such as in situations where an estate is insolvent or has significant debt. The Homestead Allowance is in addition to both the Family and Exempt Property Allowances, but where a Homestead Allowance is claimed, the surviving spouse can receive nothing else from the decedent's estate.

The Elective Share

The Elective Share is in addition to both the Family and Exempt Property Allowances, but not the Homestead. Where the spouse has claimed the Homestead Allowance, she is not also entitled to the Elective Share[4].

At its core, the claim for the elective share of a spouse's estate prevents any attempt to disinherit one's spouse. If one spouse fails to name the other as a beneficiary in their will or trust, the surviving spouse may file a claim for the elective share within six (6) months of the date of death or the date the decedent's will was put to record,

[2] VA Code § 64.2-310.
[3] VA Code § 64.2-311
[4] VA Code § 64.2-308.3.

whichever is later. Because many wills are not filed immediately, or ever, this may leave the option for filing a claim for an elective share open for a significant period of time.

Interestingly enough, however, even if the surviving spouse is provided for by the decedent's will or trust, or by beneficiary designation, she may still claim the elective share if it would give her more than under your plan. The only way to prevent this claim, or any of the other statutory claims and allowances the law affords the surviving spouse, is by the valid execution of a pre-marital, marital, or separation agreement whereby both parties voluntarily waive their right to said claims under the law.

When discussing this with clients, most tell me that their spouse would never file the claim, so they are not worried. While I understand that you may implicitly trust your spouse (and after all, isn't that the foundation of a good marriage), and while I agree that your spouse may never dream of filing any claim against your estate, I have seen too many situations where that very event occurs. Why? Because circumstances change, and people change. Any number of factors could change your spouse's mind on this issue. Your spouse may realize that the loss of your income will significantly impact his quality of life; maybe there's been a recent drop in the stock market and your spouse is concerned about a significant loss of her net worth; perhaps your spouse has some health issues now such that he is concerned about whether his own assets will be able to sustain him for the remainder of his life. These are just a few of the reasons I have heard over the years. But, more often than not, it's the influence of outsiders that make the biggest difference. Outsiders, such as your spouse's children or even ex-spouse. If your spouse is incapacitated, an agent under his power of attorney could make the election on his behalf. Even your own children could influence the decision; I have seen this happen where there is a change in their relationship after the death of one spouse. The issue is that no one really knows what will happen, or what they will or won't do, until the situation arises. So, wouldn't you rather be sure?

So, how does this work? If your spouse does file a claim, how much will he get? New legislation in 2016 dramatically changed the calculation of the elective share in two ways: 1) the existence of children from a prior relationship is no longer a factor in determining the surviving spouse's entitlement; and 2) the duration of the marriage is factored into the calculation. The longer the marriage, the more the surviving spouse

will receive. The new law works similar to the laws for determining what assets are included as "marital property" versus "separate property" in a divorce.

Determining the Elective Share

The Elective Share is equal to fifty percent (50%) of the marital property portion of the augmented estate. The Augmented Estate is determined by totaling the value of all property, real and personal, tangible and intangible. This includes all of the deceased spouse's property regardless of whether it was owned solely by the decedent or jointly with others, or if ownership was transferred ("gifted") to others during the decedent's lifetime but without the spouse's consent. Also included are assets in a trust where the decedent had unlimited access and/or control of the assets during her lifetime. Finally, all assets passing at death by beneficiary designation, right of survivorship, transfer on death or payable on death. This includes any and all transfers to the surviving spouse.

Then, the value of the surviving spouse's own property and transfers to others is determined. The inclusion of the surviving spouse's property was added with the 2016 updates to the law to take into account both the fact that the decedent may have already provided for the surviving spouse, as well as the fact that the decedent would have an equitable claim to such property and earnings in a divorce.

The "marital property" portion of the augmented estate is then determined by a sliding scale based upon the length of the marriage. If the decedent passed away before the couple's first anniversary, the marital property portion of the augmented estate would be determined by multiplying the total value of the all property by three percent (3%). The surviving spouse would then receive 50% of that number. The percentage increases with the duration of the marriage; where a marriage has lasted fifteen years or longer, the marital property portion is one-hundred percent (100%) of the augmented estate, with the spouse receiving 50% of that number.

Remember that the surviving spouse's own assets which would be includible as marital property must be calculated and added to that of the deceased spouse. Any separate property of either party is excluded from the calculation, but it is often difficult to determine whether property is marital or separate. Separate property includes property transferred by either spouse with the written consent of the other; or property received by either spouse by bequest, devise, inheritance, beneficiary designation, pay

or transfer on death, or any other form where the property was maintained as separate property. But, maintaining property as separate property doesn't simply mean holding it in a separate account in your own name. For example, assume wife inherits a home from her mother; even if title to the home remains in wife's sole name, if funds in a joint bank account were used to make repairs, updates, or simply to pay expenses associated with the home, the home is no longer separate property; it has been converted to marital property by the influx of marital funds to the property.

Getting Around the Statutory Allowances & Elective Share

The only way to be absolutely sure that your estate will pass to those persons you have designated in your will, trust, beneficiary designation, or by any other means, where you are not providing for your spouse, or are providing less than your spouse would be entitled to under the law, is for you and your spouse to enter into some form of marital agreement which waives these statutory entitlements. Under the law, such an agreement must be in writing and must conform with the requirements of the law for marital agreements. Even if you trust your spouse implicitly, remember there are others who could ultimately play a part in undermining your estate plan, ultimately for their own personal gain. Be sure; trust but verify; be prepared.