

Elective Share and why you can't write your spouse out of your will after marriage

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The idea of disinheriting a spouse may seem foreign to some, but there are many reasons why people try to do it. For example, a preference to leave one's property to a third-party, or for the purpose of preserving healthcare benefits for the other spouse. In fact, it is actually quite common for people to try to disinherit their spouses. Technically, there is nothing to stop someone from doing it. A spouse could execute a will leaving his entire estate to a third-party. He could also take out life insurance policies and designate someone other than his spouse as the beneficiary. The only caveat is- it won't actually work.

The law typically *favors* a person's freedom to do whatever they want with their property when they die. This is called freedom of disposition. However, this principle is subject to a few restrictions, one of them being an "elective share." Under Pennsylvania law, a surviving spouse can choose to take an "elective" or "forced" share of the decedent-spouse's property. In other words, if a decedent-spouse leaves his entire estate to someone other than his spouse, the surviving spouse can sue and ask the court to take an elective share. Even if the decedent-spouse left some property to the surviving spouse in his will, the surviving spouse can choose to take an elective share instead, for example, if it would result in a greater inheritance than the will provides for.

In Pennsylvania, as well as in most other states, the elective share will be 1/3 of decedent-spouse's *certain* property. Such certain property includes property disposed of under the will, property in a revocable trust, and more. The property that will be excluded in calculating the elective share includes, but is not limited to, any conveyance made with the consent of the surviving spouse, life insurance proceeds, and certain employment benefit plans.

In order to make an election in Pennsylvania, a surviving spouse must file a writing with the clerk of the orphans' court in the county where the decedent-spouse was domiciled at the time of his death, and provide notice of the election to the decedent's personal representative. The surviving spouse has six months after the decedent's death, or six months after the date of probate (whichever is later) to file the writing. If not, the surviving spouse is usually deemed to have waived his or her right to the elective share, and cannot attempt to take it later on.

There are a few additional caveats to the elective share rule. Under Pennsylvania law, an elective share right can only be exercised by the surviving spouse (or spouse's acting agent) during the surviving spouse's lifetime. Further, a spouse is not entitled to an elective share if the other spouse dies in the middle of divorce proceedings, even the divorce has not been finalized (e.g., no divorce decree has been entered). Finally, the right to take an elective share is not

absolute, but rather, can be forfeited or waived. Where a surviving spouse has waived his or her right to take an elective share, such as by doing so in a prenuptial or postnuptial agreement, it will be extremely difficult to attempt to invalidate later. For this reason, it is important to consult with an experienced attorney before entering into any prenuptial or postnuptial agreement, especially concerning the waiver of elective share rights. If you have any questions about the elective share, or any other divorce related matter, contact Notaro & Associates today. (Blog by: Kim Seskin)