

Spousal Inheritance Rights Can Impact Your Estate Plan

A second marriage can significantly impact estate planning, introducing new complexities that require careful consideration. Without thoughtful planning, default inheritance laws may fail to provide adequately for your new spouse.

In nearly every state, a person's spouse has certain property rights that apply regardless of the terms of the estate plan. And these rights are the same, whether it's your first marriage or your second or third. Here's an introduction to spousal rights and some strategies you may be able to use to limit them.

Understanding an "elective share"

Spousal property rights are creatures of state law, so it's critical to familiarize yourself with the laws in your state to achieve your planning objectives. Most states provide a surviving spouse with an "elective share" of the deceased spouse's estate, regardless of the terms of his or her will or certain other documents. The remaining states (except Georgia) are community property states. This article focuses on elective share states, but similar planning strategies may be available in community property states as well.

Generally, a surviving spouse's elective share ranges from 30% to 50%, though some states start lower and provide for progressively larger shares as the duration of the marriage increases. Perhaps the most significant variable, with respect to planning, is the definition of assets subject to the surviving spouse's elective share rights.

In some states, the elective share applies only to the "probate estate" — generally, assets held in the deceased spouse's name alone that don't have a beneficiary designation. In other states, it applies to the "augmented estate," which is the probate estate plus certain non-probate assets, such as:

- Life insurance policies,
- Revocable trusts,
- Jointly owned assets that pass automatically to a joint owner,
- Retirement or financial accounts that pass according to a beneficiary designation or transfer-on-death designation, or
- Lifetime gifts made during a specified "lookback" period (for example, one year) prior to death.

By developing an understanding of how elective share laws apply in your state, you can identify potential strategies for bypassing them.

Minimizing the effects on estate planning

Elective shares are designed to protect surviving spouses from being disinherited. But there may be good reasons for limiting the amount of property that goes to your spouse when you die.

For one thing, your spouse may possess substantial wealth in his or her own name. And you may want most of your estate to go to your children from a previous marriage. Or

perhaps the bulk of your wealth is tied up in a family business that you want to keep in the family.

Strategies for minimizing the impact of your spouse's elective share on your estate plan include:

Transferring assets to a revocable trust. In most (but not all) probate-only states, transferring assets to a revocable trust is sufficient to shield them from your spouse's elective share. In augmented estate jurisdictions, the elective share generally applies to revocable trusts. However, the laws of some states provide that the augmented estate only includes assets transferred to a revocable trust *during marriage*. In that case, it may be possible to protect assets from the elective share by transferring them to a revocable trust *before* remarrying.

Purchasing life insurance. Life insurance can be a great way to create wealth and liquidity for your children or other family members, and in probate-only states it's generally shielded from your spouse's elective share. Augmented estates usually include life insurance, but in some states, it may be possible to exclude it by holding it in an irrevocable life insurance trust.

Making lifetime gifts. By transferring property to your children or other loved ones during life (either outright or through an irrevocable trust), you remove those assets from your probate estate and place them beyond the reach of your surviving spouse's elective share. If your state uses an augmented estate to determine a spouse's elective share, lifetime gifts will be protected so long as they're made before the lookback period or, if permitted, your spouse waives the lookback period.

Retitling assets. In probate-only states, you may be able to protect assets by holding them jointly with a child or other family member with right of survivorship.

One thing most elective share states agree on is that your spouse can waive his or her elective share in writing, either through a standalone waiver or as part of a broader prenuptial or postnuptial agreement.

State elective share laws are complex

If you're remarrying, consult your estate planning advisor to evaluate the impact of your state's elective share laws on your estate plan. Depending on state law, there may be strategies available to protect your assets.