

A Look at the Spousal Election in Pennsylvania

by W. Marshall Pearson

We have all seen the movies or daytime dramas where the family of the dearly departed gathers in the lawyer's office for the reading of the will. Each member of the family is hoping they are named the sole heir. Often present is the new young spouse of the deceased who has earned the dislike of the entire family. Did the deceased leave everything or nothing to this gold digger is the question in everyone's mind.

Let's discuss this scenario under Pennsylvania law. In particular let's discuss whether a spouse can be excluded from a deceased spouse's assets.

When a person dies he either dies with a will in place (testate) or without a will in place (intestate). If a person dies intestate the distribution of their assets is determined by Pennsylvania statute and a surviving spouse will inherit assets. The intestate statutes will be discussed in another article.

This article will deal with the specific situation-

What happens if a decedent spouse leaves a will in which he leaves his surviving spouse nothing? Does the surviving spouse walk away empty handed or is there a method by which this shunned spouse can get their hands on some of the decedent's assets?

The short answer is –“The excluded spouse is entitled to an “elective share” under Pennsylvania law. The elective is 1/3 of certain assets of the deceased spouse.” To obtain the elective share, the spouse must carefully follow the procedure set out in the statute. It should also be noted that there are certain events that disqualify a spouse from receiving the elective share. Finally by taking the elective share, the spouse is deemed to be disclaiming all rights to certain types of assets that the spouse might otherwise have been entitled to. As a result, the spouse should consult with an attorney to determine if claiming an elective share will actually be in the spouse's best interest.

How is the election made and what is the time frame for making it?

The election must be made in writing and signed by the spouse and must be filed with the clerk of the orphans' court in the county where the deceased spouse lived. The notice must be filed within 6 months of the later of the date of death or date of probate. 20 Pa.C.S. §2210

*W. Marshall Pearson
Attorney at Law
311 Exton Commons
Exton, PA 19341
(610) 363 3700*

What property subject to election?

The following property is included in determining the elective share: (1) Property that passes from the deceased by will or intestacy if the deceased did not have a will (2) the use or income from property that the deceased conveyed during marriage but in which the deceased still had use of or income from at his death (3) property that the deceased conveyed at any time during his life if the decedent had the right to revoke the conveyance or invade the principal (4) property conveyed by decedent during marriage to (a) himself and (b) another with a right of survivorship to the extent the decedent had a right to convey at the time of his death (5) survivorship rights in any annuity that the decedent purchased during the marriage and from which the decedent was receiving payments at the time of death (6) property given away by the decedent within one year of death to the extent it exceeds \$3,000 per donee.

What property is not subject to election?

Certain types of property are not accessible to a spouse making the election. They are as follows: (1) any conveyance made with the express consent of the spouse (2) insurance proceeds on the life of decedent (3) any interest in employer established pension, profit sharing, deferred comp, etc. plan (4) property passing by decedent's exercise or non-exercise of a power of appointment that the deceased was given by a third party Note: None of the four types of property are subject to the election as long as they do not pass through the estate (generally none would pass through the estate-they would go directly to the beneficiary). However, if the items do pass through the estate they are subject to the election.

What property does a spouse have to disclaim an interest in if they take an elective share?

If a spouse does elect to take an elective share they are deemed to have given up any right to the following property that would otherwise have been payable to the spouse: (1) Any property subject to the election that was not awarded to the spouse as part of the elective share, (2) property appointed by the decedent's exercise of a power of appointment and property passing in default of such appointment if the decedent had the right to exclude his spouse from an interest, (3) property held in any trust created by the decedent during his life, (4) proceeds of insurance on the life of the decedent to the extent attributable to premiums paid by decedent or his employer, (5) any annuity purchased by decedent, his employer, partner or creditor premiums, (6) any pension, profit sharing, stock bonus or other plan established by decedent's employer, (7) community property in proportion to decedent's contribution, (8) all property (real and personal) held by decedent and spouse as tenants in entirety or with right of survivorship in proportion to decedent's

W. Marshall Pearson
Attorney at Law
311 Exton Commons
Exton, PA 19341
(610) 363 3700

contribution and (9) all property given to spouse by decedent during his lifetime which are still owned by spouse.

Who is not able to take an elective share?

If divorce proceedings were underway at the time of the death, the remaining spouse is not entitled to a spousal election. Also a spouse who, for a period of a year or more, has willfully neglected or deserted the now deceased spouse is not entitled to the elective share. It should be noted that under the "Slayer's Share" provisions of Pennsylvania law any person who acts as a principal or an accessory before the fact in the killing of the decedent will not be allowed to inherit from the decedent.

What is the reason for the spousal election?

The best explanation for the spousal election is that lawmakers have determined that it is against public policy for a remaining spouse to be totally excluded from the assets of a deceased spouse. This may reflect that traditional situation that spouses generally inherit a large portion of not all of a deceased spouse's estate. Often this inheritance is what allows a spouse to continue to live in a fashion as close to that in which they lived while their spouse was alive. The statutes may also evidence the fact that legislators are concerned that if the deceased spouse had all or most of the assets in his/her name and excludes the remaining spouse from his estate, the surviving spouse may be required to pursue state or federal assistance to live.

Note: The right of a spouse to take an elective share may be waived before or during the marriage and also after the other spouse's death. For example the parties could agree in a prenuptial agreement to waive their rights to an elective share.

W. Marshall Pearson
Attorney at Law
311 Exton Commons
Exton, PA 19341
(610) 363 3700