

A Surviving Spouse's Right to a Portion of the Estate

A will is a written document detailing how you want your assets distributed after death. It serves as a blueprint for distributing your assets the way you want. However, there are some things that cannot legally be done in a will. In general, one spouse cannot disinherit another. No matter what a will states, a surviving spouse can elect to claim a certain amount of a deceased spouse's estate, which is determined by state law.

In most states, a surviving spouse is entitled to at least one third to one half of the estate value on the date of death after the payment of all debts. In some states, the amount is less if the couple was married a short time or more if the couple has children. Some states only allow a spouse's share to be taken out of assets subject to probate. The laws vary widely.

But no matter where you reside, when it comes to spouses, a will is not necessarily the final word. If a surviving spouse doesn't receive what he or she is entitled to under state law, the spouse can turn to the appropriate court to claim it. This is sometimes called an elective share, a spousal statutory share, a forced election or "taking against the will."

Example: In his will, Tom leaves \$10,000 to his second wife and the rest of his \$750,000 in assets to his children from his first marriage. The laws of his state specify that spouses have a right to one third of an estate after the payment of all debts and charges against it. So Tom's wife could exercise her right of election to claim \$250,000 (one third of the estate) rather than the \$10,000 listed in the will.

Disinheriting Children

While one spouse cannot generally disinherit another, a parent *can* legally disinherit an adult child in all states except Louisiana. However, this is a serious step that should be discussed with us.

Important: If you're interested in exercising your right of election in a spousal estate, consult with your attorney immediately to preserve your rights. Each state has its own prescribed deadlines to file an election with the court. If the time requirements are not met, the surviving spouse generally loses his or her elective share.

Hiding Assets

A spouse can't own assets with a non-spouse as a way to get around the law and cut out his or her spouse.

Example: Sue owned a vacation home in one state that she jointly held with her son. She never told her third husband about it and it was not included in her will. After her death, Sue's husband discovered the existence of the property and filed an election to have it included in the estate.

Abandonment

There's one exception to the laws allowing spouses an elective share. A surviving spouse isn't entitled to a portion of the estate if he or she abandoned his or her spouse and the abandonment continued until the time of death.

Example: George left his wife, Lori, and their children 25 years ago. The family rarely heard from him and he provided little financial support but the couple never divorced. Lori's will left everything to the children. After her death, George resurfaced to file an election for his share of the estate. The court ruled he did not qualify as a surviving spouse because he abandoned his wife.

What if a person's will leaves nothing to his or her spouse or leaves less than the elective share specified in the state? If the surviving spouse does not file an election with the court, the deceased's individual's assets will pass in accordance with the will. In other words, if spouse consents to being disinherited, the court doesn't intervene.

The spousal elective share laws are complex so consult with us about your situation. A well-conceived estate plan will help ensure your final wishes are carried out.

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