

FLORIDA'S NEW ELECTIVE SHARE STATUTE

On June 16, 2017 Governor Scott signed CS/CS/SB 724 into law. The new law, which took effect on July 1, 2017, modifies several sections of the Florida Probate Code relating to the elective share.

For those readers who are unfamiliar with the term "elective share," it is basically the gender-neutral successor to the "dower and curtesy" which was abolished in Florida in 1975. Since their initial passing, the Florida Legislature has revised the elective share laws several times, each time making them more expansive to ensure that a surviving spouse will not be completely disinherited.

As it currently stands, the elective share allows a surviving spouse to elect to take thirty percent (30%) of the decedent's elective estate (see footnote 1), in lieu of whatever they would have received under the decedent's will or trust.

In addition to the elective share, the Florida Homestead Law grants a surviving spouse certain rights to the decedent's homestead property. At a minimum, the surviving spouse is entitled to receive a life estate in the homestead, which can be converted to a one-half interest as a tenant in common if the surviving spouse makes the election within 6 months of the decedent's death. The decedent's children take the remainder interest. If, however, the decedent had no descendants whatsoever, the surviving spouse receives the entire homestead property.

Prior to the enactment of CS/CS/SB 724, homestead property was one of very few assets not included in the valuation of the elective estate. This new law changes that. Unless the surviving spouse waives his/her homestead rights, CS/CS/SB 724 expressly provides that the decedent's protected homestead shall be included in the elective estate. It also provides for different valuations depending on the interest that the surviving spouse would have in the homestead, i.e. one-half of the date-of-death fair market value in the case of a life estate, or the entire date-of-death fair market value in the case of a fee simple interest.

Some other areas affected by the new bill include awards of attorney's fees and costs and the deadline to take the election. Prior to the new law, attorney's fees against the surviving spouse could not be awarded unless the court determined that the election was made or pursued in bad faith. The new law removes the bad faith requirement and provides that the court may award fees and costs in any proceeding under the elective share statute, not only instances where the surviving spouse makes or pursues an election.

Also prior to the new law, the surviving spouse was required to file his or her election with the court either within 6 months of being served with the Letters of Administration or within 2 years of the death of the surviving spouse, whichever was earlier. The surviving spouse could also petition the court for an extension of time to make the election, but the petition had to be filed within these same timeframes. The new law does not change the two-year maximum, but it does allow the surviving spouse to move for an extension within 40 days of the termination of any proceeding which affects the amount the spouse is entitled to receive under Section 732.2075(1), even if this occurs after the 6 months of service of the Letters of Administration.

To read all of the changes enacted by CS/CS/SB 724, visit: <http://laws.flrules.org/2017/121>

(1) The decedent's elective estate is not limited to the probate estate. It includes assets that pass outside of probate such as joint and "pay on death" bank accounts, Totten trusts, property held in joint tenancy and tenancy by the entireties (limited to decedent's interest in the property), revocable trusts, pensions and retirement plans, among others. See Section 732.2035, Florida Statutes.