

The Probate Team

Elective Share - A Fresh Look

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October 9, 2015

Florida Law Education Association
The Probate Team 2015
Orlando, Florida

The author encourages the use of any of the ideas in this paper. The concepts are not subject to any pending patents. (See, Jacobs, D. Patent Pending. *Bloomberg Wealth Manager*, May, 2005, p. 41.) In fact, the author is not sure if any of these ideas would even be worthy of a patent. Of course, the user must determine the appropriateness and effectiveness of any idea expressed in this paper. Consistent with expecting no royalties for these ideas, neither the author nor the Florida Legal Education Association accepts any responsibility for any damage caused by relying on these materials. Also, the author expresses his appreciation to Philip Fincher, a Resident at Law of Laird A. Lile, P.A. for his good work in preparing these materials. For more information regarding the Resident at Law Program, visit LairdALile.com.

I. Legislative History

- A. 1999: The “new” elective share law was enacted.¹
- B. 2001: Legislative changes to address “glitches” before the law began to apply.²
- C. 2002: More legislative changes to clarify certain provisions and eliminate some potential abuses.³
- D. 2004: Clarification to definition of elective share trust.⁴
- E. 2006: Legislative changes to renumber one provision and clarify time for filing elective share.⁵
- F. 2007: Clarification of the definition of “income” in an elective share trust; removal of previous \$10,000 cap on annual exclusion gifts made within one year of death to mirror automatic increases in annual exclusion gifts under Internal Revenue Code Section 2503.⁶
- G. 2009: Clarification of “Transfer in satisfaction of the elective share” as an irrevocable transfer by the decedent during life to an elective share trust; clarification that decedent’s one-half of the value of property maintaining its character as community property under the laws of another state is excluded from the elective estate; clarification of asset sources used to satisfy the elective share.⁷

¹Florida Laws, 99-343 (CS/CS for House Bill 301, §§ 1-17).

²Florida Laws, 2001-226 (CS for House Bill 137, §§ 19-30).

³Florida Laws, 2002-82 (CS for Senate Bill 720, § 2, 4).

⁴Florida Laws, 2004–5 (Senate Bill 1534, § 151).

⁵Florida Laws, 2006-217 (CS for Senate Bill 1170, § 31) and Florida Laws 2006-134 (House Bill 521, § 4).

⁶Florida Laws, 2007-74 (CS for House Bill 311, §§ 9-11).

⁷Florida Laws, 2009-115 (CS for House Bill 599, §§ 3-7).

- H. 2010: Requirement that before a court approve an election for the elective share made by an attorney-in-fact or guardian of a surviving spouse, the court must first determine if such an election is in the best interest of the surviving spouse for his/her probable lifetime.⁸

II. Legislative Possibilities⁹

A. Change in Elective Share Percentage?

1. Why currently 30%?
2. Originally proposed in 1999:

Decedent and Spouse Married:	Elective Share Percentage:
Less than 5 years	10% of the elective estate
5 years but less than 15 years	20% of the elective estate
15 years but less than 25 years	30% of the elective estate
25 years or more	40% of the elective estate

3. Uniform Probate Code: 50% of the marital-property portion of the augmented estate.¹⁰
4. What's next for Florida?

B. Collection of Costs and Attorney Fees

1. Surviving spouses are not generally entitled to recover costs and attorney fees¹¹ when pursuing an elective share of the estate except in limited

⁸Florida Laws, 2010-132 (CS/CS for House Bill 1237, § 6).

⁹The Real Property, Probate, and Trust Law Section of the Florida Bar has established the Elective Share Review Committee which is reviewing certain aspects of Florida's law on elective share. The issues identified in this portion of the materials have been considered by this committee.

¹⁰Uniform Probate Code Section 2-202(a).

¹¹See *Tillman v. Smith*, 526 So.2d 730 (Fla. 5th DCA 1988).

circumstances.¹²

2. Should attorney fees and costs be awarded as in chancery in all proceedings involving the pursuit of the elective share by a surviving spouse?

C. Homestead and Elective Estate

1. Current law disregards protected homestead for elective share purposes.
2. Compare results when the decedent's primary residence is owned by the decedent and permissibly devised to the surviving spouse with the decedent's primary residence owned as tenants by the entirety with spouse who survives. Include protected homestead in elective estate at 100% of its value.

III. Elective Share and Elective Estate

A. The elective share of a surviving spouse is calculated as 30% of certain qualifying assets which are collectively known as the "elective estate."¹³

B. The elective estate consists of the following assets:¹⁴

1. Probate estate.
2. Payable on Death/Transfer on Death type accounts.
3. Joint tenant with rights of survivorship accounts based upon the portion of the account the decedent had a right to withdraw or use without a duty to account to any person.
4. One-half of the value of assets titled as tenancy by the entirety.
5. Fractional interests in real property held as joint tenancy with right of survivorship. The fractional interest is determined by dividing the value of the property by the number of joint owners.
6. Certain revocable transfers, including assets transferred to traditional

¹²Fla. Stat. 733.2145(4); see also *Menz v. Estate of Menz*, 381 So.2d 375 (Fla.1st DCA 1980).

¹³Fla. Stat. § 732.2065.

¹⁴Fla. Stat. § 732.2035.

revocable trusts.

7. Certain irrevocable transfers of the decedent with retained life estates and/or income interests.
 - i. This includes the right to receive payments under a commercial or private annuity, an annuity trust or unitrust or similar arrangement, but only as to that portion of the income of the property necessary to satisfy the annuity, unitrust or other payment.
 - ii. This does not include irrevocable transfers made by individuals other than the decedent which were made for the benefit of the decedent.
8. Individual retirement accounts and most retirement plans.
9. The net cash surrender value immediately before death of life insurance policy issued on the life of the decedent.
10. Most gifts made within the one year period ending on the date of the decedent's death.
 - i. Exceptions:
 - a. Gifts made for educational and medical expenses which are excluded from gift tax under Internal Revenue Code Section 2503(e).
 - b. The first annual exclusion gift as described under Internal Revenue Code Section 2503(b) or (c) during the one year period ending on the date of the decedent's death.
11. Property transferred in satisfaction of the elective share.

C. The Elective Estate - What is NOT Included?

1. The elective estate, though comprehensive in its scope, does not include all assets which may be included in a decedent's estate for tax purposes.
2. Assets Excluded from the elective estate:¹⁵

¹⁵Fla. Stat. § 732.2045.

- a. Irrevocable transfers made by the decedent before October 1, 1999.
 - b. Irrevocable transfers made by the decedent prior to the decedent's marriage to the surviving spouse.
 - c. Transfers for adequate consideration in money or money's worth.
 - d. Transfers made with the written consent of the spouse. This does not include gift-splitting under federal gift tax laws.
 - e. Proceeds of a life insurance policy on the life of the decedent to the extent it exceeds the net cash surrender value.
 - f. Life insurance maintained pursuant to court order.
 - g. The one-half of any community property.
 - h. Property held in a qualifying special needs trust for a disabled spouse.
 - i. Property over which the decedent held a general power of appointment.
 - j. Protected homestead.
 - k. Property held in trust (whether revocably or irrevocably transferred) at all times between October 1, 1999 and the date of the decedent's death, if: (1) the decedent was not married to the surviving spouse at the time of transfer to trust, and (2) the property was a nonmarital asset (for equitable distribution purposes).
3. Deductions from the Elective Estate
- a. Claims paid or payable from the elective estate.
 - b. Mortgages, liens or security interests on property that is part of the elective estate.
4. Doing the Math
- Elective Estate x 30% = Elective Share Amount
5. Note: Administrative expenses are not considered when determining the

amount of the elective estate.

6. No Longer Much of an Election. The electing spouse no longer is required to choose between what would be received under the estate plan and the benefits of the elective share.
 - a. The elective estate is essentially a floor on the amount the surviving spouse will receive.
 - b. Often there will be no disadvantage in electing on behalf of a spouse.

IV. Elective Share Trusts

- A. Testators can plan for the elective share by making either irrevocable transfers during life, or through testamentary transfers at death, into a trust which qualifies as an “elective share trust.”
- B. Elective Share Trust defined
 1. Fla. Stat. § 732.2025(2) defines an elective share trust as a trust under which:
 - a. The surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually;
 - b. The surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and
 - c. During the spouse’s life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.
 2. Follow the definition:

Janien v. Janien, 939 So.2d 264 (Fla. 4th DCA 2006):

The following provisions of a 1997 Florida will did **not** qualify as an elective share trust:

“ARTICLE SECOND: If my husband, Cedric Janien, survives me:
A. I devise and bequeath my beneficial interest in the North Chatham Realty Trust, together with all furniture, fixtures,

antiques and other item of personal property in said residence, to my Trustee, with *the right in my husband to exclusively live in and occupy such residence for the period of his life*, and provided that he is financially able to do so, he shall be responsible for all maintenance charges and taxes assessed against the residence during his lifetime. If he does not have the financial ability to pay such expenses and taxes then my Trustee is authorized and is directed to mortgage the premises for the purpose of paying such maintenance charges and taxes.” (Emphasis added.)

The Court determined that the above provisions did not create an elective share trust as they did not meet the statutory requirements. Fla. Stat. § 732.2025(2)(a) was not satisfied because, according to the Court, the decedent was “entitled neither to the ‘use’ of the property within the meaning of the statute, nor to ‘income’ derived from the property.” The Court determined that the beneficial interest received under the will was something less than full use of the property because the beneficiary was not specifically given the right to receive income derived from the property.

In addition, the Court looked to case law to demonstrate that “use” of property is a term of art. The Court, quoting from *Marshall v. Hewett*, 23 So.2d 853, 854 (1945) stated that “[a]s an incident to [a] life estate in...realty [one] becomes entitled to the exclusive use and occupation of the property with the right to such rents, issues and profits as are derivable therefrom...”

Fla. Stat. § 732.2025(2)(b) was not satisfied in the opinion of the Court because “[n]othing in Article Second (A) gives [the surviving spouse] the right to compel the trustee “to make the property productive” or to sell or otherwise convert it.”

3. Limits to Consider

- a. Although the assets set aside for an elective share trust are included in calculating the elective estate, the extent to which those assets may be used to satisfy the elective share amount depends upon the amount of access and control a spouse is given over the trust assets as set forth in the trust provisions.
- b. **Qualifying Power of Appointment:** This is a general power of appointment exercisable exclusively by the surviving spouse in favor of the spouse or the spouse’s estate.

- c. **Qualifying Invasion Power:** This is a power held either by the surviving spouse or the trustee of an elective share trust. It authorizes invasion of elective share trust principal for the spouse's health, support and maintenance. The decedent, when granting this power, has the discretion to require that the spouse's other resources be considered prior to the power being exercised.
- d. **Satisfying the Elective Share Amount with Elective Share Trust Assets**
 - i. **100% of the Trust:** All of the trust assets may be used to satisfy the elective share amount if the spouse is given both a Qualifying Power of Appointment and a Qualifying Invasion Power.
 - ii. **80% of the Trust:** This lesser portion of the trust assets are counted towards satisfying the elective share amount if only a Qualifying Invasion Power is given to the spouse.
 - iii. **50% of the Trust:** This amount is considered in satisfaction of the elective share amount in all other cases.

C. **Conditional Elective Share Trusts.**¹⁶

- 1. In 2002, the law was modified to clarify that interests satisfying the elective share may be provided for on a conditional basis in the decedent's will or other estate planning instrument. Therefore, a trust that is only created or funded in the event the elective share is claimed after death by a surviving spouse is a permissible form of elective share trust.
- 2. Perhaps implicitly allowed prior to 2002 legislation.
- 3. Any doubts removed by the 2002 legislation.

V. Qualifying Special Needs Trusts

- A. If a testator is married to a spouse who is medically ill or disabled, planning for the elective share can be accomplished through the use of a Qualifying Special Needs Trust, also known as a "Supplemental Needs Trust."
- B. Qualifying Special Needs Trust defined

¹⁶Florida Laws, 2002-82 (Senate Bill 720, § 4).

1. Fla. Stat. § 732.2025(8) defines a qualifying special needs trust as a trust established for an ill or disabled surviving spouse with court approval before or after a decedent's death if commencing on the decedent's death;
 - a. Income and principal are payable to or for the benefit of the surviving spouse for life.
 - b. Distributions are made in the discretion of one or more trustees of which less than half are ineligible family trustees (decedent's grandparents and any descendants of the decedent's grandparents who are not also descendants of the surviving spouse).
 - c. During spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.
 - d. Court approval not required if the value of all such trusts held for the spouse are less than \$100,000 in value as of the date of the decedent's death.

VI. Satisfying the Elective Share Amount¹⁷

- A. A testator may specify in a will, or in a trust that is referenced in the testator's will (an Elective Share Trust), the manner in which the elective share amount is to be satisfied. Absent specific provisions, Florida law provides a prioritization of assets to be used to satisfy the elective share.
- B. Initial Assets to Consider - Assets Already Passing to Surviving Spouse
 1. Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse, including interests that are contingent upon making the election, but only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests.
 2. Individual Retirement Account and other retirement plan assets to the extent paid to or for the benefit of the surviving spouse.
 3. The decedent's one-half of any community property to the extent paid to or for the benefit of the surviving spouse.

¹⁷Fla. Stat. § 732.2075.

4. Proceeds of any life insurance policy insuring the life of the decedent to the extent paid to or for the benefit of the surviving spouse, if at the time of decedent's death the policy was owned by person other than the surviving spouse.¹⁸
5. Property held for the benefit of the surviving spouse in a qualifying special needs trust.
6. Property which would have otherwise passed to the surviving spouse but which the surviving spouse disclaimed.

C. What To Do If More Is Needed?

1. If assets described above are insufficient to fully satisfy the elective share amount, any short fall is apportioned among direct recipients of property from the estate.
2. Classes of Direct Recipients Affected: The apportionment is in the following order of priority:
 - a. Class 1: Decedent's probate estate and revocable trusts.
 - b. Class 2: Recipients of certain property interests, other than protected charitable interests,¹⁹ that were included in calculating the elective estate. These include:
 - i. Transfer on Death/Payable on Death types of accounts.
 - ii. Joint tenant with rights of survivorship accounts based upon the portion of the account the decedent had a right to withdraw or use without a duty to account to any person.
 - iii. Other joint tenant with rights of survivorship property.
 - iv. Decedent's beneficial interest in the net cash surrender

¹⁸Note: If the surviving spouse owns the policy, the proceeds do not apply towards satisfaction of the elective share amount.

¹⁹Fla. Stat. § 732.2075 was amended in the 2007 legislative session in Section 11, Chapter 2007-74 Laws of Florida such that a protected charitable interest now includes not only an interest for which a charitable deduction was allowed or allowable by the decedent or decedent's spouse for federal gift tax purpose, but also for federal income tax purposes.

value of any policy of life insurance on the decedent's life.

- v. To the extent the decedent possessed the right to designate the recipient of property described below at the time of death:
 - 1. Certain irrevocable transfers of the decedent with retained life estates and/or income interests. This includes the right to receive payments under a commercial or private annuity, an annuity trust or unitrust or similar arrangement, but only as to that portion of the income of the property necessary to satisfy the annuity, unitrust or other payment.
 - 2. Individual Retirement Accounts and most retirement plans.
- c. Class 3: Recipients of all other property interests included in calculating the elective estate other than protected charitable interests.

VII. Recent Cases Regarding Elective Share

- A. *Helpenbein v. Baval*, 157 So.3d 531 (Fla. 4th DCA 2015): Daughter, as personal representative of decedent deposited two wills with the court, and sought court determination as to which will to admit to probate. A 1982 will contained surviving spouse's waiver of entitlement to elective share, and a subsequent 2007 will did not contain such a waiver. Spouse filed for elective share before determination by the court of which will shall be admitted, and is granted summary judgment. Daughter appealed. Appellate court reversed and remanded for determination of which will should be admitted, but agreed that the waiver of elective share only applied to the 1982 will.
- B. *Dinkins v. Dinkins*, 120 So.3d 601 (Fla. 5th DCA 2013): The decedent died with an estate plan that included the following provision:

“Conditional Specific Bequest of Cash: If my spouse, JEANETTE M. DINKINS, survives me, and if she or her legal representative makes a valid disclaimer of all of her interest in the QTIP Trust created under Article VII of this Trust Agreement, and also makes a valid waiver of her right...to elect the elective share in my estate, then the Trustee shall distribute five million dollars (\$5,000,000) to JEANETTE M. DINKINS, outright and free of trust...My objective is to provide five million dollars (\$5,000,000) of assets to JEANETTE M. DINKINS, in addition to... any... property to which JEANETTE M. DINKINS

is entitled as a result of my death, except for the Elective Share.”

Surviving spouse argued provision as unlawful penalty clause causing her to forfeit the above \$5,000,000 bequest. The trial court rejected this argument, and the appellate court affirmed stating, “The purpose of statutory minimum benefits is generally to ensure that surviving family members are provided for and do not become dependent on the public treasury...This purpose is not thwarted by providing an optional alternative devise because the beneficiary is free to reject it for any reason, including that it is less valuable than the statutory benefit.”

- C. *McDonald v. Johnson*, 83 So.3d 889 (Fla. 2d DCA 2012): Surviving spouse sought financial information concerning closely held company of decedent to determine whether to choose elective share. Personal representative filed objections to discovery request. Ruling in favor of the personal representative, the probate court held the stock in the company was not part of the probate estate. Spouse filed petition for writ of certiorari seeking review of the order, and petition was granted. The parties agreed that Fla. Stat § 732.2155(6)(c) was at issue, and the court acknowledged there were no cases available interpreting that section of the statute. Appellate court determined reference to Fla. Stat. 61.075 included the determination of marital and nonmarital assets, and held that spouse was allowed to proceed to investigate whether the company’s value included marital assets which might be included in the calculating the elective share.
- D. *Foster v. Estate of Gomes*, 27 So.3d 145 (Fla. 5th DCA 2010): Spouse filed petition for elective share and personal representative moved to strike petition due to antenuptial agreement waiving right to elective share that was executed prior to marriage. Trial court upheld agreement; spouse appealed on grounds that decedent failed to disclose a \$10,000 asset. Appellate court affirmed stating lack of disclosure did not invalidate the agreement under Fla. Stat. 732.702(2).
- E. *Boulis v. Blackburn*, 16 So.3d 186 (Fla. 4th DCA 2009): Non-citizen surviving spouse chooses elective share, and personal representative sought determination of allocation of federal estate tax to elective share, homestead property, and life insurance. Trial court granted tax apportionment to amounts passing to non-citizen spouse; affirmed on appeal.
- F. *In re Estate of Magee*, 988 So.2d 1 (Fla. 2d DCA 2007): Surviving spouse filed for elective share and decedent’s daughter contested election on grounds that the elective share is unconstitutional. Trial court found for surviving spouse and stated that the elective share is constitutional; affirmed on appeal.
- G. *Trenchard v. Estate of Gray*, 950 So.2d 1277 (Fla. 2d DCA 2007) (mem.): Property owned as joint tenants with right of survivorship by decedent and unrelated third party is included in determining the elective estate.

- H. *Janien v. Janien*, 939 So.2d 264 (Fla. 4th DCA 2006): Provisions in a trust that granted surviving spouse “the right in my husband to exclusively live in and occupy such residence for the period of his life” did not to create an elective share trust as it failed to meet the statutory requirements. The court reasoned that the decedent was “entitled neither to the ‘use’ of the property within the meaning of the statute, nor to ‘income’ derived from the property.” The beneficial interest received under the will was something less than full use of the property because the beneficiary was not specifically given the right to receive income derived from the property.
- I. *Owens v. Estate of Davis*, 930 So.2d 873 (Fla. 2d DCA 2006): Testator’s adopted children filed cross-petitions to determine the beneficiaries of testator’s estate after surviving spouse claimed the elective share. Circuit court entered an order interpreting testator’s will; appeal and cross appeals were filed. Appellate court reversed and remanded holding that trial court could not consider extrinsic evidence to determine how to distribute testator’s residuary estate.
- J. *Weisfeld-Ladd v. Estate of Ladd*, 920 So.2d 1148, (Fla. 3d DCA 2006): Surviving spouse filed petition for order to determine spouse’s entitlement to elective share arguing that prenuptial agreement language was insufficient to waive right to elective share. Circuit court denied surviving spouse’s petition and spouse appealed; affirmed on appeal.
- K. *Dempsey v. Dempsey*, 899 So.2d 1272 (Fla. 2d DCA 2005): Widow chose elective share after decedent did not provide for spouse in will. Trial court entered order that spouse was entitled to elective share, and personal representative appealed. Appellate court held that order determining entitlement to elective share is not a final appealable order and dismissed the appeal.
- L. *In re Estate of Sauey*, 869 So.2d 664 (Fla. 4th DCA 2004): Surviving spouse who conditionally waived spousal rights under antenuptial agreement petitioned for removal of the personal representative of the estate, and sought financial information relevant to the calculation of the elective share amount. Trial court granted spouse’s petition; personal representative filed a petition for writ of certiorari which appellate court denied.

- M. *Velde v. Velde*, 867 So.2d 501 (Fla. 4th DCA 2004): Surviving spouse's petition for extension of time in which to take elective share tolled the four-month limitations period for making the election.
- N. *Estate of Heid v. Heid*, 863 So.2d 1259 (Fla. 5th DCA 2004): Personal representative brought action against trustee, individually and as trustee, claiming that estate was entitled to a portion of trust assets under elective share statute. Trial court dismissed claim; appellate court affirmed.
- O. *In re Estate of Tensfeldt*, 839 So.2d 720 (Fla. 2d DCA 2003): Testator's children brought action against estate, seeking funds promised to them in divorce decree from first marriage. Circuit court granted summary judgment for estate. In a separate proceeding, second wife brought action against estate, seeking elective share, and the same trial court entered judgment in favor of second wife. Children appealed both judgments. Appellate court held: (1) children's cause of action to enforce will contract incident to divorce accrued, and five-year statute of limitations began to run, at time of testator's death; (2) will contract did not merge into divorce decree; (3) cause of action to enforce Wisconsin decree accrued, and five-year statute of limitations began to run, when decree was entered; and (4) second wife timely petitioned for elective share. Affirmed in part, reversed in part, and remanded.

VIII. Conclusion: The elective share is an area of the law which should be regularly reviewed as it is trickier than it seems.