



# The Surviving Spouse

*This publication addresses how the law allocates property to the surviving spouse under various circumstances.*

The surviving spouse is usually the most important consideration in estate planning for married couples. Even if one spouse is seriously ill or is much older, it is a mistake to assume that he or she will outlive the other. The unexpected often happens. Plan accordingly.

Estate plans need to address the death of either spouse, or both simultaneously or nearly simultaneously. Otherwise, the tragedy of death may be compounded by a financial and legal crisis for the heirs, who may face higher taxes or fail to inherit property.

### **Jointly owned property**

In North Carolina, property owned jointly by spouses, with a right of survivorship, automatically passes to the surviving spouse regardless of what is written in the will or the rules of law that apply if there is no will. Property with named beneficiaries, such as life insurance policies, bank accounts, or IRAs, goes to the named persons, without regard to the will or the rules of law that apply if there is no will (unless the estate is named as the beneficiary).

### **Spouse's share without a will**

Note: The following scenarios do not apply when property owned by spouses is held jointly with a right of survivorship. These conditions apply only to a spouse's separately held property.

- If the deceased spouse has no surviving parents, children, or descendants of children, then the surviving spouse inherits 100 percent of the estate.

- If one or both parents survive the deceased spouse, but there are no children or descendants of children, the surviving spouse inherits the first \$50,000 of personal property, one-half of the remaining personal property, and one-half of all the real property in the deceased spouse's estate.
- If one child, or descendants from a deceased child, survives the deceased spouse, the surviving spouse inherits the first \$30,000 of personal property, one-half of the remaining personal property, and one-half of all the real property in the deceased spouse's estate.
- If two or more children, or descendants of children, survive the deceased spouse, the surviving spouse inherits the first \$30,000 of personal property, one-third of the remaining personal property, and one-third of all the real property in the deceased spouse's estate.

### **Spouse's share with a will**

A will provides more flexibility and control over the amount of property the surviving spouse is entitled to inherit. If specified in a will, the surviving spouse may inherit 100 percent of the property.

Leaving all property to a surviving spouse may not be recommended if reducing estate taxes is a goal because it could result in double taxation. Legal advice is recommended on this issue.

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## Right of Elective Share (of Total Net Assets)

For estates of decedents dying on or after January 1, 2001, the surviving spouse has the right to claim an *elective share*, rather than dissent from the will as was provided by prior law. The new law makes it more difficult to disinherit the surviving spouse using techniques other than a will. A surviving spouse can exercise the right of elective share under a variety of circumstances. In the absence of a valid, properly drafted prenuptial agreement (a contract between the parties prior to marriage), when a spouse dies leaving a will disinheriting the surviving spouse, the surviving spouse can claim a right to an elective share from the deceased spouse's estate.

Like the law it replaced, this statute has a similar intent of protecting a surviving spouse from being wrongfully excluded from a share. This right can also be invoked if the surviving spouse believes the share received through the will is too small or the death occurs during a divorce proceeding. The elective share of a surviving spouse is the net of a share of "total net assets," less the value of property passing to the surviving spouse as provided or defined by the statutes. A surviving spouse's share of total net assets varies by the number of lineal descendants, as follows:

- If the decedent is not survived by any lineal descendants, the surviving spouse is entitled to one-half of the total net assets as defined by law.
- If the decedent is survived by one child or a lineal descendant of one deceased child, the surviving spouse is entitled to one-half of the total net assets.
- If the decedent is survived by two or more children, or by one or more children and the lineal descendants of one or more deceased children, or by the lineal descendants of two or more deceased children, the surviving spouse is entitled to one-third of the total net assets.
- In cases where the surviving spouse is a second or successive spouse, and the decedent has one or more lineal surviving descendants from a previous marriage, the applicable share as determined by elective share is reduced by one-half. The property passing to the surviving spouse is subtracted from the total net assets in determining the surviving spouse's elective share.

Property passing to a surviving spouse includes:

- The surviving spouse's share in property held as joint tenants with rights of survivorship
- The value of any property transferred by the decedent to the surviving spouse or which passes under intestacy, and a year's allowance (\$20,000) as provided by law
- The value of the surviving spouse's interest in a trust or life insurance

The elective share can be exercised only during the lifetime of a surviving spouse who is a resident of North Carolina and *must be made within six months* after the issuance of Letters of Testamentary or Letters of Administration in connection with a will or an intestate proceeding where the surviving spouse claims the elective share.

*Note:* The right of a surviving spouse to claim an elective share may be waived, wholly or partially, before or after marriage, through a written waiver signed by the surviving spouse. The right to an elective share does not depend upon whether or not there is a will.

## Allowance to Surviving Spouse

North Carolina statutes entitle every surviving spouse of an intestate, or of a testator, to an allowance out of the decedent's personal property of \$10,000 for his or her support for one year after the death of the deceased spouse. This entitlement is valid whether or not the surviving spouse is in receipt of an elective share of the estate, unless he or she forfeits such a right. Such an allowance is exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse and shall, in cases of testacy, be charged against the share of the surviving spouse.

## Spouse's election to take a life estate

Instead of taking the intestate share, the surviving spouse may choose to take a life estate in one-third of the value of all the real property owned by the deceased spouse during the marriage. Real property in which the surviving spouse has given up his or her right to take a life estate is exempted. For example, if Wife sells a parcel of land she owns solely in her name, Husband must sign the papers conveying the land in order to waive his right to take a life estate at her death.

If the deceased spouse owned the home, the life estate may include it, regardless of the home's value. The surviving spouse must elect to include it, and he or she must occupy it at the death of the deceased spouse. This election includes the land upon which the house is situated, plus outbuildings, improvements, and easements. This election would also include complete ownership of the household goods and furnishings.

The election to take a life estate must be made by filing notice with the clerk of superior court, in the county of administration, within a certain period based upon certain events. Such an election can be made:

- Anytime within one month after expiration of the time fixed for the filing of a petition for an elective share.
- In case of intestacy (no will in place), within 12 months after the death of the deceased spouse if Letters of Administration are not issued within that period.

### EXAMPLE

Woodrow and Edwina were married in 1961. Woodrow owned Blackacre, a cattle farm of 600 acres, in his own name. In 1990 he sold it to Dan Developer who subdivided it into 1.3 acre building lots for single family homes. Dan Developer purchased Blackacre from Woodrow under a private agreement and subsequently recorded a deed signed only by Woodrow. Woodrow died in January 2010, with no assets and debts of \$50 million. Woodrow died intestate, with no will. Edwina filed her notice of her election to take her intestate share as a life estate in one third of the land that Woodrow owned during the marriage. As Blackacre was the only real estate that Woodrow owned during the marriage, the jury appointed by the clerk of superior court determined a portion of Blackacre, representing one third of the value of the total, including all improvements such as houses, to constitute Edwina's life estate. If the affected homeowners purchased title insurance, they could file a claim with their title insurance company. In any event, they would return to possession of their homes and land at Edwina's death.

- If Letters of Administration are issued within 12 months after the date of the death of the deceased spouse, then within one month after the expiration of the time limited for filing claims against the estate.
- If litigation that affects the share of the surviving spouse in the estate is pending, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

Refer to Article 8 Chapter 29-30 of the North Carolina general statutes for further details. If the election is not made within the time allowed by law, the surviving spouse waives his or her right to make this election. **If your spouse dies without a will, and he or she owned property, see a lawyer as soon as possible to avoid losing your rights to that property.**

### Summary probate proceeding for surviving spouse

If the surviving spouse is the sole beneficiary under the will, or the sole heir if there is no will, he or she may file a Petition for Summary Administration with the clerk of superior court. If the clerk finds that summary administration is proper, the clerk enters an order to that effect and no further administration of the estate is necessary. With summary administration, there is no appointment of a personal representative. The surviving spouse assumes liability for any debts of the decedent to the extent of the value of the assets.

### TOTAL NET ASSETS

*Total net assets* are computed after taking account of funeral expenses, the year's allowances to persons other than surviving spouse, debts, claims other than an equitable distribution of property as awarded under a divorce proceeding to the surviving spouse, and administrative expenses. Total net assets include property such as the decedent's property, one-half of the decedent's right in property held as joint tenants with right of survivorship, certain gifts made within six months of death, proceeds of a retirement account, pension plan, and any property passing to the surviving spouse.

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*The current authors are solely responsible for any errors or omissions.*

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