

Till Death Do Us Part

Cashing In When The Spouse
Cashes Out

Elective Share

- Determine the “elective estate”
- Calculate the elective share
- Allocate assets to satisfy the elective share

Elective Estate

■ Homestead	(Not in the Elec. Est.)	\$500,000
■ Probate Estate:		
■ Automobile		\$40,000
■ TPP		10,000
■ Investments		100,000
■ Fishing cottage		<u>150,000</u>
■ Total Probate		300,000
■ Pay on death and ITF accounts		
■ Bank Account ITF son in the Navy		20,000
■ Rental home (entireties property)		
■ \$300,000 /2 =		150,000

Elective Estate

- Decedent's interest in joint accounts (withdrawal rights)
 - Joint account with daughter (all dad's money) \$25,000
- Other survivorship assets (e.g. realty owned with brother & sister): pro rata
\$300,000 / 3 = 100,000
- Revocable transfer property
 - Revocable trust 500,000
- Transfers with retained life estate
 - CRT 100,000

Elective Estate

- Cash surrender value of life insurance
 - \$500,000 policy payable to two childrenCSV at date of death \$30,000 30,000
- Pension Plan value
 - 401k – wife is beneficiary 300,000
- Transfers within one year of death 0
- Property Transferred to Satisfy the Elective Share 0

Elective Estate -- Summary

■ Probate	\$300,000
■ ITF	20,000
■ ½ Entireties	150,000
■ Jt Acct. w/ Daughter	25,000
■ 1/3 Rental realty	100,000
■ Rev. Trust	500,000
■ CRT	100,000
■ CSV Life Insurance	30,000
■ 401k	<u>300,000</u>
Total Elective Estate	\$1,525,000

Elective Share Exclusions

- Property Irrevocably Transferred Before:
 - Effective date of the statute
 - Date of the marriage
- Transfers for Full and Adequate Consideration
- Transfers to which Spouse Consents
 - Consent to Split the Gift on 709 Does not Count

Elective Share Exclusions

- Proceeds of Life Policy Over Cash Value
- Life Policy Maintained per Court Order
- Decedent's Half of Community Property
- Property in Special Needs Trust on DOD
- General Power for Federal Estate Tax Purposes
- Non-devisable Homestead

Calculation of Elective Share

- 30% of Total Value of the Elective Estate

$$\$1,525,000 \times 30\% = \$457,500$$

- Just a Dollar Figure
- Not an Entitlement to a Portion of any Specific Property

Satisfying the 30%: First Tier

■ Face value of life insurance paid to spouse	0
■ Pension plan paid (401k) to spouse	300,000
■ Decedent's half of community property that passes to spouse	0
■ Special needs trust property	0
■ Other property passing to the surviving spouse or disclaimed by surviving spouse	
Entireties Property	<u>150,000</u>
Total First Tier	\$450,000

Satisfying the 30%: Second Tier

- *Class I:* Probate and Revocable Trust Property \$7,500
- *Class II:* Property of Which the Decedent Could Have Designated the Recipient at Time of Death
e.g. Life Insurance
- *Class III:* Recipients of All other Non-Charitable Interests Included in the Elective Estate
e.g. Non-Charity income beneficiary of CRT
- *Class IV:* Non-charitable Charitable Lead Trust Interests

Liability of Direct Recipients

- Pro Rata Liability with Others In Class
- May Pay Alternate Sums:
 - Proportional amount of all property received
 - If received before Elective Share Order
 - Contribute all property received
 - If sold or exchanged, the net value received

Funding With Less Than a Fee

- Life interest valued at half
- Elective Share Trust valued at half
 - QTIP-type trusts
 - Can require trustee to make under-productive property productive
 - During spouse's life, income and principal may only go to spouse
- If not this, FMV of interest, but not more than half

Valuing the Elective Share Trust

- 100% of principal if
 - Qualifying invasion power
 - Power held by trustee or spouse
 - Invade trust principal for spouse's (ascertainable standard)
 - Qualifying power of appointment
 - Exercisable by spouse alone
 - In favor of spouse or spouse's estate
 - May be testamentary

Valuing the Elective Share Trust

- 80% of principal if:
 - Qualifying Invasion Power
 - No Qualifying Power of Appointment
- 50% of principal if no Qualifying Invasion Power

Qualifying Special Needs Trust

- 100% Credit
- “Ill or disabled spouse”
- Established with court approval
- Commencing on decedent’s death
 - Income and principal for spouse's benefit at trustee’s discretion
 - Fewer than half of the trustees are disqualifying family members
 - No power to distribute anything to anyone else but the spouse

Election by Surviving Spouse

- Make the election
- Determination of amount of elective share and
- Determination of contribution

Election By Surviving Spouse

- Within six months of service of notice of administration
- Within two years of death
- May withdraw election
 - Fees may be assessed
 - Costs may be assessed

Election Procedure

- Personal Representative serves formal notice of election on interested persons advising:
 - You may have to contribute to this
 - You have 20 days to object to election
 - If no objection is timely served, election may be granted
- Objections filed must be heard and settled
- If no objection timely served, election granted without further notice

Election by Guardian or Attorney-in-Fact

- Must petition for approval to file
 - Must be in best interests of the spouse during the spouse's lifetime
 - Personal representative formally serves petition on interested persons
 - Election must be filed within
 - 30 days from service of order approving election, or
 - within normal time for election, whichever is later

Determination of Amount and Contribution

- Personal Representative must
 - Petition to determine the amount of elective share
 - Serve inventory of the elective estate and the petition to determine amount of elective share on all interested persons
- If PR fails to act within 90 days, spouse may
- Interested persons have 20 days to object

Determination of Amount and Contribution

- If contribution is necessary
 - Order must specify the amount
 - Order must specify who must contribute
- PR must enforce contribution order
 - Relief is available
 - Spouse has concurrent right to enforce

Till Death Do Us Part

What You Get When the End
is Really
the End