

THE DISINHERITED SPOUSE

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There are many good reasons to prepare an estate plan. A Will or Trust identifies those individuals or entities that will receive assets upon your death. An estate plan can help minimize taxes. An estate plan ensures that your wishes will be carried out by the probate court upon your death. Right? Well, not always.

New Hampshire probate courts generally seek to effectuate the intent of a testator. However, where an individual omits his or her own spouse from a Will, our probate courts will not strictly follow that intent. Instead, New Hampshire law protects the “disinherited” spouse. RSA 560:10, commonly known as the Spousal Elective Share statute, protects a spouse from complete disinheritance. This elective share generally works like this: A husband might completely disinherit his spouse, or may provide only a very small gift in a Will, while leaving the rest of his estate to others. In such a scenario, the surviving wife has an option — the spouse may “elect” to take a statutory “spousal share” of the estate, despite what the provisions in the Will might provide.

The “share” of the estate a surviving spouse will take depends on whether there are surviving children of the decedent. It generally works like this: If the decedent has living children or grandchildren, a surviving spouse may “elect” to take 1/3 of the personal property and 1/3 of any real estate of the estate. If the decedent leaves no living children or grandchildren, but leaves a parent or a sibling, a surviving spouse is entitled to \$10,000 in the value of personal property, \$10,000 in the value of real estate, and 1/2 of the remainder in both the personal property and real estate. Finally, if the decedent has no living children, grandchildren, parents or siblings, the surviving spouse will take \$10,000 of the value of the estate, plus \$2,000 for each full year from the date of marriage until the death of the spouse, as well as 1/2 the value of the remaining amount of personal property and real estate.

Any election under this statute requires the surviving spouse to waive any homestead right he or she might have and also to waive any other provisions of the Will in his or her favor. However, in many cases, the election will provide a much larger benefit than what the Will might provide.

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The election is essentially automatic — if a spouse properly makes the election with the probate court, he or she will indeed receive the distribution as set forth above. However, a spouse may forfeit the “spousal share.” RSA 560:19 provides that if an individual, at the time of his or her death, was “justifiably living apart from the surviving [spouse] because such survivor was or had been guilty of conduct which constitutes cause for divorce, such guilty survivor shall not be entitled to any interest” in the estate under the spousal elective share provision. So, if a husband passes away while his divorce is pending, may the surviving spouse elect his or her spousal share?

As with many legal issues, it depends. New Hampshire has a “no fault” divorce system, which allows a divorce, irrespective of the fault of either party, on the ground of “irreconcilable differences which have caused the irreparable breakdown of the marriage.” RSA § 458:7-a. Case law tells us that the spousal elective share forfeiture provision of RSA 560:19 requires more than an assertion that “irreconcilable differences” exist. Instead, before a spouse forfeits his or her elective share of a spouse’s estate, the decedent and the surviving spouse must have been living apart at the time of death and must have been living apart because a “guilty conduct” of the survivor existed. This guilty conduct may include adultery, extreme cruelty, abandonment for a two year period, and several other “guilty” actions. In other words, before the court will consider a divorcing spouse to have forfeited his or her spousal share of an estate, the court must determine that the surviving spouse was in fact guilty of adultery, extreme cruelty, or similar wrong-doings.

In light of the apparent public policy of the spousal elective share (to protect a spouse) this forfeiture provision perhaps makes sense. If the spouse is in fact “guilty” of such wrongful acts, which would constitute grounds for divorce, the court will not “reward” such conduct. Instead, the court will go back to square one, and will follow the ascertainable intent of the decedent as set forth in the estate planning documents themselves.

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