Elder Law/Trust & Estates

My Spouse Cut Me Out of the Will—Now What?

The freedom to dispose of one's assets how he or she sees fit is one of the basic maxims of American society. Very few restraints are placed on the testamentary freedom of an individual. As long as he has capacity, Dad can leave all of his assets in trust for his prized parakeet, leaving nothing to his children.

One of the few restraints on alienation is the inability to completely disinherit a spouse. The ability of a surviving spouse to claim a portion of a decedent's estate when the decedent left him or her little or nothing is called the right of election.

The Elective Share

The statutory framework for the surviving spouse's right of election for decedents dying on or after September 1, 1992 is found in Section 5–1.1–A of the Estates, Powers and Trusts Law. The surviving spouse is entitled to the greater of $50,000 or one-third of the net estate.[1] The net estate is calculated by deducting debts, administration expenses and reasonable funeral expenses from the decedent's gross estate plus "testamentary substitutes." These are certain assets that were either gifted before death (with limitations), have a named beneficiary, or were held jointly with an individual.[2]

One-third of the net estate is considered the surviving spouse's elective share. The elective share is then reduced by the value of any interests that pass absolutely to the surviving spouse.[3] This could include one-half of the marital house, the joint bank accounts, or that small IRA which listed the surviving spouse as the beneficiary. Put simply, the surviving spouse is entitled to one-third of the net estate subtracting any estate assets that the surviving spouse received by operation of law or beneficiary designation.

Christina Lamm

Additionally, certain assets are set off for the benefit of the surviving spouse and/or children under the age of twenty-one.[4] These assets are not considered property of the estate, but vest in the surviving spouse and/or children upon death and they are not included in the calculation of the net estate. This family exemption includes, but is not limited to: household furnishings, clothing and jewelry of the decedent not exceeding $20,000; books, electronics, photos and videos not exceeding $2,500; one motor vehicle not exceeding $25,000 in value; and money not exceeding $25,000.

It is important to note that a surviving spouse may be barred from asserting his or her right of election if it can be established that one of the grounds for disqualification exist,[5] application of the "slayer rule"[6] is applicable, or a valid waiver or release of the right of election has been executed.[7]

Testamentary Substitutes

Testamentary substitutes play an important role in protecting the rights of surviving spouses. Without this "add back" of certain assets when calculating the net estate for elective share purposes, a decedent could gift his entire estate to someone the spouse never even heard of and the purpose of the statute would be defeated.

EPTL §5–1.1–A(b) lists the following as testamentary substitutes:

Gifts *causa mortis*, made in contemplation of death.[8]

- Gifts over the yearly gift tax exclusion, made within one year before death.9
- Totten Trust Accounts, bank accounts on deposit at death, held in the decedent's name in trust for another.10

Joint bank accounts (created after August 31, 1966) on deposit at death, held jointly by the decedent and another and payable on death to the survivor. The value of these accounts for the elective share calculation is the amount contributed by the decedent or, if the account is held jointly with the surviving spouse, one-half.[11]

Property held at death by the decedent and another as joint tenants with the right of survivorship or as tenants by the entirety (designated as such after August 31, 1966).[12] The value for elective share purposes is also the amount that the decedent contributed, unless the joint party is the surviving spouse, in which case the value would be one-half of the value at death.

Life Estates and Revocable Trusts, being any property disposed of by the decedent, after August 31, 1992, in trust or otherwise, in which the decedent retained either the right to enjoyment or possession, the right to income generated, or the right to revoke the transfer.[13]

Retirement accounts where the beneficiary designation was completed after September 1, 1992. Certain plans subject to IRC §401 and payable to the surviving spouse are only counted as a testamentary substitute up to half of the value.[14]

Property upon which decedent held a presently exercisable general power of appointment immediately before death, or released or exercised that power in favor of anyone other than the decedent or his or her estate within one year before death.[15]

Transfer of securities to a beneficiary before death.[16]

This exhaustive list can thwart the intentions of many attempting to disinherit his or her spouse. Noticeably absent from this list is life insurance. This presents a loophole in which the decedent can procure a large life insurance policy and name someone other

See WILL, Page 21

Hon. Norman St. George, Administrative Judge of Nassau County, Receives Prestigious Norman F. Lent Memorial Award

(L-R) Hon. Norman St. George and F. Scott Carrigan, President of the Criminal Courts Bar Association of Nassau County

Hon. Norman St. George, Administrative Judge of Nassau County, was honored with the *Norman F. Lent Memorial Award* presented by the Criminal Courts Bar Association of Nassau County. The prestigious award was presented by the organizations President, F. Scott Carrigan, at the Association's Annual Dinner Dance on Thursday, January 23 at the Fox Hollow in Woodbury.

The award is presented each year to an individual who through actions and deeds has consistently maintained the highest standards of the legal profession. Judge St. George was recognized for his extraordinary and efficient leadership of the Nassau County Courts, his fairness, compassion, and judicial temperament.

As Administrative Judge of Nassau County, Judge St. George oversees the operations of all the courts in Nassau County, with direct supervision of nearly 90 judges and more than 900 non-judicial employees.

DEED ...

Continued From Page 6

care, resulting in a large nursing home bill for the family. Additionally, if the property is sold within five years of the life tenant requiring nursing home care, Medicaid will treat the life tenant's share of the proceeds as an available asset. This can impact Medicaid eligibility for the life tenant and require that some of the proceeds be spent on nursing home care.[4]

Alternative to Life Estate Deed

An alternative to the life estate deed is to transfer a client's property to a Medicaid trust. A Medicaid trust can be drafted to allow for all the benefits that a life estate deed provides, such as a stepped-up basis in the value of the property, while also avoiding the potential risks associated with a life estate deed. For example, property owned by a Medicaid trust, rather than the life tenant and remaindermen, is protected from potential creditors of a beneficiary and can make Medicaid eligibility simpler. Furthermore, the trustee of a Medicaid trust is in full control of the property and does not require the approval of others to sell the property.

A Medicaid trust, also referred to as an irrevocable trust, is commonly thought of as an instrument that is inflexible or rigid. During consultations, clients often refer to loss of control as a main deterrent to moving forward with this type of estate plan, however, this is a common misconception. A Medicaid trust may enable individuals to retain a significant degree of control over assets during their lifetime, while providing for protection from creditors, such as Medicaid, and reducing tax liability for his or her heirs at death. Putting assets into an irrevocable trust also may help to reduce the risk that a child's creditor or ex-wife will take the assets while the couple is alive.

A Medicaid trust may enable individuals to retain a significant degree of control over assets during their lifetime, while providing for protection from creditors

As with all estate planning, a client's specific circumstances must be evaluated to determine what plan best suits him or her. Some important considerations for determining which estate plan makes sense for a client includes the client's finances, the client's family dynamics, and whether the client will require long-term care in the future. Depending on these factors, a life estate deed may not always be the best option for the client.

Deidre M. Baker is an associate attorney with the Elder Law firm of Makofsky Law Group, P.C., located in Garden City. The firm concentrates its practice on trusts, estates, Medicaid planning, Medicaid applications, guardianships, and estate administration. The firm can be reached at (516) 228-6522.

1. *Matter of Heinlin*, NYLJ (May 21, 1996) at 35.
2. *Matter of Gaffers,* 254 A.D. 448 (3d Dept. 1938).
3. *See* I.R.S. Publication 523 (2018), *Selling Your Home*, found at https://www.irs.gov/publications/P523.
4. *See* NYSDOH Administrative Directive, *Deficit Reduction Act of 2005 – Long-Term Care Medicaid Eligibility Changes,* 06 OMM/ADM-5 (July 2006), available at https://on.ny.gov/2ubYT9z.

WILL ...

Continued From Page 5

than his or her spouse as the beneficiary, and the policy proceeds will not be included in the net estate.

Computing the Elective Share

While statutorily straightforward, computing the value of the surviving spouse's elective share and how much the surviving spouse is entitled to can prove complicated at times.

Example 1: Husband dies with no will, owning real property as tenants by the entirety with spouse, date of death value is $450,000; an individual account worth $24,000 at death; and a brokerage account, transfer on death to his brother, worth $625,000. Funeral expenses were $2,500, and estate administration expenses $6,000.

The net estate value will be $841,500 (half value of real property + brokerage account value – funeral and estate administration expenses). Note that the total value of the individual account is excluded from the calculation. This is because the individual account vests in the surviving spouse and is not an asset of the estate since it falls under the Exemption for the Benefit of the Family, as a cash exemption.[17]

One-third of the net estate is $280,500, which is the elective share amount. This amount is then reduced by the assets already passing to the surviving spouse (half value of real property), providing a net elective share amount of $55,500 due to the surviving spouse. The decedent's brother would be required to pay $55,000 to the surviving spouse.

Example 2: Wife dies with a will, owning real property owned individually worth $1.1 million at death with an outstanding mortgage of $300,000, bequeathed to her daughter; life insurance with a death benefit of $800,000 payable to the surviving spouse; jewelry valued at $15,000 at death, bequeathed to her daughter; a transfer-on-death account to her brother, worth $82,000 at death; and a residuary estate consisting of various accounts at financial institutions, worth $825,000 at death, with two-thirds left to her daughter and one-third to the surviving spouse. Estate administration expenses were $12,000 and valid debts were $20,000.

The value of the net estate is $1,665,000 (total value of real property – value of outstanding mortgage + jewelry + TOD account + residuary estate - $25,000 cash exemption – outstanding debts – estate expenses). Here, note that the total value of the life insurance death benefit is excluded from these calculations, and that $25,000 cash value from the residuary estate is also excluded under EPTL §5.3.1(a)(6).

One-third of the net estate is $555,000, which is the elective share amount. Again, this amount is reduced by the value of the assets already passing to the surviving spouse, which is one-third of the residuary estate, $266,666.67. The net elective share payable to the surviving spouse would be $288,333.33. This amount would be payable ratably between the decedent's daughter and her brother.

The actual value of the elective share must be calculated before the surviving spouse determines whether to exercise his or her right of election. The value of the assets received under a will may be higher than the amount that would be received pursuing the elective share. If it is determined that the surviving spouse would receive more under a will, then he or she may request that the court issue an order cancelling the election. The court may only grant such order, however, if there is no prejudice shown to the creditors and other parties interested in the estate.[18]

Exercising the Right of Election

The right of election is personal to the surviving spouse, with few exceptions. When authorized by the court having jurisdiction, the right can be exercised by the guardian of the property of an infant spouse; the committee of an incompetent spouse; the conservator of a conservatee spouse; the guardian ad litem for the surviving spouse; and a guardian authorized under Article 81 of the Mental Hygiene Law.[19]

The surviving spouse or such authorized person must file the notice of election with the court within six months from the date of issuance of letters testamentary or administration, but not later than two years after the date of decedent's death.[20] The notice must be served by mail on the personal representative of the estate, or the named executor if the will has not yet been admitted to probate.[21] The surviving spouse can request an extension of time to file, in six-month increments, so long as the original time to make the election has not expired.[22] If the original time to file has passed, then the surviving spouse may submit an application for relief from the default and for the extension provided there is reasonable cause.[23]

Once the notice of election has been filed, a petition to determine the validity of the right of election under Section 1421 of the Surrogate's Court Procedure Act will likely be filed by the personal representative of the estate, along with an order to show cause as to why the determination should not be made that the surviving spouse is a valid spouse and entitled to the elective share. If there is any property not in the hands of the estate representative, the value of which is required to satisfy the elective share, the petition can also request an order restraining the party holding the property from transferring said property. Process needs to issue to all persons interested in the question being posed.[24] For example, if a joint account with Son is held by Chase bank, the order to show cause will enjoin Chase bank from transferring the account and process will issue to both Son and Chase bank.

Conclusion

New York's right of election statute was enacted to provide a surviving spouse, typically the surviving homemaker wife, at the time, with some means of financial support when the deceased husband disinherited his wife. Although times have changed, the public policy behind the legislation has not.

There are many factors that go into determining whether or not a surviving spouse should exercise his or her right of election. Careful attention should be paid to this statute anytime a surviving spouse is left less than the full estate.

Christina Lamm is an associate at Makofsky Law Group, P.C., located in Garden City. The firm concentrates its practice on trusts, estates, Medicaid planning, Medicaid applications, guardianships, and estate administration.

1. EPTL § 5–1.1–A.
2. *Id.*
3. EPTL § 5–1.1–A(a)(4).
4. EPTL § 5-3.1.
5. EPTL § 5-1.2.
6. The slayer rule stands for the proposition that a person cannot profit from his or her fraud or crime. *See Riggs v Palmer,* 115 N.Y. 506 (1889).
7. In order for a waiver to be valid it must be in writing and "acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property." *See* EPTL § 5–1.1–A(e).
8. EPTL § 5–1.1–A(b)(1)(A).
9. EPTL § 5–1.1–A(b)(1)(B).
10. EPTL § 5–1.1–A(b)(1)(C).
11. EPTL § 5–1.1–A(b)(1)(D).
12. EPTL § 5–1.1–A(b)(1)(E).
13. EPTL § 5–1.1–A(b)(1)(F).
14. EPTL § 5–1.1–A(b)(1)(G).
15. EPTL § 5–1.1–A(b)(1)(H).
16. EPTL § 5–1.1–A(b)(1)(I).
17. EPTL § 5.3.1(a)(6).
18. EPTL § 5–1.1–A(c)(5).
19. EPTL § 5–1.1–A(c)(3)(A)-(E).
20. EPTL § 5–1.1–A(d)(1).
21. *Id.*
22. EPTL § 5–1.1–A(d)(2).
23. *Id.*
24. *See* SCPA § 1421.