

Securing Your Legacy: How Marital Estate Rights and Divorce Impact Your Estate Plan

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Once married, spouses acquire a number of rights in and to the estate of the other spouse.

Marital estate rights create the potential for catastrophic consequences should a spouse pass away at a time when the parties are physically separated but have not yet signed a separation agreement or been granted a divorce. These rights also create impediments if a spouse desires to leave all or part of their estate to someone other than their spouse.

This article explores North Carolina's statutory marital estate rights and discusses the means available to limit or waive these rights entirely.

The marital estate rights guaranteed to a surviving spouse are granted by statute. These rights include:

- **The right to intestate succession in the estate of the decedent.** When a spouse dies without a Will, their assets pass by way of intestate succession as provided in Article 2 of Chapter 29 of the North Carolina General Statutes. A surviving spouse is entitled to a share of their deceased spouse's estate, and the size of that share depends on whether the decedent is survived by any children and/or any parents. The intestate share includes real property and personal property.
- **The right to an elective share.** If a deceased spouse creates a Will that leaves their estate to someone other than their surviving spouse, North Carolina law gives the surviving spouse the right to claim a portion of the deceased spouse's estate. This right is called an "elective share." North Carolina's elective share statute is codified in Article 1A of Chapter 30 of the North Carolina General Statutes. The percentage of the estate that the surviving spouse may claim is dependent on the length of the marriage and starts at 15% and can grow to as large as 50%.
- **The right to a spousal year's allowance.** Regardless of whether a deceased spouse had a Will, a surviving spouse is entitled to claim a "year's allowance" and receive \$60,000 of

personal property in the deceased spouse's estate. The spousal year's allowance is codified in N.C. Gen. Stat. § 30-15.

- **The right to administer the estate.** If the deceased spouse has not designated someone to serve as executor in their Will, then their surviving spouse has priority to administer their estate.

When spouses separate with the intent to divorce, generally, there is **no impact** on marital estate rights. However, N.C. Gen. Stat. § 31A-1 sets out the following events which will extinguish these rights:

- A divorce from bed and board is entered by a Court. A divorce from bed and board is not an actual divorce decree, but, rather, is a judicially authorized and ordered separation of a married couple.
- A spouse voluntarily separates from the other and lives in adultery, and such has not been condoned. For example, a spouse who leaves the marriage and begins to cohabit with a romantic partner will likely lose their rights to the other spouse's estate.
- A spouse who willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death.

In these instances, pursuant to N.C. Gen. Stat. § 31A-1, the surviving spouse will lose the marital estate rights identified above. Nonetheless, reliance on this statute is risky as the circumstances supporting these defenses are fact-specific and can prove costly to litigate.

Life Insurance, Retirement Account, and Payable on Death Beneficiary Designations.

Beneficiary designations on life insurance policies, retirement accounts, and pay-on-death accounts will not be impacted by any of the above scenarios, separation, *or even the entry of a divorce decree* – the exceptions being (1) the existence of a separation agreement or premarital agreement providing a waiver of any beneficiary designations in the event the spouses are separated and/or divorced or (2) by court order specifically and expressly waiving the surviving spouses rights to such assets. It is important to discuss with your family law attorney the possibility of removing your spouse as a beneficiary on these policies as soon as possible. However, some policies, including retirement accounts governed by ERISA, will not allow you to remove your spouse as a beneficiary during the separation period and before a divorce decree is entered without the consent of your spouse, a separation agreement or premarital agreement, or court order.

Considerations for Blended Families

Many of our clients have children from a prior relationship and are now remarried or anticipating marriage. We refer to these families as "blended families." We often see spouses in a blended family situation desire to leave at least some of their assets to their children from a prior relationship, rather than their new spouse. This especially holds true for a spouse's separate property acquired prior to the new marriage. "Separate property" in a family law/divorce context includes all real and personal property acquired by a spouse before the marriage or acquired by gift or inheritance during the marriage.

Importantly, the value of the decedent's *entire estate* will be considered in calculating the amount of a surviving spouse's intestate inheritance or elective share. This includes a spouse's separate property.

Imagine a situation where you have generational family land (or a family business) that you owned prior to the existing marriage and that you want to pass down to your children. You probably wouldn't want the family land considered in determining your new spouse's rights to your estate, even if you are happily married at the date of death.

But not so fast...In order to effectively be able to leave your assets to your children (or any other third party such as a parent, sibling, or charitable organization) without any encumbrance from your spouse, your spouse must waive their statutorily granted rights to your estate. This can be done through several mechanisms.

Proactive Steps to Protect Your Assets

Should a spouse desire to leave a part of their estate to someone other than their surviving spouse and not want to risk the statutory marital estate rights from upsetting their estate plan, then there are a few strategies that can achieve their goals:

- A **premarital agreement** is one option. If you are anticipating marriage, a premarital agreement is an effective tool to not only define and control what is to be considered marital and separate property and how such property is to be distributed upon separation or death, but a premarital agreement can limit, or waive entirely, the rights each spouse has to the estate of the other even if they are happily married at the time of death. There are several variations for how the waiver of estate rights can be structured. For example, a spouse can waive these estate rights only to property defined as "separate property" and maintain estate rights to all "marital property." Premarital agreements can also provide that estate rights are waived only if they are separated at the date of death.
- If you are already married a **post-nuptial agreement** is an option and can provide the same protection concerning marital estate rights as a premarital agreement.
- In the event a couple separates with the intent to divorce, but is not yet eligible to file for divorce, a **separation agreement** is an option to distribute property and waive rights to each other's estate. The settlement of the property distribution is not always straightforward and may take time to negotiate. If that occurs, the couple can enter into a **partial separation agreement** to expeditiously waive estate rights during the pendency of further negotiations.
- If the statutory requirements are met, a spouse could petition the Court for a **divorce from bed and board** pursuant to N.C. Gen. Stat. § 50-7. Upon entry of a divorce from bed and board, marital estate rights are terminated. However, the entry will not affect affirmative beneficiary designations of the types described above absent a specific court order.

Conclusion

It is important to understand that unless additional steps are taken, outside of and in addition to the preparation of a Will, a surviving spouse will likely have rights to your estate, including your separate property, regardless of whether you are separated at the time of death.

Anyone who is contemplating marriage or already married, and who wants to control who receives their assets upon their death, should understand that North Carolina gives a surviving spouse certain rights that could upset those plans. These issues should be discussed at length with your estate planning attorney, and, for the reasons discussed in this article, a family law attorney may likely be a crucial member of your team.

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