

# **ELECTIVE SHARE: Is It Really Elective?**

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**BY**

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## Elective Share

- I. A (Brief) Review of the Elective Share Statute
  - A. The Legislative History
  - B. What's Included?
  - C. What's Excluded?
  - D. Deductions from the Elective Estate
  - E. At What Rate?
  - F. The Math
  - G. Only for the Math
  - H. Contribution
  - I. No Longer Much of an Election
  - J. Trusts for Surviving Spouse
  - K. Who Files the Election?
  - L. Time of Election
  - M. Notice by PR
  - N. Entitlement
  - O. Inventory
  - P. Contribution
  - Q. Withdrawal of Election
  - R. Tax Issues
- II. What Happens When Values Decline?
- III. Elective Share Problem
  - A. Example Fact Pattern
  - B. Step 1: Determine the Property Entering into the Elective Estate Under the General Inclusion Provisions - § 732.2035
  - C. Step 2: Determine the Property Excluded from the Elective Estate
  - D. Step 3: Determine the Amount of the Elective Share
  - E. Step 4: Determine the Value of Assets Passing to or for the Benefit of the Surviving Spouse that Count Towards Satisfying the Elective Share
  - F. Liability for Unsatisfied Balance
  - G. Options to Consider

Exhibit A - Elective Share Statute and Probate Rule

E-1

## I. A (Brief) Review of the Elective Share Statute

### A. The Legislative History

1. In 1975, the legislature abolished dower and curtesy and enacted the elective share.
2. Under the 1975 statute a spouse was entitled to 30% of assets subject to administration after deduction of claims and mortgages, liens, and security interests on such assets.
3. Many ways that a spouse could disinherit a spouse - (joint accounts, revocable trusts, etc.).
4. In 1999, the "new" elective share law was enacted which provided the same 30% but to an augmented estate.
5. In 2001, some changes took place to address "glitches" before the law began to apply.
6. In 2002, more legislative changes to clarify some provisions and eliminate some potential abuses.
7. In 2007, more legislative changes became law.
8. In 2009, legislative clarifications were enacted.
9. The "old" elective share statute applies to resident decedents dying before October 1, 2001.

### B. What's Included? The elective share applies to a broad base.

1. Probate estate - Fla. Stat. §732.2035(1)
2. Pay on death and similar accounts - Fla. Stat. §732.2035(2)
3. Jointly owned accounts or securities included based upon the amount the decedent had the right to withdraw or use without the duty to account to any person - Fla. Stat. §732.2035(2)
4. Jointly owned real estate included based upon the number of joint owners - Fla. Stat. §732.2035(3)
5. Tenants by entirety property included at one-half of its value - Fla. Stat. §732.2035(2)
6. Certain revocable transfers, including traditional revocable trusts - Fla. Stat. §732.2035(4)

7. Retained life estates and income interests - Fla. Stat. §732.2035(5)(a)(1)
8. Individual retirement accounts and most other retirement benefits - Fla. Stat. §732.2035(7)
9. Life insurance on the decedent's life to the extent of the net cash surrender value immediately before death - Fla. Stat. §732.2035(6), §732.2045(1)(d), §732.2055(1)
10. Most gifts during the one year period before death (other than gifts under the Federal gift tax laws which are (i) excluded as medical or educational expenses, or (ii) gifts of less than the annual exclusion) - Fla. Stat. §732.2035(8)(b)
11. Property transferred during lifetime in satisfaction of the elective share. - Fla. Stat. §732.2035(9)

C. What's Excluded? Not *all* property is included in the elective estate.

1. Property the decedent irrevocably gave away before October 1, 1999 - Fla. Stat. §732.2045(1)(a)
2. Property the decedent irrevocably gave away before marrying the surviving spouse - Fla. Stat. §732.2045(1)(a)
3. Transfers for adequate consideration in money or money's worth - Fla. Stat. §732.2045(1)(b)
4. Transfers with the written consent of the spouse - Fla. Stat. §732.2045(1)(c)
5. Life insurance proceeds in excess of the net cash surrender value - Fla. Stat. §732.2045(1)(d)
6. Life insurance maintained pursuant to a court order - Fla. Stat. §732.2045(1)(e)
7. Decedent's one-half of community property, whether under Florida law or similar provisions of another state - Fla. Stat. §732.2045(1)(f)
8. Qualifying special needs trust - Fla. Stat. §732.2045(1)(g)
9. General power of appointment property - Fla. Stat. §732.2045(1)(h)
10. Protected homestead - Fla. Stat. §732.2045(1)(i)
11. Property that is in trust (revocable or irrevocable) at all times between October 1, 1999 and death if the decedent was not married to the surviving spouse when the property was transferred to the trust and the property remained as nonmarital asset (for equitable distribution purposes) - Fla. Stat. §732.2155(6)(b)

#### D. Deductions from the Elective Estate

1. Claims paid or payable from the elective estate - Fla. Stat. §732.2055(5)(a). Funeral expenses were deducted in the early editions of the elective share law, but that provision was removed.
2. Mortgages, liens or security interest on property in the elective estate - Fla. Stat. §732.2055(5)(b)
3. Administration expenses are not deducted in determining the elective share amount.

#### A. At What Rate?

- Same rate as the “old” elective share c 30%. - Fla. Stat. §732.2065.

#### B. The Math

- Net elective estate x 30% = elective share obligation.

#### C. Only for the Math.

- Just because a certain property interest is included in the calculation of the elective share amount does not necessarily mean that property interest actually bears part of the burden of the elective share. The law includes an ordering provision, beginning with the probate estate and any revocable trust, for determining which interests are re-directed to the surviving spouse for purposes of satisfying the elective share.- Fla. Stat. §732.2075(1).
1. Assets which already pass for the benefit of the surviving spouse - Fla. Stat. §732.2075(1)(a) - (f)
  2. Class 1 - Probate estate and revocable trust. - Fla. Stat. §732.2075(2)(a)
  3. Class 2 - Joint bank accounts, “pay on death” account, and the joint account. - Fla. Stat. §732.2075(2)(b)
  4. Class 3 - all other interests other than “protected charitable interests.” - Fla. Stat. §732.2075(2)(c)
  5. Class 4 - Protected charitable interests only to the extent of the contribution permitted without disqualifying interest. - Fla. Stat. §732.2075(4)

#### D. Contribution

- Direct recipients of property included in elective estate are liable - Fla. Stat. §732.2085(1)

- Enforcement: the Personal Representative shall collect contribution from the recipients of the elective estate as provided in the court's order. - Fla. Stat. §732.2145(2)

#### E. No Longer Much of an Election

1. The electing spouse no longer is required to choose between what would be received under the estate plan and the benefits of the elective share.
2. The elective estate is essentially a floor on the amount the surviving spouse will receive.
3. Often there will be no disadvantage in electing on behalf of a spouse; provided there may be exposure to fees if pursued in bad faith.

#### F. Trusts for Surviving Spouse

1. For the first time in Florida elective share history, a trust for the surviving spouse's benefit can be utilized to satisfy the elective share obligation.
2. Two types of trusts:
  - (a) Elective Share Trusts - Fla. Stat. §732.2025(2)
  - (b) Qualifying Special Needs Trust (also referred to as Supplemental Needs Trust) - Fla. Stat. §732.2025(8)
3. Elective Share Trust.
  - (a) To qualify as an elective share trust: (a) the spouse must be entitled to use of property or to all of the income at least annually; (b) the spouse has the right to require the trustee to make property productive or convert it within a reasonable time; and (c) no person other than the spouse may make distributions from the trust to any other person. - Fla. Stat. §732.2095(2)(a-c)
    - a. A trust with nothing more counts at 50%. - Fla. Stat. §732.2095(2)(b)(3)
  - (b) If the trust also allows distributions to the spouse for health, support and maintenance, then the trust counts at 80%. - Fla. Stat. §732.2095(2)(b)(2)
  - (c) If the spouse also has a lifetime or testamentary general power of appointment in favor of spouse or estate, then the trust counts at 100%. - Fla. Stat. §732.2095(2)(b)(1)
  - (d) A trust which qualifies for the federal estate tax marital deduction as qualified terminable interest property ("QTIP") will be an elective share trust, counting at least at 50%, even if a QTIP election is not made for tax purposes.

- (e) The trust need not be designated as an elective share trust; qualification is based upon the trust terms.

**Elective Share Trust.** As of my death, my personal representative shall set aside a pecuniary amount equal to the amount, if any, by which the elective share amount (regardless of whether my spouse actually makes the election) exceeds the amount otherwise passing to my spouse in satisfaction of the elective share in a separate trust to be known as the Elective Share Trust as provided for in this instrument in Article X.

Conditional Elective Share Trusts. - Fla. Stat. §732.2075(1)(a)

- (a) In 2002, the law was modified to clarify that interests satisfying the elective share may be provided for on a conditional basis in the decedent's will or other estate planning instrument. Therefore, a trust that is only created or funded in the event the elective share is claimed after death by a surviving spouse is a permissible form of elective share trust.
- (b) Perhaps implicitly allowed prior to 2002 legislation.
- (c) Any doubts removed by the 2002 legislation.

**Elective Share Provisions.** Although I am presently married, I do not anticipate an elective share will be claimed against my estate. However, in the event that such an election is validly made, then I direct the trustee to establish a conditional elective share trust to be funded with the pecuniary amount, if any, necessary to fully satisfy the elective share amount taking into account all other assets or interests in assets that apply toward satisfaction of the elective share. The trustee shall hold that amount in trust, with my surviving spouse having the continuing right to withdraw all or any part of the income (including amounts accumulated from prior periods). Any income not withdrawn by the electing spouse will be accumulated at least annually and accounted for as a separate accumulated income account. The trustee shall spend any amounts of income or principal it determines necessary for the health, support, and maintenance of the electing spouse, after taking into account all other income and resources of the electing spouse. Upon the death of the electing spouse, the remaining assets of this trust shall be distributed under the provisions of this trust as if I had died immediately after the death of the electing spouse. The trustee shall pursue all reasonable grounds for contesting and disputing any election which may be made against my estate, including advancing attacks of this law on constitutional and other fundamental grounds. The trustee shall also take all reasonable positions regarding valuation and satisfaction of any elective share obligation which support the elimination of the need for this conditional elective share trust or the minimization of the amount otherwise passing to this conditional elective share trust.

4. Caution: Federal tax issues = marital deduction?

- (a) Elective share trust should generally qualify for federal estate tax marital deduction. Election as Qualified Terminable Interest Property under I.R.C. §2056(b)(7) likely required.
- (b) Formula approach to creating an elective share trust should operate similar to formula in traditional marital deduction planning.
- (c) This formula based elective share trust is not conditioned upon the spouse making the election. It will be established in all events, as long as the amount the spouse is otherwise receiving is less than the elective share amount. This trust will eliminate any shortfall and will preclude the spouse from receiving outright ownership of any of the decedent's property. The amount that will be funded to this trust will be dependent upon the terms of the elective share trust (i.e., whether it is a 50%, 80% or 100% type of trust).
- (d) With this type of trust, the federal estate tax marital deduction should not be at issue.
- (e) However, for a truly conditional elective share trust, which only comes into existence if the election is made, then the federal estate tax marital deduction may be in jeopardy.
- (f) The provisions for a conditional elective share trust might be dealt with in the form of an administrative provision along the following lines: **INSERT LANGUAGE??????**
- (g) The federal estate tax marital deduction may not be available with this type of elective share trust that is conditioned upon whether or not the election is made.
- (h) Special Needs Planning. - Fla. Stat. §732.2075(1)(e), §732.2025(8)
  - (i) A qualifying special needs trust can also be utilized to satisfy the elective share obligation.
  - (ii) A qualifying special needs trust may only be established for an ill or disabled spouse.®
  - (iii) Court approval is required for establishing a qualifying special needs trust, unless the trust property is less than \$100,000.
  - (iv) Unlike with an elective share trust, the income interest for the surviving spouse does not need to be mandatory in a qualifying special needs trust.
  - (v) Some limitations on who may serve as trustee.

#### G. Who Files the Election?



1. (1) Surviving spouse, or (2) attorney-in-fact or guardian of a surviving spouse - Fla. Stat. §732.2125 – court shall determine that the election is in the “best interests of the surviving spouse” during the spouse’s probable lifetime
2. Personal Representative - Serve by formal notice on all interested persons - Fla. Prob. R. 5.360(a)(2)(b)

#### H. Time of Election

- Within the earlier of (a) six (6) months of the date of service of a copy of the notice of administration on surviving spouse, attorney-in-fact or guardian or (b) 2 years after date of decedent’s death - Fla. Stat. §732.2135(1)

#### I. Notice by Personal Representative

- Within 20 days after receipt of election, the personal representative must provide to all interested persons a notice under Fla. Prob. R. 5.360(b)(3), which states:
  - (a) Persons receiving a notice of election may be required to contribute toward the satisfaction of the elective share;
  - (b) Objections to the election must be served within 20 days after service of the copy of the notice of election; and
  - (c) If no objection to the election is timely served, an order determining entitlement to the elective share may be granted after further notice

#### J. Entitlement

1. If no objection (as to entitlement), the court enters an order determining entitlement to elective share - Fla. Prob. R. 5.360(c)(1)
2. If objection (as to entitlement) from any interested person, the court determines entitlement issues after a hearing - Fla. Prob. R. 5.360(c)(2)
3. If entitlement is favorably determined, then the personal representative must file and serve the Inventory of Elective Estate with a petition to determine the amount of the elective estate and any contribution required from direct recipients of the elective estate - Fla. Prob. R. 5.360(d)(1)

#### K. Inventory. The Inventory of the Elective Estate is confidential, which requires notice pursuant to Fla. R. Jud. Admin. 2.420.

1. Estate inventories and accountings are, *per se*, confidential. Fla. R. Jud. Admin. 2.420(d)(1)(B)(xi)
2. The personal representative is required, when filing the Inventory of Elective

Estate, to file a Notice of Confidential Information Within Court Filing. Fla. R. Jud. Admin. 2.420(d)(2)

3. Rule 2.420 includes a form for providing Notice of Confidential Information Within Court Filing. Some clerks and chief judges have issued local forms or adopted local administrative orders. For instance, the Clerk in Collier County has provided a form with some technological enhancements and formatting improvements to the form found in the Rule.
4. For more about the application of this revised Rule, the Florida Bar provides a *free* CLE (about 90 minutes). See the CLE link on [www.flabar.org](http://www.flabar.org)

#### L. Contribution

1. If no objection (as to amount or contribution), the court enters an order determining amount and addressing contribution if necessary - Fla. Prob. R. 5.360(d)(5)(A)
2. If objection (as to amount and/or contribution) from any interested person, the court determines amount and contribution issues, if any, of elective share - Fla. Prob. R. 5.360(d)(5)(B)

#### M. Withdrawal of Election

- Spouse may withdraw election up to eight months after death, and no fees or costs are assessed to spouse unless election was pursued in bad faith - Fla. Stat. §732.2135(3)

#### N. Tax Issues

1. The elective share amount is likely a separate share for federal income tax purposes
2. Payment of elective share does not carry out distributable net income
3. Marital deduction issues discussed above

## II. **What Happens When Values Decline?**

- A. Amount of elective estate is based upon fair market values, generally as of the decedent's date of death - Fla. Stat. §732.2055(5)
- B. Once the value of the elective estate is determined, the elective share amount is determined and becomes a fixed pecuniary amount
- C. When satisfying the elective share amount, the value of property not passing directly to the spouse (i.e., by survivorship) is generally the fair market value of the property when the spouse takes possession of the property

D. During periods of declining values, the surviving spouse may receive more than 30% of the values at the time of the distribution

E. An example:

1. Elective estate, all of which is in the probate estate, consists of rental real estate, stock in publicly traded companies, and a bank account
2. As of the date of death, the bank account had a balance of \$10,000, the real estate appraised for \$90,000, and the stock was trading for \$40,000
3. The claims paid from the estate were \$20,000 and the administration expenses were \$10,000
4. The elective estate is \$120,000. This amount is derived by subtracting from the sum of the date of death value of assets (\$140,000) the amount of the claims (\$20,000) - Fla. Stat. §732.2055(5)(a)
5. The amount of the elective share is \$36,000 [30% of \$120,000]
6. By the time the elective share is ready to be paid, the stock had been sold for \$20,000, which was just enough, when combined with the cash on hand as of death, to pay the claims and expenses. The only remaining asset is the real estate. A new appraisal, as of the time for distribution, indicates the value of the real estate is now \$72,000.
7. The elective share remains at \$36,000. That is the amount due to the surviving spouse. (Note: the converse occurred when values were rising, which hardly ever created a hardship)
8. The spouse is entitled to \$36,000 and the current value of the estate's assets is \$72,000
  - (a) Can the personal representative distribute the real estate as equal tenants in common to the spouse and the residuary beneficiary?
    - (1) Does 50% of \$72,000 equal \$36,000?
    - (2) When does 62.5% of \$72,000 equal \$36,000?
      - (i) An undivided interest in real estate may be subject to a valuation adjustment for lack of marketability and other valuation considerations
      - (ii) Assuming the adjustment is 20%, then the spouse will be entitled to 62.5% of the real estate (Proof:  $\$72,000 \times 62.5\% = \$45,000$ ;  $45,000 \times (1-20\%) = \$36,000$ )

(b) Should the personal representative sell the real estate?

(i) Residuary beneficiary will bear all of the selling expenses

(ii) Surviving spouse will be entitled to first \$36,000 of net proceeds

### III. Elective Share Problem

#### A. Fact Pattern

You are working late one night when you receive a call from Desi. He is very excited and mumbling something about “isn’t this America and shouldn’t he be entitled to do what he wants with his assets.” You calm him down and tell him start from the beginning.

He tells you he was married to lady named June Cleaver. He and June lived in Maine and have two adult children, Wally and Beaver, both of whom are adults. He and June were divorced in October of 2003. He was lonely. So when he heard the local divorcee club had planned a trip to a tropical island in the South Seas he signed up.

While on the trip he met Lucy. It was a whirlwind relationship. He and Lucy were married on February 14, 2004 on the tropical island (without a prenuptial agreement, of course). After the trip the two of them returned to Maine where they lived in his home which has a current fair market value of \$250,000. Things were good at first. But then Lucy’s sister, Ethel and her husband, Fred, moved back to town and started causing problems between them. Desi convinced Lucy that they should move to Florida to get away from the cold winters. Lucy agreed to move provided they could live on the ocean. Desi decided to keep his home in Maine so that he would have a place to stay when he visited his children.

He purchased an oceanfront home, in St. Petersburg, in his and Lucy’s joint names as tenants by the entireties. The home is currently worth \$400,000 (with a \$150,000 mortgage). They have resided in the home since January of 2006 and claim this as their homestead property. Desi was hopeful that by relocating to Florida, there would be enough distance between Lucy and her sister that their troublesome adventures would cease. In fact, to encourage Fred and Ethel not to visit, he gave them together a gift of \$60,000 in December, 2010 and another \$51,000 in March of 2011 in order for them to buy a home in Maine. Unfortunately, for Desi, Fred and Ethel used this money to relocate to Florida, and Lucy and Ethel are once again getting into trouble at every turn and it is becoming very expensive for Desi to continue to bail them out of their outlandish situations.

Desi tells you that he was just diagnosed with terminal cancer and has been told that he has less than 6 months to live. He has already incurred \$10,000 in medical bills (which he has not paid). He has very specific plans for his funeral which includes an elaborate celebration and burial in Bahamas (no, wait, that was your other client, Anna Nicole) - he wants to be buried in Cuba which he estimates will cost \$40,000.

Desi tells you that except for the assets he has specifically given Lucy he wants his assets go to his children. A friend of his however, told him about this thing called an “elective share” and that he might not be able to do what he wants with his assets.

His current estate planning documents (executed in November of 2003) include a Will and a Revocable Trust. The Trust has a current value of \$1,500,000 and names his two children as beneficiaries. He also has an Irrevocable Trust (created in June of 1999) which has a current value of \$750,000 and from which he annually receives income and principal.

In addition to the items described above, he tells you he has the following:

- Sailboat – “I Love Lucy” (individually owned) worth \$100,000, with a loan of \$25,000
- Motor vehicle (individually owned) worth \$50,000
- Furniture and Furnishings worth \$35,000
- A POD account naming his sister, Daisy as the beneficiary, worth \$100,000
- A securities account with a TOD designation to Lucy that is worth \$200,000 (and which has a margin balance of \$50,000)
- A whole life insurance policy with a death benefit of \$600,000 and a cash surrender value of \$400,000, naming his brother as beneficiary.
- A whole life insurance policy with a death benefit of \$500,000 and a cash surrender value of \$100,000 payable to his prior wife pursuant to their divorce decree.
- A 401(k) retirement plan worth \$125,000 naming his sister as beneficiary
- An IRA account worth \$125,000 naming his brother as beneficiary.
- A defined contribution retirement plan provided by Desi Productions, Inc. with a total value of \$200,000 comprised of cash assets valued at \$50,000 and a life insurance policy with death benefits of \$150,000 and a net cash surrender value of \$50,000.

**B. Step 1: Determine the Property Entering into the Elective State Under the General Inclusion Provisions - Fla. Stat. §732.2035**

**1. The Decedent’s Probate Estate - Fla. Stat. §732.2035(1)**

- (a) The elective estate includes the decedent’s probate estate.
- (b) Probate estate is defined as all property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia.
- (c) For purposes of determining the elective estate “probate estate” is broadly defined and includes real property that is subject to administration in other states.
- (d) Value: The value of the probate estate is its fair market value on the date of

the decedent's death, less (a) any claims paid or payable from the probate estate and (b) any mortgages, liens, and security interests on the property not deducted as a claim against the estate. Fla. Stat. §732.2055(5). Administration expenses are not deducted.

	FMV	Claims/Liabilities	Net
Sailboat	\$ 100,000	\$ 25,000	\$ 75,000
Maine Home	250,000		250,000
Automobile*	50,000		50,000
Furniture/Furnishings*	25,000		25,000
Medical		10,000	(10,000)
Funeral		40,000	(40,000)
Total			350,000

2. Joint Bank Accounts or Securities; POD, TOD and ITF Accounts - Fla. Stat. §732.2035(2)

- (a) The elective estate includes the decedent's ownership interest in accounts or securities registered in "Pay On Death," "Transfer On Death," "In Trust For," or co-ownership with right of survivorship form.
- (b) The "decedent's ownership interest" means:
  - (i) one-half of the value of the accounts or securities held as tenancy by the entirety; and
  - (ii) the portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person.
- (c) Value: The "value" of the accounts or securities is the fair market value on the date of the decedent's death, less any liens, and security interests. Fla. Stat. §732.2055(5).
- (d) The determination of what portion of the accounts or securities the decedent had the right to withdraw or use without the duty to account to any person will require a case by case analysis of the facts and circumstances surrounding the creation and funding of the accounts or securities.

	FMV	Liabilities	Net
POD account	\$ 100,000		\$ 100,000
Securities account TOD	200,000	50,000	150,000
			\$250,000

1. Property Held In Joint Tenancies and Tenancy by the Entireties Property (Other

Than Accounts and Securities) - Fla. Stat. §732.2035(3)

- (a) The elective estate includes the decedent's fractional interest in property, held by the decedent in joint tenancy with right of survivorship or in tenancy by the entirety.
- (b) The "decedent's fractional interest in property" is defined as the value of the property divided by the number of tenants.
- (c) This provision will primarily capture real estate held jointly with right of survivorship or tenancy by the entirety property.
- (d) Value: The "value" of the property is the fair market value on the date of the decedent's death, less any mortgages, liens, and security interests. Fla. Stat. §732.2055(5).

	FMV	Liabilities	Value	%	Net
Gulf Home	\$ 400,000	\$150,000	\$ 250,000	50%	\$125,000

2. Certain Revocable Transfers (including Revocable Trusts) - Fla. Stat. §732.2035(4)

- (a) The elective estate includes that portion of property transferred by the decedent to the extent that at the time of the decedent's death the transfer was revocable by the decedent alone or in conjunction with any other person.
- (b) This provision primarily captures revocable trusts.
- (c) Transfers that are revocable by the decedent only with the consent of all persons having a beneficial interest in the property are excluded from this provision.
- (d) Value: The "value" of the property is the fair market value on the date of the decedent's death, less any mortgages, liens, and security interests. Fla. Stat. §732.2055(5).

	FMV	Liabilities	Net
Revocable Trust	\$ 1,500,000		\$ 1,500,000

3. Certain Irrevocable Transfers by the Decedent - Fla. Stat. §732.2035(5)(a)

- (a) Two types of irrevocable transfers fall under this category:
  - (1) Retained Right to Income or Principal: The elective estate includes that portion of property transferred by the decedent to the extent that at the time of the decedent's death the decedent possessed the right to, or in fact

enjoyed the possession or use of, the income or principal of the property;  
and

- (2) Discretionary Principal Distributions: The elective estate includes that portion of property transferred by the decedent to the extent that at the time of the decedent's death the principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent.

(b) Retained Right to Income or Principal

- (1) An example of a transfer falling under this category would include a qualified personal residence trust in which the decedent retained the right to occupy the premises at the time of death.
- (2) The decedent must have transferred the property. A trust created by someone else is not included.
- (3) A right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement is included under this category.
- (4) The amount included is the value of the portion of the property to which the decedent's right or enjoyment related, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate. - Fla. Stat. §732.2035(5)(b) 1.

(c) Discretionary Principal Distributions

- (1) If the surviving spouse is the one who possesses the power to make the discretionary principal distributions then the transfer is not included under this category.
- (2) The mere right to discretionary income distributions is not enough to cause inclusion. It must be discretionary principal distributions.
- (3) The amount included is the value of the portion subject to the discretion, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate. - Fla. Stat. §732.2035(5)(b) 2.

(d) Excluded Irrevocable Transfers - Fla. Stat. §732.2035(5)(c): The property is not included if the decedent's only interests in the property included one or more of the following:

- (1) The property could be distributed to or for the benefit of the decedent only with the consent of all persons having a beneficial interest in the property;
- (2) The income or principal of the property could be distributed to or for the benefit of the decedent only through the exercise or in default of an



exercise of a general power of appointment held by any person other than the decedent;

(3) The income or principal of the property is or could be distributed in satisfaction of the decedent's obligation of support; or

(4) The decedent had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent's death.

(e) Value: The "value" of the property is the fair market value on the date of the decedent's death, less any mortgages, liens, and security interests. Fla. Stat. §732.2055(5).

	FMV	Liabilities	Net
Irrevocable Trust*	\$ 750,000		\$ 750,000

4. Life Insurance - Fla. Stat. §732.2035(6)

(a) The elective estate includes the decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life

(b) Insurance held in a typical irrevocable life insurance trust would not be included under this category as the decedent does not have a beneficial interest in the policy.

(c) Value: The portion included is the net cash surrender value immediately before death. Fla. Stat. §732.2055(1).

	Death Benefit	Net Cash Surrender Value
Life Insurance*	\$600,000	\$ 400,000
Life Insurance*	\$500,000	100,000
		\$500,000

5. Retirement Accounts and Other Retirement Benefits - Fla. Stat. §732.2035(7)

(a) The elective estate includes the value of amounts payable to or for the benefit of any person by reason of surviving the decedent under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System.

(b) Value: The "value" is the transfer tax value of the amounts on the date of the decedent's death. Exception: In the case of a defined contribution plan that owns life insurance on the decedent only the net cash surrender value of the policy immediately before the decedent's death is included in the valuation of

the benefits.

	FMV	Less Insurance > then cash value	Value
401(k)	\$ 125,000		\$ 125,000
IRA	125,000		125,000
Defined Contribution Plan*	200,000	100,000	100,000
			\$350,000

6. Gifts Within One Year of Death - Fla. Stat. §732.2035(8)

(a) The elective estate includes property that was transferred during the 1-year period preceding the decedent's death as a result of a transfer by the decedent if the transfer was either of the following types:

(i) Any property transferred as a result of the termination of a right or interest in, or power over, property that would have been included in the elective estate under subsection (4) or subsection (5) if the right, interest, or power had not terminated until the decedent's death.

(ii) Any transfer of property to the extent not otherwise included in the elective estate, made to or for the benefit of any person, except:

- Any transfer of property for medical or educational expenses to the extent it qualifies for exclusion from the United States gift tax under s. 2503(e) of the Internal Revenue Code, as amended; and
- The first annual exclusion amount of property transferred to or for the benefit of each donee during the 1-year period, but only to the extent the transfer qualifies for exclusion from the United States gift tax under s. 2503(b) or (c) of the Internal Revenue Code, as amended. The term "annual exclusion amount" means the amount of one annual exclusion under s. 2503(b) or (c) of the Internal Revenue Code, as amended.

(b) A "termination" with respect to a right or interest in property occurs when the decedent transfers or relinquishes the right or interest, and, with respect to a power over property, a termination occurs when the power terminates by exercise, release, lapse, default, or otherwise. - Fla. Stat. §732.2035(8)(c)

(c) A "termination" with respect to a right or interest in property does not occur when the right or interest terminates by the terms of the governing instrument unless the termination is determined by reference to the death of the decedent and the court finds that a principal purpose for the terms of the instrument relating to the termination was avoidance of the elective share. - Fla. Stat. §732.2035(8)(d)

(d) Value: The value of the property is the fair market value as of the date of

transfer net of any liens, mortgages, or security interests on that date. The value of any insurance is the net cash surrender value on the date of the termination or transfer. - Fla. Stat. §732.2055(2) and (4).

- (e) A distribution from a trust the income or principal of which is subject to subsection (4), subsection (5), or subsection (9) shall be treated as a transfer of property by the decedent and not as a termination of a right or interest in, or a power over, property. - Fla. Stat. §732.2035(8)(c)
- (f) A distribution from a trust that is required by the terms of the governing instrument is not included in the elective estate under this category unless the event triggering the distribution is determined by reference to the death of the decedent and the court finds that a principal purpose of the terms of the governing instrument relating to the distribution is avoidance of the elective share. - Fla. Stat. §732.2035(8)(d)

	FMV	Less one annual exclusion per person	Net
Gift to Fred and Ethel*	\$ 111,000	\$ 26,000	\$ 85,000

7. Property Transferred in Satisfaction of the Elective Share. - Fla. Stat. §732.2035(9)

- (a) Transfers in satisfaction of the elective share are included in the elective estate.
- (b) A “transfer in satisfaction of the elective share” is any irrevocable transfer to an elective share trust. (Example: Irrevocable Lifetime Q-Tip Trust).
- (c) Value: The transferred property is “valued” at the date of the decedent’s death. Fla. Stat. §732.2095(1)(a)1.

8. Overlapping Provision. - Fla. Stat. §732.2045(2)

- If property is included in the “probate estate” and any other subsection, the amount included under the other subsections is reduced by the amount included in the “probate estate”. In all other cases, if more than one subsection applies the subsection that results in the largest amount being included applies.

C. Step 2: Determine the Property Excluded from the Elective Estate - Fla. Stat. §732.2045(1)

- 1. Once you have made the initial determination of what of property is include under the general inclusion provisions the next step is to determine if any exclusions apply. The following are excluded under Fla. Stat. §732.2045(1):
  - (a) Irrevocable Transfers made before October 1, 1999 - Fla. Stat.

§732.2045(1)(a);

	Excluded
Irrevocable Trust	\$ 750,000

#1

(b) Irrevocable Transfer made prior to Marriage - Fla. Stat. §732.2045(1)(a) - See

(c) Transfers for adequate consideration in money or money's worth. - Fla. Stat. §732.2045(1)(b)

(d) Transfers of property made by the decedent with the spouse's written consent - Fla. Stat. §732.2045(1)(c)

(NOTE: a spouse's consent to split gifts is not a written consent. However, a consent to waive rights to a qualified plan in accordance with ERISA would be a waiver);

(e) Proceeds of any policy of insurance on the decedent's life in excess of the net cash surrender value of the policy - Fla. Stat. §732.2045(1)(d);

	Death Benefit	Net Cash Surrender Value	Excluded
Life Insurance	\$600,000	\$ 400,000	\$200,00
Life Insurance	\$500,000	\$ 100,000	\$400,00
			600,000

(f) Any policy of insurance on the decedent's life maintained pursuant to a court order - Fla. Stat. §732.2045(1)(e);

	Excluded
Life Insurance payable to ex-wife	\$500,000

(g) Real property in other state that is considered community property and the decedent's one-half interest in any other community property no matter where located (NOTE: if the decedent's interest in the community property passes to the surviving spouse it counts towards satisfying the elective share see Fla. Stat. §732.2075(1)(c)) - Fla. Stat. §732.2045(1)(f);

(h) Property held in a qualifying special needs trust (a qualifying special needs trust is a trust established for a disable surviving spouse as defined in Fla. Stat. §732.2075(1)(e) and meets certain conditions). - Fla. Stat. §732.2045(1)(g);

(i) Property included in the decedent gross estate for federal estate taxes purpose, solely because the decedent held a general power of appointment property - Fla. Stat. §732.2045(1)(h); and

- (j) Property which constitutes the protected homestead of the decedent - Fla. Stat. §732.2045(1)(i).

2. Homestead- Fla. Stat. §732.2045(1)(i)

- (a) The decedent's homestead is excluded from the value of the elective estate. The surviving spouse's homestead rights are in addition to the elective share.

- (b) If homestead property is held as tenants by the entirety it is not considered protected homestead and thus, half of the value is included in determining the elective estate. - Fla. Stat. §731.201(33)

- (c) Non-Intended Inequities or a Planning Opportunity? Assume decedent wants his surviving spouse to have the home they live in (which qualifies as homestead property and is valued at \$200,000). The decedent's elective estate is \$500,000 without including the value of the home.

- (1) If the decedent devises the home to the surviving spouse (assuming it is devisable) the surviving spouse receives the home and \$150,000 (30% x \$500,000).

- (2) If the decedent titles the home as tenants by the entirety the surviving spouse receives the home and only \$80,000 (30% x \$600,000 - \$100,000).

1. Certain transfer of pre-marital property - Fla. Stat. §732.2155(6)

- (a) The elective estate does not include property held in a revocable or irrevocable trust at the decedent's death if;

- (1) The property was an asset of the trust at all times from October 1, 1999 until the time of the decedent's death;

- (2) The decedent was not married at the time the property was first transferred into the trust; and

- (3) The property was a non-marital asset within the meaning of Fla. Stat. §61.075 at the time of the decedent's death.

- (b) It is possible that only a portion of the property in the trust may qualify for the exclusion.

- (c) Planning Opportunity: As a planner you must pay careful attention to this exclusion.

2. Exempt Property - Fla. Stat. §732.402(7)

- (a) This exclusion is often lost as it is not found in the elective share provisions of the code.

- (b) Exempt property as defined in Fla. Stat. §732.402 is excluded from the

elective estate. The surviving spouse receives these assets in addition to the elective share.

- (c) Exempt property includes: up to \$20,000 of household furniture, furnishings, and appliances in the decedent's home; two motor vehicles as defined in Fla. Stat. §316.003(21); all qualified tuition programs under IRC §529; and all benefits paid under Fla. Stat. §112.1915

	Excluded
Motor vehicle	\$50,000
Furniture and Furnishings	20,000

D. Step 3: Determine the Amount of the Elective Share - Fla. Stat. §732.2065

1. The elective share amount is equal to 30% of the elective estate (after removing excluded items and reducing the value for proper deductions).
  - (a) The elective share is a right to a dollar amount, not a right to any specific property.
  - (b) The dollar amount does not have to be satisfied by receiving an outright sum.

	Included	Excluded
Sailboat	\$ 75,000	\$
Maine Home	250,000	
Furniture/Furnishings	15,000	20,000
Automobile		50,000
POD account	100,000	
Securities account TOD	150,000	
Gulf Home	125,000	
Revocable Trust	1,500,000	
Irrevocable Trust		750,000
Life Insurance	400,000	200,000
Life Insurance		500,000
401(k)	125,000	
IRA	125,000	
Defined Contribution Plan	100,000	100,000
Gift to Fred and Ethel	85,000	26,000
<b>Total</b>	<b>\$3,050,000</b>	<b>\$1,634,000</b>
Less Probate Claims		
Medical	(10,000)	
Funeral	(40,000)	
<b>Elective Estate</b>	<b>\$3,000,000.00</b>	

(c) In

our example the elective share amount would be:

$$\text{Elective Share: } \$3,000,000 \times 30\% = \$900,000$$

E. Step 4: Determine the Value of Assets Passing to or for the Benefit of the Surviving Spouse that Count Towards Satisfying the Elective Share - Fla. Stat. §732.2095

1. The next step is to determine the value under Fla. Stat. §732.2095(1) of the assets the surviving spouse has received from the decedent (or will receive from the decedent on death) that count towards satisfying the elective share. - Fla. Stat. §732.2075(1)(a)

	Value	
Motor vehicle	\$ 0	
Furniture and Furnishings	0	
Securities account TOD	150,000	
Gulf home	125,000	
401(k)	125,000	Designation of sister invalid
Defined Contribution	200,000	The Plan will dictate whether spouse gets lump sum or survivor annuity. The statute is silent as to value if survivor annuity paid. Presumably transfer tax value should be used. But perhaps IRS tables should be used.
<b>TOTAL</b>	<b>\$600,000.00</b>	

2. The amount remaining to satisfy the elective share is determined as follows:

Elective Share	\$ 900,000
Amount Satisfied	<u>(\$600,000)</u>
Amount remaining	<u><b>\$300,000</b></u>

F. Liability for Unsatisfied Balance

1. Apportionment

- The liability for the payment of the unsatisfied balance is apportioned among the “direct recipients” of property included in the elective estate according to a four tier class priority system. - Fla. Stat. §732.2075(2)

2. Classes of Payment- Fla. Stat. §732.2075(2)

- (a) Class 1: Property included in the decedent’s probate estate and revocable trust. Estate and trust beneficiaries are all treated as one group. The rationale

for this treatment was to ensure that specific and general devises in the will and trust will only be subject to contribution if the residuary estate of both the probate estate and the trust estate is exhausted.

- (b) Class 2: Recipients of property held in a joint bank or securities account, POD, TOD, or ITF account, property held in joint tenancy, and property passing by beneficiary designation under an insurance policy or retirement plan arrangement.
- (c) Class 3: Recipients of all other property interests (other than protected charitable interests)
- (d) Class 4: Recipients of protected charitable lead interests.

## G. Options to Consider

### 1. Excludable Gifts

- Consider making excludable gifts. Don't overlook prepayment of tuition. In the example if \$100,000 of excludable gifts are made the elective share is decreased by \$30,000.

### 2. Elective Share Trusts

- (a) The surviving spouse is not entitled to an outright distribution. Monies held in an "elective share trust" count towards satisfying the elective share.
- (b) An elective share trust (basic requirements - Fla. Stat. §732.2025(2)) is any trust where:
  - (i) The surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually;
  - (ii) The surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and
  - (iii) During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.
- (c) The spouse does not have to be the Trustee of the trust.
- (d) If the trust contains the basic requirements of an elective share trust fifty (50%) percent of the underlying value of the trust property counts towards satisfying the elective share. - Fla. Stat. §732.2095(2)(b)3. Thus, in our example if \$600,000 is placed in an elective share trust, the elective share amount will be satisfied.



- (e) If the trust includes a “qualifying invasion power” eighty (80%) percent of the underlying value of the trust property counts towards satisfying the elective share. - Fla. Stat. §732.2095(2)(b)2.
- (i) A “Qualifying invasion power” is a power to invade principal for the surviving spouse’s health, support, and maintenance. - Fla. Stat. §732.2095(1)(c).
  - (ii) The power may be given to the surviving spouse or the trustee.
  - (iii) The power may (but is not required) to provide that other resources of the surviving spouse be taken into account in exercising the power.
  - (iv) In our example, only \$375,000 would have to be placed in an elective share trust that contains a qualifying invasion power.
- (f) If in addition to the “qualifying invasion power” the trust also provides the surviving spouse with a “qualifying power of appointment” one hundred (100%) percent of the underlying value of the trust property counts towards satisfying the elective share. - Fla. Stat. §732.2095(2)(b)1.
- (i) The term “qualifying power of appointment” means a general power of appointment that is exercisable alone and in all events by the decedent’s spouse in favor of the spouse or the spouse’s estate. Fla. Stat. §732.2095(1)(b).
  - (ii) The term includes a power to appoint by will if the power may be exercised by the spouse in favor of the spouse’s estate without the consent of any other person. Fla. Stat. §732.2095(1)(b).
  - (iii) The term includes a power to consume or invade the principal of a trust, but only if the power is not limited by an ascertainable standard relating to the holder’s health, education, support, or maintenance.
  - (iv) In our example, only \$300,000 would have to be placed in an elective share trust that contains both a qualifying invasion power and qualifying power of appointment.
- (g) Value: The value of the elective share is determined on the date of funding if the trust is created at the death of the decedent. - Fla. Stat. §732.2095(1)(a)(3) and (5). If an elective share trust is funded during life then the trust is valued as of the date of the decedent’s death. - Fla. Stat. §732.2095(1)(a)1
- (h) The elective share trust can be drafted using a formula approach or conditional provision. The following is an excerpt from an outline prepared for the 2005 Estate Planning in the Real World seminar by Laird A. Lile entitled “Elective Share and Homestead” that provides a helpful discussion and

sample provisions.

(i) Conditional Elective Share Trusts.

- a. In 2002, the law was modified to clarify that interests satisfying the elective share may be provided for on a conditional basis in the decedent's will or other estate planning instrument. Therefore, a trust that is only created or funded in the event the elective share is claimed after death by a surviving spouse is a permissible form of elective share trust.
- b. Perhaps implicitly allowed prior to 2002 legislation.
- c. Any doubts removed by the 2002 legislation.

(ii) Caution: Federal tax issues - marital deduction?

- a. Elective share trust should generally qualify for Federal estate tax marital deduction. Election as Qualified Terminable Interest Property under I.R.C. §2056(b)(7) likely required.
- b. Formula approach to creating an elective share trust should operate similar to formula in traditional marital deduction planning.

Elective Share Trust. As of my death, my personal representative shall set aside a pecuniary amount equal to the amount, if any, by which the elective share amount (regardless of whether my wife actually makes the election) exceeds the amount other passing to my wife in satisfaction of the elective share in a separate trust to be known as the Elective Share Trust as provided for in this instrument in Article X.

- c. This formula based elective share trust is not conditioned upon the spouse making the election. It will be established in all events, as long as the amount the spouse is otherwise receiving is less than the elective share amount. This trust will eliminate any shortfall and will preclude the spouse from receiving outright ownership of any of the decedent's property. The amount that will be funded to this trust will be dependent upon the terms of the elective share trust (i.e., whether it is a 50%, 80% or 100% type of trust).
- d. With this type of trust, the Federal estate tax marital deduction should not be at issue.
- e. However, for a truly conditional elective share trust, which only comes into existence in the event the election is made, then the Federal estate tax marital deduction may be in jeopardy.
- f. The provisions for a conditional elective share trust might be dealt with

in the form of an administrative provision along the following lines:

Elective Share Provisions. Although I am presently married, I do not anticipate an elective share will be claimed against my estate. However, in the event that such an election is validly made, then I direct the trustee to establish a conditional elective share trust to be funded with the pecuniary amount, if any, necessary to fully satisfy the elective share amount taking into account all other assets or interests in assets that apply toward satisfaction of the elective share. The trustee shall hold that amount in trust, with my surviving spouse having the continuing right to withdraw all or any part of the income (including amounts accumulated from prior periods). Any income not withdrawn by the electing spouse will be accumulated at least annually and accounted for as a separate accumulated income account. The trustee shall spend any amounts of income or principal it determines necessary for the health, support, and maintenance of the electing spouse, after taking into account all other income and resources of the electing spouse. Upon the death of the electing spouse, the remaining assets of this trust shall be distributed under the provisions of this trust as if I had died immediately after the death of the electing spouse. The trustee shall pursue all reasonable grounds for contesting and disputing any election which may be made against my estate, including advancing attacks of this law on constitutional and other fundamental grounds. The trustee shall also take all reasonable positions regarding valuation and satisfaction of any elective share obligation which support the elimination of the need for this conditional elective share trust or the minimization of the amount otherwise passing to this conditional elective share trust.

g. WARNING: The Federal estate tax marital deduction probably will not be available with this type of elective share trust that is conditioned upon whether or not the election is made. As an alternative consider carving out conditional share from the Credit Shelter Trust.

### 3. Other Trusts

- (a) If a trust is created for the surviving spouse that does not meet at least the basic requirements of an elective share trust it can still count towards satisfying the elective share.
- (b) Value: The spouse's interest will be "valued" at the lesser of its "transfer tax value" and fifty percent of the value of the trust property.
- (c) "Transfer tax value" is defined as the value the interest would have for gift tax purposes if the interest was assigned to an unrelated person. Fla. Stat. §732.2025(11).

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