

# Gamechanger - Your Spouse's Entitlement to Your Estate

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May 16, 2014



## The Marital Elective Share

When a married person dies, North Carolina and many other states provide the surviving spouse with an elective share of the deceased spouse's estate if the share actually left to the spouse is less than certain thresholds. In other words, a surviving spouse may file a claim for an elective share if he or she does not receive at least a certain percentage of the deceased spouse's assets.

Until October 1, 2013, the percentage to which a surviving spouse in North Carolina was entitled was the same percentage such surviving spouse would receive had the deceased spouse died without a will. The only exception was that the percentage was halved if there were no children of the marriage but there were children from a prior marriage.

For example, if a married couple had two or more children, then the surviving spouse could file a claim for an elective share if the surviving spouse did not receive at least one-third of the deceased spouse's assets. However, if the married couple did not have any children together, but the deceased spouse had two or more children from a prior marriage, then the surviving spouse could file a claim for elective share only if the surviving spouse did not receive one-sixth (half of one-third) of the deceased spouse's assets.

As of October 1, 2013, the determination of the percentage to which a surviving spouse in North Carolina is entitled was changed to a length-of-marriage approach rather than being based on the number of children and whether they were born from the marriage. Under the new length-of-marriage approach, the percentages are as follows:

<b>Length of Marriage</b>	<b>Applicable Share Percentage</b>
Less than 5 years	15%
At least 5 but less than 10 years	25%
At least 10 but less than 15 years	33%
15 years or more	50%

These new percentages apply to any estate of a spouse who dies on or after October 1, 2013, regardless of when the marriage occurred. Married couples who effectively waive the right of elective share in a premarital agreement or postmarital agreement are unaffected by this change.

## **Strategies to Lessen the Effect of the Marital Elective Share**

A married person who wants to leave less of his or her wealth to a surviving spouse and more to other beneficiaries than the new law might otherwise allow may want to consider one or more planning techniques, particularly if the person's estate is expected to include real property that has been "in the person's family" for many years or interests in a business historically belonging to that person's family.

### *Postmarital Agreements*

A husband and wife may enter into a postmarital agreement in which both spouses agree to waive their rights to their respective statutory elective shares.

### *Gifting*

Gifts made at least one year prior to the donor's death are not subject to the elective share of the surviving spouse. Gifts may be made outright or in trust to children or other individuals. Gifts also may be made to a trust benefiting the surviving spouse during the surviving spouse's lifetime, with the assets of the trust eventually passing to the children, grandchildren, or any other beneficiary.

### *Trust Provisions under a Will*

A spouse may create a trust under a will for the benefit of the surviving spouse. If properly drafted with basic distributive terms for the surviving spouse and a disinterested trustee, then any value that passes to the trust is considered to pass to the surviving spouse. Such a trust would allow the deceased spouse to provide for the surviving spouse during the surviving spouse's lifetime while ultimately protecting the assets for the deceased spouse's children, grandchildren, or any other beneficiary.

## **Conclusion**

The new elective share law has taken many by surprise, especially since it applies to marriages entered into prior to the enactment of the new law. However, as briefly explained in this article, an individual who is not satisfied with the effect of the elective share law may still be able to accomplish his or her distributive intent with proper planning.

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