

**SPOUSAL AND FAMILY ENTITLEMENTS**  
**ELECTIVE SHARE; EXEMPT PROPERTY AND FAMILY ALLOWANCE**

**Debra L. Boje**  
**Gunster**  
**Tampa, Florida**

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## **I. THE ELECTIVE SHARE – A CASE IN POINT!**

### **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? Shouldn’t I be entitled to do what I want with my 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. He and June were divorced in October of 2012. 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, 2014 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 on one-half acre of contiguous land 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 2017 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 a gift of \$65,000 in December 2018 and another \$50,000 in January of 2019 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 already back to their old troublesome ways and it is again becoming expensive for Desi 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 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 estate planning documents (executed in November of 2012) include a Will and a Revocable Trust. The Revocable Trust has property with 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 estate under the general inclusion provisions -- §732.2035

1. The Decedent’s Probate Estate -- §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. § 732.2025(7).
  - 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. The value of the probate estate is its fair market value on the date of the decedent’s death, less (i) any claims paid or payable from the probate estate; and (ii) any mortgages, liens, and security interests on the property not deducted as a claim against the estate. §732.2055(6). 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	35,000		35,000
Medical		(10,000)	(10,000)
Funeral		(40,000)	(40,000)
Total			\$360,000.00

2. Homestead -- §732.2035(2)

- a. In 2017 the elective share provisions were amended. One of the major changes dealt with how “protected” homestead property would be treated.

Prior to the 2017 amendment there was a discrepancy in how homestead property factored into the elective estate calculation. Protected homestead (i.e. homestead that was titled in the decedent’s individual name or by a trust) was completely excluded from elective estate calculation. In contrast, if the homestead was held as tenants by entireties (“TBE”) and thus was not “protected” homestead one-half of its value was included in the elective estate calculation as TBE property. Accordingly, the elective shares of surviving spouses of decedents who died owning protected homestead were often unjustifiably more than that of spouses who owned homestead property as TBE.

- b. For decedents dying after July 1, 2017, §732.2035(c) now provides that, the elective estate includes “[t]he decedent’s interest in property which constitutes the protected homestead of the decedent.”

“Protected homestead” is defined for purposes of the Florida Probate Code as “the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner’s surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship is not protected homestead.” §731.201(33).

- c. In determining the “value” of the decedent’s interest in the protected homestead that enters into the elective estate calculation §732.2055(1)(a) provides as follows:

- (i) If the surviving spouse receives a fee simple interest, the entire fair market value of the protected homestead on the date of the decedent’s death is included. §732.2055(1)(a)1.
  - (ii) If the spouse takes a life estate or validly elects to take an undivided one-half interest as a tenant in common as provided in §732.401(2), one-half of the fair market value of the protected homestead on the date of the decedent’s death is included. §732.2055(1)(a)2.
  - (iii) If the surviving spouse validly waives homestead rights under §732.702 or other applicable law, but nevertheless receives an interest in the protected homestead, other than an interest described in §732.401, including an interest in trust, the value of the spouse’s interest is determined as property interests that are not protected homestead. §732.2055(1)(a)3.
- d. For protected homestead, fair market value is calculated by deducting from the total value of the property all mortgages, liens, and security interests to which the protected homestead is subject and for which the decedent is liable, but only to the extent that such amount is not otherwise deducted as a claim paid or payable from the elective estate.
- e. In the example, because the homestead is owned as TBE it is not “protected” homestead thus, we do not include any portion of the homestead value under this provision.
- f. If the homestead were protected homestead and titled in Desi’s name alone, but was devised to Lucy, the full value of the homestead would be included in the elective estate determined as follows:

	FMV	Liabilities	Value	%	Net
Gulf Home	\$ 400,000	\$(150,000)	\$ 250,000	100	\$250,000

- g. If the homestead were protected homestead and titled in Desi’s name alone, but was not devised to Lucy, Lucy could either receive a life estate in the homestead or elect to receive a one-half interest in the homestead. In either event 50% of the value of the homestead would be included in the elective estate determined as follows:

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

3. Joint Bank Accounts or Securities; POD, TOD and ITF Accounts -- §732.2035(3)

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. 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. §732.2055(6).

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.

e. Based upon our example the following is included under this provision in the elective estate:

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

4. Property Held In Joint Tenancies and Tenancy by the Entireties Property (Other Than Accounts and Securities) -- §732.2035(4)

a. The elective estate includes the decedent’s fractional interest in property (other than accounts or securities) 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. 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. §732.2055(6).
- e. Based upon our example, the following is included under this provision in the elective estate:

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

5. Certain Revocable Transfers (including Revocable Trusts) -- §732.2035(5)

- 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. 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. §732.2055(6).
- e. Based upon our example, the following is included under this provision in the elective estate:

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

6. Certain Irrevocable Transfers by the Decedent -- §732.2035(6)

- a. Two types of irrevocable transfers fall under this category:
  - (i) 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; or



- (ii) 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
  - (i) 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.
  - (ii) The decedent must have transferred the property. A trust created by someone else is not included.
  - (iii) A right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement is included under this category.
  - (iv) 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.
- c. Discretionary Principal Distributions
  - (i) 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.
  - (ii) The mere right to discretionary income distributions is not enough to cause inclusion. It must be discretionary principal distributions.
  - (iii) 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.
- d. Excluded Irrevocable Transfers: The property is not included if the decedent's only interest in the property included one or more of the following:

- (i) 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; or
- (ii) 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; or
- (iii) The income or principal of the property is or could be distributed in satisfaction of the decedent's obligation of support; or
- (iv) 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.
- (v) 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. §732.2055(6).

e. Based upon our example, the following would be included under this provision in the elective share:

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

7. Life Insurance -- §732.2035(7)

- 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. The portion included is the net cash surrender value immediately before death. §732.2055(2).

- d. Based upon our example, the following would be included under this provision in the elective share:

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

8. Retirement Accounts and other retirement benefits -- §732.2035(8)

- 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. The “value” is the transfer tax value of the amounts on the date of the decedent’s death.
- c. 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.
- d. Based upon our example, the following would be included under this provision in the elective share:

	FMV	Less Insurance > 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

9. Gifts within one year of death -- §732.2035(9)

- 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 (5) or

subsection (6) of §732.2035 if the right, interest, or power had not terminated until the decedent's death, or

- (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:
  - (1) Any transfer of property for medical or educational expenses to the extent it qualifies for exclusion from the United States gift tax under IRC §2503(e);
  - (2) 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 IRC §2503(b) or (c). The term "annual exclusion amount" means the amount of one annual exclusion under IRC §2503(b) or (c).

b. Termination Defined.

- (i) 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. §732.2035(9)(c)1.
- (ii) Caveat: A distribution from a trust the income or principal of which is subject to subsection (5), subsection (6), or subsection (10) of §732.2035 is 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. §732.2035(9)(c)2
- (iii) Caveat: 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. §732.2035(9)(d)1
- (iv) 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.  
 §732.2035(9)(d)2

- (v) 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. §732.2055(3) and (5).

- c. Looking at our example, gifts that would be included would be as follow:

	FMV	Less one annual exclusion per person	Net
Gift to Fred and Ethel	\$115,000	\$30,000	\$85,000

10. Property transferred in satisfaction of the elective share -- §732.2035(10)

- 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 made by the decedent during lifetime. (Example: Irrevocable Lifetime Q-Tip Trust).
- c. The transferred property is “valued” at the date of the decedent’s death. §732.2095(1)(a)l.

11. Overlapping provision -- §732.2045(2).

If property is included in the “probate estate” under §732.2035(1) and any other subsection of §732.2035 applies to the same property interest, 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 of §732.2035 applies to a property interest, only the subsection resulting in the largest elective estate shall apply.

C. Step 2 - Determine the property excluded from the elective estate

- 1. Exclusions. Once you have made the initial determination of what property is included under the general inclusion provisions the next step is to determine if any exclusions apply. The following are excluded under §732.2045(1):

- a. Irrevocable transfers made before October 1, 1999 -- §732.2045(1)(a);

	Excluded
Irrevocable Trust	\$ 750,000

- b. Irrevocable transfers made prior to marriage -- §732.2045(1)(a);

	Excluded
Irrevocable Trust	\$ 750,000

- c. Transfers for adequate consideration in money or money's worth for the transfer -- §732.2045(1)(b);

- d. Transfers of property made by the decedent with the spouse's written consent -- §732.2045(1)(c) (NOTE: a spouse's consent to split gifts does not constitute written consent to the transfer for purposes of §732.2045(1)(c). 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 whether payable to the decedent's estate, a trust, or in any other manner -- §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

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

	Excluded
Life Insurance	\$500,000

- g. Real property in another 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 §732.2075(1)(c) -- §732.2045(1)(f);

- h. Property held in a qualifying special needs trust on the date of the decedent's death (a qualifying special needs trust is a trust established for a disabled surviving spouse as defined in §732.2025(8) and meets certain conditions) -- §732.2045(1)(g);
  - i. Property included in the decedent gross estate for federal estate tax purpose, solely because the decedent held a general power of appointment property -- §732.2045(1)(h); and
  - j. Property which constitutes the protected homestead of the decedent if the surviving spouse validly waived their homestead rights as provided under §732.702, or other applicable law, and the surviving spouse did not receive any interest in the protected homestead upon the decedent's death -- §732.2045(1)(i).
2. Certain transfer of pre-marital property -- §732.2155(6)
- a. The elective estate does not affect any interest in property held as of the decedent's death, in a trust, whether revocable or irrevocable trust if;
    - (i) The property was an asset of the trust at all times between October 1, 1999 and the time of the decedent's death;
    - (ii) The decedent was not married to the decedent's surviving spouse when the property was transferred to the trust; and
    - (iii) The property was a non-marital asset as defined in §61.075 immediately prior to 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.
3. Exempt Property -- §732.402(7)
- a. The exempt property exclusion is often lost as it is not found in the elective share provisions of the code.
  - b. Exempt property as defined in §732.402(2) is excluded from the value of the estate before residuary, intestate, or pretermitted or elective shares are determined. The surviving spouse receives these assets in addition to the elective share.

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

D. Step 3 - Determine the amount of the elective share

1. Calculation. 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.

**Example. In our example the elective share amount would be:**

	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	30,000
<b>Total</b>	<b>\$3,050,000</b>	<b>\$1,650,000</b>
Less Probate Claims		
Medical	(10,000)	
Funeral	(40,000)	
<b>Elective Estate</b>	<b>\$3,000,000.00</b>	

Elective Share:    \$3,000,000 x 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

1. Assets Received by Surviving Spouse. The next step is to determine the value 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. §732.2095

	Value	
Motor vehicle	\$ 0	
Furniture and Furnishings	0	
Securities account TOD	150,000	
Gulf home	125,000	
401(k)	125,000	Designation of sister is 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. Balance of Assets. The amount remaining to satisfy the elective share is determined as follows:

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

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 three tier class priority system. §732.2075(2).
2. Classes of Payment
  - 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 are exhausted.
  - b. Class 2: Recipients of property interests, other than protected charitable interests 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 and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests, other than protected charitable interests.

- c. Class 3: Recipients of all other property interests (other than protected charitable interests).
3. Remaining Unpaid Balance. If after application of the tier class priority system the elective estate is not fully satisfied the additional amounts are paid as follows:
- a. First, from assets that will pass or have passed to a non-qualifying trust. (Note: if more than one trust the contribution is apportioned pro rata. It may also be necessary to recalculate the value of the beneficial interests.);
  - b. Second, from direct recipients of protected charitable lead interests, but only to the extent and as such times that contribution is permitted without disqualifying the interest for a deduction.

G. Planning Opportunities

1. Excludable Gifts. Consider making excludable gifts. Don't overlook prepayment of tuition. For 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 -- §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. A trust that does not provide the surviving spouse the right to require the trustee to convert non-productive assets to productive assets, but otherwise meets the requirements of §732.2025(2) to qualify as an elective share trust, may be "saved" under the 2017 amendment to §738.606, which now provides such rights to the surviving spouse under state law.
- d. The spouse does not have to be the trustee of the trust.
- e. If the trust contains the basic requirements of an elective share trust fifty percent (50%) of the underlying value of the trust property counts towards satisfying the elective share. §732.2095(2)(d). Thus, in our example, if \$600,000 is placed in an elective share trust, the elective share amount will be satisfied.
- f. If the trust includes a "qualifying invasion power" eighty percent (80%) of the underlying value of the trust property counts towards satisfying the elective share. §732.2095(2)(d).
  - (i) A "qualifying invasion power" is a power to invade trust principal for the surviving spouse's health, support, and maintenance. §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.
- g. If in addition to the "qualifying invasion power" the trust also provides the surviving spouse with a "qualifying power of appointment" one hundred percent (100%) of the underlying value of the trust property counts towards satisfying the elective share. §732.2095(2)(d).
  - (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. §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. §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.
- h. The value of the elective share is determined on the date of funding if the trust is created at the death of the decedent. §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. §732.2095(1)(a)1
- i. Conditional Elective Share Trusts.
- (i) 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, an elective share trust that is only created or funded in the event the surviving spouse claims an elective share is a permissible form of an elective share trust.
  - (ii) NOTE: Although a conditional trust is a permissible form of an elective share trust it may not qualify for the marital deduction since it is conditional upon the surviving spouse making an election.

### 3. Other Trusts

- a. If a trust is created for the surviving spouse that does not meet the requirements of an elective share trust it can still count towards satisfying the elective share.
- b. The spouse's interest will be "valued" at the lesser of its "transfer tax value" and fifty percent (50%) of the value of the trust property.
- c. "Transfer tax value" is defined as the value the interest would have for gift tax purposes under the United States estate and gift tax laws if it passed without consideration to an unrelated person on the applicable valuation date. §732.2025(11).

## H. Miscellaneous Points of Interest

1. Elective Share is a Floor, Not a Ceiling. If you represent a surviving spouse and there is any doubt as to whether your client received an amount equal to at least the elective share file the election. In 2016, an amendment was made to §732.201 to clarify that the election does not reduce what the spouse receives if the election were not made and the spouse is not treated as having predeceased the decedent.
2. Interest on Elective Share. If litigation is involved, a surviving spouse may have to wait several years before receiving payment of the elective share. Effective for decedents dying on or after July 1, 2017, §732.2145 now provides that the surviving spouse is entitled to receive interest (at the statutory rate) on any portion of the elective share that is not satisfied with two years of the decedent's death, regardless of whether an order of contribution has been entered. Prior to the 2017 amendments to the elective share statutes, surviving spouses were only entitled to received interest (at the statutory rate) on the unpaid portion of their elective share beginning ninety days after an order of contribution was entered. Thus, under the old law, a delay in payment generally favored the estate, as the estate was able to retain the income, interest or appreciation generated on the elective share during the pending litigation.
3. Deadlines and Extensions to Make Election. Under §732.2135(1), an election to take an elective share must be filed by the earlier of the date that is 6 months after the surviving spouse is served with a copy of notice of administration or the date that is 2 years after the decedent's death. In 2017, §732.2135(2) was amended to extend the time in which a petition for extension of time to make the elective share can be filed. Now, a petition to extend the time for making an election may be filed within the time provided in §732.2135(1) or 40 days after termination of any proceeding which affects the amount that the surviving spouse is entitled to receive under §732.2075(1), whichever is later, but no more than two years after the decedent's death.
4. Attorneys' Fees and Costs.
  - a. Prior law (now repealed) only provided for the assessment of attorneys' fees and costs against the surviving spouse or the surviving spouse's estate if the election was made or pursued in bad faith.
  - b. The 2017 amendments to the elective share statutes, created a new §732.2151 which provides as follows:
    - (i) The court may award attorney fees and costs as in chancery actions but only when there is an objection or dispute over

entitlement to or the amount of the elective share, the property interests included in the elective share or its value, or the satisfaction of the elective share.

- (ii) A court may direct payment from the estate or from a party's interest in the elective share or the elective estate, or may enter a judgment that can be satisfied from other property of the party. This provision allows the court to enter a money judgment against a party for fees and costs.
- (iii) In addition to the fees and costs awardable under Subsections (1) and (2), if a personal representative does not file a petition to determine the amount of the elective share, the electing spouse or his or her representative may be awarded attorney fees and costs from the estate in connection with the preparation and filing of the petition.
- (iv) The statute is prospective and thus applies to all proceedings filed after the effective date of the statute, without regard to the date of the decedent's death.

- c. NOTE: The statute does not change the provision in §732.2145 regarding attorney fees and costs for bringing a claim to enforce a contribution for the elective share.

## II. **EXEMPT PROPERTY F.S. §732.402; Fla. Prob. R. 5.406**

### A. Prerequisites.

- 1. The decedent must be domiciled in Florida at the time of death.
- 2. The decedent must be survived by a spouse or children.

### B. Who is entitled to claim the exemption?

- 1. If there is a surviving spouse the spouse is entitled to claim the exemption.
- 2. If there is no spouse (or the spouse has waived his or her right) the children are entitled to claim the exemption.

### C. What constitutes exempt property?

- 1. Household furniture, furnishings, and appliances in the decedent's usual place of abode up to a net value of \$20,000 as of the date of death. (NOTE: prior to July 1, 2009 the amount was \$10,000.) -- §732.402(2)(a).
- 2. Two motor vehicles as defined in F.S. §316.003, which do not, individually, as to either such motor vehicle, have a gross vehicle weight

in excess of 15,000 pounds, held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal vehicles. -- §732.402(2)(b).

a. Prior to July 1, 2009, the exemption was for all automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal automobiles.

b. The term was broadened from automobiles to motor vehicles. F.S. §316.003(40) now defines a "motor vehicle" as a "self-propelled vehicle not operated upon rails or guideway, but not including any bicycle, motorized scooter, electric personal assistive mobility device, swamp buggy, or moped." Thus, the term now includes motorcycles.

3. Certain prepaid college contracts and Florida college savings agreements are considered exempt assets. -- §732.402(2)(c).

a. Prior to July 1, 2009, the exemption was limited to the "Stanley G. Tate Florida Prepaid College Program contracts purchases and Florida College Savings agreement established under part IV of chapter 1009."

b. Post July 1, 2009, the exemption includes "[a]ll qualified tuition programs authorized by s. 529 of the Internal Revenue Code of 1986, as amended, including, but, not limited to, the Florida Prepaid College Trust Fund advance payment contracts under s. 1009.98 and the Florida Prepaid College Trust Fund participation agreements under s. 1009.981

4. Benefits paid pursuant to F.S. §112.1915 (certain death benefits to teachers and school administrators). -- §732.402(2)(d).

D. Specifically or demonstratively devised property -- §732.402(5).

1. General rule. Property that is specifically or demonstratively devised is excluded from exempt property.

2. Exception. If exempt property is specifically or demonstratively devised to a person who would otherwise be entitled to the exempt property then the court may declare the property to be exempt.

3. *Babcock v. Estate of Bradford L. Babcock, et al.*, 995 So. 2d 1044 (4<sup>th</sup> DCA 2008): The decedent executed a will that left all his clothing, jewelry, household goods, personal effects, automobile and all other tangible personal property not otherwise specifically devised herein or pursuant to the written statement or list to his then wife and if she did not

survive him to his son. The decedent divorced his wife and subsequently remarried. The decedent did not execute a new will. The first wife was deemed to have predeceased the decedent. The new wife claimed she was entitled to the property as exempt property. The court held that the property was specifically devised by decedent to the son thus, removing the property from spouse's claim of exempt property.

E. Procedure and timing for filing.

1. A verified petition must be filed.
2. **WARNING:** The petition must be filed on or before the later of (i) the date that is 4 months after the date of service of the notice of administration; or (ii) the date that is 4 months after the date a waiver of notice of administration is filed; or (iii) the date that is 40 days after the date of termination of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the estate subject to a claim for exempt property. -- §732.402(6).

F. Effect.

1. Property that is determined to be exempt property §732.402 is excluded from the value of the residuary estate and the value of the estate for purposes of determining the pretermitted or elective shares. -- §732.402(7).
2. Property that is determined to be exempt property is exempt from all claims of the estate except perfected security interests thereon.

**III. FLORIDA CONSTITUTIONAL EXEMPTION OF PERSONAL PROPERTY; FLA. Const. art. X, §4**

- A. In addition to exempt property set for in the Florida Probate Code, Article X, §4(a)(2) of the Florida Constitution exempts up to \$1,000 of personal property.
- B. The exemption inures to the surviving spouse or heirs of the owner.
- C. Personal property exempt under Article X, §4(a)(2) of the Florida Constitution is presumably in addition to the elective share.

**IV. FAMILY ALLOWANCE F.S. §732.403; Fla. Prob. R. 5.407**

A. Prerequisites

1. The decedent must be a Florida resident.



2. The decedent must be survived by a spouse or lineal heirs that the decedent was supporting or was obligated to support. "Lineal heirs" includes lineal ascendants and descendants.
- B. Amount of allowance. The allowance cannot exceed \$18,000.
- C. Procedure for claiming.
1. Effective January 1, 2004, Rule 5.407 governs the procedure for claiming a family allowance.
  2. A verified petition must be filed.
- D. Payment.
1. If there is a surviving spouse, the family allowance is payable to the spouse for the use of the spouse and dependent lineal heirs.
  2. If any lineal heir does not live with the surviving spouse, the allowance may be apportioned based upon need.
  3. If there is no surviving spouse, the family allowance is paid to the lineal heirs or the person having their care or custody.
- E. Attorney Fees. Attorney's fees may be awarded to the successful petitioner for family allowance. *Hoyt v Hoyt*, 814 So.2d 1254 (Fla. 2d DCA 2002).
- F. Effect. The family allowance is not chargeable against any benefit or share otherwise passing to the surviving spouse or to the dependent lineal heirs, unless the will provides otherwise. The family allowance is only a class 5 priority claim. Thus, beware of payment of the family allowance if there are not sufficient funds in the estate to pay all claims.