

June 21, 2021

## CAN YOU DISINHERIT YOUR FAMILY? | ESTATE PLANNING

Occasionally an individual wishes to disinherit a member of his or her immediate family. This may be for a variety of reasons. The excluded family may have been provided for in other ways; is estranged; has sufficient assets of her own; is trying to qualify for governmental benefits, or one side of the family is favored over another. In North Carolina, an individual may disinherit family members, with one exception: a surviving spouse.

### Elective Share

A surviving spouse has the right to a portion of the deceased spouse's estate. This is unless the surviving spouse waived that right in a valid premarital agreement. This portion of the estate is an "elective share". The amount of the elective share varies from 15% to 50% of the deceased spouse's estate. The percentage depends on the length of the marriage but does *not* depend on whether the deceased spouse had children (either with the current spouse or a previous spouse).

Assets left in trust for the surviving spouse may be treated as passing to the surviving spouse, *if* (i) the trust includes certain distribution provisions, (ii) the surviving spouse is the sole beneficiary during his or her lifetime, and (iii) the trustee is nonadverse. For example, a typical credit shelter trust that allows for distributions to a surviving spouse and children of the decedent, with a child as trustee, will not be treated as passing to the surviving spouse, even if the spouse is the only person to whom distributions are made.

If the deceased spouse did not leave the required percentage of assets to the surviving spouse, the survivor can file a claim requiring payment of the required percentage. There is a very strict time requirement for filing this claim. The claim must be filed within six months of the qualification of the personal representative. If the surviving spouse is incapacitated, the six months is not extended. Also, the claim must be filed during the surviving spouse's lifetime; if the survivor dies during the six months the claim expires.

### How JAH Can Help

The **Trusts and Estates Group** at **Johnston Allison Hord** has extensive experience in preparing estate planning. This includes the preparation of documents that allow an individual to pass his or her assets to the desired beneficiaries while complying with requirements of the elective share statute. We also represent many surviving spouses who have been omitted from or designated a nominal share of a spouse's estate. Our guidance enables them to recover the shares to which they are

entitled. If you have questions about structuring your estate plan or your rights as a surviving spouse, **contact** our Trusts and Estates Group.