

Surviving Spouses Get Their Share

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On January 1, 2011 Oregon HB 3077 became effective. Have you planned for the changes to the Spousal Elective Share, ORS 114.105 to 165? If not, review William D. Brewer's article on the subject from the October 2009 issue.¹ Are your clients married with children from a prior marriage? Did your client bring substantial assets into a new marriage? Does your client intend to leave his or her estate to charity or his or her children? If you answered yes, then your client's estate plan may be vulnerable to unintended consequences. Oregon House Bill 3077, which passed in June, 2009, greatly expands the right of a surviving spouse to challenge the estate plan of the deceased spouse. Under the new law, the surviving spouse can demand as much as 33% of all assets, including assets held in trust, retirement accounts, life insurance benefits, and annuities. The law became effective for all deaths occurring on or after January 1, 2011.

By example, John Pauper marries Marcy Richwoman who has children from a previous marriage. Marcy prepares an estate plan that places her real estate and accounts in a revocable living trust. Her trust provides a sensible income to John for his life but gives the rest of her vast real estate and retirement holdings to charities and her children. After 15 years, Marcy dies. Under the old law, Marcy's plan would be honored because her assets were held in trust and in retirement accounts. John could not successfully demand more.

Under the new law, John can demand a larger share than otherwise provided by Marcy's estate plan. He would receive 33% of their combined assets plus his sensible income for life. If John had just signed a pre or post marital agreement releasing his spousal elective share, then Marcy's plan would be honored.

The percentage by which an estate can be divided to permit a spousal share changes under the new law. Under the old law the percentage was set at 25%. Under the new law, the size of the spousal elective share is determined by the length of time the spouse and decedent were married to each other. The longer the marriage, the larger the share a surviving spouse is entitled. Surviving spouses married under 2 years receive 5% of all assets; surviving spouses married for 15 years or longer receive 33% of all assets.

If the QTIP and Credit Shelter Trusts contain the power to invade principal for the spouse's benefit, then the trusts will be valued at 100% for determining the interest passing to the surviving spouse. If the QTIP and Credit Shelter Trusts provide income to the surviving spouse, but do not allow invasion of principal, then the Trusts will be valued at 50% of the principal value of the trust.

The new law allows the surviving spouse up to nine months to contest the deceased spouse's estate plan and apply for the increased elective spousal share. What happens if a surviving spouse demands his or her larger share after an estate is distributed? The court can order those assets returned or obtain a judgment against the beneficiaries. In the case of retirement assets, those assets can be returned without offset for the tax liability on the original

distribute. The Oregon Legislature will hopefully resolve this unintended liability in the upcoming session.

As with the current statute, the new law allows spouses to relinquish their elective share rights by an agreement or waiver entered into before or after the marriage and signed by at least the surviving spouse.

Your clients should pay particular attention to this new law if they have children from a prior marriage or plan to give a substantial portion of their estate to charity. Also, the law is likely to undergo additional modification to correct some difficult issues left unresolved by the current law.

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ⁱ In the October, 2009, issue of the *Oregon Estate Planning and Administration Newsletter* William D. Brewer of Hershner Hunter, LLC authored “Planning for the Elective Share” regarding HB 3077.