

# ***FUNDAMENTALS OF SPOUSAL RIGHTS***

## **I. PRELIMINARY DETERMINATIONS**

### **A. Was There a Valid Marriage?**

1. Requirements
2. Same Sex Marriages
3. Civil Unions
4. Domestic Partnerships
5. Common Law Marriage
  - a. Florida Law
  - b. Laws of Other States
    - (i) States that Still Have Common Law Marriages
    - (ii) States that Abolished Common Law Marriages
    - (iii) Cohabitation.

### **B. Was There a Divorce, Dissolution or Annulment of Marriage?**

1. Termination of the Marriage.
2. Dissolution.
3. Effect of Dissolution.
4. Annulment.
5. Rights Under Will.
6. Rights Under Trust.
7. Rights to Non-Probate Assets.

- C. Is the Marriage Void or Voidable?
  - 1. Void Marriages
    - a. Bigamous Marriage
    - b. Incestuous Marriage
    - c. Lack of Capacity to Marry
  - 2. Voidable Marriages
    - a. Consent obtained by undue influence, fraud, or duress
    - b. Prior to October 1, 2010
    - c. Effective October 1, 2010
- D. Were Spousal Rights Waived?
  - 1. Requirements for Waiver
  - 2. Homestead Waiver
    - a. Waiver of Homestead by Deed (Maybe?)
    - b. Waiver of Homestead by Mortgage
    - c. Waiver of Homestead After Death
- E. Are There Equitable Defenses That Would Prevent Spousal Rights?
- F. Does the Slayer Statute Apply - F.S. § 733.802?
- G. Abuse, Neglect, Exploitation, or Aggravated Manslaughter of the Decedent who is Elderly or a Disabled Person Under New F.S. 732.8031.
  - 1. New Provision
  - 2. Application
  - 3. Ratification of Intent

## **II. EFFECT OF DEATH OF SURVIVING SPOUSE TO ENTITLEMENT TO SPOUSAL RIGHTS**

- A. General Rule
- B. Exceptions
  - 1. Family Allowance
  - 2. Elective Share

### **III. SPOUSAL RIGHTS**

- A. Preference to Serve as Personal Representative - F.S. § 733.301
- B. Intestate Share - F.S. § 732.102
- C. Pretermitted Spouse -- F.S. § 732.301; Fla. Prob. R. 5.025
  - 1. General Rule
  - 2. Exceptions
  - 3. Notice
  - 4. Deadline
- D. Family Allowance - F.S. § 732.403 and Fla. Prob. R. 5.407
  - 1. Rule
  - 2. Amount
  - 3. Payment
  - 4. Necessity vs. Reasonable
  - 5. Class of Claim
  - 6. Attorney Fees
- E. Homestead - Art. X, s. 4 and F.S. § 732.401
  - 1. Restrictions on Devise
  - 2. Default Provisions If Homestead Not Validly Devised
    - a. If Decedent Survived by Descendants

- b. If Decedent Not Survived by Descendants
  - 3. Election
    - a. Timing
    - b. Procedure
    - c. Suggested Form
  - 4. Caution
- F. Elective Share - F.S. §§ 732.201 -732.2155
- 1. Elective Share
  - 2. Qualifications
    - a. Decedent must be a Florida domiciliary at time of death
    - b. Who may file
    - c. Must File a Timely Election
      - (i) Time for Filing
      - (ii) Extension
      - (iii) Where to file
  - 3. Property Included in the Elective Estate
  - 4. Overlapping Provisions - F. S. § 732.2045(2)
  - 5. Property excluded from the elective estate – social security
  - 6. Valuation
  - 7. Satisfying the Elective Share
  - 8. Classes of Payment - F.S. § 732.2075
  - 9. Effect of Other Spousal Rights
    - a. Exempt Property

- b. Family Allowance
    - c. Homestead
  - 10. Attorneys' Fees and Costs.
- G. Exempt Property- F.S. § 732.402 and Fla. Prob. R. 5.240
  - 1. Entitlement
  - 2. Definition
  - 3. Exception
  - 4. Timely Election
  - 5. Priority
- H. Community Property
  - 1. Treatment in Florida
  - 2. MUST file claim!
- E. Kelley Probate System
- F. Belcher's Redfearn Wills and Administration in Florida