



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