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Planning to Avoid Spousal Elections

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I. Introduction

§5.1 Why would anyone want to disinherit his or her spouse? At first blush, doing so seems like a rather harsh decision. However, in certain situations, the decision might be quite obvious. For example, clients who are separated or in the process of a divorce may want to change their estate plans and leave nothing to their spouses. Likewise, clients who are in a second or subsequent marriage may want to leave all of their property to their children from a prior marriage. Even in situations where marital discord is not a concern, the issue of disinheriting a spouse, in full or in part, may arise. In some cases, a client has family property, such as inherited property or a family business, that the client prefers to keep on his or her side of the family. Or spouses may each have substantial wealth of their own, and there may be tax reasons for not leaving the property to the surviving spouse. A client's spouse may be receiving governmental assistance or may be terminally ill. A client may fear that his or her spouse is a spendthrift or will give all of the money to a special cause. In all of these situations, a client may wish not to give any property directly to the surviving spouse.

Michigan law may permit a spouse to disinherit his or her spouse by placing all of the deceased spouse's assets in a grantor trust before death. This chapter discusses the rights of a surviving spouse and the use of a grantor trust to circumvent certain of those rights.

II. Rights of the Surviving Spouse**A. Elective (Statutory) Share**

§5.2 In Michigan, a surviving spouse is entitled to elect against his or her spouse's will and take a statutory share. MCL 700.2202. This share is equal to "1/2 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by 1/2 of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death." MCL 700.2202(2)(b). The intestate share is defined at MCL 700.2102. Depending on whether there were surviving issue or parents and whether the issue were from another marriage, the intestate share of the surviving spouse could be as much as the entire probate estate or as little as \$148,000 (as adjusted by the Michigan Department of Treasury for decedents who die in 2016, pursuant to MCL 700.2102(2)) plus one half of the probate estate. The elective share is one half of the intestate share. Accordingly, the elective share could be as much as one half of the intestate estate or as little as \$74,000 (in 2016) plus one quarter of the intestate estate. See the Michigan Department of Treasury website for the annual Estates and Protected Individuals Code cost-of-living adjustments referred to in §2102 (and other sections discussed below). See exhibit 5.1.

Even when a surviving spouse marries a testator after the execution of the testator's will and is therefore a pretermitted spouse entitled to an intestate share of the estate under MCL 700.2301, the surviving spouse is not barred from claiming

an elective share under MCL 700.2202. MCL 700.2301; *Hill v Flint (In re Estate of Sprengle-Hill)*, 265 Mich App 254, 703 NW2d 191 (2005). The intestate share received under MCL 700.2301 reduces the amount available to the spouse under MCL 700.2202.

The elective share is then offset by one-half of the value of property derived from the deceased spouse other than by testate or intestate succession. MCL 700.2202. The offset includes property received through joint ownership or beneficiary designation, MCL 700.2202(7)(c); the value of any transfer made within two years of the decedent's death to the extent that the transfer is subject to federal gift or estate taxes, MCL 700.2202(7)(a); and any transfer made before the date of death subject to a power retained by the decedent that would make the property (or a portion of the property) subject to federal gift or estate taxes, MCL 700.2202(7)(b). Accordingly, property in a grantor trust over which the decedent retains control during his or her lifetime and that passes at death to the surviving spouse constitutes property derived by the spouse from the decedent.

A technical reading of the elective share statute indicates that the intestate share is determined by looking only at property in the probate estate. Assets the deceased spouse controlled at his or her death but that were not subject to probate, such as assets in a grantor trust, would not be subject to an election. Michigan caselaw generally supports this interpretation and holds that the intestate share does not include assets in a grantor trust, at least where there has been no fraud and where the result is equitable vis-à-vis the surviving spouse. *Soltis v First of America Bank—Muskegon*, 203 Mich App 435, 513 NW2d 148 (1994) (interpreting MCL 700.282, the now repealed predecessor to MCL 700.2202); see also *In re Estate of Johnson*, No 201404, 1998 Mich App LEXIS 1609 (May 26, 1998) (unpublished). The Michigan Trust Code, 2009 PA 46, effective April 1, 2010, does not change the status quo. In other states that have adopted the augmented estate concept (see §5.10), a grantor's revocable trust may be subject to a surviving spouse's elective share.

B. Dower Rights

§5.3 In addition to the statutory right of election given to the surviving spouse, Michigan has statutorily retained the right of dower, a right to which only a widow, not a widower, is entitled. This right consists of a lifetime interest in one-third of the real property that the husband owns during marriage and may be elected in lieu of the statutory share. MCL 700.2202(2)(c). Most states have replaced this right with the statutory share concept because land is no longer the primary source of wealth and inchoate dower restricts free alienation of realty.

Michigan's statutory dower provisions have survived scrutiny in a constitutional challenge based on equal protections grounds. *Eifler v Swartz (In re Estate of Miltenberger)*, 275 Mich App 47, 737 NW2d 513 (2007), *leave denied*, 482 Mich 901, 753 NW2d 219 (2008). The Michigan Supreme Court granted leave to examine this question and subsequently vacated the order granting leave. The widow's right of dower generally means that if a husband wishes to transfer title to

his real estate during marriage, his wife must consent by signing the transfer document. The wife, on the other hand, may, as a general rule, give away or transfer her real estate without her husband's signature.

C. Certain Trust Assets Subject to the Surviving Spouse's Election

§5.4 Assets of a grantor trust will be subject to a widow's election if the deceased husband was the donee of a testamentary general power of appointment over trust assets, and the donee's will "exercises the power or manifests an intent to exercise the power." MCL 556.116. For example, if a mother gives her son a lifetime income interest in a trust with a general power to appoint the trust assets by his will, and the son exercises this power, the assets in the trust will be included in his estate for purposes of his widow's election. To further illustrate, a wife might create a marital trust for her husband over which he has a testamentary general power of appointment. If the husband remarries and then dies during the time he exercises his testamentary general power of appointment, his surviving widow may elect against the assets in the marital trust.

D. Other Rights of the Surviving Spouse

1. In General

§5.5 In addition to the rights listed in §§5.2–5.4, the surviving spouse also has rights to a homestead allowance, MCL 700.2402; the family allowance, MCL 700.2403; and exempt property, MCL 700.2404. These rights are described more fully in §§5.6–5.8. Typically, these rights are exercised against the assets in the probate estate of the deceased spouse. To the extent the probate estate is insufficient to satisfy them, however, the deceased spouse's grantor trust generally is subject to these rights. MCL 700.7506(1), .7605(1). Yet, a grantor trust will not be subject to liability for such rights if a personal representative is not appointed for the grantor's estate within four months after the date of the publication of the notice to creditors. MCL 700.7606(1).

In addition, these rights arguably could be exercised against assets held in the deceased spouse's grantor trust on the same theories permitting the spousal election against trust assets. See §§5.11–5.15.

2. Homestead Allowance

§5.6 A surviving spouse is entitled to receive a homestead allowance of \$15,000 (the actual value provided in the statute) in addition to any devise (unless otherwise provided in the deceased spouse's will), intestate share, or elective share. MCL 700.2402. However, for decedents who die after December 31, 2000, the specific dollar amount listed above is to be multiplied by a cost-of-living adjustment factor published by the Michigan Department of Treasury for the calendar year in which the decedent dies. MCL 700.1210. The adjusted amount for 2016 is \$22,000. See exhibit 5.1. The personal representative is obligated to pay the homestead allowance; the surviving spouse is not required to affirmatively elect to receive this amount. *Chelenyak v Veith (In re Estate of Jajuga)*, 312 Mich App 706, ___ NW2d ___ (2015).