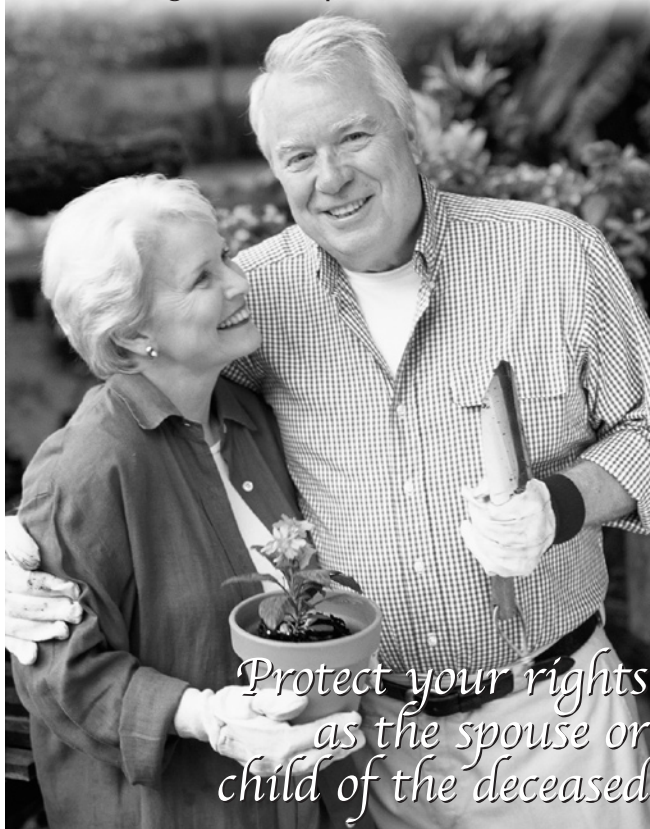


Managing Prosperity: Estate and Retirement Planning for All Ages Rights of Surviving Spouses and Children

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Occasions arise where surviving spouses or children are omitted from the will of the deceased, or the surviving spouse or children perceive that the deceased failed to adequately provide for them. This publication addresses the issues of whether a surviving spouse or child has a right to more than was left to them under the will and, if so, what rights these persons hold.



Rights of a Surviving Spouse

Prior to January 1, 1991, a surviving spouse in Virginia was entitled to a 1/3 interest in any real estate held by the deceased spouse at the time of death. This right was called *dower* (wife's right) or *curtesy* (husband's right). However, some people were transferring real estate prior to death, or converting real estate to personal property, and then writing wills which left nothing to their spouse. Effective January 1, 1991, the Virginia legislature acted to strengthen the rights of surviving spouses.

Currently, whether or not the deceased spouse had a will or left anything to the surviving spouse in the will, the surviving spouse may elect a share in the deceased spouse's *augmented estate*.

The distinction between *tangible* personal property and *intangible* personal property plays a key role in the augmented estate. *Tangible* personal property means items that can be touched and have a physical existence, but not including land, buildings or things attached to land. A chair or pencil is tangible personal property. Stocks, bonds, cash, and promissory notes are *intangible* personal property.

The *augmented estate* is all property passing by will or by law where persons die intestate (without a will) (see VCE Publication 448-078 on Intestacy), to which is added the following:

- (1) the *value* of property (other than tangible personal property received by gift and the proceeds thereof) owned by the surviving spouse and acquired from the deceased spouse without adequate consideration (for example, if surviving spouse receives a

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\$500,000 death benefit from a life insurance policy held by deceased spouse, \$500,000 is added to the augmented estate);

- (2) the *value* of property (other than tangible personal property received by gift and the proceeds thereof) owned by the surviving spouse and acquired from the deceased spouse without adequate consideration, and transferred by the surviving spouse to someone other than the deceased spouse during the marriage (for example, if deceased spouse gave surviving spouse a condominium during their lives, and the surviving spouse gifted the condominium to her daughter from a prior marriage, the value of the condominium is included in the augmented estate);
- (3) the *value* of property transferred to anyone other than for fair market value by the deceased spouse during the marriage if:
 - (i) the deceased spouse retained income or other benefits of the property for life (for example, if deceased spouse gave his/her extramarital lover a rental property, but retained the right to receive the rents during his/her life, the value of the rental property is included in the augmented estate);
 - (ii) the deceased spouse retained the right to take back the property or use the property during his/her life (for example, if the deceased spouse gifted 10,000 shares of Microsoft to a revocable trust (see VCE Publication 448-087 on Trusts), the value of the Microsoft shares is included in the augmented estate);
 - (iii) the property is held by the deceased spouse and another with a right of survivorship (for example, if a deceased spouse set up a certificate of deposit with cash that belonged to him/her, and the account was set up in his/her name and his/her daughter's name, "with right of survivorship," the value of the bank account is included in the augmented estate); or,
 - (iv) the transfer occurred during the calendar year of the deceased spouse's death or any of the five preceding calendar years to the extent that the aggregate value of the transfers to any person exceeded \$10,000 during any calendar year (for example, if deceased spouse gave his/her extramarital lover a Porsche worth \$80,000 in 1996, and died in 2000, \$70,000 (\$80,000-\$10,000) is added to the augmented estate).

The augmented estate, therefore, includes items such as the proceeds of life insurance policies, which are not generally considered part of the deceased's probate estate (see VCE Publication 448-067 on Probate).

The following are **not** included in the augmented estate:

- (1) the *value* of any property transferred by the deceased spouse with the written consent of the surviving spouse (for example, if deceased spouse donated Blackacre to Virginia Tech during his/her life, and surviving spouse signed the deed, the value of Blackacre is not added to the augmented estate);
- (2) the *value* of any property received by the deceased spouse by gift, inheritance or will from someone other than the surviving spouse before or during the marriage as long as the property was maintained as the separate property of the deceased spouse and not mixed with the property owned by the couple jointly (for example, if deceased spouse inherited family farm from his/her parents, and farmed the property himself/herself with no financial or other assistance from surviving spouse, the value of family farm is not included in the augmented estate); and,
- (3) any irrevocable transfer to someone other than the surviving spouse made prior to January 1, 1991 (for example, if deceased spouse gave his/her extramarital lover a diamond necklace on December 25, 1990, the value of the necklace is not included in the augmented estate).

If the surviving spouse wishes to claim the elective share in the augmented estate, he/she must file a claim with the court within 6 months of the date of the deceased spouse's death. If the election is made, the surviving spouse is entitled to 1/3 of the augmented estate if the deceased spouse left surviving children, grandchildren, great grandchildren, or other direct lineal descendants. If no children, grandchildren or great grandchildren, or other direct lineal descendants survive, the surviving spouse is entitled to 1/2 of the augmented estate. The remainder of the property of the estate, after satisfaction of the elective share, passes under the will or by intestacy to someone other than the spouse.

First, the total dollar value of the augmented estate is calculated. Next, the value of the surviving spouse's share is computed. Then, the value of augmented estate property that the surviving spouse already holds (whether received by gift or by reason of the death of the deceased spouse) is subtracted to give the net amount due to the surviving spouse.

For example, if the surviving spouse received the family home by right of survivorship, then the value of the family home is subtracted from the amount due under

the augmented estate rules. The remaining property due to the spouse is taken so as to apportion the liability among the recipients of the augmented estate in proportion to the value of their interests. For example, if the value of the augmented estate is \$1,000,000, and cousin Billy received \$333,333 worth of property from the augmented estate, cousin Billy must contribute 1/3 of the cash or property necessary to give the surviving spouse his/her elective share.

The only persons who must contribute to the elective share of the surviving spouse are:

- (1) any persons originally receiving the property from the deceased spouse;
- (2) any persons receiving the property by gift or inheritance from the persons originally receiving the property from the deceased spouse, but only if they still have the property or money received from sale of the property; and,
- (3) any trustee, executor or other person or institution holding or managing property for another, after receiving notice that the surviving spouse has claimed an elective share in the property.

No one else must contribute money or property to make up the elective share. Even if someone makes a payment or transfers an item of property or other benefit to any person with actual knowledge that a surviving spouse has claimed an elective share in the decedent's estate, that person is not required to reimburse the estate to make up the elective share.

After the surviving spouse has filed a claim for an elective share, the surviving spouse, the deceased spouse's executor or personal representative, or any party in interest may petition the court and ask the court to determine the amount of the elective share. In addition, the court determines who must contribute to the elective share and in what amounts.

If a husband or wife willfully deserts or abandons his/her spouse and the desertion or abandonment continues until the death of the spouse, the deserting spouse may not claim an elective share. The deserting spouse also may not receive any property except under the will of the deceased spouse. If someone alleges desertion or abandonment, the desertion or abandonment must be proven to the satisfaction of the appropriate court.

Rights of Surviving Children

In Virginia, as in most other states, surviving children have no right to inherit anything from their parents. Parents may, therefore, disinherit children for any rea-

son or no reason, or generously provide for undeserving children, at their option.

Three exceptions exist to this rule. First, if someone defrauds a parent into leaving property to someone other than a child, the will may be overturned. For example, your cousin Billy tells your mother to sign a paper entering a contest to win a free television. The paper is actually a will leaving all of your mother's property to cousin Billy. Billy defrauded your mother. The "will" would be invalidated.

Secondly, if someone exercised improper (or in legal jargon "undue") influence over a parent, resulting in a will that disinherits the children, such a will may be invalidated by the court. For example, cousin Billy convinces your mother to visit a lawyer to draw up a will. Cousin Billy has been spending a lot of time with your mother since she won the lottery. Cousin Billy drives your mother to the attorney's office. During the trip, he discusses how wonderful it would be to leave her property to him, since he has so many expenses. Cousin Billy sits in on the meeting between the attorney and your mother. Your mother leaves all of her property to cousin Billy. Cousin Billy may have exercised undue influence over your mother, and the will may be overturned.



Third, if a parent signs a will while incompetent (see VCE Publication 448-080 on Wills), then that will is not effective. In this case, as in the cases of fraud or undue influence, a court would invalidate the improper will. If the deceased parent has a prior will that has not been revoked, then the earlier will governs. If the deceased parent has no other valid will, the property will pass to the heirs at law. (See VCE Publication 448-080 on Wills and VCE Publication 448-078 on Intestate in this series for more information).

Children contemplating a challenge of a parent's will under these circumstances should be aware that such challenges are very difficult. The challenger of the will must prove his/her case, and proof is often extremely complicated. Courts place much importance on the right of each person to leave their property to whom-ever they choose.

Augmented Estate Example

Bo Cephas married his wife, Flo, in 1960. Bo and Flo have a son, Rufus. Bo (decedent) died in 2000. Decedent has a daughter from a prior marriage, Doris, to whom he leaves all his property. Decedent has the following assets (values are as of the date of Bo's death):

Blackacre	\$250,000	owned jointly with right of survivorship with Spouse
Greenacre	\$300,000	given to Daughter in 1996.
Red Acre	\$150,000	inherited by Decedent in 1989, and maintained as separate property.
Personal property	\$150,000	
Gift of Vase	\$50,000	to Virginia Tech in 1990, wife was not aware of gift.
Gift of Cash	\$50,000	to church, Spouse co-signed, 1987.
Life insurance	\$120,000	Son and Daughter named beneficiary.

Asset	Value included in Augmented Estate
Blackacre (held by Spouse as survivor)	\$250,000
Greenacre	\$300,000
Red Acre	\$0
Personal Property	\$150,000
Gift of vase to Virginia Tech	\$50,000
Gift of cash to Church	\$0
Life insurance Son and Daughter	\$120,000
Total:	\$870,000

The value of selected assets is added to the augmented estate. Flo receives the Blackacre, worth \$250,000, since it was held as right of survivorship (see VCE Publication 448-082 on Real Estate). If Flo elects against the will, she can receive property valued at a total of \$290,000, or an additional \$40,000 worth of property (\$290,000 (augmented estate share) less \$250,000 (value of Blackacre, already received)).

Conclusion

Surviving spouses, possess rights in the augmented estate of the deceased spouse. The augmented estate includes not only property owned by the deceased spouse at death, but also certain other property conveyed by the deceased spouse during his/her lifetime. These rules prevent married persons from conveying property to deny their spouse inheritance.

Children hold no right to inherit from their parents. If someone acts to prevent children from receiving the inheritance that their parents desire them to receive, then, under limited circumstances, children may have a court determine their rights.

If someone encounters a situation where children or a spouse may be entitled to contest or elect against a will, an attorney should be consulted. The rules governing these situations are very complex. The issues and calculations are very difficult. The gray areas overwhelm the few clear answers. Anyone involved in planning his/her estate should carefully consider spousal rights, and issues arising when children are omitted from the will or estate plan. Thoughtfulness and meticulous attention to detail during the estate planning process prevent legal battles at the death of the planner. More importantly, good planning will save the large financial and family costs that accrue in these legal battles.

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