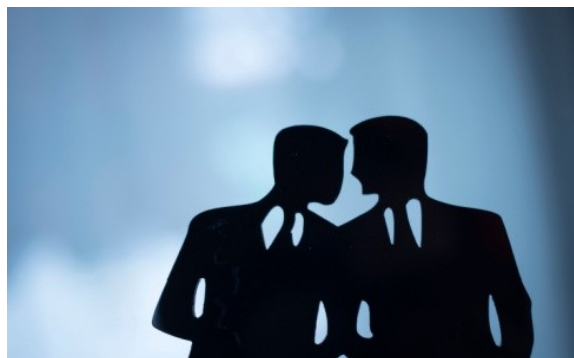


Can Your Spouse Disinherit You? How Marriage Protects the Family

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By Lee Carpenter



It's the stuff of low-budget movies. The grieving widow, dressed in black with her face veiled, sits in the attorney's oak-paneled conference room for the reading of the will.

Mystery surrounds the proceedings. Who among the family members present will inherit the patriarch's vast estate?

The gray-headed attorney breaks the will's wax seal and begins to read. Dramatic music swells as he utters phrases like "being of sound mind," "heirs of the body," and "give, bequeath, and devise."

The widow's gaze intensifies as the attorney comes to the words she has been waiting for: "And to my wife of many years, I leave . . . nothing."

Audible gasps are heard as the widow faints in despair and is carried to a nearby sofa. Had her years of dutiful service meant nothing to the man she loved?

So much fiction. In the real world, there is no reading of the will (the beneficiaries will likely receive a copy by email). Women seldom wear veils. And a would-be disinherited spouse has options.

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In fact, one of the benefits of marriage is protection from disinheritance. In Maryland, a surviving spouse can "elect against the will" by taking a "spousal share." This usually amounts to one-half or one-third of the estate, depending on whether there are children.

But conniving spouses were known to game the system. Some would transfer their property into a trust or name someone other than their spouse as the beneficiary on assets like retirement accounts and life insurance, which transfer outside the will. Maneuvers such as these placed the assets beyond the reach of the spousal share, and surprisingly enough, they were perfectly legal.

To protect the surviving spouse from such attempts at disinheritance, Maryland has expanded the pool of assets that are subject to the elective share. A surviving spouse can now take a share of the "augmented estate." This includes both the "probate" assets of the estate and any "non-probate" assets, which transfer outside the will.

Probate and Non-probate Assets

Probate assets include any property a deceased person owned in his or her name alone, such as a bank account, house, or investment portfolio. This property is controlled by the person's will and generally goes to the beneficiaries named in the document.

Non-probate assets, on the other hand, include things like retirement accounts and life insurance policies, which generally name a beneficiary directly on the asset. The beneficiary will receive the account or death benefit regardless of what the will might say.

Non-probate assets also include most jointly owned property—whether real estate or bank accounts—which passes outside the will to the surviving owner. Assets the late spouse put into a trust are non-probate as well, as are any accounts that name a “transfer on death” or “pay on death” beneficiary.

Before Maryland changed its laws protecting the surviving spouse from disinheritance, he or she was generally limited to a portion of the probate assets when taking an elective share. By adding the non-probate assets to the mix under the augmented estate, the law allows for a larger distribution to the surviving spouse when he or she would otherwise receive little or nothing under the will.

This change to the augmented estate would seem to be a vast improvement over the older setup. There can be times, however, when disinheriting a spouse is completely appropriate. For example, someone who has children from a prior marriage might want them to inherit their entire estate, rather than their new spouse. In this circumstance, a prenuptial agreement can help ensure that the prior children receive their intended inheritance.

The rules surrounding the augmented estate are complex and include many exceptions. Whether you want to leave your entire estate to your spouse or not, consulting with an Estates & Trusts attorney is an essential first step.