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When the Deceased Leaves a Spouse Off of Their Will, California Assumes They Just Forgot

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Just got remarried? Time to update the estate plan! Just had a baby? Time to update the estate plan!

Remembering to update your estate planning documents, (your will and trust), may not be top of mind after every life changing event. These milestone moments take up time, emotions, and let's face it, valuable sleep, so California assumes you probably had positive intentions to update your plan but just didn't make the time, and eventually forgot. In other words, California has a strong public policy to protect surviving spouses who are left out of their deceased spouse's will or trust, if the will or trust was created before marriage.

These laws are meant to protect spouses in a situation where their deceased partner simply forgot to change their will or trust after getting married.

Community Property v. Separate Property in California

California is a community property state, meaning that all property a couple receives during marriage becomes joint property, making two people one legal "community." Any property or debt acquired by one person during the marriage is seen as belonging to the community, and not the individual that accrued it. On the other hand, any property that a person owns before marriage, or property acquired during marriage as a gift or inheritance, or property acquired after separation, is considered separate property, and not belonging to the community.

What is an Omitted Spouse Entitled to?

The term "omitted spouse" refers to a person who marries an individual who already has a will or trust, and the will or trust is not amended after marriage to include the spouse. Unless one of the exceptions below applies, the California Probate Code protects the omitted spouse, and presumes the deceased spouse simply forgot to amend their will or trust after marriage to include their spouse.

If a surviving spouse qualifies as an "omitted spouse," they would receive:

- Half of the community property owned by the decedent at death
- Half of the quasi-community property owned by the decedent at death
- A share of the separate property of the decedent that is equal to what the surviving spouse would have received if the decedent died with no will or trust. However, this share of separate property cannot exceed half of the value of the separate property in decedent's estate.

A Few Exceptions

There are a few exceptions in which a surviving spouse will not receive a share of the deceased spouse's estate:

- The decedent's failure to provide for the spouse intentionally appears in the decedent's testamentary instruments (the will and/or trust)
- The decedent provided for the spouse outside of the will or trust (such as purchasing an annuity plan for the spouse while decedent was alive), and the decedent made it clear that they intended this to be in lieu of providing for the spouse in the will/trust.
- The spouse made a valid agreement waiving the right to share in the decedent's estate.
- If both of the following apply:
    1. The spouse was a care custodian of the decedent who was a dependent adult, and the marriage commenced while the care custodian provided services to the decedent, or within 90 days after those services were last provided to the decedent.
    2. The decedent died less than six months after the marriage commenced.
- Spouse proves by clear and convincing evidence that the marriage between the spouse and the decedent was not the product of fraud or undue influence.

These exceptions are to prevent surviving spouses from recovering more than the decedent wanted or what the couple agreed to, and to prevent caretakers from taking advantage of dependent adults.

What About a Prenup?

A prenuptial agreement that is properly drafted and signed by informed parties may qualify for the exception above. This is because it can be considered a waiver of the spouse's right to share in the decedent's estate. However, the wording must be explicitly clear and unequivocal, since the public policy in California is to provide for a surviving spouse with the deceased spouse's estate. In fact, courts even have the power to invalidate a prenuptial agreement; for example, if it is found to have been executed under undue duress, fraud, or undue influence.

Children Left Out of a Will or Trust

On a related note, California also has an "Omitted Child" statute. If you have a child who is born, adopted, or discovered after you create your will or trust, and you have not provided for the child in the will or trust, the child is considered an "omitted child." Under California law, that omitted child is entitled to the same share they would have received if you died without a will or trust.

For more information on this topic, please refer to my newsletter from March 2020 entitled, *Just Like Kobe Bryant's Daughter, Kids Have Rights in the Family Trust.*

MARCH 2020: Just Like Kobe Bryant’s Daughter, Kids Have Rights in the Family Trust.

Essentially, any time you have a life changing event such as marriage, children, real estate purchases, you should take the time to update your estate plan with explicit asset distribution, or lack thereof, to ensure your intentions are granted.

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