



**Transfers of Real Property to a Surviving Spouse**  
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A previous article in this newsletter series reviewed the estate of tenancy by the entirety and its various issues. Unlike the estate of tenancy by the entirety where title does not pass to the surviving spouse as a result of death, but due to the vesting document, there are mechanisms for a decedent's real property to pass to a surviving spouse when the decedent is the sole owner, or when the spouses own real property as tenants in common. There are five ways real property can be transferred to the surviving spouse; those five ways are devise, Summary Administration, Elective Share, Intestate Succession and the Election to take a Life Estate In Lieu of Intestate Share or Elective share.

Of course, a decedent can devise property to a surviving spouse by will as they could to any person. A second way to transfer property to a surviving spouse is by Summary Administration. A Summary Administration can be petitioned for if there has not yet been an application for letters of testamentary and if the surviving spouse is 1) the sole devisee if the decedent is testate or 2) the sole heir if intestate; if the decedent is partially testate and partially intestate, then the surviving spouse must be the sole devisee for the testate portion and the sole heir for the intestate portion. The petition must be verified as true by the surviving spouse and establish 12 elements listed in NCGS 28A-28-2. The clerk determines if all of the elements are met and can then issue an order for Summary Administration, the effect of which is to end the administration and vest title to real property in the surviving spouse so that the property is not subject to the notice to creditors provisions of NCGS 28A-17-12.

The third way for real property to be transferred to the surviving spouse is by Elective Share. Prior to 2001, a surviving spouse could dissent from the decedent's will if they took less than an intestate share under the will. Now, the surviving spouse can claim an elective share, which is the applicable share of the total assets (total assets as defined in NCGS 30-3.2(4) as the total assets reduced by year's allowance to persons other than the surviving spouse and claims) less the value of the property passing to the surviving spouse (as defined in NCGS 30-3.2(2c) as property already passing to the surviving spouse reduced by death taxes and claims allocated to property passing to the surviving spouse). The applicable share of the total net assets is dependent on the length of marriage. The claim for an Elective Share must be filed within six months from the issuance of the letters testamentary and within the lifetime of the surviving spouse. But once filed, the surviving spouse's personal representative (PR) succeeds to the claim. This claim is made by filing a petition with the Clerk of Superior Court and sending a copy to the personal representative. Once this petition is filed, the PR must submit information to the Clerk concerning the total asset value. The Clerk then determines whether the surviving spouse is entitled to the elective share, determines the value of the elective share and ultimately orders the PR to transfer the determined amount to the surviving spouse. The Order must contain findings of fact and conclusions of law in arriving at the decedent's total net assets, the property passing to the surviving spouse and the elective share. This order is

stayed by an appeal to the Superior Court where the Superior Court Judge determined is not bound by the Clerk's findings of fact rendering the appeal a trial de novo. Once a petition for an elective share is filed, the surviving spouse can request the Clerk to issue a Standstill Order which freezes assets both in the estate and assets already distributed. The procedure for an Elective Share is in the nature of a law suit and is detailed in NCGS Chapter 30, Article 1A. The right to claim an elective share can be waived, but such waivers may be suspect, as all a surviving spouse has to do is prove to the Clerk that the waiver was not voluntary, or that the financial situation of the decedent was not fully disclosed.

The fourth way for real property to be transferred from a decedent to a surviving spouse is through Intestate Succession. When one dies without a will, NCGS 29-14 governs what the surviving spouse receives. The laws and formulas for intestate succession have changed over the years. The undivided interest in real property a surviving spouse receives is dependent on the decedent's lineal descendants or surviving parents. The surviving spouse receives:  $\frac{1}{2}$  when also survived by one child,  $\frac{1}{3}$  undivided interest when survived by two or more children,  $\frac{1}{2}$  when survived by no children but by one or both parents, and the entire fee when survived by neither parents nor children. The right to receive property through intestate succession is barred by acts described in NCGS 31A-1 which include divorce, separation and adultery, as well as the unlawful killing of the decedent under NCGS 31A-4.

The final way for a decedent's real property to be transferred to the surviving spouse is by the Election to take a Life Estate in Lieu of an Intestate Share or Elective Share under NCGS 29-30. This election can be taken if the decedent spouse was intestate or if the surviving spouse files for an elective share under NCGS 30-3.1. This elective right is an inchoate interest and not an estate in land that confers any ownership or possessory interest. It does, however, limit the owner's ability to sell the land. This Elective Life Estate can be waived under NCGS 52-10 or by joining in the owner's deed or deed of trust. If this election is made, the surviving spouse takes a life estate in one third in value of all real estate owned during the marriage that was not previously waived. Also this election is conclusively deemed waived if not made in the manner and time provided in NCGS 29-30 (c). This life estate interest first is applied to the dwelling home, if owned solely by the decedent at the time of death. If the dwelling is more than one third of value of all property owned by decedent, the surviving spouse still receives a life estate in the dwelling. If the dwelling is valued less than one third of the value of all real estate owned and not released, or if the dwelling is not solely owned by the decedent, then the surviving spouse can elect to take a life estate in other real property. This life estate is not subject to any estate debts. The election must be made within 12 months of the date of death if letters have not been issued. If letters of administration have been issued, and the decedent is intestate, then the election must be made within one month after the expiration of the time for filing claims against the estate. If letters testamentary have been issued, and the decedent is testate, then the election must be made within one month after the expiration of the time for filing a claim for an elective share. It is NCGS 29-30 which presents the risk that is unacceptable to buyers, real estate attorneys and title companies to consummate a transaction without the joinder of a non-owning spouse.

This is a brief overview of the ways a surviving spouse can obtain ownership of property owned solely by the decedent spouse. A fuller understanding of the procedures used to obtain title can only be had with the review of the general statutes.