

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 881

(Senator Kelley)

Judicial Proceedings

Estates and Trusts - Elective Share of Surviving Spouse

This bill establishes new provisions that authorize a surviving spouse to take a one-half or one-third elective share of the *augmented* estate of the decedent (depending on whether there is a living lineal descendent of the decedent) reduced by the value of the “spousal benefits” (that is, those assets passing to the surviving spouse by reason of the decedent’s death or that are held in trust for the spouse’s benefit). The augmented estate is the value of the decedent’s gross estate for federal estate tax purposes, which includes probate and nonprobate assets, reduced by specified estate-related expenses. The bill repeals existing provisions allowing for a surviving spouse to take a one-half or one-third elective share of the net probate estate of the decedent, as specified. The bill applies only prospectively.

Fiscal Summary

State Effect: The bill is not expected to materially affect general fund revenues, as any impact on tax liabilities is anticipated to be negligible. State expenditures are not affected; the bill’s changes can be implemented with existing resources.

Local Effect: The bill is not expected to materially affect local government operations or finances. Any impact on local tax revenues is anticipated to be negligible. Local expenditures are not affected.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Defined Terms: The “augmented estate” is the value the decedent’s gross estate for federal and Maryland estate tax purposes is reduced by:

- funeral and administration expenses payable from the gross estate of the decedent;
- family allowances;
- enforceable claims and debts against any part of the gross estate of the decedent;
- the value of any assets included in the gross estate that were held in a trust of which the decedent is not a settlor;
- the value of any real property included in the gross estate by reason of the decedent’s retention of a life estate in the real property if, at the time of the decedent’s death, the decedent held no power of disposition over the property; and
- the value of any real property included in the gross estate of the decedent that is not subject to the jurisdiction of the State.

“Spousal benefits” are the aggregate value of property passing to or in trust for the benefit of the surviving spouse by reason of a decedent’s death and property held for the benefit of the surviving spouse in any trust created during a decedent’s lifetime of which the decedent was a settlor, reduced by:

- any jointly owned property that is not included in the augmented estate;
- the value of assets held in any trusts of which the surviving spouse is not the sole beneficiary;
- one-quarter of the value of assets passing to (or held in) a trust that qualifies for the estate or gift tax marital deduction; and
- one-third of the aggregate value of any other trust assets held for the surviving spouse’s exclusive benefit created during the decedent’s lifetime, or passing by the decedent’s death or held at the time of the decedent’s death, that are not more restrictive than a special needs trust.

Right to Take an Elective Share of an Augmented Estate: If there is no surviving issue (living lineal descendant), the surviving spouse of a decedent may elect, subject to limitations and conditions, to take an amount equal to one-half of the value of the augmented estate reduced by the value of all spousal benefits, instead of property left to the surviving spouse by will or trust. If there is surviving issue, the surviving spouse may take an amount equal to one-third of the value of the augmented estate. The value of the augmented estate is equal to the value of the decedent’s gross estate reduced by the value of all spousal benefits.

The right of the election is personal to the surviving spouse and cannot be transferred or exercised after the surviving spouse's death. If the surviving spouse is a minor, disabled, or incapacitated, the election may be exercised by (1) court order; (2) a guardian of the property of the surviving spouse who has been specifically authorized to make the election by order of the court supervising the guardianship; or (3) an agent designated by the surviving spouse under a power of attorney that specifically authorizes the agent to make the election.

Before exercising a right of election, a guardian of the property, or agent designated under a power of attorney, must deliver notice of the election to all interested persons in the decedent's estate and all persons who would inherit from the surviving spouse, if the spouse died intestate and unmarried. An exercise of the right to an elective share is valid unless an interested party makes an objection to the election in court within 30 days following delivery of the notice of the election and a court, following a hearing, rules that the election is not in the best interests of the surviving spouse.

Making an Election: An election to take an elective share must (1) be in writing and signed by the surviving spouse, or in the case of a minor or disabled individual, by the court having jurisdiction; and (2) be filed in the court in which the personal representative of the decedent was appointed; or (3) if no personal representative has been appointed, be filed in the court for the jurisdiction in which the decedent resided at the time of death.

Notice of the filing of an election to take an elective share may be delivered to the trustee of each revocable trust of the decedent or to the person responsible for filing the estate tax return if different from the trustee. The filing of the election by the procedure described above is considered adequate notice to the personal representative, the trustee, or the person responsible for filing the estate tax return. Persons receiving notice of an election to take an elective share must promptly deliver notice of the election to each person from whom any portion of the elective share may be payable. Within 60 days after the date a trustee of a revocable trust acquires knowledge of the decedent's death, the trustee must notify the surviving spouse of the existence of the trust, the identity of the trustees, and the surviving spouses' right to request a copy of the trust instrument.

A surviving spouse must provide all information relevant to the calculation of the elective share that is in his or her possession and not otherwise available, on receipt of a written request by (1) the personal representative of the decedent; (2) the trustee of any revocable trust of the decedent; or (3) the person responsible for filing the estate tax return.

The election by a surviving spouse to take an elective share must be made within the later of (1) nine months after the date of the decedent's death or (2) six months after the first appointment of a personal representative. A surviving spouse may file a petition for an extension with the court within the period for making an election and must provide a

copy of the filing to the personal representative. For good cause shown, the court may grant an extension of time for making an election, in three-month increments.

Waiver of Right to Elective Share: The right of election may be waived before or after marriage by a written contract, agreement, or waiver signed by the party waiving the right of election. Unless a waiver specifies to the contrary, a waiver of “all rights” or equivalent language constitutes a waiver of all rights of family allowance and elective share by each spouse in the property of the other, as does a complete property settlement entered into after or in anticipation of a separation or divorce. The waiver of all rights is an irrevocable renunciation by each spouse of all benefits that would otherwise pass to the spouse from the other by intestate succession, by elective share, or by virtue of a will or revocable trust of the present or prospective spouse executed before the waiver or property settlement.

Court Modification of Elective Share: A court may modify the calculation of the value of an augmented estate or spousal benefits or the sources of the payment of an elective share if it finds that the calculation or payment of an elective share would frustrate the purposes of the law, on the petition of:

- the surviving spouse;
- the personal representative of the decedent;
- the trustee of any revocable trust of the decedent;
- the person responsible for filing the estate tax return;
- any interested person in the estate of the decedent;
- any qualified beneficiary of any revocable trust of the decedent; or
- any other person who may be required to pay any portion of the elective share.

In the court’s consideration of a petition, there is a rebuttable presumption that transfers, or arrangements that became irrevocable before the decedent’s marriage to the surviving spouse are excluded from the augmented estate. In determining whether an asset should be included in the value of the augmented estate or the spousal benefits, the court may consider the circumstances of the transfer or arrangement, including (1) the extent of control retained by the decedent; (2) the motivation for the transfer or arrangement; (3) the familial relationship between the decedent and the beneficiary; (4) the degree to which the transfer or arrangement deprives the surviving spouse of property that otherwise might form part of the augmented estate or spousal benefits; (5) the degree to which the transfer or arrangement provides a benefit to the surviving spouse beyond what would be available to the surviving spouse as part of the elective share; and (6) the surviving spouse’s assets.

A personal representative is entitled to reasonable commissions or attorney’s fees in connection with court proceedings regarding modifications of an elective share. Any

amount of compensation or attorney's fees consented to by all interested persons is presumed to be reasonable.

Payment of Elective Share: Unless otherwise provided for by will, trust instrument, or written agreement, payment of the elective share must be made from the portion of the decedent's probate estate that is included in the augmented estate and does not constitute any part of the spousal benefits. To the extent that the elective share is not fully paid from the probate estate, payment may be made from the portion of any revocable trust of the decedent included in the augmented estate and that does not constitute any part of the spousal benefits. If there is more than one revocable trust, the payment is apportioned among the trusts in proportion to the value of the assets of each that are available to satisfy the elective share.

If the payment of the elective share cannot be satisfied from the sources stated above, it must be paid by the recipients of any other portions of the augmented estate that do not constitute any part of the spousal benefits unless payment is preempted by federal law and prorated among the recipients in proportion to the value of the assets received by the recipient.

Unless the surviving spouse and the payor agree otherwise, in writing, each person required to pay a portion of the elective share must make payment in cash. The payment must also be made with a prorated share of each item of property from which that portion of the elective share can be paid or with other property acceptable to the surviving spouse in an amount equal to the fair market value of that portion.

Effect of Election: By electing to take the elective share, the surviving spouse receives only spousal benefits and the elective share itself. On election to take an elective share, all property or other benefits that would have passed to the surviving spouse under the will, other than any portion of the spousal benefits, is treated as if the surviving spouse had died before the execution of the will. A surviving spouse or the person claiming on behalf of the surviving spouse may not receive property under the will, other than property forming any portion of the spousal benefits.

If a surviving spouse is the personal representative of the decedent's estate and elects to take an elective share of an augmented estate, the surviving spouse must be removed as personal representative for the estate unless a court finds that continuing the personal representative in office is in the best interests of the estate.

Unless the terms of a trust, court order, or written agreement between the settlor and the settlor's surviving spouse specify otherwise, a surviving spouse who is the trustee or an advisor to the trustee of a formerly revocable trust of a settlor is removed as trustee or advisor on the date of filing of an election to take an elective share. After an election to

take an elective share becomes final, the surviving spouse may not (1) serve as trustee or an advisor to the trustee of the trust or (2) exercise any trust or fiduciary powers provided for in the terms of the trust. Additionally, all property or other benefits that would have passed to the surviving spouse under the trust, other than any portion of the spousal benefits, must be treated as if the surviving spouse had died on the day before the settlor. The surviving spouse or a person claiming through a surviving spouse may not receive property, other than property forming any portion of the spousal benefits, under the trust.

Application: The bill applies only prospectively and may not be applied or interpreted to have any effect on or application to any estate opened before the bill's October 1, 2017 effective date or to any revocable trust of a decedent that became irrevocable by reason of the death or incapacity of the settlor before the effective date of the bill.

Current Law: Instead of property left to a surviving spouse by will, a spouse may elect to take a one-third share of the net estate if there is also a surviving issue (living lineal descendant) or a one-half share if there is no surviving issue. "Net estate" is defined as the property of the decedent passing by testate succession (by will), without a deduction for State or federal estate or inheritance taxes and reduced by funeral and administration expenses, family allowances, and enforceable claims and debts against the estate. The net estate and property allocable to a share of a surviving spouse is valued as of the date or dates of distribution.

An election to take an elective share is filed in court and must be made within the later of nine months after the date of the decedent's death or six months after the first appointment of a personal representative under a will, though extensions may be sought, as specified. Upon the election of the surviving spouse to take the elective share, all property or other benefits which would have passed to the surviving spouse under the will are treated as if the surviving spouse had died before the execution of the will. The surviving spouse may withdraw the election at any time before the expiration of the time for making the election. Contribution to the payment of the elective share is prorated among all legatees. Instead of contributing an interest in specific property to the elective share, a legatee or legatees, but not the personal representative, may pay the surviving spouse in cash or other property acceptable to the spouse. Unless specified in the will, a legatee is not entitled to a set-aside or compensation from another legatee, or from another part of the estate of the decedent. However, an interest renounced by the surviving spouse and not included in the share of the net estate received by the surviving spouse may be subject to a set-aside for the benefit of individuals who are specified family members of the decedent, in order to comply with the wishes of the testator.

The right of election is personal to the surviving spouse and not transferable and cannot be exercised subsequent to the surviving spouse's death. If the surviving spouse is younger than age 18 or under disability, the election may be exercised by order of the court having

jurisdiction of the person or property of the spouse or person under disability. The right of election may be waived before or after marriage by a written contract, agreement, or waiver.

A surviving spouse who has elected to take against a will is entitled to the surviving spouse's portion of the income earned on the net estate during the period of administration based on a one-third or one-half share, whichever is applicable. If one or more distributions have been made to a surviving spouse or another person that require an adjustment in the relative interests of the beneficiaries, the applicable share must be adjusted.

Background: Increasingly, a substantial portion of the property owned by married persons does not become part of the estate subject to probate. Various interests such as life insurance, annuities, pensions, and some trusts do not become part of the probate estate. Recently, augmented estates, which generally include all or some of the historically nonprobate interests, have been used as a tool for a surviving spouse to receive a larger share of the decedent spouse's property.

In Maryland, a decedent's surviving spouse has a statutory right to elect to take a share of the net probate estate (one-third if there are one or more surviving lineal descendants or one-half if there is no surviving lineal descendant) instead of property left to the surviving spouse by will. In addition to Maryland, 39 other states also provide a right of election to a surviving spouse. Of the 10 remaining states, 9 are community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin), where property acquired with income earned during a marriage is owned jointly by both spouses. Upon the death of one spouse, the surviving spouse is entitled to one-half of the community property. One state, Kentucky, still recognizes the ancient doctrine of "dower and curtesy," under which a surviving spouse may release the property given to him or her by will and receive a one-third share of any real estate owned by the decedent.

Application of Elective Share: In 20 states, including Maryland, a surviving spouse's elective share applies to the "net probate estate," (*i.e.*, property of the decedent passing by will that is reduced by specified estate-related expenses). In these states, a surviving spouse can be effectively disinherited if most of the decedent's assets pass outside probate, for example, through joint tenancies with right of survivorship, bank or brokerage accounts with a "transferrable on death" or "payable on death" beneficiary designation, or *inter-vivos* trusts. Conversely, if the decedent has adequately provided for the surviving spouse through nonprobate assets, an election by the surviving spouse to take the statutory share of the net probate estate can result in the spouse receiving more than his or her "fair share."

The other 20 elective share states (Alaska, Colorado, Delaware, Florida, Hawaii, Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina,

North Dakota, Oregon, South Dakota, Utah, Virginia, and West Virginia) have addressed this situation by expanding the pool of assets to which the elective share applies. In these states, the elective share applies to the “augmented estate,” which includes specified nonprobate as well as probate assets. Of these 20 states, at least 14 states’ laws are substantially similar to one of the versions of the Uniform Probate Code (UPC).

Uniform Probate Code: The UPC was originally promulgated by the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission (ULC)) in 1969. The concept of the “augmented estate” was introduced in this version of the UPC. The ULC then substantially revised provisions relating to the elective share of a surviving spouse in 1990. Reorganization and additional clarifying provisions were promulgated in 1993 and 2008.

Additional Information

Prior Introductions: HB 1229 of 2016, a similar bill, passed the House with amendments and was referred to the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, SB 913, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. HB 281 of 2015, a similar bill, passed the House with amendments and received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. SB 633 of 2012, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: HB 722 (Delegate Dumais) - Health and Government Operations.

Information Source(s): Comptroller’s Office; Judiciary (Administrative Office of the Courts); Register of Wills; Department of Legislative Services

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