

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

Senate Bill 633

(Senator Frosh)

Judicial Proceedings

Estates and Trusts - Elective Share - Augmented Estate

This bill repeals existing provisions allowing for a surviving spouse to take a one-half or one-third elective share of the net estate of the decedent (depending on whether there is a living lineal descendant of the decedent) and establishes new provisions that set forth a surviving spouse's right to take a 50% elective share of the "marital property portion of the augmented estate." The bill applies only prospectively.

Fiscal Summary

State Effect: General fund revenues may decrease significantly as a result of additional personnel hired in register of wills offices to manage the process of holding funds and property affected by an elective share petition. If an additional position is needed in each jurisdiction, general fund revenues may decrease by approximately \$1 million annually. General fund revenues from estate and inheritance taxes may also be affected by the new method of calculating an elective share. Any such impact cannot be reliably estimated, but is expected to only affect taxes collected on a limited number of estates.

Local Effect: The bill is not expected to affect local government finances.

Small Business Effect: None.

Note: Expenses of registers of wills are paid for with fees and a portion of inheritance taxes collected by the offices, with the remaining funds deposited in the State general fund. Any additional administrative costs for the registers of wills result in a decrease in general fund revenues.

Analysis

Bill Summary:

Right to Take an Elective Share and the Augmented Estate

The surviving spouse of a decedent who dies domiciled in the State has a right of election, subject to limitations and conditions, to take an elective share amount equal to 50% of the value of the marital property portion of the augmented estate. A supplemental elective share is also available where generally the surviving spouse's assets and elective share from the estate are less than \$75,000, to bring the surviving spouse's assets after receipt of the elective share and supplemental elective share (exclusive of certain assets) to \$75,000. The value of the augmented estate consists of:

- (1) the net probate estate of the decedent – the value of the probate estate reduced by funeral and administration expenses, homestead and family allowances, exempt property, and enforceable claims;
- (2) nonprobate transfers by the decedent to others – consisting of:
 - (a) property owned or owned in substance by the decedent immediately before death that passed outside of probate at the death of the decedent;
 - (b) property transferred in specified forms by the decedent during the marriage (in which generally the decedent retained some right to or power over);
 - (c) specified types of property transferred by the decedent during marriage and during the two-year period prior to the death of the decedent;
- (3) nonprobate transfers by the decedent to the surviving spouse (excluding property passing under the federal Social Security system) – consisting of all property that passed outside of probate at the death of the decedent from the decedent to the surviving spouse by reason of the death of the decedent;
- (4) property owned by the surviving spouse at the death of the decedent and any other property that would have been included in nonprobate transfers by the surviving spouse to others had the spouse been the decedent.

Similar to the probate estate, the value of property under numbers (2) through (4) is reduced by enforceable claims against included property and certain exclusions apply to

nonprobate transfers by the decedent to others where consideration was received or the surviving spouse consented in writing to the transfer.

Marital Property Portion of the Augmented Estate

The value of the marital property portion of the augmented estate is determined by applying specified percentages relating to the number of years the decedent and surviving spouse were married to each other to the augmented estate. The percentages are shown below in **Exhibit 1**.

Exhibit 1
Percentages for Determining the Marital Property
Portion of the Augmented Estate

<u>Duration of Marriage</u>	<u>Percentage</u>
Less than 1 year	3%
1 year but less than 2 years	6%
2 years but less than 3 years	12%
3 years but less than 4 years	18%
4 years but less than 5 years	24%
5 years but less than 6 years	30%
6 years but less than 7 years	36%
7 years but less than 8 years	42%
8 years but less than 9 years	48%
9 years but less than 10 years	54%
10 years but less than 11 years	60%
11 years but less than 12 years	68%
12 years but less than 13 years	76%
13 years but less than 14 years	84%
14 years but less than 15 years	92%
15 years or more	100%

Making the Election

The election is made by filing a petition in court and mailing or delivering the petition to the personal representative of the estate, if any, within nine months after the date of the death of the decedent or within six months after the probate of the decedent's will, whichever is later. However, if the petition is filed more than nine months after the decedent's death, nonprobate transfers by the decedent to others are not included in the augmented estate for the purpose of computing the elective share unless an extension is obtained. After notice to interested parties and a hearing, the court determines the elective share and supplemental elective share amounts and orders payment of the amounts. The surviving spouse may withdraw the demand for an elective share at any time before entry of a final determination.

Satisfying the Elective Share

Certain rules apply to how the elective share is satisfied (or paid) from the augmented estate. Generally, amounts of the elective share (beyond what passes to the surviving spouse through the probate estate by testate or intestate succession and/or nonprobate transfers and the marital property portion of the surviving spouse's assets) are apportioned among the recipients of (1) the remainder of the net probate estate; and (2) nonprobate transfers by the decedent to others. The elective share is apportioned among certain nonprobate transfers by the decedent to others before being apportioned to others.

Other Provisions

The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed. The election may be exercised on behalf of the surviving spouse by the conservator, guardian, or agent of the surviving spouse under the authority of a power of attorney. If the election is exercised on behalf of a surviving spouse who is incapacitated, the elective share property due from the probate estate and recipients of nonprobate transfers by the decedent to others is administered by a trustee for the support of the surviving spouse, subject to certain requirements.

The right of election of a surviving spouse may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse. Certain circumstances are specified, however, where a waiver is not enforceable.

The bill establishes the liability of a payor or third party that makes a payment or transfers an item of property or other benefit to a beneficiary designated in a governing instrument, or who took other action in good faith reliance on the validity of the governing instrument, on request and satisfactory proof of the death of the decedent. The

payor or third party is only liable for payments made or actions taken after receiving written notice either of an intention to file a petition for the elective share or that a petition has been filed. After receiving such notice, the payor or third party may pay an amount owed or transfer or deposit an item of property to a court with jurisdiction over the matter and be discharged from all claims for the amount paid or value of the property transferred or deposited. The court holds the funds or property for disbursement in accordance with an elective share determination or disbursement to the designated beneficiary.

Current Law: Instead of property left to a surviving spouse by will, the 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.

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 is treated as if the surviving spouse had died before the execution of the will.

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. 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.

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 under 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.

Background: The bill is modeled after elective share provisions in the Uniform Probate Code (UPC) promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) which were revised in 2008. Comments in the UPC indicate that the elective share provisions reflect the contemporary view of marriage as an economic partnership. The comments describe the partnership theory of marriage generally as a view that both spouses contribute, whether monetarily or non-monetarily, to the earnings

and acquisitions of and during the marriage partnership and are therefore entitled to a half interest in those earnings and acquisitions.

The elective share provisions of the UPC use the table of percentages in relation to the length of a marriage to approximate what portion of the augmented estate (generally the spouses' combined assets) represents the "marital property portion" (what was acquired during the marriage) of the estate. A 50% elective share is then applied to the marital property portion of the augmented estate.

State Fiscal Effect: General fund revenues may decrease significantly to the extent that register of wills offices require additional personnel to manage the process of holding funds and property affected by an elective share petition which are paid or transferred to the orphans' court pursuant to the bill. Registers of wills serve as the clerks for the orphans' courts and are currently not set up to hold funds and property of decedents. The registers of wills indicate that a fiscal officer position in each jurisdiction may be required to manage that process.

Expenses of register of wills offices are paid for with fees and a portion of inheritance taxes collected by the offices, with the remaining funds deposited in the State general fund. The cost of each additional position in the register of wills offices would therefore result in a reduction in general fund revenues. The salary and benefits for a fiscal officer in a register of wills office is \$43,841.

General fund revenues may also be affected by the new method of determining the elective share established in the bill, to the extent it affects the amount of property that is obtained by surviving spouses that petition for an elective share. Estate and inheritance taxes are not paid on property that passes to a surviving spouse. The impact cannot be reliably estimated, but would only affect taxes collected on a limited number of estates. Currently, based on the number of recent elections to take an elective share in one county (approximately 10 out of 3,600 estates), it appears that statewide, elections likely are made in less than 1% of estates.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Comptroller's Office, Judiciary (Administrative Office of the Courts), Register of Wills, National Conference of Commissioners on Uniform State Laws, Department of Legislative Services

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Analysis by: Scott D. Kennedy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510