

Department of Legislative Services  
Maryland General Assembly  
2014 Session

FISCAL AND POLICY NOTE

Senate Bill 621 (Senator Frosh)  
Judicial Proceedings

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Estates and Trusts - Elective Share of Surviving Spouse - Augmented Estate

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This bill repeals provisions allowing 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 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.

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Fiscal Summary

**State Effect:** This bill is not expected to materially affect general fund revenues, as any impact on inheritance and estate taxes is anticipated to be negligible. State expenditures are not affected as the bill's changes can be implemented with existing resources.

**Local Effect:** The bill is not expected to materially affect local government finances or operations.

**Small Business Effect:** None.

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Analysis

**Bill Summary:**

*Right to Take an Elective Share and the Augmented Estate*

The surviving spouse of a decedent has a right of election, subject to limitations and conditions, to take an amount equal to 50% of the value of the marital property portion of

the augmented estate, instead of property left to the surviving spouse. The value of the augmented estate consists of:

- the net probate estate of the decedent – the value of the probate estate reduced by funeral and administration expenses, family allowances, and enforceable claims and debts against the estate;
- nonprobate transfers by the decedent to others – consisting of property owned or owned in substance by the decedent immediately before death that passed outside probate at the death of the decedent;
- 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; and
- 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 (reduced by enforceable claims against the surviving spouse).

**Exhibit 1** shows an example of the calculation to determine the value of the augmented estate.

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**Exhibit 1**  
**Calculating the Value of the Augmented Estate**  
**(\$ in Thousands)**

<u>Category</u>	<u>Form</u>	<u>Value</u>
Net Probate Estate of the Decedent	To spouse	\$10
	To child	10
	To friend	5
Nonprobate Transfers to Others	Revocable trust for child	\$1,000
	IRA to child	175
	Life insurance for friend	150
Nonprobate Transfers to Surviving Spouse	Decedent's one-half of residence	\$100
Property Owned by Surviving Spouse at Death of Decedent	Surviving spouse's property	\$50
	One-half of residence	100
<b>Augmented Estate</b>	<b>=</b>	<b>\$1,600</b>

Note: *For illustrative purposes*, the examples throughout this fiscal and policy note assume that (1) the surviving spouse was married to the decedent for 10 years and (2) the residence of the surviving spouse and decedent was owned as tenants by the entirety and is worth \$200,000.

Source: Department of Legislative Services

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*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.

**Exhibit 2** shows the relevant percentages and an example of the calculation to determine the marital property portion of the augmented estate.

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**Exhibit 2**  
**Calculating the Marital Property Portion of the Augmented Estate**

<u>Duration of Marriage</u>	<u>Percentage</u>
Less than 6 years	30%
6 years but less than 15 years	60%
15 years or more	100%

Since the surviving spouse was married to the decedent for 10 years, the marital portion of the augmented estate is 60% of the augmented estate. Here, the total value of the augmented estate as calculated under Exhibit 1 is \$1,600; therefore, the marital property portion of the augmented estate is \$960 (60% of \$1,600).

Source: Department of Legislative Services

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*The Elective Share*

The elective share is equal to 50% of the value of the marital property portion of the augmented estate. The surviving spouse has the right to elect if the elective share is greater than the total value of the net probate estate of the decedent left to the spouse, nonprobate transfers to the surviving spouse, and marital property portion of the property owned by the surviving spouse at the death of the decedent.

**Exhibits 3 and 4** show examples of calculations to determine the elective share and whether a surviving spouse has a right to elect.

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**Exhibit 3**  
**Calculating the Elective Share**

A surviving spouse may elect to take an amount equal to 50% of the value of the marital property portion of the augmented estate. The marital property portion of the augmented estate as calculated under Exhibit 2 (\$ in thousands) is \$960; therefore, the surviving spouse's elective share is \$480 (50% of \$960).

Source: Department of Legislative Services

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**Exhibit 4**  
**Augmented Estate**  
**Does the Surviving Spouse Have a Right to Elect?**  
**(\$ in Thousands)**

To determine whether a surviving spouse has a right to elect, the elective share must be greater than the total value of the net probate estate of the decedent left to the spouse, nonprobate transfers to the surviving spouse, and the marital property portion (60% as determined under Exhibit 2) of the property owned by the surviving spouse at the death of the decedent.

If the elective share is less than the total value of the net probate estate of the decedent left to the spouse, nonprobate transfers to the surviving spouse, and the marital property portion (60% as determined under Exhibit 2) of the property owned by the surviving spouse at the death of the decedent, then the surviving spouse does not have a right to elect.

<u>Category</u>	<u>Form</u>	<u>Value</u>
Net probate estate of the decedent	To Spouse	\$10
Nonprobate transfers to surviving spouse	Decedent's One-half of Residence	\$100
Property owned by surviving spouse at death of decedent	Surviving Spouse's Property One-half of Residence	\$30 (60% of 50) 60 (60% of 100)
<b>What did the surviving spouse receive?</b>	=	<b>\$200</b>

Because the surviving spouse received less (\$200) than the elective share as calculated under Exhibit 3 (\$480), the surviving spouse has the right to elect.

Source: Department of Legislative Services

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*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 first appointment of a personal representative, whichever is later. If the surviving spouse files a petition for an extension of time, the court may extend the time for making an election for three months at a time.

After notice and a hearing, the court must determine the elective share amounts and order payment of the amounts.

The surviving spouse may withdraw the demand for an elective share at any time before the expiration of the time for making the election.

### *Satisfying the Elective Share*

The elective share is satisfied (or paid) from the assets of the augmented estate. Generally, liability for the unsatisfied balance of the elective share amount (beyond what passes to the surviving spouse by testate or intestate succession and in the nonprobate transfers by the decedent to the surviving spouse) is apportioned among the recipients of (1) the remainder of the net probate estate, in proportion to its value and (2) nonprobate transfers by the decedent to others, in proportion to its value.

**Exhibit 5** shows an example of the calculation to apportion the elective share among certain recipients.

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**Exhibit 5**  
**Augmented Estate**  
**How Is the Elective Share Satisfied?**

The amount that the surviving spouse will receive to satisfy the elective share is \$280 (the difference between the elective share and what the surviving spouse received (\$480 - \$200 = \$280)). Liability for the unsatisfied balance of the elective share amount is apportioned among the recipients of the net probate estate and of the portion of the nonprobate transfers to others in proportion to its value.

The following formulas are used satisfy and apportion the elective share:

- The total value of the net probate estate of the decedent and nonprobate transfers to others that are available to satisfy the additional amount due to the spouse is \$1,340 as shown below. Each available asset contributes to the amount due the surviving spouse in proportion to that amount. Each asset will be required to contribute proportionately in making up the additional amount due the surviving spouse.

<u>Category</u>	<u>Form</u>	<u>Value</u>	<u>Proportional Contribution</u>
<b>Net Probate Estate of the Decedent</b>	To Child	\$10	$\$ 10/1,340 * 280 = 2$
	To Friend		
Nonprobate Transfers to Others	Revocable Trust for Child	\$1,000	$\$1,000/1,340 * 280 = 209$
	IRA to Child	175	$175/1,340 * 280 = 37$
	Life Insurance for Friend	150	$150/1,340 * 280 = 31$
<b>Total Value Received to Satisfy the Elective Share</b>	<b>=</b>	<b>\$1,340</b>	<b>\$280</b>

Note: Numbers are rounded for illustrative purpose.

Source: Department of Legislative Services

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*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 guardian of the property, 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 a minor or under disability, 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 specified 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.

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, transfer an amount, 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 must hold 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, as specified. 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 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.

**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 which were revised in 2010. 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 nonmonetarily, 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.

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### **Additional Information**

**Prior Introductions:** 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 570 (Delegate Dumais) - Judiciary.

**Information Source(s):** Department of Health and Mental Hygiene, 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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