

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE
Revised

House Bill 281 (Delegate Dumais)

Health and Government Operations

Judicial Proceedings

Estates and Trusts - Elective Share

This bill alters the definition of the “net estate” of a decedent, for the purpose of determining a surviving spouse’s elective share, to include the property of any revocable trust of the decedent, reduced by specified amounts. The bill specifies that a surviving spouse may take an elective share in lieu of property left to the surviving spouse in accordance with the trust instrument governing a revocable trust of the decedent. The bill further specifies entitlements, procedures, requirements, and contributions upon the election of the surviving spouse to take the elective share of the property of the decedent.

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 governmental operations or finances, as any impact on local tax revenues is anticipated to be negligible. Local expenditures are not affected.

Small Business Effect: Minimal.

Analysis

Bill Summary: This bill alters the definition of the “net estate” of a decedent, for the purpose of determining a surviving spouse’s elective share, to include the property of any

revocable trust of the decedent, without a deduction for taxes, and reduced by specified amounts under current law.

This bill establishes that:

- instead of property left to the surviving spouse in accordance with the trust instrument governing a revocable trust of the decedent, a surviving spouse may elect to take a one-third share of the net estate if there is also a surviving issue (living lineal decedent), or a one-half share if there is no surviving issue;
- a “revocable trust of the decedent,” for the purpose of determining a surviving spouse’s elective share, is any trust of which the decedent was the settlor (the creator of the trust) and that was revocable by the decedent immediately prior to the decedent’s death or incapacity;
- the elective share of a surviving spouse must be paid from the decedent’s estate and each revocable trust of the decedent in the same proportion that the value of the estate or revocable trust bears to the value of the net estate;
- a surviving spouse who has elected to take against a revocable trust of the decedent is entitled to a portion of the income earned on the net estate during the period of the administration based on the one-third or one-half share taken by the spouse;
- unless otherwise specified, a waiver of the right to take an elective share is an irrevocable renunciation of any benefit which would pass to the spouse by virtue of the provisions of a revocable trust executed before the waiver or property settlement;
- a surviving spouse must elect to take an elective share with specified time periods after receiving from the trustee specified disclosures and documents regarding the decedent’s revocable trust;
- a copy of a petition for an extension of time to take an elective share and notice of an election to take an elective share must be delivered to the trustee of each revocable trust of the decedent;
- all property or other benefits which would have passed to the surviving spouse in accordance with a trust instrument of a revocable trust of the decedent must be treated as if the surviving spouse had died before the execution of the trust instrument;
- if the surviving spouse or a person claiming through a surviving spouse elects to take the elective share, the surviving spouse and a person may *not* receive property in accordance with the trust instrument;
- the portion of the elective share that is payable from a revocable trust of the decedent must be (1) paid in a manner that the trustee considers to be in accordance with the terms and purposes of the trust and interest of the beneficiaries, to the extent that the payment is not unreasonably delayed and (2) made in cash or other property

acceptable to the surviving spouse in an amount equal to the fair market value of the surviving spouse's interest in the revocable trust of the decedent; and

- unless otherwise specified, on the filing of an election by a surviving spouse to take an elective share that applies to a revocable trust of a settlor that became irrevocable by reason of the death or incapacity of the settlor, (1) the surviving spouse, if serving as a trustee or an advisor to the trustee of the settlor's trust, must be removed as a trustee or an advisor on the date of filing of the election without further court order and (2) after the election becomes final, the surviving spouse may not serve as the trustee or an advisor to the trustee of the settlor's trust or exercise any trust or fiduciary powers related to the trust.

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 effective date of the bill *or* 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 specifically provided 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.

Additional Information

Prior Introductions: None.

Cross File: None.

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

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