

**Department of Legislative Services**

Maryland General Assembly

2019 Session

**FISCAL AND POLICY NOTE**

**Enrolled - Revised**

House Bill 99

(Delegate Dumais)

Health and Government Operations

Judicial Proceedings

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**Estates and Trusts - Elective Share of Surviving Spouse**

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This bill alters the elective share for a surviving spouse by making numerous changes to statute governing the calculation, election, and payment of an elective share of a surviving spouse. The bill, among other things, (1) establishes definitions and procedures for calculating the *estate subject to election*; (2) expands and clarifies procedures by which the surviving spouse may elect to take an elective share; (3) establishes additional procedures for the payment of an elective share; and (4) establishes standards for court modification of an elective share. The bill also updates specified personal financial power of attorney and limited power of attorney forms contained in statute and makes other technical, clarifying, and conforming changes. The bill applies prospectively. **The bill takes effect October 1, 2020.**

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**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.

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## Analysis

**Bill Summary:** 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 *estate subject to election* 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 estate subject to election reduced by the value of all spousal benefits.

### *Calculating the Estate Subject To Election*

The calculation of the estate subject to election begins with the calculation of the augmented estate. The “augmented estate” is calculated by totaling the value of:

- the probate estate of the decedent;
- all revocable trusts of the decedent;
- all property with respect to which the decedent, immediately before death, held a qualifying power of disposition;
- all qualifying joint interests of the decedent; and
- all qualifying lifetime transfers of the decedent.

The “estate subject to election” is calculated by reducing the value of the decedent’s augmented estate by:

- family allowances and funeral and administration expenses payable from the augmented estate;
- enforceable claims and debts against any part of the augmented estate;
- the value of any assets that, at the time of the decedent’s death, were held in a trust of which the decedent is not a settlor, if the assets were not previously owned by the decedent or were previously owned by the decedent but sold in the manner specified;
- the value of a federal qualified disability trust, college tuition savings plan, or special needs trust as specified, in which the decedent, immediately before death, had a qualifying power of disposition;
- the value of any qualifying joint interests, lifetime transfers, or property in which the decedent, immediately before death, had a qualifying power of disposition, and which the surviving spouse consented to in writing during the decedent’s lifetime, with specified exceptions;
- the value of specified irrevocable transfers of the decedent if (1) the initial transfer took place before the decedent’s marriage to the surviving spouse or (2) the

- decedent's interest in the property transferred terminated more than two years before the decedent's death;
- the value of specified irrevocable transfers of the decedent that occurred before the later of (1) the decedent's marriage to the surviving spouse or (2) two years before the decedent's death;
  - the value of any life estate of the decedent, if at the time of the decedent's death, the decedent held no qualifying power of disposition over the real property and the interest was created more than two years before the decedent's death; and
  - the value of the proceeds of an insurance policy on the decedent's life in excess of the net cash surrender value of the policy immediately before the decedent's death or, in the case of term insurance, in excess of the total premiums paid, under specified circumstances.

“Spousal benefits” means 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. The aggregate value is reduced by:

- that portion of the value of any jointly held property that is not included in the estate subject to election;
- the value of assets passing by reason of the decedent's death to any trust of which the surviving spouse is not the sole beneficiary during the surviving spouse's lifetime;
- the value of assets held in any trust created during the decedent's lifetime of which the decedent was a settlor and the surviving spouse is not the sole beneficiary during the surviving spouse's lifetime;
- one-quarter of the aggregate value of assets passing by reason of the decedent's death to, or held at the time of the decedent's death in, any marital trust;
- one-third of the aggregate value of assets passing by reason of the decedent's death to, or held at the time of the decedent's death in, any trust, whether testamentary or created during the decedent's lifetime if (1) the decedent was a settlor; (2) the trust was created during the decedent's lifetime for the exclusive lifetime benefit of the surviving spouse; and (3) the trustees may make distributions to or for the benefit of the surviving spouse in accordance with specified rules; and
- the entire value of any trust for the exclusive lifetime benefit of the surviving spouse that is not a marital trust or other specified trust of which the decedent was a settlor.

### *Right to an Elective Share*

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.

### *Making an 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.

An election to take an elective share must be (1) in writing and signed by the surviving spouse, the surviving spouse's agent, guardian of the property, or in the case of a minor or disabled individual, by the court having jurisdiction; and (2) filed in the court in which the personal representative of the decedent was appointed; or (3) if no personal representative has been appointed, filed in the court for the jurisdiction in which the decedent resided at the time of death or where the most valuable portion of the decedent's assets was located at the time of death.

Notice of the filing of an election to take an elective share may be delivered to the trustee of any revocable trust of the decedent or to the person responsible for filing the estate tax return if different from the trustee. On receipt of a written request by the surviving spouse, all information necessary to calculate the elective share must be delivered to the surviving spouse by the personal representative, the trustee of any revocable trust, or the person responsible for filing the estate tax return, as appropriate. The filing of the election by this procedure 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 spouse's right to request a copy of the trust instrument.

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, 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 to the person making the request.

### *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 the elective share on behalf of the surviving spouse may not receive property under the will, other than property forming any portion of the spousal benefits.

With respect to any revocable trusts of which the surviving spouse was a beneficiary, after an election to take an elective share becomes final, 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.

### *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 estate subject to election 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 must be made from the portion of any revocable trust of the decedent included in the estate subject to election 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 estate subject to election that do not constitute any part of the spousal benefits and prorated among the recipients in proportion to the value of the assets received by the recipient. If any required payment from recipients is preempted by federal law or is to be made from a federal qualified disability trust, college tuition savings program, or special needs trust, as specified, the portion of the elective share payable must be apportioned only among those recipients whose benefits are not preempted under federal law or who are not beneficiaries of those trusts or accounts.

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 accordance with any instrument

governing disposition of that part of the estate from which the portion of the elective share is to be paid, and 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.

On the final payment of an elective share, the personal representative of the decedent, the trustee of any revocable trust of the decedent, or the person responsible for filing the estate tax return, as appropriate, must file with the register of wills for the county in which the election is made, a statement signed and verified by the surviving spouse stating the value of the elective share and that the elective share has been paid in full. Any of the parties mentioned above may request the register to redact the value of the elective share from the filed statement.

The register must certify in writing the accuracy of the calculation and payment of the elective share upon the request 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 payor of any portion of the elective share, or any other person having an interest in the assets from which the elective share has been paid.

#### *Court Modification of Elective Share*

On a showing of clear and convincing evidence, a court may modify:

- the calculation of the value of an augmented estate;
- the calculation of the value of an estate subject to election;
- the calculation of the value of spousal benefits; or
- the sources of payment of an elective share.

The court may consider the circumstances of any transfer or arrangement impacting the elective share of a surviving spouse, 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, if any, to which the transfer or arrangement deprives the surviving spouse of property that otherwise might form part of the augmented estate, estate subject to election, or spousal benefits; (5) the degree, if any, 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; (6) the length and nature of the relationship between the decedent and surviving spouse; (7) the nature and value of the surviving spouse's assets; and (8) the relationship of the beneficiary of the transfer or arrangement to any previous owner of the property subject to the transfer or arrangement.

A court may (1) issue orders that may be necessary to determine value or sources of payment of an elective share when implementing modifications, including orders requiring the holder or recipient of any augmented estate, an estate subject to election, or spousal benefits, to provide any information that the court considers necessary to determine the value or sources of payment of an elective share and (2) transmit issues of fact relating to the value or sources of payment of an elective share to the county circuit court in which the election is filed.

### *Compensation and Attorney's Fees*

A court may award reasonable attorney's fees. A personal representative is entitled to reasonable commissions or attorney's fees in connection with court proceedings pertaining to the election of an elective share by a surviving spouse. Any amount of compensation or attorney's fees consented to by all interested persons is presumed to be reasonable.

### *Application*

The bill applies only prospectively and may not be applied or interpreted to have any effect on or application to any estate opened, or to any revocable trust of a decedent that became irrevocable by reason of the death or incapacity of the settlor, before the bill's October 1, 2020 effective date.

**Current Law:** Generally, if there is no surviving issue (living lineal descendant), the surviving spouse of a decedent may elect to take an amount equal to one-half of the net estate, instead of property left to the surviving spouse by will. If there is surviving issue, the surviving spouse may take an amount equal to one-third of the net estate.

### *Calculating the Net Estate*

"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.

### *Right to an Elective Share*

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 disabled, the election may be exercised by order of the court having jurisdiction of the person or property of the spouse or disabled person. The right of election may be waived before or after marriage by a written contract, agreement, or waiver.

### *Making an Election*

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.

### *Effect of Election*

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.

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.

### *Waiver of the Right of Election*

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.

**Background:** State law has long protected widows and widowers from disinheritance when their spouse dies. Increasingly, a substantial portion of the property owned by



married persons does not become part of the estate subject to probate. Various assets and interests such as retirement accounts, 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 assets, 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. According to the Maryland State Bar Association, Maryland and 39 other states 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. Georgia is not a community property state and does not have statutory elective share.

#### *Application of Elective Share*

In Maryland, 18 other states, and the District of Columbia, 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."

According to the Maryland State Bar Association, states have addressed this situation by expanding the pool of assets to which the elective share applies. In 21 states, the elective share applies to the "augmented estate," which includes specified nonprobate as well as probate assets. Of these states, 13 have enacted statutes that are substantially similar to one of the versions of the Uniform Probate Code (UPC). **Exhibit 1** shows the elective share status of each state.

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**Exhibit 1**  
**State Elective Share Calculations**

**Net Probate Estate**

Alabama	Maryland	Oklahoma
Arkansas	Massachusetts	Rhode Island
Connecticut	Michigan	South Carolina
Illinois	Mississippi	Tennessee
Indiana	New Hampshire	Vermont
Iowa	Ohio	Wyoming
Kentucky		

**Augmented Estate (UPC)**

Alaska	Minnesota	Utah
Colorado	Montana	Virginia
Hawaii	Nebraska	West Virginia
Kansas	North Dakota	
Maine	South Dakota	

**Augmented Estate (Modified Form)**

Delaware	New Jersey	Oregon
Florida	New York	Pennsylvania
Missouri	North Carolina	

UPC: Uniform Probate Code

Source: Maryland State Bar Association

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*Uniform Probate Code*

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. 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.

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## Additional Information

**Prior Introductions:** SB 649 of 2018, a similar bill, passed the Senate with amendments and received a hearing in the House Health and Government Operations Committee, but no further action was taken. Its cross file, HB 777, received a hearing in the House Health and Government Operations Committee, but no further action was taken. SB 881 of 2017, another similar bill, was referred to the Senate Judicial Proceedings Committee but subsequently withdrawn. Its cross file, HB 722, was withdrawn after being heard by the House Health and Government Operations Committee. 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, another similar bill, passed the House with amendments and received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

**Cross File:** SB 192 (Senator Kelley, *et al.*) - Judicial Proceedings.

**Information Source(s):** Office of the Attorney General (Securities Division); Comptroller's Office; Judiciary (Administrative Office of the Courts); Register of Wills; Department of Legislative Services

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