
Maryland's New Elective Share Law is Effective as of October 1, 2020

In all common law jurisdictions in the United States other than Georgia,¹ state law provides a surviving spouse with a minimum share of the deceased spouse's estate. The minimum share provisions are often referred to as the "elective share." This is a marital right that may be waived in a marital agreement, such as a prenuptial agreement.

As a variant of the marital "doctrine of necessities," the elective share's purpose is to ensure that the surviving spouse is "reasonably provided for during the surviving spouse's remaining lifetime."² The elective share prevents the deceased spouse from disinheriting the surviving spouse. The elective share applies to the deceased spouse whose assets pass upon death by reason of a Will, revocable trust, beneficiary designation, pay-on-death designations, or joint ownership with rights of survivorship. The elective share does not apply when the deceased spouse's property passes pursuant to intestate succession, because all intestate succession statutes provide a surviving spouse with a significant share of the intestate estate, thereby eliminating any need for a spousal elective share.³

With this background, as of October 1, 2020, Maryland has a new, comprehensive elective share law,⁴ which is designed to comprehensively consider all of the deceased spouse's property and make it more difficult to evade the surviving spouse's right to the elective share.

Maryland Law Prior to October 1, 2020

Prior to October 1, 2020, Maryland law allowed the surviving spouse to either receive assets that passed to the surviving spouse under the deceased spouse's Will, or exercise his or her right to the elective share and take a portion of the deceased spouse's "net estate." The "net estate" was defined as the property that passed under the deceased's Will, reduced by funeral and administration expenses, family allowances, and enforceable claims and debts against the estate.⁵ The elective portion of the net estate was dependent on whether the deceased spouse had surviving descendants. The following example illustrates the prior law. Suppose that the deceased spouse's Will failed to provide for the surviving spouse.⁶ If the deceased spouse died leaving two surviving descendants, the surviving spouse could

At FKL, we are committed to being innovative and creative leaders in the trusts & estates practice.

Richard Franklin was named a D.C. area "Top Lawyer" by Washingtonian Magazine in its December 2020 issue.

Future Presentations:

Richard Franklin will be presenting:

As a co-instructor for a *Wealth and Well-Being Workshop* on Wednesdays, April 7, 14, 21 and 28, from 6:30 to 8:30 pm, via Zoom. The program is sponsored by the Arlington Community Education Program.

Participants will learn to bring positivity, meaning and purpose to the inheritance process. Click [here](#) for more information.

Well-Being Trusts – The Future of Imbuing Trusts with Positivity, Meaning and Purpose to the National Association of Estate Planners & Councils – [April 21, 2021](#).

George Karibjanian will be presenting:

The Federal Estate Tax – Florida Bar Board Certification in Wills, Trusts & Estates Review Seminar – March 10, 2021.

More Than Just Creditor Protection – Practical Uses of Domestic Asset Protection Trusts in Estate Planning, an American Law Institute – American College of Trust and Estate Council Webinar – March 25, 2021.

¹ In community property states, each spouse has a one-half interest in the assets acquired during the marriage. In Georgia, the spouse is not entirely disinherited, rather the spouse will receive a modest monetary allowance for the year that follows the individual's death.

² Md. Code Ann., Est. & Trusts § 3-402(1) (2021). Unless indicated otherwise, all future statutory references in this Client Alert are to the 2021 version of the Estates & Trusts statutory provision.

³ In Maryland, the surviving spouse's share of the deceased spouse's intestate estate ranges from one-half to the entire estate depending on certain factors, such as whether the deceased spouse had any surviving descendants.

⁴ Md. Code Ann., Est. & Trusts, Title 3, Subtitle 4, encompassing §§ 3-401 through 413.

⁵ Md. Code Ann., Est. & Trusts § 3-203(b) (2020), repealed by Acts 2019, ch. 435, § 1, effective October 1, 2020.

⁶ Unless otherwise indicated, all examples in this Client Alert will presume that no marital agreement exists.

elect to take a one-third share of the net estate; if there were no surviving descendants, then the surviving spouse could elect to take a one-half share of the deceased spouse's net estate.⁷

An analysis of the prior law reveals four (4) significant deficiencies to the approach relating to the elective share.

First, the elective share only applied to property passing under the deceased spouse's Will. If the deceased spouse had transferred a majority of his or her property to a revocable trust, such property would not be included in the net estate. Thus, if the deceased spouse's property consisted only of property held in a revocable trust, retirement accounts and life insurance policies, it would be possible to completely disinherit a surviving spouse.

Second, the converse to the first deficiency could also occur. For example, suppose that the deceased spouse died owning \$5,000,000 of assets, with \$4,000,000 held in a revocable trust, retirement accounts and insurance policies, all of which passed to the surviving spouse. Suppose further that the surviving spouse was disinherited under the deceased spouse's Will, which devised all of the deceased spouse's individually owned assets to the children from the first marriage. Without considering the elective share, the surviving spouse would receive 80% of the deceased spouse's total assets, and the children from the first marriage would receive 20% of the deceased spouse's total assets. However, because the net estate only considered the assets passing under a Will, and because the surviving spouse was disinherited under the Will, the surviving spouse could elect the elective share to receive a percentage of the property passing under the Will. This scenario would have left the surviving spouse with a share of the deceased spouse's assets disproportionately larger than the deceased spouse might have intended.

Third, Maryland case law did not adequately remedy the first two deficiencies. Because Maryland's prior right of election only related to the net probate estate, Maryland courts developed case law designed to prevent the deceased spouse from intentionally avoiding the elective share by using non-probate transfers. Unfortunately, the courts failed to establish a "bright-line" rule for determining what non-probate transfers should be included in the elective share calculation. Instead, the courts adopted a case-by-case "facts and circumstances" analysis. The factors considered by the courts included the motives for any transfer or arrangement, the retention of control of the transferred property and if such control was exercised, the degree to which the elective share was reduced by the transfer or arrangement, whether other non-probate arrangements were made for the surviving spouse (e.g., joint property, retirement account, life insurance), whether significant lifetime gifts were made to the surviving spouse, and the relationship of the deceased spouse to the non-spousal beneficiaries.⁸ This case-by-case approach, unfortunately, created uncertainty for both the deceased spouse and the surviving spouse, as neither could be certain how non-probate assets would be addressed when an elective share was determined.

The disproportionate distribution of assets and the uncertainty and inconsistency of the outcomes of each case led to the fourth perceived deficiency of Maryland's prior law, which is the inability, in many instances, for the surviving spouse to obtain adequate judicial relief. For example, a surviving spouse who wished to challenge his or her case in court might not have had the means to do so. Similarly, non-spousal beneficiaries who wished to pursue a remedy in court under the belief that the spousal election was unfair were hampered because case law only considered whether the transfers hindered the elective share. No judicial precedent had been created with respect to reversing excess transfers, thus, the non-spousal beneficiaries lacked standing to pursue such claims.

Maryland's New Elective Share Provisions

Maryland's new comprehensive elective share statutes are designed to eliminate the prior law's deficiencies. In doing so, however, it is fair to say that the new approach is complicated.

What is not complicated is the end result of the elective share. Under the former law, if a surviving spouse elected to take the elective share, all provisions under the deceased spouse's Will for the surviving spouse were negated, and the surviving spouse received a bequest of the elective share amount. Under the new law, the elective share is formulaic. The amount of property payable to the surviving spouse under the elective share is

⁷ *Id.*

⁸ *Karsenty v. Schoukroun*, 406 Md. 469, 959 A.2d 1147 (2008).

reduced by certain property that the surviving spouse receives as a result of the deceased spouse's death, such that the surviving spouse only receives the net difference.

The new elective share formula considers the deceased spouse's non-probate transfers, as well as the benefits provided to the surviving spouse, in order to ensure that both, (a) the surviving spouse is reasonably provided for during his or her remaining lifetime, and (b) the deceased spouse is provided flexibility in ordering his or her affairs.⁹

The new elective share formula is a two-step formula. First, the "Estate Subject to Election" is determined as follows:

$$\text{(Augmented Estate – Adjustments) = Estate Subject to Election}$$

Next, the elective share is determined by:

$$\text{((Estate Subject to Election} \div \text{(3 or 2))}^{10} \text{ – Spousal Benefits) = Elective Share}$$

Step #1 – Determine the Estate Subject to Election

First Element – Determine the "Augmented Estate"

The first element to determining the "Estate Subject to Election" is to determine the "Augmented Estate."

Under the new law, the "Augmented Estate" consists of the deceased spouse's probate and non-probate assets.¹¹ The non-probate assets included in the determination are all of the deceased spouse's revocable trusts, qualifying lifetime transfers, property with respect to which the deceased spouse held a qualifying power of disposition immediately before death, and qualifying joint interests of the deceased spouse. Examples of the property in which the deceased spouse held a "qualifying power of disposition immediately before death" include general powers of appointment,¹² the ability to designate beneficiaries pursuant to a beneficiary designation, payable or transfer on death designation, and other powers to affect the use or enjoyment of property. Examples of "qualifying joint interests" include the greater of the tenant's fractional interest in the property or the percentage of the property's value, exclusive of income or appreciation, contributed by the tenant in the case of a joint tenant with right of survivorship or one-half of a tenancy-by-the-entireties interest.

Second Element – Determine the "Adjustments"

The second element is to determine the "Adjustments." "Adjustments" include standard estate expenses and expenditures, such as funeral and administration expenses, family allowances, and enforceable claims and debts against the estate. "Adjustments" also include other, more complex reductions, such as the following:

- Certain types of trusts where the deceased spouse was not a settlor at the time of the deceased spouse's death or that benefited individuals with disabilities,¹³ as well as any qualifying powers of disposition, qualifying joint interests of the deceased spouse, or qualifying lifetime transfers to which the surviving spouse consented to in writing during the deceased spouse's lifetime (other than by means of spousal consent to split-gift treatment under the federal gift tax laws);¹⁴

⁹ Md. Code Ann., Est. & Trusts § 3-402.

¹⁰ Divide by 3 if there is surviving issue; divide by 2 if there is no surviving issue.

¹¹ Md. Code Ann., Est. & Trusts §§ 3-401(b) and 3-404(a).

¹² Special powers of appointment are not included. Special powers of appointment are exercisable in favor of persons other than the holder of the power, the holder's estate, the holder's creditors or the creditors of the holder's estate. Special powers of appointments are frequently granted to a spouse or descendant and exercisable in favor of spouses, descendants and charities.

¹³ *Id.* §§ 3-404(b)(1) – (5).

¹⁴ *Id.* § 3-404(b)(6).

- Qualifying lifetime transfers with retained interests where the initial transfer occurred before the marriage or in which the retained interest terminated more than two years before the deceased spouse's death;
- Qualifying lifetime transfers made before the later of the marriage date or two years before the deceased spouse's death;
- Any interest in real property where the deceased spouse held a life estate interest but had no qualifying powers of disposition over the real property and the life estate was created more than two years before the deceased spouse's death; and
- Certain life insurance proceeds benefitting a charity or close family members of the deceased spouse.¹⁵

The above valuations are determined based on Maryland's estate tax valuation principles or in the same manner as assets would be reported on a Maryland probate inventory.¹⁶

Step #2 – Determine the Elective Share Amount

First Element – Determine the Estate Subject to Election Divisor

The first element in the determination of the Elective Share Amount is to divide the Estate Subject to Election by a factor of either 3 or 2, *i.e.*, multiply by one-third or by one-half. The factor is dependent on whether the deceased spouse is survived by descendants. If there are descendants, the divisor is “3;” if there are no descendants, the divisor is “2.”¹⁷

Second Element – Determine the Spousal Benefits

The second element is to reduce the quotient derived above by the Spousal Benefits. The “Spousal Benefits” are generally the assets that pass to the surviving spouse as a result of the deceased spouse's death. These are assets that pass automatically to the surviving spouse by beneficiary designation or by joint property arrangements, but do not include the surviving spouse's portion of any jointly held property. For example, a property owned as tenants-by-the-entirety is considered to be owned one-half by each spouse; therefore, for the Spousal Benefit calculation, the one-half interest passing to the surviving spouse from the deceased spouse is a Spousal Benefit. The other one-half interest deemed to have been owned by the surviving spouse is not a Spousal Benefit.

Spousal Benefits do not include any property passing to or held in any trust under which the surviving spouse is *not* the sole beneficiary during the surviving spouse's lifetime. If a trust is created upon the deceased spouse's death or was created during the deceased spouse's lifetime for the surviving spouse's benefit, and such trust is essentially a “qualified terminable interest property” trust for purposes of §2056(b)(7) of the Internal Revenue Code of 1986, as amended, one-fourth of the value of such trust is a reduction from Spousal Benefits. Further, if a trust is created for the surviving spouse under which the benefits for the surviving spouse are no more restrictive than a Maryland special needs trust, one-third of the value of such trust is a reduction from Spousal Benefits.¹⁸

Does the New Law Fix the Deficiencies from Prior Law?

The new law, for the most part, fixes the deficiencies noted regarding the prior law. For example, the new law accounts for benefits that the surviving spouse enjoys during his or her lifetime; therefore, it likely addresses the disproportionate shares of inheritance the surviving spouse and non-spousal beneficiaries may receive upon the deceased spouse's death.

Moreover, should a court ever have to be involved in an asset distribution dispute between the surviving spouse and other non-spousal beneficiaries, the new law details additional factors for the court to consider when

¹⁵ *Id.* §§ 3-404(b)(7) – (10).

¹⁶ *Id.* § 3-401(o).

¹⁷ *Id.* § 3-403.

¹⁸ *Id.* § 3-401(n); *citing* a “special needs trust” pursuant to Md. Code Ann., Est. & Trusts §14-402(b)(3).

deciding whether a specific type of asset should be included in the elective share calculation. Such new factors include examining the nature and length of the relationship between the deceased spouse and the surviving spouse, the nature and value of the assets the surviving spouse owns individually, and the relationship of the beneficiaries to the previous owners of the assets.¹⁹

The new law's more "holistic" approach to calculating the spousal elective share allows the elective share to more accurately achieve the state's policy goals and, accordingly, will hopefully promote fewer disputes between the parties.

Notwithstanding the benefits of the newly enacted law, as is the case with most, if not all new legislation, there will be some new interpretation questions. By example, what is the legal effect of a pre-October 2020 marital agreement that validly waived the elective share when the deceased spouse dies after October 2020? One interpretation would be that such a change is an unanticipated event, which does not change the rights of the parties as they understood them at the time of entering into the agreement. Another interpretation would be that, if the effect of the elective share was a significant negotiating point in the agreement, and now, with the changes in the law, the degree to which the elective share applies has significantly altered the ultimate disposition of property, which should allow the aggrieved party to seek a judicial reformation of the agreement. Suffice it to say, the effect on existing prenuptial agreements is not yet clear.

What About Our Other Jurisdictions?

As for the other jurisdictions in our practice, the leader in reform is Florida, which, in 1999, was one of the first jurisdictions to completely negate the old approach and adopt very progressive augmented estate-styled laws. One feature in Florida's laws that is not found in many other jurisdictions is the concept of the "elective share trust." Where, as described above, certain marital trusts enter into the *determination* of the elective share under Florida's elective share laws, so certain marital trusts can be used to entirely *satisfy* the elective share.

In 2017, Virginia also reconstructed its elective share laws to adopt an "augmented estate" approach.

Finally, the District of Columbia is lagging behind with rules similar to Maryland's laws prior to October 1, 2020. It is not known whether any reform will be considered in the near future.

* * * * *

If you have any questions, please contact one of our lawyers.

RICHARD S. FRANKLIN [bio](#)
rfranklin@fkl-law.com

GEORGE D. KARIBJANIAN [bio](#)
gkaribjanian@fkl-law.com

LESTER B. LAW [bio](#)
lblaw@fkl-law.com

NICHOLEEN DePERSIS [bio](#)
ndepersis@fkl-law.com

JUNE C. FAN [bio](#)
jfan@fkl-law.com

DISCLAIMER: This material is not intended to constitute a complete analysis of all tax or legal considerations. This material is not intended to provide financial, tax, legal, accounting, or other professional advice. Consult with your professional adviser to obtain counsel based on your individual circumstances.

¹⁹ *Id.* § 3-413(2).