

## Steve Leimberg's Estate Planning Email Newsletter Archive Message #2828

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### Subject: Linda Kotis, Andrea Dykes & Carolyn Rogers on Navigating the Waters of Maryland's New Elective Share Law - How Not to Be Up the Creek without a Paddle

*“Derived from a statute originally enacted in 1798, Maryland’s elective share law is fundamentally changing on October 1, 2020. The option to take against the decedent’s net estate which generally excludes non-probate assets and lifetime gifts to third parties will no longer be the rule. Instead, a surviving spouse who exercises his right of election will receive a share of the deceased spouse’s estate from a mix of probate assets, property outside the probate estate, and certain lifetime and testamentary transfers. Assets eligible to pass to the surviving spouse will also include certain life insurance proceeds payable to a non-spousal beneficiary. These significant changes provide new planning opportunities. Ideas to consider are executing a premarital agreement, post-marital agreement, or consent to transfer specific assets to a child or other non-spousal beneficiary. Also, using insurance in the estate plan may mitigate undesirable results when an election is made. The strategies to address consequences of Maryland’s new law may also apply in other jurisdictions where the elective share is based on the augmented estate concept as well.”*

We close the week with important commentary by **Linda Kotis, Andrea Dykes** and **Carolyn Rogers** that reviews the changes to and planning opportunities under Maryland’s new elective share law, with an emphasis on using insurance in the estate plan to mitigate undesirable results when a spousal election is made. Versions of their newsletter appeared in the July/August 2020 issue of *Probate & Property* magazine and in *Wealth Management’s Trusts & Estates* on August 11, 2020.<sup>1</sup>

**Linda Kotis** is Of Counsel in the Washington, DC office of **Ivins, Phillips & Barker**. She is a member of the District of Columbia, California, Indiana, and Maryland Bars. Linda advises clients on forming and revising their

estate plans and analyzes estate, income, generation-skipping transfer, and gift taxation matters for high net worth individuals and families. Linda's significant experience includes analysis of complex state trust administration and non-tax issues, the administration of high net worth estates, formation of private foundations, marital agreements, complex guardianships, post-mortem planning, probate matters and court pleadings regarding fiduciary administration issues. For **LISI**, Linda has written [\*Look Up in the Sky. It's a Transfer Tax on Your Plane\*](#) (March 19, 2020) with co-author Ken Jefferson of Ivins, Phillips & Barker, [\*Modification Mania: Avoid Trust Code Trip-Ups and Draft Documents to Facilitate Change\*](#) (October 31, 2019), [\*Reset of the District of Columbia's Estate Tax Exemption\*](#) with co-authors Andrea Dykes and Carolyn Rogers of Howard Insurance (January 9, 2019), [\*Minding the Gap: The Mismatch Between Maryland's 2019 Estate Tax Exemption and the New Federal Estate Tax Exemption\*](#) (June 25, 2018), and [\*Reform School: Lessons on Rescuing an Undesirable Tax Plan after Death\*](#) (April 27, 2017). She is a co-author with Andrea Dykes and Carolyn Rogers of Howard Insurance of *Maryland Enacts New Elective Share Law: Increased life insurance planning opportunities for states that have adopted the augmented estate concept*, *Wealth Management's Trusts & Estates* (August 11, 2020) and *The 2020 Election in Maryland: It's Not About Politics*, *Probate & Property* magazine (July/August 2020), and the author of *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, *Probate & Property* magazine (March/April 2017), and other articles in *Washington Lawyer*, *Bloomberg BNA Daily Tax Report*, and *Wealth Strategies Journal*. Linda is scheduled to co-present with Judith Barnhard of Councilor Buchanan & Mitchell at the Greater Washington Society of CPAs' 2020 Nonprofit Symposium (December 14-16, 2020) on *Planning to SECURE Charitable Gifts: How the SECURE Act Supports Donations of Retirement Assets* and with Kasey Place of Ivins Phillips & Barker at the 2020-2021 District of Columbia Bar Estates, Trusts and Probate Program Series on planning for and administering estates with charitable beneficiaries (Date TBD). Linda's most recent presentations on estate planning were *Lemons to Lemonade: Making Use of the Delaware Tax Trap* (November 13, 2018) with Kasey A. Place of Ivins, Phillips & Barker at the DC Bar Communities, Estates, Trusts, and Probate Lunch Series, and as a panelist with Robin Solomon of Ivins, Phillips & Barker at the *Women, Influence & Power in Law* conference (October 4, 2018). Past presentations include meetings of the American Bar Association and the District of Columbia Bar, as well as law

firm briefings. Linda is an active member of the Estate Planning Council of Montgomery County, Maryland.

**Andrea Dykes** is Managing Partner of **Howard Insurance**. Andrea is focused on developing strategies to achieve the firm vision for its clients in addition to leading the firm's life insurance practice. For over a decade, Andrea has earned a trusted reputation for her consultative approach to providing life insurance solutions for individuals, business owners, and executives. Her areas of expertise include the use of insurance in family wealth transfer planning and business succession planning. For **LISI**, Andrea has written [\*Reset of the District of Columbia's Estate Tax Exemption\*](#) with co-authors Carolyn Rogers of Howard Insurance and Linda Kotis of Ivins, Phillips & Barker (January 9, 2019). She is a co-author with Carolyn Rogers and Linda Kotis of *Maryland Enacts New Elective Share Law: Increased life insurance planning opportunities for states that have adopted the augmented estate concept*, *Wealth Management's Trusts & Estates* (August 11, 2020) and *The 2020 Election in Maryland: It's Not About Politics*, *Probate & Property* magazine (July/August 2020). Andrea has extensive experience in all aspects of executive and employee benefit strategies. Andrea graduated from the University of Delaware, earning a degree in Business Administration with concentrations in Finance and Economics. Andrea holds the Certified Financial Planner (CFP) and Certified in Long Term Care (CLTC) professional designations. She currently serves on the Board of Directors of the Washington Area Women's Foundation, the Washington Women's Leadership Initiative, and is an active member of the DC Estate Planning Council, Association for Advanced Life Underwriting (AALU), and the Society of Financial Service Professionals. Andrea has been recognized as a top Insurance Advisor by *Washingtonian Magazine*.

**Carolyn Rogers** is a Vice President of **Howard Insurance**. In this role, she works directly with the firm's clients and advisors on the planning, placement, and servicing of sophisticated life, disability, and long term care insurance solutions. From the beginning of her insurance career in 2005, Carolyn has built a successful practice by combining her passion for educating clients on their insurance portfolio with distilling complex planning and products. Carolyn uses this approach to advise successful families on life insurance solutions for their estate planning and personal financial security, and on the use of life insurance for business succession and executive benefit planning. Carolyn's technical proficiency and dedication to client service is highly respected and sought after by clients

and advisors. For [LISI](#), Carolyn has written [Reset of the District of Columbia's Estate Tax Exemption](#) with co-authors Andrea Dykes and Linda Kotis (January 9, 2019). She is a co-author with Andrea Dykes and Linda Kotis of *Maryland Enacts New Elective Share Law: Increased life insurance planning opportunities for states that have adopted the augmented estate concept*, *Wealth Management's Trusts & Estates* (August 11, 2020) and *The 2020 Election in Maryland: It's Not About Politics*, *Probate & Property* magazine (July/August 2020). Carolyn graduated cum laude from The George Washington University, earning a degree in International Affairs with concentrations in International Development and International Economics. Carolyn holds the Chartered Life Underwriter (CLU) and Chartered Financial Consultant (ChFC) designations. She is an active member of the Washington, D.C. Estate Planning Council and serves on the board of the National Capitol Chapter of the Society of Financial Services Professionals. Carolyn has been recognized as one of the area's best insurance advisors by *Washingtonian Magazine* and *Northern Virginia Magazine*.

Here is their commentary:

## **EXECUTIVE SUMMARY:**

An important, life-changing election will occur in the state of Maryland during autumn 2020. Here's a hint: it's not the presidential race. It's Maryland's new elective share law. No longer limited to taking a fractional share of the net probate estate, a surviving spouse who decides to reject his interests under the decedent's existing estate plan will receive his elective share out of the deceased spouse's augmented estate. This larger group of assets includes lifetime gifts to others, certain joint interests, assets in the decedent's revocable trust, insurance proceeds payable to a third party, and much more.<sup>2</sup> The Department of Legislative Services notes that an election from the augmented estate addresses potential disinheritance while taking into account non-probate assets passing to the spouse, so as not to allow a spouse to receive more than a "fair share."<sup>3</sup> The new law applies to the estate of a decedent who dies on or after October 1, 2020.<sup>4</sup>

To give context to the changes, the authors review Maryland's current elective share law and the competing considerations of individual property rights and support for marital relationships when an elective share is

exercised. The new statute is described, as is the consequence of diverting assets otherwise passing to heirs, particularly in the case of blended families. The law's challenges are addressed and strategies are discussed to address potential consequences, with an emphasis on using insurance in the estate plan to mitigate undesirable results when an election is made. While the authors focus on Maryland's new law, issues presented by a spousal election apply in other jurisdictions as well, especially those which have adopted the augmented estate concept. Virginia and West Virginia are among the 13 states that calculate their elective shares based on an augmented estate model substantially similar to a version of the Uniform Probate Code. Eight other states, including Delaware, Florida, New York, and Pennsylvania, have adopted a modified form of the augmented estate.<sup>5</sup>

## **COMMENT:**

### **I. Overview of Maryland's Existing Elective Share Law**

Maryland's existing elective share law is derived from a statute originally enacted in 1798, and states as follows: "Instead of property left to the surviving spouse by will, the surviving spouse may elect to take: (1) A one-third [1/3] share of the net estate if there is also a surviving issue; or (2) A one-half [1/2] share of the net estate if there is no surviving issue." The term "net estate" is defined as property passing by the decedent's Last Will and Testament. There is no deduction for state or federal estate or inheritance taxes, and the total estate is reduced by funeral and administration expenses, family allowances, and enforceable claims and debts.<sup>6</sup>

***Process for Making Election:*** The election is made by filing within the later of (i) nine (9) months after the date of the decedent's death or (ii) six (6) months after the first appointment of a personal representative under a Will. A three (3) month extension of time to file the election may be granted to the surviving spouse "for good cause shown." The surviving spouse may withdraw the election at any time before the expiration of the time period for making the election.<sup>7</sup> The election must be in writing and signed by the surviving spouse or made by court order if the surviving spouse is under age 18 or is disabled. The election is filed in the court in which the personal representative was appointed. A sample statutory form is available.<sup>8</sup> A spouse may waive elective share rights before or after marriage.<sup>9</sup>

**Assets Not Affected by Election:** Under Maryland's existing elective share law, any rights the spouse has in non-probate assets such as jointly held bank accounts, life insurance proceeds, or assets passing by beneficiary designation are unaffected by the spouse's exercise of her elective share rights. Non-probate assets passing to some person other than the spouse are likewise not affected by the election, absent proof of fraud.<sup>10</sup> Asset transfers during a decedent's lifetime, such as to a decedent's revocable trust, an irrevocable trust, or outright gifts to a third party, are generally not included within the definition of net estate either. This is the case so long as the *inter vivos* transfer holds up under scrutiny with respect to the following factors: (i) the completeness of the transfer and the extent of control retained by the transferor; (ii) the motive of the transferor; (iii) participation by the transferee in an alleged fraud; and (iv) the degree to which a surviving spouse is stripped of his or her interest in the decedent's estate.<sup>11</sup>

**Effect of Election:** All legatees must contribute to the payment of the elective share pro rata. Rather than contributing an interest in specific property, a legatee may pay the surviving spouse in cash or other property acceptable to the spouse. The Will may require a set-aside or compensation from another legatee, or from another part of the estate. Also, an interest renounced by the surviving spouse and not included in the net estate may be subject to a set-aside for the benefit of specified family members "who are natural objects of the bounty of the decedent in order to avoid a substantial distortion of the intended dispositions of the testator."<sup>12</sup>

**Development of Law and Consequences:** The development of elective share law reflects a tension between individual property rights and marital relationships. There is a long-recognized right of a person to "alienate his personal property and his equitable interest in land, either by sale or gift, without the concurrence or assent of his wife, and if the transfer be absolute and unconditional, and without any reservation of interest in, or control over, the property to himself, and if the possession be parted with or delivered in pursuance of the conveyance."<sup>13</sup>

Contrast this right with the consequences of a disposition intended to deprive the surviving spouse of property previously available to both parties, which countermands the lifetime duty of each spouse to support the other. The common law doctrine of necessities required that a husband provide his wife with food, clothing, shelter, and medical care. Therefore, a husband was obligated to support his wife or accept the debt

created for items obtained by his wife. Virginia and the District of Columbia are among those jurisdictions which broadened and modified the doctrine of necessities to apply equally to both spouses.<sup>14</sup> While the Court of Appeals of Maryland rejected such an expansion as “predicated on a sex-based classification” unconstitutional under the Maryland Equal Rights Amendment,<sup>15</sup> willful nonsupport “without just cause” is a misdemeanor under Maryland law, with monetary fines and imprisonment for failure to support one’s spouse.<sup>16</sup>

A decedent’s disinheritance of his spouse may be damaging to the surviving spouse’s financial well-being. A spouse’s exercise of the right to an elective share, however, may have significant consequences as well. It can disrupt legitimate expectancies of non-spousal beneficiaries, such as bequests to children and grandchildren of the decedent who are not descendants of the surviving spouse. The election may have financial repercussions, that is, affecting estate tax liability by causing recalculation of the marital deduction.<sup>17</sup> Finally, even when a surviving spouse’s exercise of the election is a reasonable decision based upon all facts and circumstances, taking an elective share undoes the decedent’s estate plan and upends the decedent’s intent.

## **II. New Elective Share Statute**

On October 1, 2020, Maryland’s elective share law will fundamentally change. The option to take against the decedent’s net estate which generally excludes non-probate assets and lifetime gifts to third parties will no longer be the rule. Instead, a surviving spouse who exercises his right of election will receive a share of the deceased spouse’s estate from a mix of probate assets, property outside of the probate estate, and certain other lifetime and testamentary transfers.

***Purpose of New Law:*** The purpose of the new law is “(1) [t]o ensure that a surviving spouse is reasonably provided for during the surviving spouse’s remaining lifetime; and (2) [s]ubject to item (1) . . . , to provide a testator flexibility in ordering the testator’s affairs.”<sup>18</sup> Maryland’s change in the elective share statute does more than that. It reflects the evolution in testamentary dispositions of property, that is, the increasingly common use of the revocable trust as a Will substitute. The new law’s determination of the property that should make up the elective share may also be based upon the characterization of the marriage relationship itself. This manifests itself in two ways. First, if marriage is viewed as an economic partnership,

then expanding the base of resources from which a spouse's share may be satisfied would better attain the fifty percent (50%) share of the couple's combined assets that the partnership theory would imply.<sup>19</sup> Second, there seems to be little rationale for not including all assets controlled by either spouse during lifetime in determining the elective share.<sup>20</sup> Finally, Gibber on Estate Administration notes that "planning to avoid elective share rights has become simpler and more effective, while the rights of the surviving spouse have been diminished."<sup>21</sup> This rationale underlies the factors articulated in recent cases for determining when a decedent seeks to evade a spouse's elective share through various kinds of *inter vivos* transfers.

**Share of Augmented Estate:** Similar to the former law, the surviving spouse of a decedent with issue is entitled to take a one-third (1/3) share of the decedent's estate and the surviving spouse of a decedent with no issue may elect to take a one-half (1/2) share. A key difference is that "the estate subject to election" now starts with the concept of the "augmented estate." This consists of the following: (i) the decedent's probate estate; (ii) the decedent's revocable trusts; (iii) all property with respect to which the decedent, immediately before death, held a qualifying power of disposition; (iv) all qualifying joint interests of the decedent; (v) all qualifying lifetime transfers made by the decedent; and (vi) certain life insurance policies. Section V of this article discusses how life insurance is included in the calculation.

Next, the value of the decedent's augmented estate is reduced by certain categories of assets: (i) expenses and claims; (ii) trust assets; (iii) joint interests, lifetime transfers, and property in which a decedent had a qualifying power of disposition to which the surviving spouse consented during lifetime; (iv) irrevocable transfers; (v) life estates; and (vi) spousal benefits.<sup>22</sup>

A chart at the end of this article summarizes the primary differences between the decedent's property subject to the elective share applicable to a decedent's estate (i) before October 1, 2020, and (ii) on or after October 1, 2020.

**Process for Making Election:** As under existing law, the new law will require a signed writing filed in the appropriate court and follow the same time frames for making an election, withdrawing an election, and granting an extension.<sup>23</sup> A sample statutory form is also available.<sup>24</sup> Additional steps



and notices will now be required to effectuate the election. These will include: (i) optional notices of the election to the trustee of the decedent's revocable trust and the estate tax return preparer; (ii) delivery by the trustee of the decedent's revocable trust and the estate tax return preparer of all information necessary to calculate the elective share calculation upon request by the surviving spouse; (iii) notice to the surviving spouse of the revocable trust's existence, the trustee's identity, and the spouse's right to request a copy of the trust, within sixty (60) days after the trustee acquires knowledge of the decedent's death; and (iv) delivery of all information in the surviving spouse's possession, relevant to the elective share calculation and not otherwise available, upon request by the personal representative, the trustee, or the estate tax return preparer, as the case may be.<sup>25</sup>

The new law establishes the following ordering rule for satisfaction of the elective share, to determine the priority of payment from assets which are included in the estate and which are not part of the spousal benefits: (i) from the probate estate; (ii) from the revocable trust; (iii) if the decedent had more than one revocable trust, by apportionment among the trusts in proportion to the value of each revocable trust; (iv) by the recipients of any other portions of the estate, prorated among the recipients in proportion to the value of the assets received by each recipient. If federal law preempts any required payment from a recipient, or if a payment is to be made from a federal qualified disability trust, 529 Plan or other college tuition savings program, or a special needs trust, then payment of the share must be apportioned among recipients whose benefits are not preempted under federal law or who are not beneficiaries of such trusts or accounts. The decedent's Will or trust instrument may override the ordering rule, or the parties who pay the elective share may enter into an agreement subject to court approval for payment of the elective share.<sup>26</sup>

### **III. Consequences to Family Members of a Spouse's Election**

***Blended Families and Unclean Hands:*** The intent of an elective share statute may be to safeguard the surviving spouse from disinheritance by a conniving mate. A recent Maryland case<sup>27</sup> demonstrates that the deceased spouse's children from a prior marriage are sometimes the parties in need of protection. Robert M. Watkins, Jr. had an adult daughter, Shannon, who lived with her father until she married at age 38 and moved to a new home nearby. Robert's third wife, Emeline, met him shortly before his second wife, Jasmine, died of cancer. Shannon became concerned that Emeline was trying to take advantage of Robert while he was depressed and

grieving over Jasmine's death, and thought that Emeline was influencing her father's financial decisions. After Robert's death, Emeline filed for her elective share of one-third of Robert's net estate. The Orphans' Court of Prince George's County found that Emeline dominated the decedent, physically attacked him when he initially declined to marry her, and isolated him from his family and friends. The Court of Special Appeals affirmed the judgement of the Orphans' Court, applying the common law doctrine of unclean hands to find that Emeline's "inequitable conduct in achieving her status as a surviving spouse" barred her claim for a spousal share of the decedent's estate.<sup>28</sup>

Courts in other jurisdictions have made similar rulings under their elective share laws. A recent article describes a New York court's rejection of the petition of a 58 year-old substitute caregiver who had secretly married a 72 year-old man suffering from dementia while his daughter, who was his regular caregiver, was away on vacation. The new wife moved her husband's assets into her name and changed his pension's beneficiary designation. She exercised her elective share rights to contest the decedent's Will which left his entire estate to be divided equally among his adult children.<sup>29</sup> Commentators Yolanda Kaner, Maryann Stallone and Amanda Leone note that: "For the first time, New York courts went beyond the bounds of statutory disqualification, and used their equitable powers to correct the injustice that would result from the strict application of the elective share statute. In doing so, they laid a framework to enable other courts to combat the growing problem of elder abuse and exploitation."<sup>30</sup> The New Jersey Superior Court in *Chrisomalis v. Chrisomalis*<sup>31</sup> affirmed the probate court's rejection of a widow's attempt to exercise her elective share and set aside a valid antenuptial agreement. Roland Chrisomalis had a family business and two sons from a previous marriage. Though Norma Chrisomalis knew her husband wished to protect his estate and his sons' interest in the business from subsequent invasion and understood that the agreement waived her elective share interest, Norma "signed the antenuptial agreement notwithstanding the fact that she did not intend to be bound by it, and openly admitted to this fraud."

An attempt by a widow or widower to take undue advantage of his or her status obviously is not unique to Maryland's new law. The calculation of the elective share based upon a larger pool of the decedent's assets, could, however, exacerbate the result, and provide more incentives for unsavory behavior.

***Unjust Distributions:*** An undesirable effect on other beneficial interests could occur even though a surviving spouse is not attempting a fraud on the decedent's estate.

Scenario: Johnny died with a Will and revocable trust leaving his wife Moria 20% of his gross estate for federal estate tax purposes. The balance of his estate, 80%, passes to Johnny's son David from a prior marriage. Moria's election would entitle her to receive one-third (1/3) of the augmented estate, reducing the assets passing to David to a two-thirds (2/3) share instead. Suppose Moria sometimes supports her brother Jared who suffers from opioid addiction, and Johnny had considered that fact in designing his estate plan. Moria's receipt of the larger elective share could then indirectly result in an unjust distribution to Moria's family members in contravention of Johnny's estate plan.

Solution: As Johnny's heir, David has the right to request judicial review and modification of Moria's election based on the circumstances involving Moria's support of her brother.<sup>32</sup>

***Unimplemented Planning:*** An election following a spouse's untimely death, however, may achieve a more desirable and equitable result. This may be particularly true now that assets outside of the probate estate are used to satisfy the elective share.

Scenario: Stevie's existing revocable trust executed 12 years ago left most assets to Habitat for Humanity with only 10% of her estate as a marital gift under the trust to her husband Bob. Stevie also funded an *inter vivos* trust for their daughter Ronnie Lee which represented 10% of her estate at that time. As Ronnie Lee reached age 14, Stevie's thinking evolved about her existing plan. She and Bob began to discuss an amendment to her revocable trust to leave a 50% share of her estate to Bob and their daughter, with the balance to charity. Sadly, while Stevie was supervising the renovation of her motel, she was killed by a falling beam before the unimplemented planning could proceed.

Solution: By taking his elective share, the assets passing to Bob will be increased to a one-third (1/3) share of Stevie's estate. He will also be entitled to satisfy his share from the assets in Stevie's revocable trust. The transfer of assets to the *inter vivos* trust created for Ronnie Lee's benefit is a qualifying lifetime transfer that occurred before the later of two years before Stevie's death and the date of her marriage to Bob which was 16

years ago.<sup>33</sup> This reduces Stevie's augmented estate by the amount of that trust. Therefore, the total amount passing to Bob and their daughter would be closer to the 50% share that Stevie was contemplating at the time of her death.

***Other Disruptions:*** The taking of the elective share may disrupt the decedent's charitable planning. See Section V of this article for a discussion of this scenario and possible solutions using life insurance.

#### **IV. Planning Opportunities and Recommendations**

The new law provides an incentive for married individuals to review their existing estate plans. Such a review is important for several reasons: (i) to ensure that each spouse has made adequate provision for the other, given the context of the marriage and the couple's financial situation; (ii) to address factors which may motivate a surviving spouse to exercise the right to an election; and (iii) to protect legitimate plans to benefit a decedent's children and transfers to non-spousal beneficiaries.

***Marital Agreements and Waivers:*** For couples contemplating marriage or who married without an agreement, this may be a good time to explore a marital agreement. The new statute allows a waiver of the right of election through a premarital agreement, post-marital agreement, or written waiver.<sup>34</sup> This is supported under Maryland's family law statutes<sup>35</sup> which permit spouses to enter in agreements to address property and support rights.

Those interested in addressing elective share rights through a marital agreement should seek counsel and understand the five "considerations" articulated by Maryland courts to create a valid premarital agreement:

- (i) the agreement must be fair and equitable in procurement and result;
- (ii) the parties must make frank, full and truthful disclosure of all their assets;
- (iii) the agreement must be entered into voluntarily, freely and with full knowledge of its meaning and effect;

- (iv) access to independent legal advice in evaluating whether the agreement was voluntarily and understandingly made is emphasized;
- (v) there is a confidential relationship between the parties which, if a contest to validity occurs, shifts the burden of proof to the one attempting to uphold the agreement to prove that it is fair and equitable.<sup>36</sup>

While the rules governing marital agreements in other jurisdictions may vary, note that over half of states have enacted some form of the Uniform Premarital Agreement Act,<sup>37</sup> which also permits spouses to waive rights that would otherwise arise upon a spouse's death.

***Spousal Consent.*** Rather than executing a comprehensive marital agreement addressing all property rights, a spouse may instead consent to the disposition of specific assets owned by the other spouse. This may not be in the form of a spousal consent to split-gift treatment under the federal gift tax laws.<sup>38</sup>

Scenario: Twyla and Mutt are married, and Twyla has one son, Patrick. Twyla's desire is to give her vacation house that she inherited from her grandfather to a trust for Patrick. While Mutt has been a loving and generous step-father to Patrick, Twyla is aware of the new statute and wants to protect her son from conflicts over an elective share in the event of her death.

Solution: To exclude the vacation house from being part of Twyla's augmented estate, Mutt may execute a written consent to Twyla's lifetime disposition of the property. The statute does not set out requirements for the content or form of such instrument. To protect their respective interests, Twyla and Mutt should seek separate counsel to draft the consent. It would be advisable for the consent to include information such as: (i) a detailed description of the property to be transferred and method of transfer; (ii) photographs, drawings, surveys, or diagrams of the property; (iii) valuation information and the source of the valuation; and (iv) acknowledgement of and agreement by both spouses that Mutt is voluntarily and knowingly consenting to Twyla's disposition of the house and that it will be removed from her augmented estate for purposes of the elective share statute. The consent should be executed in the presence of two witnesses and a notary public, none of whom is related to Twyla, Mutt, or Patrick. Both spouses

should keep a copy for their records, and the executed original should be retained in a secure location such as one of their attorneys' offices.

## V. Planning With Life Insurance to Address Elective Share

***Insurance as Part of Estate:*** Historically, a benefit of life insurance is the ability to direct a policy's proceeds to a beneficiary and avoid probate. The owner of the policy has the sole right to name one or more beneficiaries of a policy and the life insurance company is mandated by the policy's contract to pay policy proceeds to those named following the death of the insured. The new elective share statute changes this convention and, with a few exceptions, allows the surviving spouse to share in the death benefit from a policy on the life of the deceased spouse.

Life insurance proceeds will be viewed as part of the augmented estate to which the surviving spouse is entitled to a one-half (1/2) share if the decedent had no descendants, and a one-third share (1/3) if there were descendants. The portion of the life insurance death benefit includable in the calculation of the augmented estate is the amount such death benefit exceeds the net cash surrender value of the policy immediately before the decedent's death. In the case of term insurance, the value to include in the calculation is the amount of the death benefit in excess of the total premiums paid.<sup>39</sup> These calculations will be applied when:

- Proceeds of the insurance policy are payable to a person other than the spouse and none of the requirements to exclude life insurance (discussed below) are met; and/or,
- Proceeds of the insurance policy are payable to a trust which is the owner and the beneficiary of the life insurance policy on the decedent's life and of which the spouse is one of at least two beneficiaries.

The life insurance proceeds, as calculated for inclusion, may be excluded from the augmented share of the estate when:

- Proceeds are payable to a trust for the exclusive benefit of the spouse; and,
- Proceeds are payable to a charity or to or for the exclusive lifetime benefit of a person who qualifies for an exemption from inheritance tax, such as the decedent's ancestor, child or more remote

descendant, stepchild or more remote step-descendent, or a sibling, and:

- The policy was purchased before the decedent's marriage to the surviving spouse;
- The policy was purchased more than five years before the decedent's death; or,
- The surviving spouse consented in writing during the decedent's lifetime to the disposition of the policy proceeds (as calculated).<sup>40</sup>

Under the new law, it is important to conduct a review of existing life insurance policies to make sure they are held properly in or outside of one's estate and that policies contain beneficiary designations compliant with the new elective share statute. There are also several life insurance strategies to consider in order to incentivize a spouse to not exercise the election, to protect legitimate non-spousal beneficiaries, and to uphold the decedent's intended estate plan.

***Separate Planning for Beneficiaries:*** Plan the use of life insurance specifically for a spouse apart from other beneficiaries or heirs, including establishing separate trusts and policies for these separate interests.

Scenario: Ted and Alexis have been married for five years. Both have minor children from previous relationships. Therefore, each wishes to make sure that financial security is locked into place for both their surviving spouses and surviving children and that any election a surviving spouse might be able to make under the new law does not upend those plans. During their marriage, however, Ted and Alexis wish to be able to make use of the entirety of their joint assets.

Solution: Ted and Alexis each form an irrevocable trust for the benefit of the other where each spouse gifts up to their maximum lifetime exemption amount, up to \$11,580,000 in 2020.<sup>41</sup> This type of trust is known as a Spousal Lifetime Access Trust (SLAT). While Ted is living, he indirectly benefits from distributions made to Alexis from the SLAT he created for her benefit, because such distribution to Alexis may be used for their joint vacations, housing expenses, and financial commitments. The same is true for the SLAT created by Alexis for Ted's benefit. If each SLAT holds a life insurance policy on the grantor spouse, at the death of the grantor spouse,

the death benefit proceeds can replace the loss of the beneficiary spouse's indirect access to distributions from the SLAT created for the other spouse, and satisfy the surviving spouse's elective share under the new law. Then, at the death of the non-grantor spouse (who is the beneficiary spouse), the trust will distribute the remainder of its assets under the SLAT to the remainder beneficiaries.

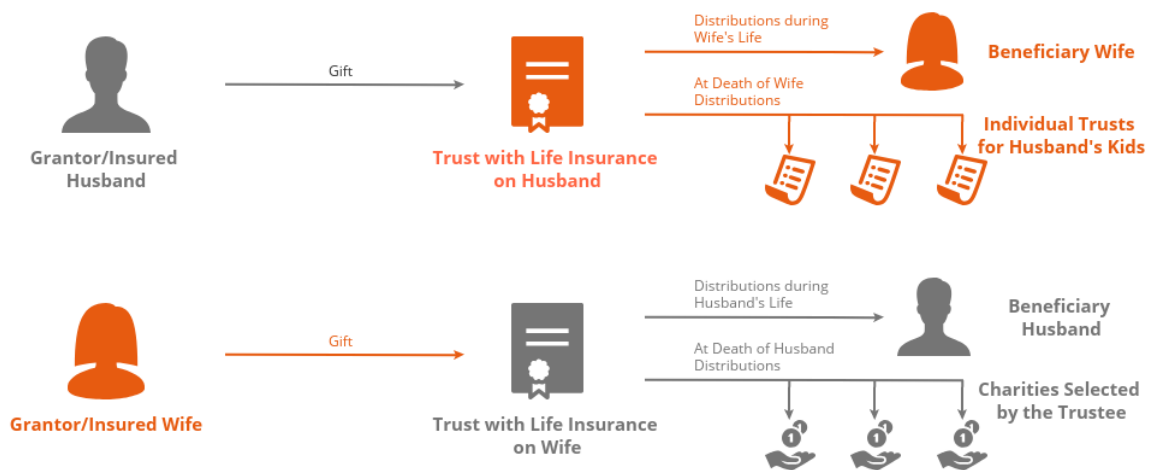
The SLATs should have different terms and beneficiaries as would be the case if one trust includes the children of a spouse's prior relationship as remainder beneficiaries. The remaining principal of the other SLAT could pass as directed by the non-grantor spouse's exercise of a limited power of appointment, or if no such appointment was exercised, to charities selected by the trustee.

Otherwise, a trust created by Alexis for Ted, with substantially identical provisions to a second trust created by Ted for Alexis, and which puts each grantor in approximately the same economic position as if he or she had retained a life estate in the other spouse's trust, are considered to be reciprocal trusts. In that case, each SLAT would be includible in the other grantor's gross estate at death.<sup>42</sup>

Note that a SLAT which has children as remainder beneficiaries may be considered to reduce spousal benefits under Maryland's new elective share law<sup>43</sup> and thus may be available for satisfaction of the elective share.<sup>44</sup> These issues should be considered when funding the SLATs in order to provide disincentives to the exercise of the elective share.

The diagram below shows how the SLATs might be structured.





**Funding of Elective Share.** A life insurance policy could be purchased to fund an elective share.

Scenario: Grace is from a wealthy family and separated from her husband, Ray. They have three adult children. Due to their religion, the couple refuses to divorce, and Ray is currently living with his girlfriend and their newborn child nearby. As Grace and Ray are still legally married, Grace fears she is going to lose a lot of her estate she intends for her children to Ray if Grace predeceases him. Further, Ray will not consent in writing to forgo an election.

Solution: Grace establishes an irrevocable life insurance trust (ILIT) for the benefit of Ray. The trust purchases a life insurance policy on Grace's life with the trust as both owner and beneficiary of the policy. The policy's death benefit should be in the amount to satisfy the value of Grace's estate subject to any election Ray would likely make under the new law.

The trustee should be granted powers to manage the life insurance policy, an important task should Grace and Ray divorce or Ray predeceases Grace and the policy is no longer needed. The trustee could permit Grace as the grantor to extract the life insurance policy from the ILIT by either buying the policy back for the policy's fair market value or substituting another asset for an equivalent value in exchange for the policy.<sup>45</sup> The policy could then be used for other areas of Grace's planning, including to fund another ILIT. Another option is for the trustee to donate the policy to charity for a tax deduction which is limited to the lesser of (i) the fair market

value of the policy or (ii) the trust's basis in the policy. The basis is usually the amount of premiums paid less any dividends the policy may have provided.

***Use of Term Life Insurance:*** Purchase a term life insurance policy to keep in-force to offset the loss of assets under the new law, either while restructuring an estate plan or waiting for an expiration of an exception period.

Scenario: Roland and Jocelyn have been married forty years and have four children. Roland purchases a whole life insurance policy on his life and lists the beneficiary as a charity he and Jocelyn support. If Roland dies within five years of purchasing this policy, Jocelyn may elect, under the new statute, to have a share of the death benefit proceeds, less the cash surrender value, included in the calculation of her spousal share. As Roland and Jocelyn have made other financial plans for Jocelyn, should Roland predecease Jocelyn, Roland does not wish to have his charitable planning disrupted. Jocelyn could agree in writing to forgo an election but Roland fears the new law could be modified to prevent such a refusal.

Solution: Roland purchases a five-year term policy on his life for the same death benefit with the beneficiary also listed as the same charity as the whole life insurance policy. Should Roland die within five years and Jocelyn makes an election under the new law under both policies, the combined remaining death benefit proceeds from both policies would satisfy Roland's charitable wishes.

## **Concluding Observations**

Maryland's new law affects many property interests through a complex system for satisfaction of a spouse's elective share. An elective share statute based upon the augmented estate concept is now the case in Maryland along with 21 other states. The new law demonstrates that spouses need to consider their assets, lifetime transfers, beneficial interests of other family members, and charitable intent, all in the context of provisions for one another through their Wills, revocable trusts, *inter vivos* trusts, and jointly owned interests. For blended families, making planning decisions for the spouse apart from other heirs is recommended. Granted, a decedent's heirs may petition a court to modify the value of the spouse's elective share or the property to which it applies. Even so, planning ahead to address potential family conflicts is nearly always preferable to judicial

intervention. Married couples should seek guidance from an experienced estate planning attorney to minimize unwanted consequences from the exercise of an elective share upon a spouse's death.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Linda Kotis*

*Andrea Dykes*

*Carolyn Rogers*

**CITE AS:**

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## COMPARISON OF PROPERTY SUBJECT TO MARYLAND ELECTIVE SHARE LAWS

Category	For Decedents Dying Before October 1, 2020	For Decedents Dying On Or After October 1, 2020
Decedent's Property Included in Estate Subject to Election	<ol style="list-style-type: none"> <li>1. Net probate estate ("Net Estate")</li> <li>2. Non-probate transfers to 3<sup>rd</sup> party that meet criteria for inclusion under <i>Karsenty v. Schoukroun</i></li> </ol>	<ol style="list-style-type: none"> <li>1. Net Estate</li> <li>2. Revocable trusts</li> <li>3. Property with a qualifying power of disposition: <ul style="list-style-type: none"> <li>• General power of appointment to decedent, estate, creditors, or creditors of estate (not POA created by another donor and subject to HEMS standard)</li> <li>• Beneficiary, POD, or TOD designation</li> <li>• Power created by decedent to determine or amend possession, enjoyment of, or income right from property</li> </ul> </li> <li>4. Qualifying joint interests: <ul style="list-style-type: none"> <li>• For JTWROS, greater of (i) tenant's fractional interest in property; or (ii) percentage of property's value contributed by tenant (exclusive of income or appreciation)</li> <li>• For TBE, one-half of property value</li> </ul> </li> <li>5. Irrevocable lifetime transfer with retained interest at or after transferor's death, for: <ul style="list-style-type: none"> <li>• Possession of property</li> <li>• Right to receive income</li> <li>• Use or enjoyment of property</li> <li>• Qualifying joint interest</li> <li>• Qualifying power of disposition</li> <li>• Right to receive annuity or other periodic payment, including a periodic payment based on property value</li> </ul> </li> <li>6. Life Insurance on decedent's life: <ul style="list-style-type: none"> <li>• Non-term policy proceeds in excess of policy's net cash surrender value immediately before decedent's death</li> <li>• Term policy proceeds in excess of total premiums paid</li> <li>• Calculations apply when: <ul style="list-style-type: none"> <li>- Proceeds payable to third-party and no requirements discussed in "Assets Excluded" are met</li> <li>- Proceeds are payable to a trust which is owner and beneficiary of policy on decedent's life and of which spouse is one of at least two beneficiaries</li> </ul> </li> </ul> </li> </ol>

Category	For Decedents Dying Before October 1, 2020	For Decedents Dying On Or After October 1, 2020
Calculation of Elective Share	One-third of Net Estate if decedent had no living children or descendants  OR  One-half of Net Estate if decedent had no living children or descendants	One-third of Augmented Estate if decedent had no living children or descendants  OR  One-half of Augmented Estate if decedent had no living children or descendants
Assets Excluded from Estate or Reducing Estate Subject to Election	<ol style="list-style-type: none"> <li>1. Joint bank account with third party</li> <li>2. Life insurance proceeds to third party</li> <li>3. Beneficiary, POD, or TOD designation for third party</li> <li>4. Lifetime transfer to decedent's revocable trust</li> <li>5. Lifetime transfer to irrevocable trust</li> <li>6. Outright gifts to third party</li> </ol> <p>These are excluded so long as transfer holds up to scrutiny under <i>Karsenty v. Schoukroun</i></p>	<ol style="list-style-type: none"> <li>1. Assets held in trust of which decedent is not a settlor, when assets either were (i) not previously owned by decedent or (ii) previously owned by decedent but sold</li> <li>2. Value of federal qualified disability trust, college tuition savings plan, or special needs trust, in which decedent had a qualifying power of disposition</li> <li>3. Any qualifying joint interests, lifetime transfers, or property in which decedent had a qualifying power of disposition, and surviving spouse consented to in writing during decedent's lifetime, other than by consent to split gift for federal gift tax purposes</li> <li>4. Specified irrevocable transfers of decedent if (i) initial transfer took place before decedent's marriage or (ii) decedent's interest in property transferred terminated more than two years before decedent's death</li> <li>5. Specified irrevocable transfers of decedent occurring before later of (i) decedent's marriage or (ii) two years before decedent's death</li> <li>6. Any life estate of decedent, if at time of death, (i) decedent held no qualifying power of disposition over the real property and (ii) interest was created more than two years before decedent's death</li> <li>7. Insurance policy proceeds when:               <ul style="list-style-type: none"> <li>• Payable to trust for spouse's exclusive benefit</li> <li>• Payable to a charity or to or for exclusive lifetime benefit of a person who qualifies for an exemption from inheritance tax (decedent's ancestor, child or more remote descendant, stepchild or more remote step-descendant, or a sibling) and one of following is true:                   <ul style="list-style-type: none"> <li>- Policy was purchased before decedent's marriage to surviving spouse</li> <li>- Policy was purchased more than 5 years before decedent's death; or</li> <li>- Surviving spouse of consented in writing during decedent's lifetime to disposition of proceeds.</li> </ul> </li> </ul> </li> <li>8. Spousal benefits that reduce estate except for:               <ul style="list-style-type: none"> <li>• Portion of jointly held property with spouse not included in Augmented Estate;</li> <li>• Assets passing by reason of decedent's death to any trust of which surviving spouse is not sole beneficiary;</li> <li>• Assets held in inter vivos trust with decedent as settlor and surviving spouse is not sole beneficiary;</li> </ul> </li> </ol>

Category	For Decedents Dying Before October 1, 2020	For Decedents Dying On Or After October 1, 2020
		<ul style="list-style-type: none"> <li>• One-fourth of aggregate value of assets in any testamentary marital trust;</li> <li>• One-third of the aggregate value of assets passing by reason of decedent's death to, or held at decedent's death in, any trust, whether a testamentary or inter vivos trust if (i) decedent was a settlor; (ii) trust was created during decedent's lifetime for exclusive lifetime benefit of surviving spouse; and (iii) trustees may make distributions to or for benefit of surviving spouse in accordance with specified rules</li> <li>• Entire value of any other trust created by decedent as settlor for exclusive lifetime benefit of surviving spouse that is not a marital trust</li> </ul>

## CITATIONS:

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- <sup>1</sup> <https://www.wealthmanagement.com/insurance/maryland-enacts-new-elective-share-law>; *The 2020 Election in Maryland: It's Not About Politics*, Probate & Property magazine (July/August 2020).
- <sup>2</sup> MD. CODE ANN., EST. & TRUSTS §§ 3-401 through 3-413 (2019).
- <sup>3</sup> See Department of Legislative Services, Maryland General Assembly, 2019 Session, Fiscal and Policy Note, H.B. 99, page 10.
- <sup>4</sup> H.B. 99, Section 2, Ch. 35, Acts 2019.
- <sup>5</sup> See H.B. 99 Fiscal and Policy Note at page 10.
- <sup>6</sup> MD. CODE ANN., EST. & TRUSTS § 3-203 (2019).
- <sup>7</sup> MD. CODE ANN., EST. & TRUSTS § 3-206 (2019).
- <sup>8</sup> MD. CODE ANN., EST. & TRUSTS §§ 3-204, 3-207 (2019).
- <sup>9</sup> MD. CODE ANN., EST. & TRUSTS § 3-205 (2019).
- <sup>10</sup> See ALLAN J. GIBBER, GIBBER ON ESTATE ADMINISTRATION § 10.31 (6th ed. 2018).
- <sup>11</sup> See *Karsenty v. Schoukroun*, 959 A.2d 1147 (2008).
- <sup>12</sup> MD. CODE ANN., EST. & TRUSTS § 3-208(b) (2019).
- <sup>13</sup> See *Rabbitt v. Gaither*, 8 A. 744 (1887).
- <sup>14</sup> See DC CODE ANN. § 46-601(b)(2) (2019); VA. CODE ANN. § 55.1-202 (2019).
- <sup>15</sup> See *Condore v. Prince George's County*, 289 Md. 516, 530, 533 (Md. 1981).
- <sup>16</sup> MD. CODE ANN., FAMILY LAW § 10-201 (2019).

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<sup>17</sup> See Pennell, Cline, and Turnipseed, 841 T.M., Spouse's Elective Share.

<sup>18</sup> MD. CODE ANN., EST. & TRUSTS § 3-402 (2019).

<sup>19</sup> Waggoner, Lawrence W., "Uniform Probate Code's Elective Share: Time for a Reassessment," U. Mich. J. L. Reform 37, no. 1 (2003) at page 3.

<sup>20</sup> Patricia J. Roberts, *The 1990 Uniform Probate Code's Elective-Share Provisions – West Virginia's Enactment Paves the Way*, 95 W. VA. L. REV. 57, 109 (1992).

<sup>21</sup> GIBBER, § 10.36.

<sup>22</sup> MD. CODE ANN., EST. & TRUSTS §§ 3-403, 3-404 (2019).

<sup>23</sup> MD. CODE ANN., EST. & TRUSTS § 3-407 (2019).

<sup>24</sup> MD. CODE ANN., EST. & TRUSTS § 3-408(b) (2019).

<sup>25</sup> MD. CODE ANN., EST. & TRUSTS §§ 3-408(a)(2), 3-409 (2019).

<sup>26</sup> MD. CODE ANN., EST. & TRUSTS § 3-410(a),(b) (2019).

<sup>27</sup> *In re Watkins*, 209 A.3d 135 (Md. Ct. Spec. App. 2019).

<sup>28</sup> *In re Watkins*, 209 A.3d at 146-147.

<sup>29</sup> *Campbell v. Thomas*, 73 A.D.3d 103 (2d Dept. 2010).

<sup>30</sup> See Boomers, Beware: Predatory Marriage and New York's Elective Share Law, New York Law Journal, January 21, 2020.

<sup>31</sup> 615 A.2d 266 (1992).

<sup>32</sup> MD. CODE ANN., EST. & TRUSTS § 3-413 (2019).

<sup>33</sup> See MD. CODE ANN., EST. & TRUSTS § 3-404(b)(8) (2019).

<sup>34</sup> MD. CODE ANN., EST. & TRUSTS § 3-406 (2019).

<sup>35</sup> MD. CODE ANN., FAM. LAW § 8-101 (2019).



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<sup>36</sup> See *McGeehan v. McGeehan*, 167 A.3d 579 (Md. Ct. App. 2017), footnote 16, citing *Cannon v. Cannon*, 865 A.2d 563 (2005). Note that similar standards have been applied to post-marital agreements.

<sup>37</sup> See Prefatory Note to UNIF. PREMARITAL AGREEMENT ACT (2012).

<sup>38</sup> MD. CODE ANN., EST. & TRUSTS § 3-404(b)(6) (2019).

<sup>39</sup> MD. CODE ANN., EST. & TRUSTS § 3-404(b)(10) (2019).

<sup>40</sup> MD. CODE ANN., EST. & TRUSTS § 3-404(b)(10)(ii),(iii) (2019).

<sup>41</sup> See REV. PROC. 2019-44.

<sup>42</sup> Pursuant to I.R.C. § 2036(a)(1) and *U.S. v. Grace et al.*, 395 U.S. 316 (1969).

<sup>43</sup> As defined under MD. CODE ANN., EST. & TRUSTS § 3-401(n) (2019).

<sup>44</sup> See MD. CODE ANN., EST. & TRUSTS §§ 3-410(b), 3-411 (2019).

<sup>45</sup> As permitted by I.R.C. § 675(4).