

## SPOUSAL ELECTIVE SHARE LEGISLATION

### SUMMARY

The proposed “Augmented Estate” legislation is designed to cure flaws in the current Maryland elective share. The current elective share is both unfair and unclear. The current elective share (ET §3-203 et seq.) gives a surviving spouse the right to take a forced share of the decedent’s estate rather than what may otherwise be given under the decedent’s spouse’s will. This statutory elective right applies only to the decedent’s probate estate. Given the numerous methods of probate avoidance currently available, there is no guarantee that a surviving spouse will receive anything at death. Case law (Knell v. Price, 318 Md. 501 (1990)) has brought some non-probate assets back into the probate estate where the decedent maintained full dominion and control over the asset during life. Precisely how that case affects the status of all non-probate property is unclear.

The proposed “Augmented Estate” legislation attempts to clarify the rules. The new legislation “augments” the estate for purposes of determining the spouse’s elective share. The elective estate includes not only the probate estate but also other assets including the following:

- Certain property passing by right of survivorship
- Property in a revocable trust
- The net proceeds of life insurance
- Death benefits payable under a qualified plan
- Certain transfers made within two years of decedent’s death

The new elective share amount is a right to a dollar amount, not a right to specific property. The amount of the elective share will depend on the duration of marriage varying in stages from 10% for marriages of less than five years to a maximum of 40% for marriages of 25 years or more.

Once the elective share amount is determined, the elective share amount will be satisfied by estate property in the following order or priority:

- First, from any property interest that has passed to the surviving spouse by operation of law, under the will of the decedent, or in certain trusts for the benefit of the surviving spouse. Note, if the trust is a qualified interest it can satisfy the elective share amount. The spouse cannot exchange the trust interest for cash.
- Second, from the decedent’s other probate assets.

- And finally, by contribution from other recipients of other non-probate elective share property.

The most recent attempt to change the elective share laws in Maryland was House Bill 265, introduced in the Maryland legislature in January of 2000. Since that time, the State of Florida has enacted a substantially identical statute. Reports from Florida practitioners indicate that the law is working well in Florida, although a number of amendments to the statute have been proposed for the 2006 legislative session. The proposed legislation is essentially the same as House Bill 265 with two major changes and incorporation of Florida law where it differs significantly from Maryland law. Those changes and incorporated items are as follows:

- The net proceeds of life insurance on the decedent's life are included in the elective estate, rather than the cash surrender value of the life insurance policies just prior to the decedent's death.
- Certain gifts made within two years of the decedent's death are included in the elective estate, rather than certain gifts made within one year of the decedent's death.
- The elective share may also be satisfied by providing the surviving spouse with an interest in a qualifying special needs trust. [Florida law as enacted]
- The definition of an elective share trust is amended to qualify a QTIP trust as an elective share trust even if the QTIP election is not made. [**Proposed** Florida law]
- In the case of POD, TOD and similar arrangements, the decedent's interest is defined by his or her right to withdraw or use without duty to account rather than a tracing concept. [Florida law as enacted]
- Unitrust included with annuity interests in determining the decedent's retained right to income or principal in transferred property. [Florida law as enacted]
- Florida law excludes from the elective estate an interest includible in the decedent's gross estate solely by reason of his or her having a general power of appointment over the property. [Florida law as enacted]
- Florida law does not reduce the value of property by deducting administration expenses and funeral expenses, but does reduce the value of claims. [Florida law as enacted – change **not** made to HB 265]
- Florida law does **not** include a phasing-in of the elective share for marriages of differing lengths. [Florida law as enacted – the phase-in schedule in HB 265 has been retained]

- Florida law includes in the interests which pass or have passed to the surviving spouse, for purposes of priority of payment of the elective share, interests contingent on making the election. [Florida law as enacted]
- Protected charitable interests are exempt from contribution [Florida law as enacted], and protected charitable interests are defined to include an interest for which an income tax deduction was allowed or allowable [**Proposed** Florida law].
- Florida law requires the personal representative of the decedent's estate to collect the contribution and requires service on the surviving spouse or his or her attorney-in-fact or guardian. Maryland law requires the surviving spouse to collect the contribution. [Florida law as enacted – change **not** made to HB 265]
- Florida law requires interest to be paid on any contribution not made within 90 days of the court order. [Florida law as enacted – change **not** made to HB 265]
- Proposed changes to the Florida law include changing the language relating to gifts excludable from the elective estate from \$10,000 to gifts excluded under Sections 2503(b) and 2503(c) of the IRC. This more flexible definition was already included in HB 265.
- Florida law contains additional transitional rules and the Uniform Disposition of Community Property Rights at Death Act.
- Proposed changes to Florida law include a change to the provisions protecting pensions from the claims of creditors excluding the spousal elective share from the protection. Similar changes may need to be made to the Maryland law.