ELECTIVE SHARE REFORM FOR MARYLAND
COMMENTARY ON LEGISLATION TO BE INTRODUCED IN THE 2018 LEGISLATIVE SESSION

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on behalf of

The Legislative Work Group on Elective Share Reform[1]

EXECUTIVE SUMMARY

Throughout its history, Maryland has protected widows and widowers from disinheritance when their spouse dies. Historically, as the nature of wealth and property has evolved, the State's laws have adjusted to new circumstances. However, since its enactment in the mid-1970s, Maryland's current elective share statute has relied entirely on probate assets to value and fund an electing spouse's share of an estate. In the intervening decades, non-probate structures for holding and transferring property have gained increasing prominence. This allows decedents effectively to disinherit their spouses through relatively-simple estate planning with non-probate assets.

A secondary problem is the converse of the first. The current statute takes no account of non-probate arrangements benefitting the surviving spouse. As a result, an electing surviving spouse could receive a disproportionately high share of the decedent's assets if he or she is the beneficiary of large joint bank account, a retirement account, life insurance, or other non-probate assets.

Maryland's courts have endeavored to keep pace with this shift toward non-probate property. The resulting case law may offer a surviving spouse access to non-probate assets in

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The author is grateful to his colleagues on the Work Group and on the Estate and Trust Law Section Council for their engagement with this issue, their encouragement, and the ideas and debate that fostered the development of the proposed legislation and provide the basis for this Commentary. Thanks also are due to other members of the bar – particularly the Elder Law and Disability Rights Section Council – who have worked assiduously to find solutions that advance the interests of all Marylanders. This Commentary is intended to reflect the consensus reached by the Work Group. Any failures in that regard, as well as any other errors, are the author's sole responsibility. The author used an earlier version of this Commentary (that was compiled before the Work Group began its work) for presentations in May and June, 2017.

certain circumstances, but obtaining that result requires litigation, the expense of which may well be beyond the reach of a disinherited widow or widower.

Thus, the problems with Maryland's current elective share law are threefold:

1. It is far too easy to disinherit a surviving spouse;[2]
2. In some circumstances, a widow or widower can receive a disproportionately large share of the estate;[3] and
3. Judicial redress often is beyond the reach of poorer individuals, thus creating a two-tier system for relief from the current statute's inequities.

Building on decades of previous efforts, the Legislative Work Group on Elective Share Reform reached consensus on legislation addressing these problems.[4] The resulting bill proposes a formula that includes non-probate arrangements in the calculation and satisfaction of the elective share as follows:

I. CALCULATION AND PAYMENT OF THE ELECTIVE SHARE.[5]

a. The Elective Share equals:

i. The "Estate Subject to Election" (made up of the "Augmented Estate" with certain adjustments),
ii. Divided by three (if the decedent leaves issue) or two (if there are no descendants),
iii. Reduced by the "Spousal Benefits."

b. Absent other provision by the decedent or an agreement among the parties, the elective share will be paid as follows:

i. First, from the probate estate;
ii. Second, from any revocable trusts; and
iv. Finally, proportionally from any other non-probate assets.

[2] See "Example 2: Miserly Decedent Spouse," in Appendix B.

[3] See "Example 3: Greedy Surviving Spouse," in Appendix B.

[4] The Work Group, which consists of legislators, academics, members of the Estate and Trust Law and Elder Law and Disability Rights Section Councils, and practitioners in the estates and trusts field, was formed in response to disagreements arising from legislation introduced in the 2014 through 2017 legislative sessions. That earlier legislation, in turn, built on discussions and abortive legislative efforts for elective share reform dating back to at least the mid-1990s.

[5] Please see Appendix C for a more detailed outline of the proposed formula.

II. KEY DEFINITIONS USED IN THE FORMULA.

a. The "Augmented Estate" consists of:
   i. The decedent's probate estate;
   ii. The decedent's revocable trusts;
   iii. All property for which the decedent could name the beneficiaries (such as IRAs, insurance policies, TOD accounts, etc.);
   iv. The decedent's share of any joint accounts or interests; and
   v. Certain lifetime transfers made by the decedent.

b. The "Estate Subject to Election" is the Augmented Estate reduced by:
   i. Funeral and administration expenses;
   ii. Family allowances;
   iii. Enforceable claims;
   iv. Certain trusts not created by the decedent, or which benefit others with disabilities;
   v. Lifetime transfers made more than two years before the decedent's death, or to which the surviving spouse consented;
   vi. Real property in which the decedent held a life estate without power of disposition; and
   vii. Certain life insurance policies benefitting close family members.

c. The "Spousal Benefits" are all assets passing to or for the benefit of the surviving spouse by reason of the decedent's death, reduced by:
   i. The spouse's share of any joint property;
   ii. Any assets passing to, or held in, a trust of which the surviving spouse is not the sole beneficiary or that does not meet at least the standard of a "special needs trust" under the Maryland Code;
   iii. 25% of any trust of which the surviving spouse is the sole beneficiary and which pays all income to the surviving spouse; and
   iv. 33% of any other trust for the exclusive benefit of the surviving spouse that meets or exceeds the distribution standard of a special needs trust.

III. OTHER SIGNIFICANT CHANGES FROM CURRENT LAW.

a. If specifically authorized a guardian or a person acting pursuant to a power of attorney now may make the election on behalf of the surviving spouse.
b. Should a court (which initially will be the Orphans' Court in the jurisdiction where the election was filed) be called upon to modify the formula's results, the bill offers guidance on the factors to be considered.

Through these provisions, the proposed legislation addresses the problems identified above. Non-probate assets now are included in the calculation and payment of the elective share, making it significantly more difficult to disinherit a surviving spouse. Those same assets also may form part or all of the spousal benefits, meaning that an election will cause less disruption to a well-balanced estate plan, and reducing the likelihood of an over-large share of the assets going

to the surviving spouse.[6] By addressing the most common problems with the existing statutory scheme, the bill should reduce the need for litigation, and make the elective share more uniformly accessible to Marylanders.

[6] For illustrations of how the proposed legislation will solve these problems, please see attached Examples 2 and 3 in Appendix B.

COMMENTARY

INTRODUCTION

Throughout its history, Maryland has protected widows and widowers from disinheritance when their spouse dies. As the nature of wealth and property has evolved, the State's laws have adjusted to new circumstances. Over time, "dower" and "curtesy," which protected surviving spouses in a real property based economic system, gave way to the spousal "elective share" recognizing that wealth now is concentrated more in personal than in real property. When Maryland's elective share statute took what is essentially its current form in 1978, most wealth was held in the form of probate assets.[7] In the intervening decades, non-probate structures for holding and transferring property have become increasingly prevalent. Although Maryland's courts have endeavored to keep pace with this shift toward non-probate property, current law effectively limits protection - if any - from resulting disinheritance to those widows and widowers who can afford to litigate. The legislation discussed below is designed to ensure that Maryland's longstanding policy of protecting surviving spouses from disinheritance is available to all.

Another enduring Maryland policy value is testamentary freedom: the ability to dispose of one's assets as one sees fit. Like its predecessors, the elective share is one of the few restraints the State places on that liberty.[8] The evolution of new estate planning techniques has allowed spouses to avoid that restraint. However, the current structure of Maryland's elective share statute also prevents them from using those approaches to benefit their widow or widower, while still meeting their longer-term testamentary goals. The proposed legislation recognizes that new methods can serve the dual goals of testamentary freedom and spousal protection by providing a formula that considers all assets at a decedent spouse's disposal, as well as differing ways in which those assets might benefit a surviving spouse.

The bill also recognizes that marriages are as varied and diverse as the individuals in them, and that no formula can address every circumstance. Accordingly, it offers guidance to courts that may be called upon to modify the elective share where that will achieve a more equitable result.

This proposal represents the efforts of a Work Group composed of legislators, law professors, and practicing attorneys in the areas of estates and trusts and elder law. It builds on decades of efforts to achieve elective share reform for Maryland. The persistence of the issue reflects agreement that current law does not serve Marylanders well. That finding a consensus

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[7] Probate assets are those passing pursuant to the decedent's Will under the supervision of the relevant authorities: in Maryland, the Registers of Wills and Orphans' Courts.

[8] *See e.g.*, Angela M. Vallario, *The Elective Share has No Friends: Creditors Trump Spouse in the Battle over the Revocable Trust* (October 24, 2016), Capital University Law Review, Forthcoming; University of Baltimore School of Law Legal Studies Research Paper No. 2017-08. Available at SSRN: https://ssrn.com/abstract=2856659.

solution has taken so long illustrates the difficulty of balancing the differing theories and interests involved. In the end, the Work Group believes that the approach embodied in this legislation strikes a fair and equitable balance among spouses' interests, while making the elective share statute work for more Marylanders.

MARYLAND'S CURRENT ELECTIVE SHARE LAW

I. Statutory Law.

Section 3-203 of the Estates and Trusts Article of the Annotated Code of Maryland entitles the surviving spouse to elect to take a one-third (if there are living descendants) or one-half (if there are no living descendants) share of the deceased spouse's "net estate" in lieu of what might pass to the widow or widower under the decedent's Will.[9] The "net estate" consists of all property passing under the decedent's Will, reduced by funeral and administration expenses, statutory family allowances, and enforceable claims against the estate.[10] The elective share is payable *pro rata* from all assets passing under the Will, unless the non-spousal beneficiaries substitute cash.[11] The current statute neither makes provision for including non-probate assets in the elective share, nor allows satisfaction of the share either from assets not subject to the election or through the use of trusts benefitting the surviving spouse.

II. Case Law.

The current statutory formula works well enough when all (or substantially all) of the decedent's assets pass via probate. However, it became apparent early on that the formula was subject to evasion through the use of lifetime gifts and/or increasingly sophisticated non-probate estate planning techniques. Maryland's courts have endeavored to find equitable solutions to those problems, which also have evolved over time.

Two cases, in particular, have dominated the landscape of Maryland elective share law during the time various groups have been wrestling with statutory reform. In *Knell v. Price*,[12] the Court of Appeals seemed to establish a "per se" test that would subject property over which the decedent retained lifetime dominion and control to the spousal election.[13] The case of

[9] MD. ANN. CODE. Estates & Trusts Article ("E&T Article") §3-203(b) (2011 Replacement Volume; 2016 Supplement).

[10] Id. §3-203(a).

[11] Id. §3-208(b).

[12] 318 Md. 501, 569 A.2d 636 (1990).

[13] *See, Knell, supra* 318 Md. at 512. *See also*, Frederick R. Franke, Jr. *Article 15.3 Knell v. Price*, http://fredfranke.com/articles/15-3-knell-v-price/.

Karsenty v. Schoukroun[14] clarified that the decedent's retained control is only one of several factors to be considered in determining whether a non-probate asset should be included in the elective share calculation.[15] Under *Karsenty*, those factors – which essentially are those listed in Sections 3-412(b)(1) through (4) of the proposed legislation discussed below[16] – will be applied on a case-by-case basis to determine the most equitable result in that particular situation.

III. The Problem with Maryland's Current Elective Share Law.

Experience has shown that Maryland's current blend of statutory and case law does not work consistently to protect surviving spouses from disinheritance. First, by omitting non-probate assets from its formula, the existing statute makes it exceedingly easy to disinherit a surviving spouse – on purpose or inadvertently. As shown in the example attached in Appendix B, a "Miserly Decedent Spouse" has merely to transfer his or her assets to a revocable trust to avoid the elective share. In a similar - and probably more common - vein, one spouse might inadvertently deprive the other of access to non-probate assets, and thus significant means of support.[17]

On the other side of the coin, the present statute also permits a "Greedy Surviving Spouse" to obtain a disproportionately large share of the decedent's overall assets (as shown in the example of that name in Appendix B) where non-probate assets are deployed for the surviving spouse's benefit. This could be particularly burdensome where the decedent's probate estate consists primarily of illiquid assets, such as a family business. Suppose, for example, that a small business person wishes to leave the enterprise to his or her children by a prior marriage, while providing for the widow or widower using non-probate assets such as life insurance or retirement accounts. Under the existing statute, the surviving spouse could receive those non-probate assets and take an elective one-third share of the business (unless the children could afford to substitute cash).

Either of these situations might be remedied by courts following *Karsenty*. That case's facts-and-circumstances based approach, however, creates two practical problems for Marylanders: decedent spouses cannot plan the disposition of their assets with certainty, and the costs of litigation may foreclose access to judicial relief. The problem of a "Greedy Surviving

[14] 406 Md. 469, 959 A. 2d 1147 (2008).

[15] *Karsenty*, 406 Md. at 501.

[16] *See*, *Karsenty*, 406 Md. at 516-524.

[17] For example, financial institutions increasingly press their customers to avoid probate by executing beneficiary designations, transfer on death ("TOD") instruments, and similar devices directing the disposition of assets. Often, people will name non-spousal beneficiaries for one or more accounts without coordinating among them. Similarly, someone might spend-down one account without considering how its absence will affect their overall estate plan. This can lead to inadvertent disinheritances in frustration of the decedent's intent. When the surviving spouse is unintentionally disinherited via non-probate arrangements, the current statute affords him or her no remedy.

Spouse" noted above means that a decedent has no guarantee that a carefully crafted plan involving non-probate assets – even if it provides generously for the surviving spouse – will be honored under current law. More importantly, the cost of litigation could leave a surviving spouse with no avenue for vindicating his or her rights.[18] Except in the most clear-cut cases, there is no certainty of success, and the financial burden could prevent a disinherited spouse (especially one with few or no assets of his or her own) from pursuing the judicial remedy.

Thus, current Maryland law effectively provides a two-tier system for elective share law: those with the means to litigate have a reasonable chance of achieving an equitable result, while those without the necessary resources – particularly widows and widowers without meaningful assets of their own – are at the mercy of a flawed statutory formula.

LEGISLATIVE HISTORY

The proposed legislation discussed below evolved from several years of experience with elective share reform legislation in Maryland. The extremes of recent efforts ranged from House Bill 218 introduced in 2015 that would have added only revocable trusts to the existing statutory structure to 2014's House Bill 570 and Senate Bill 621, which employed a formula based largely on the model used in the Uniform Probate Code ("UPC"). Objections raised to those bills help explain the approach ultimately endorsed by the Work Group.

I. Adding Revocable Trusts to the Existing Statutory Formula.

Introduced during the 2015 General Assembly session, House Bill 281 attempted to add revocable trusts to the existing statutory structure. It passed the House of Delegates, but was defeated in Senate commitee because of concerns raised by attorneys in other practice areas. This failure illustrates a problem with any piecemeal approach to revising Maryland's elective share statute: the interrelated nature of probate and non-probate dispositions of assets. While including non-probate revocable trusts in the existing formula appeared straightforward in many respects, doing so would have significantly impaired techniques used to assist elderly and disadvantaged clients. It also would have left significant room for non-probate arrangements (other than revocable trusts) designed to frustrate the elective share. The fate of HB 281 showed that a more comprehensive approach was needed.

II. The Uniform Probate Code ("UPC").

The UPC approach was represented by House Bill 570 and Senate Bill 621 introduced during the 2014 session.[19] The UPC formula, which has been adopted by several states, values

[18] This concern also applies somewhat to non-spousal beneficiaries. However, the problem is not as dire for them as for an impoverished and disinherited surviving spouse because, presumably, the estate plan favors the non-spousal beneficiaries, and therefore they will be able to access the decedent's assets to oppose the spouse's claim.

[19] HB 570 was withdrawn, and SB 621 did not receive a vote in committee.

all assets (probate and non-probate) held or controlled by the decedent as well as portions of jointly owned property, and certain lifetime transfers made by the decedent.[20] To this total it adds the value of the surviving spouse's assets (determined in the same manner as the decedent's assets) to complete the "augmented estate."[21] The augmented estate then is multiplied by a percentage based on the length of the marriage to produce the "marital-property portion."[22] The elective share is fifty percent of the marital-property portion. [23] It can be satisfied from that part of the marital-property portion comprised of the spouse's assets and assets he or she receives outright from the decedent's part of the marital-property portion.[24] If those assets are insufficient to fund the elective share, the UPC directs payment of the balance from the decedent's other probate and non-probate assets on a proportional basis.[25]

Much opposition to this approach centers around two major areas of concern: the inclusion of spousal assets in the formula, and the use of a vesting schedule to determine the marital-property portion. Many practitioners believe that including the surviving spouse's assets in the formula effectively would double the amount of work necessary to calculate the elective share because those assets would need to be identified and valued.[26] In addition, some see that inclusion as an invitation to litigation. If the non-spousal beneficiaries wish to frustrate the elective share, they need only challenge the value of the survivor's assets to impose substantial costs on him or her (beyond the administrative costs noted above). This could be especially devastating to truly-impoverished widows and widowers. These commentators believe that, as a result of these considerations, including the surviving spouse's assets in the elective share calculation could have a chilling effect on widows and widowers, and may place the elective share's benefits farther beyond their reach.

Some also believe that the UPC's use of a vesting schedule based on the length of the marriage is needlessly arbitrary.[27] It fails to take into account the variety and complexity of

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[20] UNIFORM PROBATE CODE ("UPC") (1969; Last Amended or Revised 2010), §§ 2-203(a), 2-204, 2-205, 2-206.

[21] UPC §§ 2-203(a), 2-207.

[22] UPC § 2-203(b).

[23] UPC § 2-202(a),

[24] UPC § 2-209.

[25] Id. For the sake of brevity, this summary of the UPC formula has been highly simplified. House Bill 570 and Senate Bill 621 proposed a slightly modified version of this formula.

[26] The decedent's assets that would form part of the augmented estate already must be identified and valued in the ordinary course of administering the decedent's estate and/or trust(s).

[27] The UPC provides an alternative to the vesting schedule embodied in Section 2-203(b). That "Alternative B" substitutes "marital property" as defined under relevant divorce law. In Maryland, Alternative B would raise the difficulty of administering the elective share exponentially, and would

today's marital relationships. For example, couples often have cohabitated for many years before marrying (or being able to marry). Were one spouse in such a relationship to die shortly after the marriage, the UPC formula effectively could disinherit her or him. Presumably, a court could rectify this injustice, but there is no certainty as to how Maryland courts would apply an entirely new approach to the elective share. Even if the courts could be relied on in those instances, including a vesting schedule is yet another invitation to litigation that would exacerbate the two-tier nature of Maryland's existing elective share law.

Other commentators contend that including surviving spouse's assets in the formula and providing a vesting schedule helps "bring elective-share law into line with the contemporary view of marriage as an economic partnership."[28] The Uniform Law Commissioners argue that the division of assets upon death should not differ substantially from what might happen in the event of divorce, and that the UPC approach accomplishes that goal.[29] While the Work Group endorses the partnership theory of marriage, not all members believe that the UPC approach to the elective share effectively implements it.[30] More to the point, the Work Group does not believe that adopting the full UPC approach is necessary to resolve the problems inherent in Maryland's current elective share law. Nothing in the legislative proposal discussed below precludes adding spousal assets or a vesting schedule to the formula at a later date if experience shows that their omission produces unjust results. However, given the concerns discussed above and the Work Group's conclusion that they are not necessary to solving the problems at hand, we believe that their inclusion in the revised statutory formula would be premature at best, and damaging at worst.

III. Approach Selected.

As the above discussion shows, elective share reform is complex, and there are myriad opinions on how best to accomplish it. Many of those opinions are well represented in the Work Group, and played significant parts in reaching consensus on a legislative approach after two-plus decades of abortive efforts. The end result does not attempt a philosophical revision of Maryland's longstanding commitment to preventing spousal disinheritance. Rather, it addresses the problems identified above by updating the current statutory formula in light of contemporary estate planning techniques and vehicles.

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exacerbate the problems already inherent in including spousal assets and a vesting schedule in the elective share formula.

[28] UPC, Part 2, General Comment.

[29] Id.

[30] These members are not convinced that applying the partnership theory in the elective share context is possible, if at all, without the full panoply of considerations that courts apply in divorce cases – something that, if attempted, would render the elective share nugatory in all but the most litigious circumstances.

A conceptually similar approach was used in bills introduced in 2016 and 2017, respectively.[31] However, significant differences with the proposed legislation – most notably the earlier bills' reliance on federal estate tax definitions as the basis for the elective share formula – attracted opposition that resulted in the withdrawal of the 2017 bills, the formation of the Work Group, and the consensus approach embodied in the bill offered below.

That proposed legislation provides a formula designed to address the needs of the vast majority of Marylanders. It expands the pool of the decedent's assets available for the elective share to virtually all probate and non-probate property owned or controlled by her or him. The new formula also takes into account probate and non-probate beneifts provided by the decedent to his or her surviving spouse, thereby maximizing testamentary freedom to the extent that can be accomplished without jeopardizing the surviving spouse's interest.[32] This formula creates a "default setting" that restores the surviving spouse to a primary position, rather than the role of a supplicant, while also protecting the interests of non-spousal beneficiaries. Finally, the legislation recognizes that no formula can fit every marriage or every circumstance by including guidance for courts that may be called upon to adjust the statutory formula where doing so would effect a more equitable result.

[31] In 2016, HB 1229 passed the House of Delegates, but did not receive a committee vote in the Senate, nor did the cross-filed SB 913. In 2017, House Bill 722 and Senate Bill 881 were withdrawn to facilitate the Work Group's efforts.

[32] Briefly, the proposed formula can be stated as follows: The "elective share" equals the "estate subject to election" divided by three if there are living descendants, or two if there are no descendants, with the result reduced (but not below zero) by the "spousal benefits." Please see the more detailed outline of the formula in Appendix C.

PROPOSED LEGISLATION[33]

SUBTITLE 4. ELECTIVE SHARE OF SURVIVING SPOUSE

3–401.

(A) IN THIS SUBTITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(B) (1) "AUGMENTED ESTATE" MEANS THE SUM OF THE VALUE OF:

(I) THE PROBATE ESTATE OF THE DECEDENT;

(II) ALL REVOCABLE TRUSTS OF THE DECEDENT;

(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; AND

(V) ALL QUALIFYING LIFETIME TRANSFERS OF THE DECEDENT.

(2) IF ANY PROPERTY INTEREST IS INCLUDED IN THE AUGMENTED ESTATE UNDER MORE THAN ONE SUBPARAGRAPH OF § 3-401(B)(1), ONLY THE SUBPARAGRAPH RESULTING IN THE LARGEST AUGMENTED ESTATE SHALL APPLY.

(C) (1) EXCEPT WITH RESPECT TO A PROCEEDING UNDER § 7-502 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE, OR AS OTHERWISE PROVIDED BY RULE OR THIS SUBTITLE, "COURT" MEANS THE ORPHANS' COURT (OR THE COURT EXERCISING THE JURISDICTION OF AN ORPHANS' COURT) FOR THE COUNTY IN WHICH THE ELECTION UNDER § 3-403 OF THIS SUBTITLE IS FILED.

[33] The proposed statutory text used here follows standard Maryland legislative formatting: bold small/large capitalization for new statutory text, regular typeface for existing text, and deletions shown in brackets. Unless stated otherwise, all statutory references are to the Estates and Trusts Article of the Annotated Code of Maryland.

(2) FOR PURPOSES OF ENFORCING PAYMENT OF AN ELECTIVE SHARE, OR ANY PORTION THEREOF, UNDER § 3-409 OF THIS SUBTITLE, "COURT" MEANS THE COURT HAVING JURISDICTION OVER THE PROPERTY FROM WHICH SUCH PAYMENT IS TO BE MADE.

COMMENT

The bill places primary jurisdiction for adjudicating disputes over the calculation of the elective share with the Orphans' Court for the jurisdiction in which the election is filed. In any such proceeding, the Orphans' Court could certify questions to the Circuit Court, and the Court's determinations would be subject to *de novo* appeal to the Circuit Court as in other cases. This provision does not grant the Orphans' Court jurisdiction over non-probate assets, but only over determining the value of the elective share. Jurisdiction for enforcing payment remains with the court with authority over the property in question.

(D) "ESTATE SUBJECT TO ELECTION" MEANS THE VALUE OF THE DECEDENT'S AUGMENTED ESTATE, REDUCED BY:

(1) FUNERAL AND ADMINISTRATION EXPENSES PAYABLE FROM THE AUGMENTED ESTATE;

(2) FAMILY ALLOWANCES PAYABLE FROM THE AUGMENTED ESTATE;

(3) ENFORCEABLE CLAIMS AND DEBTS AGAINST ANY PART OF THE AUGMENTED ESTATE;

(4) THE VALUE OF ANY ASSETS INCLUDED IN THE AUGMENTED ESTATE THAT, AT THE TIME OF THE DECEDENT'S DEATH, WERE HELD IN A TRUST OF WHICH THE DECEDENT IS NOT A SETTLOR, IF:

(I) SUCH ASSETS WERE NOT PREVIOUSLY OWNED BY THE DECEDENT; OR

(II) SUCH ASSETS WERE PREVIOUSLY OWNED BY THE DECEDENT, BUT WERE SOLD BY THE DECEDENT PURSUANT TO A BONA FIDE SALE FOR ADEQUATE CONSIDERATION IN MONEY OR MONEY'S WORTH;

(5) THE VALUE OF ANY ASSETS INCLUDED IN THE AUGMENTED ESTATE UNDER § 3-401(B)(III) THAT, AT THE TIME OF THE DECEDENT'S DEATH, WERE HELD:

(I) IN A TRUST ESTABLISHED UNDER SECTIONS 1917(C)(2)(B)(III), (C)(2)(B) (IV), (D)(4)(A), OR (D)(4)(C) OF THE SOCIAL SECURITY ACT;

(II) IN AN ACCOUNT ESTABLISHED UNDER SECTION 529A OF THE INTERNAL REVENUE CODE; OR

(III) IN A SPECIAL NEEDS TRUST FOR THE BENEFIT OF AN INDIVIDUAL WHO IS DISABLED AS DEFINED IN SECTION 1614C(A)(3) OF THE SOCIAL SECURITY ACT.

COMMENT

Section 3-401(b)(iii) includes property over which the decedent retains a "qualified power of disposition" (see § 3-401(j)) in the augmented estate. The arrangements listed in subsection 3-401(d)(5) benefit persons with disabilities and special needs. While they may have been created and managed by the decedent (thus giving rise to the qualified power of disposition) the decedent may not have provided all (or any) of the assets involved. By removing those portions of these arrangements not funded by the decedent from the estate subject to election, the bill protects their beneficiaries.[34]

(6) (I) THE VALUE OF ANY PROPERTY INCLUDED IN THE AUGMENTED ESTATE UNDER SUBPARAGRAPHS (B)(III), (B)(IV) OR (B)(V) OF THIS SECTION TO THE DISPOSITION OF WHICH THE SURVIVING SPOUSE OF THE DECEDENT CONSENTED IN WRITING DURING THE DECEDENT'S LIFETIME;

(II) FOR PURPOSES OF THIS SUBPARAGRAPH, SPOUSAL CONSENT TO SPLIT-GIFT TREATMENT UNDER THE UNITED STATES GIFT TAX LAWS SHALL NOT BE DEEMED TO SIGNIFY THE SPOUSE'S CONSENT TO A QUALIFYING LIFETIME TRANSFER OR OTHER ARRANGEMENT;

COMMENT

For couples that file federal gift tax returns, gift-splitting often occurs as a matter of course. Given the possibility of removing assets from which a surviving spouse otherwise might benefit under this bill, it seems important that the spouse have a greater opportunity for considering those implications than might be afforded simply by signing a tax return.

[34] Assets actually contributed by the decedent would be included in the augmented estate as "qualifying lifetime transfers" (§ 3-401(i)), although they might be removed from the estate subject to election if they took place outside the limits prescribed by § 3-401(d)(7).

(7) THE VALUE OF ANY QUALIFYING LIFETIME TRANSFER OF THE DECEDENT DESCRIBED IN §3-401(I)(2) WHERE:

(I) THE INITIAL TRANSFER TOOK PLACE PRIOR TO THE DECEDENT'S MARRIAGE TO THE SURVIVING SPOUSE OF THE DECEDENT; OR

(II) THE DECEDENT'S INTEREST IN THE PROPERTY TRANSFERRED TERMINATED MORE THAN TWO (2) YEARS PRIOR TO THE DECEDENT'S DEATH;

(8) THE VALUE OF ANY QUALIFYING LIFETIME TRANSFER OF THE DECEDENT DESCRIBED IN §3-401(I)(3) THAT OCCURRED BEFORE THE LATER OF:

(I) THE DECEDENT'S MARRIAGE TO THE SURVIVING SPOUSE OF THE DECEDENT; OR

(II) TWO (2) YEARS PRIOR TO THE DECEDENT'S DEATH;

COMMENT

Setting temporal limits for including qualifying lifetime transfers in the estate subject to election necessarily is an arbitrary act. The Work Group considered different options, and concluded that long timeframes could risk including arrangements put in place before the marriage partners even met, while too short an inclusion period could open doors to evading the elective share. The time limits selected follow the UPC's lead. They (a) recognize that elective share rights attach upon marriage, and (b) prevent gifts made in contemplation of death from frustrating those rights.

(9) THE VALUE OF ANY INTEREST IN REAL PROPERTY INCLUDED IN THE AUGMENTED ESTATE BY REASON OF THE DECEDENT'S RETENTION OF A LIFE ESTATE IN THE REAL PROPERTY IF:

(I) AT THE TIME OF THE DECEDENT'S DEATH, THE DECEDENT HELD NO QUALIFYING POWER OF DISPOSITION OVER THE REAL PROPERTY; AND

(II) THE DECEDENT'S LIFE ESTATE IN THE PROPERTY WAS CREATED MORE THAN TWO (2) YEARS PRIOR TO THE DECEDENT'S DEATH; AND

(10) THE VALUE OF THE PROCEEDS OF ANY INSURANCE POLICY ON THE DECEDENT'S LIFE IN EXCESS OF THE NET CASH SURRENDER VALUE OF SUCH POLICY IMMEDIATELY BEFORE THE DECEDENT'S DEATH OR, IN THE CASE OF TERM INSURANCE, IN EXCESS OF THE TOTAL PREMIUMS PAID, IF:

(I) SUCH PROCEEDS ARE INCLUDED IN THE AUGMENTED ESTATE;

(II) SUCH PROCEEDS ARE PAYABLE TO OR FOR THE EXCLUSIVE LIFETIME BENEFIT OF AN ANCESTOR, DESCENDANT, STEP-DESCENDANT OR SIBLING OF THE DECEDENT; AND

(III) 1. THE POLICY WAS PURCHASED BEFORE THE DECEDENT'S MARRIAGE TO THE SURVIVING SPOUSE OF THE DECEDENT;

2. THE POLICY WAS PURCHASED MORE THAN FIVE (5) YEARS BEFORE THE DECEDENT'S DEATH, OR

3. THE SURVIVING SPOUSE OF THE DECEDENT CONSENTED IN WRITING DURING THE DECEDENT'S LIFETIME TO THE DISPOSITION OF THE PROCEEDS AS DESCRIBED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH.

COMMENT

Individuals often provide life insurance benefits to close relatives in order to ensure that they are cared for should the insured pass away. This subsection protects those benefits to the extent doing so does not make such policies vehicles for "parking" assets beyond the elective share's reach.

(E) "MARITAL TRUST" MEANS ANY TRUST CREATED FOR THE EXCLUSIVE LIFETIME BENEFIT OF THE SPOUSE OF A DECEDENT OR OF THE SETTLOR OF THE TRUST IF:

(1) THE SPOUSE IS ENTITLED TO ALL INCOME FROM THE PROPERTY HELD BY THE TRUST, PAYABLE ANNUALLY OR AT MORE FREQUENT INTERVALS, OR HAS A USUFRUCT INTEREST FOR LIFE IN THE PROPERTY; AND

(2) THE SPOUSE HAS THE POWER TO COMPEL THE TRUSTEES OF THE TRUST TO CONVERT UNPRODUCTIVE ASSETS INTO INCOME PRODUCING ASSETS.

COMMENT

This definition is based on the requirements for qualified terminable interest property ("QTIP") trusts for federal and Maryland estate tax purposes. It is designed to ensure that marital trusts give the surviving spouse meaningful benefits. (See, also, the comment to §3-401(n), below.)

(F) "PERSON RESPONSIBLE FOR FILING THE ESTATE TAX RETURN" MEANS A PERSON WHO WOULD BE RESPONSIBLE FOR FILING A MARYLAND ESTATE TAX RETURN FOR A DECEDENT UNDER § 7-305 OF THE TAX-GENERAL ARTICLE, REGARDLESS OF WHETHER A STATE ESTATE TAX RETURN ACTUALLY IS REQUIRED TO BE FILED FOR THE DECEDENT.

(G) "PROBATE ESTATE" MEANS ALL PROPERTY PASSING BY TESTATE SUCCESSION.

(H) "QUALIFYING JOINT INTEREST" MEANS AN INTEREST IN PROPERTY HELD AS A JOINT TENANT WITH RIGHT OF SURVIVORSHIP OR EQUIVALENT, OR A TENANCY-BY-THE-ENTIRETIES EQUAL TO:

(1) IN THE CASE OF A JOINT TENANCY WITH RIGHT OF SURVIVORSHIP OR EQUIVALENT, 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; OR

(2) IN THE CASE OF A TENANCY-BY-THE-ENTIRETIES, ONE-HALF OF THE VALUE OF THE PROPERTY.

(I) "QUALIFYING LIFETIME TRANSFER" MEANS

(1) ANY IRREVOCABLE TRANSFER MADE DURING THE LIFETIME OF THE TRANSFEROR IN WHICH THE TRANSFEROR RETAINED FOR A PERIOD ACTUALLY TERMINATING AT OR AFTER THE TRANSFEROR'S DEATH:

(I) POSSESSION OF THE PROPERTY;

(II) THE RIGHT TO RECEIVE THE INCOME FROM THE PROPERTY;

(III) THE USE OR ENJOYMENT OF THE PROPERTY;

(IV) A QUALIFYING JOINT INTEREST;

(V) A QUALIFYING POWER OF DISPOSITION; OR

(VI) THE RIGHT TO RECEIVE AN ANNUITY OR OTHER PERIODIC PAYMENT FROM THE PROPERTY, INCLUDING, WITHOUT LIMITATION, A PERIODIC PAYMENT BASED ON THE VALUE OF THE PROPERTY.

(2) ANY IRREVOCABLE TRANSFER MADE DURING THE LIFETIME OF THE TRANSFEROR IN WHICH THE TRANSFEROR RETAINED AN INTEREST DESCRIBED IN §3-401(I)(1) THAT ACTUALLY TERMINATED BEFORE

THE TRANSFEROR'S DEATH, AND THE REMAINING VALUE OF THE PROPERTY TRANSFERRED THEN PASSED TO A RECIPIENT OTHER THAN THE TRANSFEROR OR THE TRANSFEROR'S SPOUSE.

(3) ANY OTHER IRREVOCABLE TRANSFER MADE DURING THE LIFETIME OF THE TRANSFEROR, OTHER THAN A TRANSFER TO THE TRANSFEROR'S SPOUSE.

(4) THIS SUBSECTION SHALL NOT APPLY TO ANY TRANSFER MADE PURSUANT TO A BONA FIDE SALE FOR ADEQUATE CONSIDERATION IN MONEY OR MONEY'S WORTH.

(J) "QUALIFYING POWER OF DISPOSITION" MEANS ANY POWER (WHETHER OR NOT THE HOLDER HAS THE CAPACITY TO EXERCISE IT) PURSUANT TO WHICH THE HOLDER, DURING LIFE OR UPON THE HOLDER'S DEATH, MAY:

(1) (I) APPOINT THE PROPERTY SUBJECT TO THE POWER TO THE HOLDER, THE HOLDER'S ESTATE, THE HOLDER'S CREDITORS OR THE CREDITORS OF THE HOLDER'S ESTATE;

(II) THIS PARAGRAPH SHALL NOT APPLY TO ANY POWER NOT CREATED, DIRECTLY OR INDIRECTLY, BY THE HOLDER THAT IS LIMITED BY AN ASCERTAINABLE STANDARD RELATING TO THE HOLDER'S HEALTH, EDUCATION, SUPPORT OR MAINTENANCE;

(2) DESIGNATE THE RECIPIENT OR RECIPIENTS OF THE PROPERTY UPON THE HOLDER'S DEATH, SUCH AS, BY WAY OF EXAMPLE AND NOT LIMITATION, PURSUANT TO A BENEFICIARY DESIGNATION (INCLUDING A BENEFICIARY DESIGNATION FOR ANY RETIREMENT PLAN), A PAYABLE ON DEATH (POD) DESIGNATION, OR A TRANSFER OR DEATH (TOD) DESIGNATION; OR

(3) DETERMINE, ALTER OR AMEND THE POSSESSION OR ENJOYMENT OF, OR THE RIGHT TO INCOME FROM, THE PROPERTY SUBJECT TO THE POWER IF THE POWER WAS CREATED, DIRECTLY OR INDIRECTLY, BY THE HOLDER.

COMMENT

This section includes in the augmented estate assets over which the decedent possessed control (exercisable at death or during his or her lifetime), even if that power does not extend to benefitting the decedent directly. Where the decedent created the power in question, subsection 3-401(j)(3) expands the inclusion to encompass any power to modify beneficiaries or the amounts they receive – including an unfettered right to change trustees. This protects the surviving spouse's interests by preventing the decedent from entering into arrangements where the decedent retains control over (if not benefit from) the assets.

(K) "REVOCABLE" HAS THE MEANING STATED IN § 14.5-103 OF THIS ARTICLE.

(L) "REVOCABLE TRUST OF THE DECEDENT" MEANS ANY TRUST OF WHICH A DECEDENT WAS THE SETTLOR AND THAT WAS REVOCABLE BY THE DECEDENT PRIOR TO THE DECEDENT'S DEATH OR INCAPACITY.[35]

(M) "SETTLOR" HAS THE MEANING STATED IN § 14.5-103 OF THIS ARTICLE.

(N) "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, REDUCED BY:

(1) WITH RESPECT TO PROPERTY THAT THE DECEDENT OWNED JOINTLY WITH THE SURVIVING SPOUSE, THAT PORTION OF THE VALUE OF THE PROPERTY THAT IS NOT INCLUDED IN THE ESTATE SUBJECT TO ELECTION;

(2) 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;

(3) THE VALUE OF ASSETS HELD IN ANY TRUST CREATED DURING THE DECEDENT'S LIFETIME OF WHICH:

(I) THE DECEDENT WAS A SETTLOR; AND

(II) THE SURVIVING SPOUSE IS NOT THE SOLE BENEFICIARY DURING THE SURVIVING SPOUSE'S LIFETIME;

(4) 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;

(5) 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:

[35] In light of the increased use of joint revocable trusts, the Work Group is examining whether this provision needs to be modified to account for those estate planning vehicles.

(I) OTHER THAN A TRUST DESCRIBED UNDER ITEM (4) OF THIS SUBSECTION;

(II) OF WHICH THE DECEDENT WAS A SETTLOR, IF THE TRUST WAS CREATED DURING THE DECEDENT'S LIFETIME;

(III) WHICH IS HELD FOR THE EXCLUSIVE LIFETIME BENEFIT OF THE SURVIVING SPOUSE; AND

(IV) FROM WHICH THE TRUSTEES MAY MAKE DISTRIBUTIONS TO OR FOR THE BENEFIT OF THE SURVIVING SPOUSE IN ACCORDANCE WITH A STANDARD NOT MORE RESTRICTIVE THAN THAT UNDER § 14-402(B)(3) OF THIS ARTICLE; AND

(6) THE ENTIRE VALUE OF ANY TRUST FOR THE EXCLUSIVE LIFETIME BENEFIT OF THE SURVIVING SPOUSE THAT IS NOT A MARITAL TRUST AND IS NOT DESCRIBED UNDER ITEM (5) OF THIS SUBSECTION.

COMMENT

Maryland's current elective share statute gives no credit for arrangements a decedent spouse might have established to benefit his or her widow or widower. By reducing the elective share to account for "spousal benefits," the proposed legislation preserves the decedent's testamentary freedom so long as it is not exercised in contravention of the surviving spouse's rights. Essentially, the elective share is reduced by the value of all assets passing outright to the surviving spouse by reason of the decedent's death, and fractions of certain trusts created by the decedent (or funded at his/her death) that are held for the exclusive benefit of the surviving spouse.

Section 3-401(n) intentionally includes assets derived from someone other than the decedent within the definition of spousal benefits. This incorporates arrangements – such as those where one spouse owns insurance on the life of the other – that reflect the couple's considered estate plan, but which might be subject to abuse by a "greedy" surviving spouse.

Notes on the Use of Trusts. Under this proposal, the elective share effectively may be satisfied with trusts. However, in order to qualify as part of the spousal benefits, those trusts (a) must be for the exclusive benefit of the surviving spouse during his or her lifetime, (b) must have been created by the decedent or funded by reason of his or her death, and (c) must permit distributions to the surviving spouse on a standard at least a generous as a statutory special needs trust.[36] Under these requirements, the decedent must provide his or her widow or widower with

[36] Section 14-402(b)(3) of the Estates and Trusts Article grants trustees of special needs trusts discretion to make distributions in order to "provide for the *needs* of the beneficiary *to the extent not provided for by other sources*, including public and private benefit programs for which the beneficiary would or might be eligible if the trust did not exist." (Emphasis added.) This standard is more restrictive than that typically

substantial benefits, and the interests of any non-spousal beneficiaries are delayed until after the surviving spouse's death, thereby protecting against the abuse of trusts to defeat the spouse's rights.

In addition, Section 3-401(n) recognizes that trusts may not convey the same benefits as outright possession by reducing their value by certain fractions based on their dispositive terms. Marital trusts (as defined in § 3-401(e)) are reduced by a quarter for purposes of calculating the spousal benefits, while purely discretionary trusts receive a one-third reduction. This distinction recognizes the greater rights of a surviving spouse in marital trusts – namely, an entitlement to all of the trust's income, and the ability to compel the trustees to invest in income-producing assets – as opposed to a fully discretionary trust where the trustees decide the amounts of all distributions and the trust's investment strategy.

Both Maryland's existing statute and the UPC require that the elective share be satisfied only with outright distributions, meaning that the decedent spouse possesses no vehicle for providing lifetime benefits to his or her surviving spouse while still controlling the ultimate disposition of his or her assets. By allowing the use of trusts to satisfy the elective share, the proposed legislation gives decedents the ability to protect both their spouses and their non-spousal beneficiaries.[37]

(O) (1) "VALUE" MEANS

(I) FOR ANY ASSET INCLUDED IN THE GROSS ESTATE OF A DECEDENT UNDER § 7-301(B) OF THE TAX-GENERAL ARTICLE, THE VALUE OF THE ASSET UNDER TITLE 7, SUBTITLE 3 OF THE TAX-GENERAL ARTICLE, IF A STATE ESTATE TAX RETURN IS REQUIRED TO BE FILED WITH RESPECT TO THE DECEDENT; AND

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used in other discretionary trusts – namely, that distributions may be made for the beneficiary's health, education maintenance and support (a "HEMS" standard) – because (a) the HEMS standard is not limited to "needs," and (b) the HEMS standard, by itself, does not require the Trustee to consider "other sources." Based on this, the proposed statute includes the most frequently used type of discretionary trust, as well as special needs trusts, in the spousal benefits.

[37] In situations where the surviving spouse relies on state medical assistance, the ability to use trusts to satisfy the elective share can provide benefits to the widow or widower that otherwise would not be available. Without a special needs trust, assets benefitting the widow or widower – including the elective share – must be spent down entirely in order to preserve benefits. Special needs trusts – which traditionally have been viewed favorably by the General Assembly in the medical assistance context – allow those assets to be deployed to provide healthcare and other benefits beyond those afforded by the state program.

(II) FOR ANY OTHER ASSET, THE VALUE OF THE ASSET UNDER § 7-202 OF THIS ARTICLE, REGARDLESS OF WHETHER THE ASSET IS REQUIRED TO BE REPORTED ON AN INVENTORY.

(2) (I) THE VALUE OF ANY QUALIFYING LIFETIME TRANSFER DESCRIBED IN §3-401(I)(1) SHALL BE DETERMINED UNDER THIS SUBSECTION AS IF THE PROPERTY STILL WAS OWNED BY THE TRANSFEROR.

(II) THE VALUE ANY QUALIFYING LIFETIME TRANSFER DESCRIBED IN §3-401(I)(2) SHALL BE DETERMINED UNDER THIS SUBSECTION AS OF THE DATE OF THE TERMINATION OF THE TRANSFEROR'S INTEREST IN THE PROPERTY TRANSFERRED.

(III) THE VALUE ANY QUALIFYING LIFETIME TRANSFER DESCRIBED IN §3-401(I)(3) SHALL BE DETERMINED UNDER THIS SUBSECTION AS OF THE DATE OF THE TRANSFER.

COMMENT

Section 3-401(o) provides alternative valuation standards depending whether or not a Maryland estate tax filing requirement exists. In general, the standards used for determining estate tax values produce more accurate results. For example, real estate must be appraised for estate tax purposes, but the assessed value may be used in a probate inventory. However, appraisals can be expensive, and there is no wish to impose an additional burden on estates that are not required to file a Maryland estate tax return. Therefore, if no such return is due, the proposed statute allows assets to be valued as they would if reported on an estate Inventory.

Subsection 3-401(o)(2) addresses the time for valuing qualifying lifetime transfers using the standards provided by subsection (1). Transfers with respect to which the decedent held an interest or power at death will be valued as of the date of death. Transfers with retained interests that terminated prior to the decedent's demise, will be valued as of that termination date. Finally, the date of the transfer will apply to all other qualifying lifetime transfers made by the decedent.

3-402.

THE PURPOSES OF THIS SUBTITLE ARE:

(1) TO ENSURE THAT A SURVIVING SPOUSE IS REASONABLY PROVIDED FOR DURING THE SURVIVING SPOUSE'S REMAINING LIFETIME; AND

(2) SUBJECT TO ITEM (1) OF THIS SECTION, TO PROVIDE A DECEDENT FLEXIBILITY IN ORDERING THE DECEDENT'S AFFAIRS.

COMMENT

The purposes stated in Section 3-402 reflect existing Maryland public policy. As embodied in the current statute, that longstanding policy places the right of a surviving spouse not to be disinherited above a decedent's freedom to dispose of property as he or she sees fit. Over time, the General Assembly concluded that what is necessary "to ensure that the surviving spouse is reasonably provided for" (to use the proposed statutory language) is one-third (if issue) or one-half (if no issue) of the assets available for the elective share. In applying the existing statute, the Court of Appeals has recognized the need "to balance the social and practical undesirability of restricting the free alienation of personal property against the desire to protect the legal share of the spouse."[38] This proposed legislation is designed to acknowledge myriad developments in methods of transferring wealth without intruding upon the underlying public policy.

3-403.

THE SURVIVING SPOUSE MAY ELECT TO TAKE AN ELECTIVE SHARE OF AN ESTATE SUBJECT TO ELECTION AS FOLLOWS:

(1) IF THERE IS SURVIVING ISSUE, THE ELECTIVE SHARE SHALL EQUAL ONE-THIRD OF THE VALUE OF THE ESTATE SUBJECT TO ELECTION, REDUCED BY THE VALUE OF ALL SPOUSAL BENEFITS; OR

(2) IF THERE IS NO SURVIVING ISSUE, THE ELECTIVE SHARE SHALL EQUAL ONE-HALF OF THE VALUE OF THE ESTATE SUBJECT TO ELECTION, REDUCED BY THE VALUE OF ALL SPOUSAL BENEFITS.

COMMENT

This section preserves the existing statute's judgment that one-third of the assets subject to the elective share is a reasonable provision for the surviving spouse if the decedent has living descendants, and that one-half of those assets is reasonable when there are no descendants. For the practical application of the proposed elective share formula, please see the examples in Appendix B.

3-404.

(A) THE RIGHT OF ELECTION OF A SURVIVING SPOUSE:

(1) IS PERSONAL TO THE SURVIVING SPOUSE;

[38] *Knell, supra* 318 Md. at 512, quoting *Whittington v. Whittington,* 205 Md. 1, 106 A. 2d 72 (1953) and *Allender v. Allender,* 199 Md. 541, 87 A. 2d 608 (1952).

(2) IS NOT TRANSFERABLE; AND

(3) CANNOT BE EXERCISED AFTER THE SURVIVING SPOUSE'S DEATH.

(B) SUBJECT TO SUBSECTION (C) OF THIS SECTION, IF THE SURVIVING SPOUSE IS A MINOR OR IS INCAPACITATED WITHIN THE MEANING OF § 17–101(C) OF THIS ARTICLE, THE ELECTION MAY BE EXERCISED BY:

(1) AN ORDER OF THE COURT HAVING JURISDICTION OF THE PERSON OR PROPERTY OF THE MINOR OR INCAPACITATED PERSON;

(2) A GUARDIAN OF THE PROPERTY OF THE SURVIVING SPOUSE WHO HAS BEEN SPECIFICALLY AUTHORIZED TO MAKE THE ELECTION BY ORDER OF THE COURT HAVING SUPERVISION OF 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.

(C) (1) BEFORE A GUARDIAN OF THE PROPERTY OF THE SURVIVING SPOUSE OR AN AGENT DESIGNATED BY THE SURVIVING SPOUSE UNDER A POWER OF ATTORNEY MAY EXERCISE A RIGHT OF ELECTION UNDER SUBSECTION (B) OF THIS SECTION, THE GUARDIAN OF THE PROPERTY OR THE AGENT SHALL DELIVER NOTICE OF THE ELECTION TO:

(I) ALL INTERESTED PERSONS IN THE DECEDENT'S ESTATE; AND

(II) ALL PERSONS WHO WOULD INHERIT FROM THE SURVIVING SPOUSE UNDER SUBTITLE 1 OF THIS TITLE IF THE SURVIVING SPOUSE DIED INTESTATE AND UNMARRIED AT THE TIME THE ELECTION IS MADE.

(2) AN EXERCISE OF A RIGHT OF ELECTION UNDER SUBSECTION (B) OF THIS SECTION IS VALID UNLESS:

(I) WITHIN 30 DAYS FOLLOWING THE DELIVERY OF NOTICE OF THE ELECTION IN ACCORDANCE WITH PARAGRAPH (1) OF THIS SUBSECTION, A PERSON MAKES AN OBJECTION TO THE ELECTION IN THE COURT IN WHICH THE ELECTION WAS FILED; AND

(II) FOLLOWING A HEARING ON THAT OBJECTION, THE COURT RULES THAT THE ELECTION IS NOT IN THE BEST INTERESTS OF THE SURVIVING SPOUSE.

COMMENT

While not related to the calculation and payment of the elective share, the proposed legislation adds specifically-authorized guardians and agents of an incapacitated surviving spouse to those able to make the election on her or his behalf. Under existing law, a court procedure is necessary for someone other than the widow or widower to elect. Such a procedure can place the election out of the reach of an impoverished surviving spouse. These revisions allow the spouse to designate someone to make the election if he or she is unable to do so.

However, the granting of such a power could lead to abuse by an unscrupulous agent, and the proposed statute allows persons interested in either the decedent's estate or the spouse's potential estate to object. The "best interests" standard under which the court must evaluate the election under Section 3-404(c)(2)(ii) applies only to whether or not the election should be made by a guardian or agent. It has no implications with respect to the purpose of the elective share itself. The "best interests" standard in this context is designed to protect an incapacitated surviving spouse from the actions of a self-interested agent. For example, suppose in a second marriage situation that one spouse dies leaving all of his/her estate in trust for the sole lifetime benefit of the surviving spouse, with the remainder passing to the decedent's natural children. Meanwhile, the surviving spouse named a child of his/her own as agent with authority to make the election on the surviving spouse's behalf. If the surviving spouse's agent makes the election, that agent is likely to benefit from the elective share through the surviving spouse's estate, even though the election will reduce the pool of assets available to provide for the surviving spouse by two-thirds. Under Section 3-404(c), the court will have an opportunity to protect the surviving spouse's interests from this type of abuse.

3-405.

(A) THE RIGHT OF ELECTION OF A SURVIVING SPOUSE MAY BE WAIVED BEFORE OR AFTER MARRIAGE BY A WRITTEN CONTRACT, AGREEMENT, OR WAIVER SIGNED BY THE PARTY WAIVING THE RIGHT OF ELECTION.

(B) UNLESS THE WAIVER PROVIDES TO THE CONTRARY, A WAIVER OF "ALL RIGHTS", OR EQUIVALENT LANGUAGE, IN THE PROPERTY OR ESTATE OF A PRESENT OR PROSPECTIVE SPOUSE OR A COMPLETE PROPERTY SETTLEMENT ENTERED INTO AFTER OR IN ANTICIPATION OF SEPARATION OR DIVORCE IS A WAIVER OF ALL RIGHTS OF FAMILY ALLOWANCE AND ELECTIVE SHARE BY EACH SPOUSE IN THE PROPERTY OF THE OTHER AND THE RIGHT TO LETTERS UNDER § 5–104 OF THIS ARTICLE, AND 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.

3-406.

(A) (1) THE ELECTION BY A SURVIVING SPOUSE TO TAKE AN ELECTIVE SHARE SHALL BE MADE WITHIN THE LATER OF:

(I) 9 MONTHS AFTER THE DATE OF THE DECEDENT'S DEATH; OR

(II) 6 MONTHS AFTER THE FIRST APPOINTMENT OF A PERSONAL REPRESENTATIVE.

(2) (I) WITHIN THE PERIOD FOR MAKING AN ELECTION, THE SURVIVING SPOUSE MAY FILE WITH THE COURT A PETITION FOR AN EXTENSION OF TIME, WITH A COPY GIVEN TO THE PERSONAL REPRESENTATIVE.

(II) FOR GOOD CAUSE SHOWN, THE COURT MAY EXTEND THE TIME FOR ELECTION FOR A PERIOD NOT TO EXCEED THREE MONTHS AT A TIME.

(B) THE SURVIVING SPOUSE MAY WITHDRAW THE ELECTION AT ANY TIME BEFORE THE EXPIRATION OF THE TIME FOR MAKING THE ELECTION TO TAKE AN ELECTIVE SHARE.

3-407.

(A) (1) AN ELECTION TO TAKE AN ELECTIVE SHARE UNDER THIS SUBTITLE:

(I) SHALL BE IN WRITING AND SIGNED BY THE SURVIVING SPOUSE OR OTHER PERSON ENTITLED TO MAKE THE ELECTION PURSUANT TO § 3–404 OF THIS SUBTITLE; AND

(II) 1. SHALL BE FILED IN THE COURT IN WHICH THE PERSONAL REPRESENTATIVE OF THE DECEDENT WAS APPOINTED; OR

2. IF NO PERSONAL REPRESENTATIVE OF THE DECEDENT HAS BEEN APPOINTED, SHALL BE FILED IN THE COURT FOR THE JURISDICTION IN WHICH VENUE WOULD BE PROPER UNDER § 5-103 OF THIS ARTICLE.

(2) NOTICE OF THE FILING OF AN ELECTION TO TAKE AN ELECTIVE SHARE UNDER PARAGRAPH (1) OF THIS SUBSECTION MAY BE DELIVERED:

(I) TO THE TRUSTEE OF EACH REVOCABLE TRUST OF THE DECEDENT; OR

(II) TO THE PERSON RESPONSIBLE FOR FILING THE ESTATE TAX RETURN, IF DIFFERENT FROM THE TRUSTEE.

(B) THE ELECTION MAY BE IN THE FOLLOWING FORM.

"I, A. B., SURVIVING SPOUSE OF C. D., LATE OF THE COUNTY (CITY) OF ....., ELECT TO TAKE MY ELECTIVE SHARE OF THE DECEDENT'S ESTATE SUBJECT TO ELECTION UNDER SECTION 3-403 OF THE ESTATES AND TRUSTS ARTICLE OF THE ANNOTATED CODE OF MARYLAND.

.....

(SIGNATURE)"

COMMENT

Proposed Sections 3-405, 3-406 and 3-407 cover the procedural steps needed actually to file the election. With some minor technical changes, proposed Sections 3-405 and 3-406 are identical to current Sections 3-205 and 3-206, respectively. Section 3-407(a)(1)(ii)2 provides for the possibility that there is no probate estate, but that there are non-probate assets subject to the elective share, by allowing a surviving spouse to file in the court of most appropriate jurisdiction. In addition, Section 3-407(a)(2) provides for notification of those holding non-probate assets that the election has been made.

3-408.

(A) ON RECEIPT OF A WRITTEN REQUEST BY THE SURVIVING SPOUSE, ALL INFORMATION NECESSARY TO CALCULATE THE ELECTIVE SHARE UNDER THIS SUBTITLE SHALL BE DELIVERED TO THE SURVIVING SPOUSE BY, AS APPLICABLE:

(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.

(B) (1) THE FILING OF AN ELECTION TO TAKE THE ELECTIVE SHARE AS PROVIDED IN § 3-407 OF THIS SUBTITLE IS DEEMED TO GIVE ADEQUATE NOTICE OF THE ELECTION TO, AS APPLICABLE:

(I) THE PERSONAL REPRESENTATIVE OF THE DECEDENT;

(II) THE TRUSTEE OF ANY REVOCABLE TRUST OF THE DECEDENT; OR

(III) THE PERSON RESPONSIBLE FOR FILING THE ESTATE TAX RETURN.

(2) THE PERSON RECEIVING NOTICE OF AN ELECTION TO TAKE THE ELECTIVE SHARE UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL PROMPTLY DELIVER NOTICE OF THE ELECTION TO EACH PERSON FROM WHOM ANY PORTION OF THE ELECTIVE SHARE MAY BE PAYABLE.

(C) WITHIN 60 DAYS AFTER THE DATE A TRUSTEE OF A REVOCABLE TRUST OF THE DECEDENT ACQUIRES KNOWLEDGE OF THE DECEDENT'S DEATH, THE TRUSTEE SHALL NOTIFY THE SURVIVING SPOUSE OF THE EXISTENCE OF THE TRUST, OF THE IDENTITY OF THE TRUSTEES, AND OF THE SURVIVING SPOUSE'S RIGHT TO REQUEST A COPY OF THE TRUST INSTRUMENT.

(D) ON RECEIPT OF A WRITTEN REQUEST BY 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, THE SURVIVING SPOUSE SHALL DELIVER TO THE PERSON MAKING THE REQUEST ALL INFORMATION RELEVANT TO THE CALCULATION OF THE ELECTIVE SHARE UNDER THIS SUBTITLE THAT IS IN THE POSSESSION OF THE SURVIVING SPOUSE AND NOT OTHERWISE AVAILABLE TO THE PERSON MAKING THE REQUEST.

COMMENT

Proposed Section 3-408 requires those with information relevant to the calculation of the elective share to share that information with the surviving spouse or non-spousal beneficiaries, as the case may be. It is important to highlight that the notice required for potential payors of the elective share under Section 3-408(b)(2) differs from that provided in Section 3-407(a)(2). A surviving spouse may not have access to information with respect to holders of any non-probate assets (or, indeed, the nature and extent of those assets). It would be unreasonable to impose the burden of developing that information on the surviving spouse. Accordingly, while Section 3-407(a)(2) provides that the surviving spouse "may" deliver notice (which might facilitate payment of the share), §3-408(b) deems the filing of the election to have given notice to those people most likely to have access to information on the decedent's assets, and imposes on them the burden of notifying the holders of assets that may be subject to the elective share.

3-409.

(A) THIS SECTION DOES NOT APPLY IF PAYMENT OF THE ELECTIVE SHARE OF A SURVIVING SPOUSE IS OTHERWISE PROVIDED FOR:

(1) (I) IN THE DECEDENT'S WILL; OR

(II) IN THE INSTRUMENT GOVERNING ANY TRUST OF WHICH THE DECEDENT WAS THE SETTLOR; OR

(2) IN A WRITTEN AGREEMENT BETWEEN THE PERSONS RESPONSIBLE FOR PAYING THE ELECTIVE SHARE THAT IS APPROVED BY THE COURT.

(B) (1) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, THE ELECTIVE SHARE OF A SURVIVING SPOUSE SHALL BE PAID:

(I) FROM THAT 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;

(II) TO THE EXTENT THE ELECTIVE SHARE IS NOT FULLY PAID AS PROVIDED IN ITEM (I) OF THIS PARAGRAPH:

1. FROM THE PORTION OF ANY REVOCABLE TRUST OF THE DECEDENT THAT IS INCLUDED IN THE ESTATE SUBJECT TO ELECTION AND DOES NOT CONSTITUTE ANY PART OF THE SPOUSAL BENEFITS; AND

2. IF THERE IS MORE THAN ONE REVOCABLE TRUST OF THE DECEDENT, THE PAYMENT SHALL BE APPORTIONED AMONG THE TRUSTS IN PROPORTION TO THE VALUE OF THE ASSETS OF EACH REVOCABLE TRUST THAT ARE AVAILABLE TO SATISFY THE ELECTIVE SHARE; AND

(III) TO THE EXTENT THE ELECTIVE SHARE IS NOT FULLY PAID AS PROVIDED IN ITEMS (I) AND (II) OF THIS PARAGRAPH, BY THE RECIPIENTS OF ANY OTHER PORTIONS OF THE ESTATE SUBJECT TO ELECTION THAT DO NOT CONSTITUTE ANY PART OF THE SPOUSAL BENEFITS, PRORATED AMONG THE RECIPIENTS IN PROPORTION TO THE VALUE OF THE ASSETS RECEIVED BY EACH RECIPIENT.

(2) IF ANY PAYMENT REQUIRED BY THIS SUBSECTION IS PREEMPTED BY FEDERAL LAW OR IS TO BE MADE FROM A TRUST DESCRIBED IN § 3-401(D)(5) OF THIS SUBTITLE, THE PORTION OF THE ELECTIVE SHARE PAYABLE UNDER THIS SUBSECTION SHALL BE APPORTIONED AMONG THOSE RECIPIENTS

WHOSE BENEFITS ARE NOT PREEMPTED UNDER FEDERAL LAW AND WHO ARE NOT A TRUST DESCRIBED IN § 3-401(D)(5) OF THIS SUBTITLE.

(C) UNLESS THE SURVIVING SPOUSE AND THE PAYOR AGREE OTHERWISE IN WRITING, EACH PERSON REQUIRED TO PAY A PORTION OF THE ELECTIVE SHARE UNDER THIS SECTION SHALL MAKE PAYMENT:

(1) IN A MANNER THAT IS DEEMED TO BE IN ACCORDANCE WITH THE TERMS AND PURPOSES OF ANY INSTRUMENT GOVERNING THE DISPOSITION OF THE PORTION OF THE ESTATE SUBJECT TO ELECTION FROM WHICH THE PORTION OF THE ELECTIVE SHARE IS TO BE PAID; AND

(2) (I) IN CASH;

(II) WITH A PRORATED SHARE OF EACH ITEM OF PROPERTY FROM WHICH THAT PORTION OF THE ELECTIVE SHARE CAN BE PAID; OR

(III) WITH OTHER PROPERTY ACCEPTABLE TO THE SURVIVING SPOUSE, IN AN AMOUNT EQUAL TO THE FAIR MARKET VALUE OF THAT PORTION OF THE ELECTIVE SHARE TO BE PAID BY THE PAYOR.

(D) A PAYOR OR ANY OTHER THIRD PARTY, OTHER THAN 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, IS NOT LIABLE FOR HAVING MADE A PAYMENT OR TRANSFERRED AN ITEM OF PROPERTY, OR ANY OTHER BENEFIT FROM WHICH THE ELECTIVE SHARE MIGHT BE PAID, TO A BENEFICIARY DESIGNATED IN A GOVERNING INSTRUMENT OR BENEFICIARY DESIGNATION IF THE PAYMENT OR TRANSFER IS MADE:

(1) IN GOOD FAITH RELIANCE ON THE VALIDITY OF THE GOVERNING INSTRUMENT OR BENEFICIARY DESIGNATION ON REQUEST AND SATISFACTORY PROOF OF THE DEATH OF THE DECEDENT; AND

(2) BEFORE THE PAYOR OR OTHER THIRD PARTY RECEIVES WRITTEN NOTICE OF THE ELECTION BY THE SURVIVING SPOUSE TO RECEIVE THE ELECTIVE SHARE UNDER THIS SUBTITLE.

COMMENT

Unlike Maryland's current statute, which requires the elective share to be satisfied with a pro-rata share of each asset unless the legatee receiving that asset elects to pay in cash,[39] the

[39] E&T § 3-208.

proposed legislation gives both the decedent spouse and the holders of assets from which the elective share may be paid some discretion as to the source and method of payment. Section 3-409(a) permits the decedent spouse to direct the source(s) of payment of the elective share in his or her Will and/or trust instrument(s). Where that specific direction is absent, Section 3-409(c)(1) provides that payment may be made in a manner that conforms with the overall purpose and terms of the trust instrument or other document governing the asset in question. For example, if the instrument provides for multiple trusts, one of which (absent the election) would provide benefits to the surviving spouse (and which does not qualify as a "spousal benefit"), the Trustee could elect to make payment from that source instead of another trust that does not provide benefits to the surviving spouse. Similarly, under Section 3-409(c)(2), the payor – be it a Personal Representative, Trustee or recipient of assets – may elect to pay in cash, with a pro-rata share of each asset, or with non-cash property acceptable to the surviving spouse. By providing this flexibility, the legislation balances the interest of the surviving spouse in being paid with useful assets with sustaining the decedent's plan to the extent practicable.

Section 3-409(b) recognizes the practical complexities of obtaining payment of the elective share from multiple sources. Unless the payors agree differently under Section 3-409(a)(2), the share is to be satisfied first from the decedent's probate estate, then from any revocable trust the decedent may have established, and finally on a *pro rata* basis by the recipients of any other assets forming part of the augmented estate.[40] This structure parallels the ease with which assets can be reached by any court called upon to enforce payment of the share. It also allows third parties – such as insurance carriers or retirement account custodians – to process claims so long as they have not received notice of the election being made.

3-410.

(A) ON THE ELECTION OF THE SURVIVING SPOUSE TO TAKE AN ELECTIVE SHARE UNDER THIS SUBTITLE, ALL PROPERTY OR OTHER BENEFITS THAT WOULD HAVE PASSED TO THE SURVIVING SPOUSE UNDER THE WILL, OTHER THAN ANY PORTION OF THE SPOUSAL BENEFITS, SHALL BE TREATED AS IF THE SURVIVING SPOUSE HAD DIED BEFORE THE EXECUTION OF THE WILL.

(B) THE SURVIVING SPOUSE AND A PERSON CLAIMING THROUGH THE SURVIVING SPOUSE MAY NOT RECEIVE PROPERTY UNDER THE WILL, OTHER THAN PROPERTY FORMING ANY PORTION OF THE SPOUSAL BENEFITS.

[40] Technically, any asset can be used to satisfy the elective share so long as it meets the requirements of §3-409(c)(2). However, federal law governs the disposition of certain assets – such as 401(k) accounts – thus placing them beyond the reach of Maryland law. Similarly, the arrangements benefitting disabled and special needs individuals described in §3-401(d)(5) are limited by their own governing statutes. Both sets of assets are not "available to satisfy the elective share" and are removed from the apportionment of payments under §3-409(b)(2).

COMMENT

This section modifies existing Section 3-203(a), which provides that an electing spouse will receive no benefit under the decedent's Will, to allow for those portions (if any) of the spousal benefits the decedent may have provided under his or her Will.

3-411.

(A) UPON 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, SHALL FILE WITH THE REGISTER OF WILLS FOR THE COUNTY IN WHICH THE ELECTION UNDER § 3-403 OF THIS SUBTITLE IS FILED A SIGNED STATEMENT, WHICH HAS BEEN VERIFIED BY THE SURVIVING SPOUSE, STATING THE VALUE OF THE ELECTIVE SHARE AND THAT IT HAS BEEN PAID IN FULL.

(B) (1) 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, THE REGISTER OF WILLS SHALL CERTIFY IN WRITING THE ACCURACY OF THE CALCULATION AND PAYMENT OF THE ELECTIVE SHARE.

(2) IF A CERTIFICATION IS REQUESTED UNDER THIS SUBSECTION, 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, AND ANY PAYOR OF ANY PORTION OF THE ELECTIVE SHARE SHALL DELIVER TO THE REGISTER OF WILLS SUCH INFORMATION AND DOCUMENTATION AS THE REGISTER OF WILLS MAY DEEM NECESSARY TO VERIFY THE ACCURATE CALCULATION OF THE ELECTIVE SHARE AND ITS PAYMENT IN FULL.

(C) (1) UPON THE REQUEST OF THE SURVIVING SPOUSE, 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, THE REGISTER OF WILLS SHALL REDACT FROM THE STATEMENT DESCRIBED IN SUBSECTION (A) OF THIS SECTION THE VALUE OF THE ELECTIVE SHARE.

(2) THE REGISTER OF WILLS SHALL NOT MAKE PUBLIC ANY INFORMATION OR DOCUMENTATION SUBMITTED TO THE REGISTER OF WILLS PURSUANT TO SUBSECTION (B) OF THIS SECTION.

COMMENT

Under current law, the calculation and payment of the elective share is verified through the Personal Representative filing one or more Administration Accounts. Proposed Section 3-411 offers a new procedure that addresses the possible inclusion of non-probate assets in that process. Now, the Personal Representative (or, if there is no Personal Representative, the Trustee of a revocable trust, or failing both, another person who would be responsible for filing an estate tax return) will file with the Register of Wills a document stating the amount of the elective share, and certifying its payment. Those statements must be verified by the surviving spouse. Should the surviving spouse – or any other interested party – request a formal certification of the calculation and payment, they may ask the Register of Wills to do so. All interested parties must provide the Register with the information necessary to complete the certification (as requested by the Register), which documents will remain off of the public record. This last provision is needed to protect the confidentiality of non-probate arrangements.

3-412. IN ANY ACTION ARISING UNDER THIS SUBTITLE, A COURT MAY:

(A) UPON CLEAR AND CONVINCING EVIDENCE MODIFY:

(1) THE CALCULATION OF THE VALUE OF AN AUGMENTED ESTATE;

(2) THE CALCULATION OF THE VALUE OF AN ESTATE SUBJECT TO ELECTION;

(3) THE CALCULATION OF THE VALUE OF SPOUSAL BENEFITS; OR

(4) THE SOURCES OF PAYMENT OF AN ELECTIVE SHARE;

(B) CONSIDER THE CIRCUMSTANCES OF ANY TRANSFER OR ARRANGEMENT, 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 OF THE TRANSFER OR ARRANGEMENT;

(4) THE DEGREE, IF ANY, TO WHICH THE TRANSFER OR ARRANGEMENT DEPRIVES THE SURVIVING SPOUSE OF PROPERTY THAT OTHERWISE MIGHT FORM PART OF THE VALUE 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 THE SURVIVING SPOUSE; AND

(7) THE NATURE AND VALUE OF THE SURVIVING SPOUSE'S ASSETS; AND

(C) AWARD REASONABLE ATTORNEY FEES FOR ANY ACTION ARISING UNDER THIS SUBTITLE.

COMMENT

In *Karsenty*, the Court of Appeals established a framework for analyzing transactions impacting the elective share. Under the proposed legislation, that framework remains a useful tool in those situations where the statutory formula fails either the surviving spouse or the non-spousal beneficiaries (and where the assets involved justify the cost of litigation). Section 3-412 offers courts guidance in applying the statute and analyzing questioned transactions or arrangements. The factors for consideration enumerated in Section 3-412(b) track those identified by the Court of Appeals in *Karsenty*, and add to them items that encourage, where litigation becomes necessary, consideration of the full nature and extent of the spouses' relationship.

7-603.

(A) [When a**] A** personal representative or person nominated as personal representative **WHO** defends or prosecutes a proceeding in good faith and with just cause**[**, he**]** shall be entitled to receive **[**his**]** necessary expenses and disbursements from the estate regardless of the outcome of the proceeding.

(B) (1) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, IN ADDITION TO THE COMPENSATION PROVIDED FOR IN THIS SUBTITLE, A PERSONAL REPRESENTATIVE IS ENTITLED TO REASONABLE COMMISSIONS OR ATTORNEY'S FEES, AS DETERMINED BY THE COURT, IN CONNECTION WITH AN ELECTION BY A SURVIVING SPOUSE TO TAKE AN ELECTIVE SHARE UNDER SECTION § 3-403 OF THIS ARTICLE.

(2) THE AMOUNT OF COMPENSATION OR ATTORNEY'S FEES CONSENTED TO BY ALL INTERESTED PERSONS IS PRESUMED TO BE REASONABLE.

COMMENT

The revisions to Section 7-603 recognize that the calculation and administration of the elective share may place additional burdens on a personal representative, and allow additional compensation for that work, subject to court approval.

§13–204.

(a) **(1)** If a basis exists as described in § 13-201 of this subtitle for assuming jurisdiction over the property of a minor or disabled person, the circuit court, without appointing a guardian, may authorize or direct a transaction with respect to the property, service, or care arrangement of the minor or disabled person.

(2) [These**] THE** transactions **DESCRIBED UNDER PARAGRAPH (1) OF THIS SUBSECTION** include **[**but are not limited to**]**:

[(1)**] (I)** Payment, delivery, deposit, or retention of funds or property;

[(2)**] (II)** Sale, mortgage, lease, or other transfer of property;

[(3)**] (III)** Purchase of contracts for an annuity, life care, training, or education; **[**or**]**

(IV) MAKING THE ELECTION TO TAKE AN ELECTIVE SHARE OF AN ESTATE SUBJECT TO ELECTION UNDER SECTION 3-403 OF THIS ARTICLE; OR

[(4)**] (V)** Any other transaction described in:

[(i)**] 1.** § 13-203(c)(2) of this subtitle;

[(ii)**] 2.** Title 9, Subtitle 2 of this article; or

[(iii)**] 3.** § 15-102 of this article.

COMMENT

Proposed Section 3-404(b) allows a court to direct that the spousal election be made. The revision to Section 13-204 adds that specific transaction to the list of actions a court may authorize without the appointment of a guardian.

14.5–605.

(A) IN THIS SECTION, "ESTATE SUBJECT TO ELECTION" AND "SPOUSAL BENEFITS" HAVE THE MEANINGS STATED IN § 3-401 OF THIS ARTICLE.

(B) AFTER THE FILING OF AN ELECTION TO TAKE AN ELECTIVE SHARE UNDER § 3-403 OF THIS ARTICLE BECOMES FINAL:

(1) ALL PROPERTY OR OTHER BENEFITS THAT WOULD HAVE PASSED TO THE SURVIVING SPOUSE UNDER THE TRUST INSTRUMENT GOVERNING ANY TRUST THAT FORMS A PART OF THE ESTATE SUBJECT TO ELECTION, OTHER THAN ANY PORTION OF THE SPOUSAL BENEFITS, SHALL BE TREATED AS IF THE SURVIVING SPOUSE HAD DIED ON THE DAY BEFORE THE SETTLOR; AND

(2) THE SURVIVING SPOUSE OR A PERSON CLAIMING THROUGH THE SURVIVING SPOUSE MAY NOT RECEIVE PROPERTY, OTHER THAN PROPERTY FORMING ANY PORTION OF THE SPOUSAL BENEFITS, UNDER THE TRUST INSTRUMENT.

COMMENT

As discussed above, proposed Section 3-410 provides that an electing widow or widower may not receive any benefit under the deceased spouse's Will other than the spousal benefits. Proposed Section 14.5-605 applies those strictures to the deceased spouse's revocable trust(s). Revocable trusts effectively serve as "Will substitutes," and Maryland law already contains many provisions equalizing the *post mortem* treatment of Wills and revocable trusts. Given that a revocable trust, rather than a Will, often is the primary testamentary instrument, it makes sense to treat an electing spouse the same under both instruments.

17-202.

"MARYLAND STATUTORY FORM

PERSONAL FINANCIAL POWER OF ATTORNEY

<NOTE: FORM LANGUAGE NOT RELEVANT TO THE ELECTIVE SHARE HAS BEEN OMITTED FROM THIS COMMENTARY; THE BELOW TEXT WILL FOLLOW THE "NOMINATION OF GUARDIAN (OPTIONAL)" SECTION>

DESIGATION OF AGENT TO MAKE ELECTION TO TAKE ELECTIVE SHARE (OPTIONAL)

IF I AM INCAPACITATED WITHIN THE MEANING OF SECTION 17-101(C) OF THE ESTATES AND TRUSTS ARTICLE, I DESIGNATE THE FOLLOWING PERSON AS MY AGENT FOR PURPOSES OF MAKING THE ELECTION TO TAKE AN ELECTIVE SHARE OF AN ESTATE SUBJECT TO ELECTION UNDER SECTION 3-403 OF THE ESTATES AND TRUSTS ARTICLE:

NAME OF DESIGNATED AGENT: _____
DESIGNATED AGENT'S ADDRESS: _____
DESIGNATED AGENT'S TELEPHONE NUMBER: _____

SIGNATURE AND ACKNOWLEDGEMENT …

17–203.

"MARYLAND STATUTORY FORM LIMITED POWER OF ATTORNEY

PLEASE READ CAREFULLY

<NOTE: FORM LANGUAGE NOT RELEVANT TO THE ELECTIVE SHARE HAS BEEN OMITTED FROM THIS COMMENTARY>

SUBJECTS AND AUTHORITY

H. Estates, Trusts, and Other Beneficial Interests (including trusts, probate estates, guardianships, conservatorships, escrows, or custodianships or funds from which the principal is, may become, or claims to be entitled to a share or payment) – With respect to this subject, I authorize my agent to:

(___) Accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from the fund described above

(___) Demand or obtain money or another thing of value to which the principal is, may become, or claims to be entitled by reason of the fund described above, by litigation or otherwise

(___) Exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal

(___) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal

(___) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary

(___) Conserve, invest, disburse, or use anything received for an authorized purpose

(___) Transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor

(___) Reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from the fund described above

(___) ELECT TO TAKE AN ELECTIVE SHARE OF AN ESTATE SUBJECT TO ELECTION UNDER SECTION 3-403 OF THE ESTATES AND TRUSTS ARTICLE

(___) All of the above

COMMENT

The revisions to Sections 17-202 and 17-203 add to the statutory form powers of attorney language specifically authorizing an incapacitated surviving spouse's agent to make the election as permitted by proposed Section 3-404.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any estate of a decedent who died before the effective date of this Act or any revocable trust of a decedent that became irrevocable by reason of the death or incapacity of the settlor before the effective date of this Act.

COMMENT

This provision specifying that the proposed revisions to Maryland's elective share law will apply only prospectively contains language shielding from the elective share a revocable trust that becomes irrevocable prior to the effective date by reason of the settlor's incapacity, but it does not contain similar language regarding an incapacitated testator or testatrix. Under current law, a testator or testatrix makes a Will with the knowledge that the elective share may apply to his or her probate estate. Conversely, a settlor of a revocable trust may execute that instrument in the belief that its assets are not subject to the spousal election. If the settlor loses the capacity to amend the revocable trust before the effective date, but dies afterward, it seems unreasonable to deny that individual the opportunity to revise his or her plan in light of the new law.

APPENDIX A

THE LEGISLATIVE WORK GROUP ON ELECTIVE SHARE REFORM

Delegate Kathleen M. Dumais
Vice Chair, Judiciary Committee
Maryland House of Delegates

Senator Delores G. Kelley
Vice Chair, Judicial Proceedings Committee
Senate of Maryland

Delegate Samuel I. Rosenberg
Chair, Government Operations and Estates and Trusts Subcommittee
Health and Government Operations Committee
Maryland House of Delegates

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Pasternak & Fidis, P.C.
MSBA Estate and Trust Law Section Council

Morris Klein, Esquire
Law Office of Morris Klein
MSBA Elder Law and Disability Rights Section Council

Jonathan G. Lasley, Esquire
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University of Maryland Francis King Carey School of Law

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Gordon Feinblatt LLC
Past Chair, MSBA Estate and Trust Law Section Council

Shale D. Stiller, Esquire
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Professor Angela M. Vallario
University of Baltimore School of Law

Linda V. Forsyth
Chief of Staff to Senator Kelley

Kelly L. McCrea, Esquire
KMC Law
Work Group Staff

APPENDIX B

EXAMPLES OF THE APPLICATION OF THE CURRENT AND PROPOSED ELECTIVE SHARE FORMULAE

APPENDIX C

AN OUTLINE OF THE PROPOSED ELECTIVE SHARE FORMULA

THE ELECTIVE SHARE EQUALS:

I. The **"Estate Subject to Election"** (§ 3-401(d)), consisting of:

A. The **"Augmented Estate"** (§ 3-401(b)) made up of of:
   i. The decedent's probate estate (§ 3-401(g));
   ii. The decedent's revocable trusts (§ 3-401(l));
   iii. Property in which the decedent held a "Qualifying Power of Disposition" (§ 3-401(j)), including:
      a. General powers of appointment;
      b. The ability to designate the beneficiaries (including via POD, TOD or similar arrangements); and
      c. The ability to control the possession or enjoyment of the property if the decedent created the power.
   iv. The decedent's share of any joint accounts or interests (§ 3-401(h)); and
   v. Certain lifetime transfers made by the decedent (§ 3-401(i)).

B. Reduced by:
   viii. Funeral and administration expenses;
   ix. Family allowances;
   x. Enforceable claims;
   xi. Certain trusts not created by the decedent (§ 3-401(d)(4)), or which benefit others with disabilities (§ 3-401(d)(5));
   xii. Lifetime transfers made more than two years before the decedent's death (§§ 3-401(d)(7) and (8)), or to which the surviving spouse consented (§ 3-401(d)(6));
   xiii. Real property in which the decedent held a life estate without power of disposition (§ 3-401(d)(9)); and
   xiv. Certain life insurance policies benefitting close family members (§ 3-401(d)(10)).

II. Divided (under § 3-403) by:

A. Three if the decedent leaves surviving issue; or
B. Two if no descendants of the descendant are living.

III. With the quotient of I and II being reduced by the **"Spousal Benefits"** (§ 3-401(n)); consisting of:

A. All property passing to or in trust for the benefit of the surviving spouse by reason of the decedent's death.

B. Reduced by:

v. The spouse's share of any joint property;

vi. Any assets passing to, or held in, a trust of which the surviving spouse is not the sole beneficiary or that does not meet at least the standard of a "special needs trust" under the Maryland Code;

vii. 25% of any trusts created by the decedent of which the surviving spouse is the sole beneficiary and which meet the definition of a "Marital Trust" (§ 3-401(e)) ; and

viii. 33% of any other trust for the exclusive benefit of the surviving spouse that meets or exceeds the distribution standard of a special needs trust.