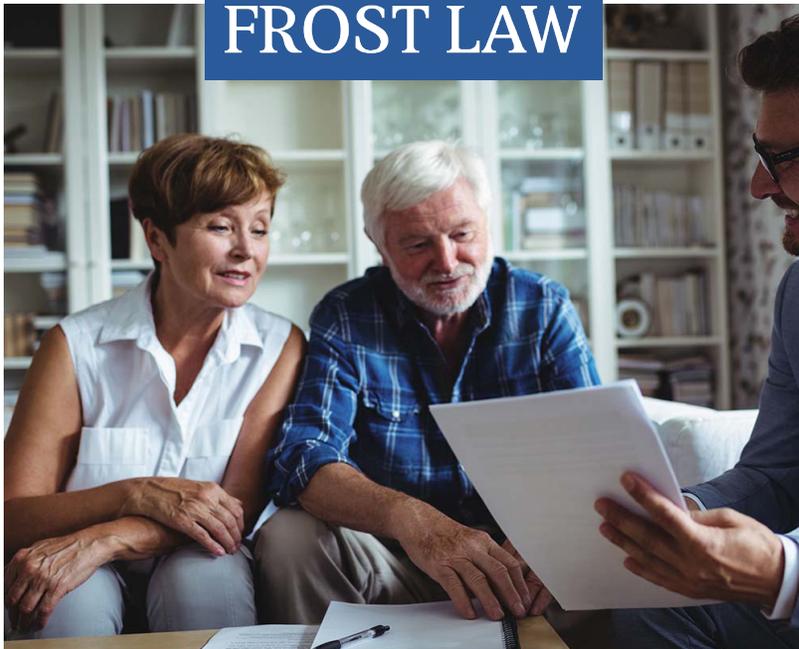




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On October 1, 2020, Maryland's new elective share law took effect—clarifying the rights of a surviving spouse to inherit from a deceased spouse, and arguably making it much harder to disinherit a spouse. Under prior law, a surviving spouse's rights to take an elective share were somewhat ambiguous, and the extent of assets against which they could elect was arguably limited. The new law sets forth a formula of assets against which the surviving spouse may elect a share—the “Augmented Estate”—which is comprised of both probate and non-probate assets, and in certain instances assets that were gifted prior to death.

Maryland's New Augmented Estate Further Shields a Spouse from Disinheritance

By Mary Lundstedt, Esq. & Leanne Broyles, Esq.

Practically speaking, the new law won't impact you greatly if you intend to leave all, or most, of your estate to your spouse. On the other hand, if you intend to leave your assets differently, you need to understand the framework and what's at stake. In particular, it is vitally important that couples in blended families, individuals who have children from outside a marriage, and individuals leaving assets for the benefit of a surviving spouse *in trust* to protect them for future generations visit or revisit their estate plans to ensure they will not be disrupted by the law.

Background

Maryland has a long common law history of trying to protect a surviving spouse from being disinherited upon the death of the other spouse. Unsurprisingly, the intent behind this position has been to equitably balance the interests of the State, the decedent, and the surviving spouse.

An elective share operates to balance these interests by allowing a sur-

viving spouse to either accept the terms of the decedent's last will and testament or choose to elect a fixed portion of the predeceased spouse's estate. The portion is one-third or one-half, depending on whether or not the predeceased spouse had descendants.

Under prior law, it was obvious that the surviving spouse's right to elect applied to probate assets, but when the decedent's assets passed outside probate (i.e., via joint tenancies with right of survivorship, bank accounts with “payable on death,” or *inter-vivos* trusts), the law was not particularly clear or settled on the surviving spouse's rights.

Calculating Maryland's New Elective Share

In an effort to clarify a surviving spouse's right, Maryland legislators created an “Augmented Estate” formula, which outlines the property of a deceased spouse that can be reached. Subject to certain limitations and conditions, a surviving spouse now has the right to take a share from the “Augmented Estate”—which includes both probate and non-probate assets.¹

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More specifically, per Md. Code, Est. & Trusts §3-404(a), the Augmented Estate is calculated by totaling the value of the following:

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

This list is a significantly expanded group of assets readily available for the surviving spouse to claim against when taking the elective share. Note that this newly expanded list even leaves room to recoup prior gifts made to individuals other than the surviving spouse and subject them to elective share (unless the surviving spouse consented in writing to such transfer).²

After these amounts are totaled, numerous exceptions apply to reduce the Augmented Estate's value.³ Exceptions include, but are not limited to:

- family allowances and funeral and administration expenses payable from the augmented estate;
- enforceable claims and debts against any part of the augmented estate;
- the value of any assets that, at the time of the decedent's death, were held in a trust of which the decedent is not a settlor, if the assets were not previously owned by the decedent or were previously owned by the decedent but sold in the manner specified;
- the value of a federal qualified disability trust, college tuition savings plan, or special needs trust as specified, in which the decedent, immediately before death, had a qualifying power of disposition; and
- the value of any qualifying joint interests, lifetime transfers, or property in which the decedent, immediately before death, had a qualifying power of disposition, and which the surviving spouse consented to in writing during the decedent's lifetime, with specified exceptions.⁴

Further, certain assets passing in trust for the benefit of a surviving spouse may count in part toward satisfying the elective share.

Conclusion

As this new law develops in practice, it is prudent to consider speaking with an experienced estate planner about the impact of Maryland's Elective Share on your current estate plan, and your

estate planning goals. Couples in blended families or individuals who have children from outside their marriage whom they want to provide for, or individuals who wish to leave assets in trust for a surviving spouse to ensure they ultimately pass to children, will need to take extra care to ensure their plan will not be disrupted by the elective share law.

We will be monitoring and updating you on developments in this area.

If you are looking for an estate attorney, contact our legal team at 410-862-3957 or fill out [our online form](#).

Footnotes

1. Md. Code, Est. & Trusts §3-404.
2. Md. Code, Est. & Trusts §3-404(b)(6).
3. Md. Code, Est. & Trusts §3-404(b).
4. H.B. 99, Fiscal and Policy Note, 439th Sess., at 2 (Md. 2019).

Additional Resources



The Transition Tax Campaign and Small Business – Soft Letters for a Hard-Luck Provision

The IRS has begun to communicate with individual taxpayers as part of a formal campaign to review calculations of the IRS §965 ...

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Final regulations regarding the treatment of business meals and entertainment expenses were published in the Federal Register on ...

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