

DC BAR ETPL/TAXATION SECTION JOINT MEETING

JUNE 7, 2018

MARYLAND LEGISLATIVE UPDATE:

ESTATES AND TRUSTS LEGISLATION PASSED DURING THE 2018
LEGISLATIVE SESSION

AND

ISSUES FOR 2019

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2018 MARYLAND LEGISLATIVE UPDATE

I. GENERAL OBSERVATIONS AND STATISTICS

- A. 3,101 bills were introduced during the 2018 General Assembly session.
- 889 passed both houses.
 - As of April 25, 356 had become law.
- B. During the 2018 session, the Estate and Trust Law Section Council tracked, with varying degrees of involvement, 48 bills. The Council actively supported (or advocated amendments) to 16 of these, falling into seven categories:
- Elective Share
 - Intestacy
 - Governing Law of Trusts
 - Revocable Trust Contests
 - Breach of Trust Limitations
 - Transfer & Excise Tax Exemptions for Revocable Trusts
 - Maryland Estate Tax

Ten of those bills, covering five of the listed subject areas, successfully passed both houses, and either have been signed by the governor, or were enacted without his signature.

- C. The General Assembly also passed bills of interest to estates and trusts practitioners in the following areas:
- Estate Administration
 - Inheritance Tax
 - Guardianship
 - ABLE Program
 - UTMA
 - Recordation Tax

II. LEGISLATION PASSED/ENACTED

Maryland Estate Tax

- A. Maryland Estate Tax – Unified Credit
Chapter 21 (HB 308):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_21_hb0308T.pdf
Chapter 15 (SB 646):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_15_sb0646T.pdf
Statutory Reference: Amended Tax-General Section 7-309(b)

- The Maryland estate tax (“MET”) remains decoupled from the federal estate tax exclusion amount.
- Beginning on January 1, 2019, the MET exclusion amount will be \$5 million, plus any Maryland deceased spousal unused exclusion amount (“DSUEA”).
- The Maryland DSUEA equals:
 - The Maryland exclusion amount in effect at the time of the first spouse’s death, minus
 - The taxable estate of the first spouse.
- Portability is available if:
 - For first spouses dying before 2019 or whose estate contained no property with a Maryland taxable situs, the portability election was made on the first spouse’s federal estate tax return.
 - For first spouses dying after 2018 with Maryland taxable situs property, the election is made on a timely filed Maryland estate tax return.

Maryland Trust Act

- A. Estates and Trusts – Maryland Trust Act – Governing Law of Trust Provisions.
 Chapter 258 (HB 491):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_258_hb0491T.pdf
 Chapter 259 (SB 267):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_259_sb0267T.pdf
 Statutory Reference: New E&T Section 14.5-107

- The terms of a trust will be governed by the law of the jurisdiction:
 - Selected by the settlor; or
 - “Having the most significant relationship to the matter at issue.”
- The law of another jurisdiction cannot supersede the “strong public policy” of the jurisdiction with the most significant connection to the matter at issue.
- This legislation has no effect on the tax situs of a trust.

- B. Estates and Trusts – Contesting Validity of Revocable Trust – Limitation.
 Chapter 256 (HB 444):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_256_hb0444T.pdf
 Chapter 257(SB 348):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_257_sb0348T.pdf
 Statutory Reference: New E&T Section 14.5-605

- An action contesting the validity of a revocable trust must be brought within the earlier of:
 - One year following the decedent’s death; or
 - Six months following the delivery of notice by the Trustee.

C. Estates and Trusts – Breach of Trust Action – Limitation Period.

Chapter 260 (HB 474):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_260_hb0474T.pdf

Chapter 261 (SB 1014):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_261_sb1014T.pdf

Statutory Reference: New E&T Sections 14.5-105(15) and 14.5-904

- A Trustee may start a one-year limitations period for a breach of trust action by delivering a “report that adequately discloses” the existence of the transaction in question.
 - Adequate disclosure means providing enough information that the beneficiary knows of, or should have inquired further into, the potential claim.
- The new limitations period does not apply to a Trustee’s bad faith or reckless indifference.
- The bills also add limitations periods to the list of provisions that cannot be modified by the trust instrument.

Inheritance Tax

A. Inheritance Tax – Perpetual Conservation Easement – Farming Purposes – Exemption.

Chapter 293 (HB 198):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_293_hb0198T.pdf

Statutory Reference: New Tax-General Section 7-203(m)

- This bill adds an inheritance tax exemption for real property subject to a farming conservation easement that passes to (or for the use of) a niece or nephew of the decedent.
- The inheritance tax will be recaptured if the property ceases to be used for farming purposes.

Estate Administration

A. Estates – Administration Exemption – Transfer of Motor Vehicle and Boat Titles.

Chapter 551 (SB 292):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_551_sb0292E.pdf

Statutory Reference: New E&T Section 5-608

- If the decedent’s estate consists only of (a) one or two cars, or (b) a boat worth less than \$5,000, this bill waives administration of the estate where the surviving spouse is the only heir or legatee.

B. Estates and Trusts – Administration of Estates – Waiver of Fees.

Chapter 233 (HB 556):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_233_hb0556E.pdf

Statutory Reference: Amended E&T Section 2-206

- This bill permits a Register of Wills to waive probate and other fees when:
 - Real property held in the estate is:
 - To be transferred to “an heir” of the decedent who resides in the property; or
 - Subject to tax sale; and
 - The estate cannot pay its fees by reason of poverty.
- The bill defines poverty to mean:
 - At the time of the decedent’s death, the household income was less than 50% of the Maryland median; or
 - The Personal Representative is represented through the Maryland Legal Services Corporation.

Recordation, Transfer and Excise Taxes

A. Estates and Trusts – Transfer from Revocable Trust – Exemption from Taxes and Fees.

Chapter 316 (HB 948):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_316_hb0948T.pdf

Chapter 315 (SB 372):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_315_sb0372T.pdf

Statutory Reference: Amended E&T Section 14.5-1001

- These bills exempt from recordation and transfer tax transfers of real property from a revocable trust so long as:
 - The transfer is made to a beneficiary of the trust; and
 - The transfer is made by reason of the settlor’s death.
- The bills also prohibit imposition of the motor vehicle excise tax when vehicles are transferred from revocable trusts in the same circumstances.
- The exemptions take effect July 1, 2018.

B. Recordation Tax – Exemptions.

Chapter 594 (SB 999):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_594_sb0999T.pdf

Statutory Reference: Amended Tax-Property Sections 12-108 and 12-117

- The bill adds limited partnerships and statutory trusts to the list of business entities for purposes of the exemption for transfers between entities with identical ownership.
- For purposes of the refinancing exemption, this bill expands the definition of “original mortgagor” to include exempt recipients of the real property.
- These exemptions take effect July 1, 2018.

Guardianship

A. Appointment or Designation of a Standby Guardian – Adverse Immigration Action.

Chapter 749 (SB 1239):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_749_sb1239T.pdf

Statutory Reference: Amended E&T Sections 13-901, 13-904, 13-907

- This bill adds an “adverse immigration action” to the circumstances in which a standby guardianship may take effect.
- Under the bill, a parent may designate a standby guardian who will assume authority with respect to a minor child if the parent is detained or absent from the country by reason of a government immigration action.
- This is an emergency bill that will take effect on the date of enactment (May 15, 2018).

B. Duties of a Guardian of the Person – Visitation.

Chapter 287 (HB 1483):

http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_287_hb1483E.pdf

Statutory Reference: Amended E&T Section 13-708

- This bill adds the “duty to foster and preserve family relationships” to the list of duties and powers a court may confer upon a guardian.

C. Guardianship of Disabled Persons – Voluntary Admission to Mental Facility.
Chapter 760 (HB 33):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_760_hb0033T.pdf
Statutory Reference: E&T Sections 13-706 and 13 708; Health-General Sections 10-609 and 10-611

- This bill provides that a disabled person, notwithstanding her or his disability, may apply for voluntary admission to a mental facility so long as two psychiatric professionals certify that the individual is competent to do so.

Miscellaneous

A. Maryland Achieving a Better Life Experience (ABLE) Program – Modifications.
Chapter 390 (HB 782):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_390_hb0782T.pdf
Chapter 391 (SB 550):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_391_sb0550E.pdf
Statutory Reference: Education Sections 18-1903, 18-1905, 18-1909, 18-19A, 18-9B, and 18-19C

- These bills permit transfers of funds from traditional 529 plans to ABLE accounts.
- In addition, the bills provide that, upon the death of an ABLE beneficiary, the funds may be transferred to the beneficiary’s estate or an ABLE account for another eligible beneficiary pursuant to the original beneficiary’s designation.
- Unless otherwise required by federal law, the State is prohibited from seeking medical assistance reimbursement from an ABLE account.
- These bills take effect June 1, 2018.

B. Estates and Trusts – Maryland Uniform Transfer To Minors Act – Award of Reasonable and Necessary Expenses.
Chapter 298 (HB 769):
http://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_298_hb0769T.pdf
Statutory Reference: New E&T Section 13-323.1

- This bill permits a court to award “reasonable and necessary expenses” for prosecuting or defending an action under MUTMA.

III. ISSUES FOR THE 2019 LEGISLATIVE SESSION

A. Estates and Trusts – Elective Share of Surviving Spouse. The Section Council believes that reform of Maryland’s broken elective share law remains essential and, in 2019, plans to pursue legislation similar to the bills considered by the General Assembly this year:

- Senate Bill 649: <http://mgaleg.maryland.gov/2018RS/bills/sb/sb0649T.pdf>
 - Passed the Senate.
 - Did not receive a vote in the House Health and Government Operations Committee.
- House Bill 777: *Text not included because it does not include relevant amendments; please see SB 649.*
 - Did not receive a vote in the House Health and Government Operations Committee.
- These bills are designed to address three fundamental problems with Maryland’s existing elective share law:
 - It is far too easy to disinherit a surviving spouse – intentionally or inadvertently;
 - A surviving spouse who receives non-probate assets can take advantage of the current statute to receive a disproportionately large share of the overall estate; and
 - Redress for these problems under Maryland case law is uncertain at best, leaving well-crafted estate plans in limbo, and poorer disinherited widows and widowers without recourse.
- The bills solve these problems by:
 - Including probate and non-probate assets in the calculation of the elective share;
 - Taking into account the decedent’s probate and non-probate arrangements benefitting the surviving spouse; and
 - Providing courts with guidance for analyzing arrangements not adequately covered by the formula.
- For a detailed discussion of the bills’ provisions, please see the author’s commentary at go.msba.org/electiveshare17 or: [https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member Groups/Sections/Estate and Trust Law/Elective%20Share%20Fall%202017%20newsletter.pdf](https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member%20Groups/Sections/Estate%20and%20Trust%20Law/Elective%20Share%20Fall%202017%20newsletter.pdf)

B. Intestacy. Over the past two legislative sessions, the General Assembly has expressed interest in revising Maryland’s intestacy statute. The Section Council believes that reform along the lines considered this year would move Maryland’s law more in line with national trends:

- Estates and Trusts – Intestate Succession – Share of Surviving Spouse and Order of Distribution
House Bill 567: <http://mgaleg.maryland.gov/2018RS/bills/hb/hb0567F.pdf>
 - Withdrawn.
 - This bill addresses concerns raised in several separate bills introduced in the 2017 session by:
 - Increasing the surviving spouse’s pecuniary share across the board;
 - Insuring that step-children of the surviving spouse receive at least 10% of the net estate; and
 - Moving step-children up one level so that they take after grandparents’ (as opposed to great-grandparents’) descendants.
- Estates and Trusts – Share of Intestate Estate Inherited by Surviving Parent – Repeal
House Bill 783: <http://mgaleg.maryland.gov/2018RS/bills/hb/hb0783F.pdf>
 - Unfavorable report by the House Health and Government Operations Committee/Withdrawn.Senate Bill 109: <http://mgaleg.maryland.gov/2018RS/bills/sb/sb0109F.pdf>
 - Unfavorable report by the Senate Judicial Proceedings Committee.
 - These bills would eliminate the share of an intestate estate going to the decedent’s parents where there is a surviving spouse and no issue.

C. Trust Decanting. The Section Council is working on a proposal to allow “decanting” between trusts. Decanting statutes, which permit Trustees to “pour” the assets of one trust into another under certain circumstances, have been used successfully in other states to add flexibility where changes in the law or circumstances have complicated the trust’s administration.

D. Electronic Wills.

- Online services and others increasingly are promoting electronic Wills as a means of simplifying estate planning.
- Nevada has adopted a broad electronic Wills statute:
 - The Will may be created, stored and signed entirely in digital form.
 - No witnesses are required if the testator uses an “authentication characteristic” (i.e. a biometric marker) unique to the testator.

- If the testator does not use an “authentication characteristic,” two witnesses are required.
 - The witnesses also may sign electronically.
 - The witnesses need not be physically present with the testator so long as they can communicate audio-visually.
- The testator need not be present in, or a resident of, Nevada.
 - A nonresident can avail himself/herself of Nevada law by executing the Will as required by the Nevada statute, and transmitting the “authoritative copy” of the document to a Nevada custodian.
- Section 4-104 of the Maryland Estates and Trusts Article provides as follows:

“A will executed outside this State is properly executed if it is:

 - (1) In writing;
 - (2) Signed by the testator; and
 - (3) Executed in conformity with the provisions of § 4-102 of this subtitle, or the law of the domicile of the testator, or the place where the will is executed.”