Maryland Treads Water Over Elective Share Reform: The Spouse's Desperate Cry for the Court's Intervention with a Bright-line Rule for Revocable Trusts

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MARYLAND TREADS WATER OVER ELECTIVE SHARE REFORM: THE SPOUSE’S DESPERATE CRY FOR THE COURT’S INTERVENTION WITH A BRIGHT-LINE RULE FOR REVOCABLE TRUSTS

By: Angela M. Vallario *

I. INTRODUCTION

Despite extensive progress protecting the marital relationship between persons regardless of gender, Maryland has failed to financially protect the marital right of a surviving spouse on the death of his or her spouse. One of the most important marital rights is financial protection on the death of one’s spouse, known as the elective share. Maryland’s elective share statute was enacted in 1969 when Maryland abolished dower and curtesy. The elective share is intended to protect a spouse from disinheritance by their partner. But because it only extends to the decedent’s probate estate, this statutory protection has been severely undermined by the increasingly popular inter vivos transfers to a revocable trust.

A revocable trust is created, inter vivos, when the property owner single-handedly declares himself as trustee, to hold for himself for life, and provides for a distribution upon death. Furthermore, a revocable trust, created either by declaration of trust or by a transfer of property, is not rendered invalid because the trust creator retains substantial control.1 Thus, a revocable trust is a de facto will that easily avoids the elective share by a change in legal title from a probate asset (subject to the elective share statute) to a non-probate asset (beyond the elective share statute), allowing the creator to use and enjoy the property in same fashion after this transfer as before.

Over the years, the courts have necessarily intervened to protect the legal share of the spouse from inter vivos transfers using judicial doctrine as a deterrent. Initially, the courts referred to the doctrine as

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“fraud on marital rights,” but more recently they have referred to the deterrent frustrating the spouse’s elective share with “sham transfers.” Regardless of its name, the doctrine results in uncertainty, unfairness, and inadequacy for the surviving spouse who will be required to endure the costs, burdens, and risks of litigation to advocate for a legally protected marital right. Although the doctrine provides some measure for evaluating whether other inter vivos transfers should be available for the elective share, this approach should not be required for a revocable trust.

There are two avenues for eliminating this inequity: (1) legislation and (2) reform through case law. Maryland would benefit from legislation, and has passed significant trusts and estates legislative reform, like the Maryland Trust Act, which offers a roadmap for elective share reform. However, over the last 20 years sporadic elective share reform efforts have failed. This is due to a number of factors. These include the fact that Maryland’s elective share bills lack a driving force behind the legislation, change time and time again, are without unified support from the estates and trust and/or elder law bar sections, and the general assembly lacks understanding of a complex topic.

The Uniform Probate Code’s model provides a possible legislative solution because that model is objective, has been heavily vetted, and is recognized by a majority of states. However, Maryland’s recent elective share reform efforts suggest that approach is unlikely. The Uniform Probate Code model has been rejected by the estates and trust and elder law bar sections, who have become accustomed to advising clients on techniques such as the revocable trust which have a detrimental consequence for the disinherited spouse.

The time has come to accept that the only effective recourse is through case law. The court must protect the surviving spouse from disinheritance with a revocable trust. To protect a spouse, the revocable trust like the probate estate, must be included in the pool of assets subject to Maryland’s elective share. Although most states have accomplished this with legislative reform, Maryland has not. The Court of Appeals must remedy this wrong because legislative action has not occurred. The time is ripe for Maryland Courts to follow the path taken in Massachusetts, and other states, and create a bright-line rule for revocable trusts in order to protect this important marital right.²

II. MARYLAND’S MARRIAGE-FRIENDLY MARITAL PROTECTIONS

Maryland promotes marriage in many ways and can be generally viewed as a marriage-friendly jurisdiction. The Court of Appeals has recognized that marriage is the “most important contract into which individuals can enter.” Moreover, actions taken that discourage marriage may be challenged as a violation of public policy. Some marital rights attach upon marriage to pre-marital assets and continue after the death of a spouse. For example, the right to a deceased spouse’s Social Security, the spouse’s right to inherit under intestacy, and the protection against disinheritance with the elective share. In Collins v. Collins, the Court in addressing the elective share stated, “[a] marital right, which in common with all legal rights, is a proper subject of legal protection.”

3 Conaway v. Deane, 401 Md. 219, 418 (2007) (quoting Fornshill v. Murray, 1 Bland 479, 481 (1828)); Conaway, 401 Md. at 326 (“Appellees seek the right to marry, understanding that a civil marriage license entitles married couples to a vast array of economic and social benefits and privileges -- the rights of marriage -- as well as other intangible benefits.”).

4 Bowman v. Weer, 204 Md. 344, 348 (1954) (“Of course, a condition in general restraint of marriage, whether of a man or of a woman, as a general rule has been held in law as being contrary to public policy and void.”) (citing Edgar G. Miller The Construction of Wills: In Maryland, 879 (1927)); Shapira v. Union Nat'l Bank, 39 Ohio Misc. 28, 28 (1974) (“If the condition in a will were that the beneficiary not marry anyone would be held to be contrary to public policy and void.”); See Gordon v. Gordon, 332 Mass. 197 (1955); United States Nat'l Bank v. Snodgrass, 202 Or. 530 (1954); Capps v. Capps 216 Va. 378 (1975).


6 Md. CODE, ANN., EST. & TRUSTS § 3-102 (LexisNexis 2018) (stating that if the intestate is survived by a spouse, the surviving spouse will inherit at least one-half of the decedent’s probate estate).

7 Md. CODE, ANN., EST. & TRUSTS § 3-203 (LexisNexis 2018) (providing that the surviving spouse may elect against the deceased spouse’s estate and take one-half or one-third of the decedent’s probate estate, instead of what was provide under the will).

8 Collins v. Collins, 98 Md. 473, 479 (1904) (quoting Chandler v. Hollingsworth, 3 Del. Ch 99 (1867) (finding in favor of the spouse, when decedent secretly made an
Within the last decade, Maryland has made progress in protecting marriage, as marital rights have been extended to “all individuals” regardless of sexual orientation.\(^9\) The Civil Marriage Protection Act in 2012 began the journey of extending marital rights to all individuals.\(^10\) Following the Civil Marriage Protection Act, the Supreme Court in \textit{US v. Windsor} and ultimately in \textit{Obergefell v. Hodges}, noted “no union is more profound.”\(^11\) Despite monumental strides with the Civil Marriage Protection Act’s marriage-friendly legislation and strong public policy favoring protection, Maryland has not provided any meaningful protection to a spouse’s marital right, the elective share.\(^12\)

**III. MARYLAND’S CURRENT ELECTIVE SHARE LAW**

Maryland is a separate property state where a married couple has the ability to accumulate and title property separately in their individual names.\(^13\) Therefore, on the death of one spouse, Maryland legally protects the surviving spouse from disinheritance by extending the spouse a statutory marital right known as the “elective share.”\(^14\) The

\(\textit{inter vivos}\) transfer property retaining a life estate in himself 20 days before marriage).

\(^9\) \textit{See MD. CODE. ANN., FAMILY LAW} § 2-201 (LexisNexis 2018) (“Only a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State.”).

\(^{10}\) Maryland Office of the Attorney General, \textit{The State of Marriage Equality in America} (April 2015), available at http://www.marylandattorneygeneral.gov/Reports/The%20State%20of%20Marriage%20Equality%20in%20America%202015.pdf (the Civil Marriage Protection Act was ultimately ratified by the voters on November 6, 2012, with 52.4\% of the vote).


\(^{12}\) \textit{Shimp v. Huff}, 315 Md. 624, 646 (1989) (“In addition, § 3-204 suggests that the right to receive the elective share is a personal right, which cannot be waived by the unilateral acts of others, including the actions of the deceased spouse. These statutes and principles of law suggest that there is a strong public policy in favor of protecting the surviving spouse’s right to receive an elective share”) (emphasis added).

\(^{13}\) \textit{See Angela M. Vallario, Spousal Election: Suggested Equitable Reform for the Division of Property at Death}, 52 Cath. U. L. Rev. 519, 523 (2003) (discussing the common law property system which Maryland follows).

\(^{14}\) \textit{MD. CODE. ANN., EST. & TRUSTS} § 3-203 (LexisNexis 2018).
elective share is a limitation on testamentary freedom, because if the deceased spouse fails to adequately provide for the survivor by will, the surviving spouse may elect against the will and take a statutory share.\textsuperscript{15} Maryland has protected spouses from disinheritance for more than a century.\textsuperscript{16} Historically, the spouse was protected against disinheritance with common law’s dower and curtesy rights.\textsuperscript{17} However, in 1969, Maryland abolished these common law rights and replaced them with a statute giving the spouse the option to take an elective share rather than the property that had been left to the spouse under the decedent’s will.\textsuperscript{18} Maryland’s current statute provides that, instead of property left by will, the spouse may elect to take a one-third share if there are surviving issues or one-half of the net [probate] estate if there are no surviving issue.\textsuperscript{19} Since Maryland’s elective share statute can only be taken as to the deceased spouse’s probate estate, the surviving spouse can be totally disinherit not by a will, but with a revocable trust.

Nearly fifty years have passed since the enactment of Maryland’s elective share statute, which provides that a surviving spouse is entitled to a fractional share of the deceased spouse’s probate estate.\textsuperscript{20} The

\textsuperscript{15} Karsenty v. Schoukroun, 406 Md. 469, 504-06 (2008) (“...although we previously referred to this judicial authority as the doctrine of fraud on marital rights, on more than one occasion, we have stated more aptly its purpose: ‘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.’”).

\textsuperscript{16} Schoukroun, 406 Md. at 504, n.25 (“Maryland enacted its original elective share statute in 1798...That statute, the forerunner to Section 3-203, provided, in pertinent part, that a widow who renounces her right to take under her husband’s will ‘shall be entitled to one third part of the personal estate . . ., which shall remain after payments of his just debts, and claims against him, and no more.’ ”).

\textsuperscript{17} Vallario, supra note 13, at 526 (“Like much of the common law throughout the United States, the legal protection for a surviving spouse at the death of his or her spouse can be traced to England. Individual states in America adopted the English concepts of dower and curtesy to protect the surviving spouse at the death of his or her spouse. Dower protected the wife, while curtesy was the protection extended to the husband.”).

\textsuperscript{18} MD. CODE. ANN., EST. & TRUSTS § 3-203 (1978) (LexisNexis 2018) (replacing MD. CODE. ANN., EST. & TRUSTS § 3-102 (1969)) (“The share of a surviving spouse shall be: (1) if there is also surviving issue, one-third (1/3); (2) if there is no surviving issue but a surviving parent, one-half (1/2); (3) if there is no surviving issue or parent but a surviving brother or sister, or issue of a brother or sister, four thousand dollars ($4,000) plus one-half (1/2) of the residue; (4) if there is no surviving issue, parent, brother, sister or issue of a brother or sister, the whole.”).

\textsuperscript{19} Id.

\textsuperscript{20} Id.
elective share statute does not provide adequate protection for the spouse because either spouse can deplete his or her probate estate by single-handedly transferring probate assets to a revocable trust. Due to the inadequacy of the elective share statute, Maryland courts needed to intervene to protect a spouse from *inter vivos* transfers. Therefore, Maryland’s elective share law represents a combination of statute and necessary judicial doctrine.

Maryland courts initially adopted the “fraud on marital rights” doctrine to curtail a deceased spouse from circumventing the surviving spouse’s marital rights. This doctrine does not require ‘fraud’ in the classic sense. Instead, every non-probate transfer requires a judicial examination to determine whether the transfer violated a surviving spouse’s marital rights. Furthermore, uncertainty surrounds the doctrine because there is “no general and completely satisfactory rule” defining “fraud on marital rights.” Moreover, Maryland courts have difficulty with articulating the “fraud on marital rights” doctrine.

As early as 1904, Maryland courts identified the need for judicial intervention. In *Collins v. Collins*, the Court stated, “[w]here a man, immediately before his marriage, privately and secretly conveys, his

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21 See RESTATE 3D OF TRUSTS, § 25 (2012) (“In short, despite modern efforts to simplify the probate process ... revocable trusts created by declaration or by transfer to another are often preferred by property owners as means of holding and disposing of their property. Accordingly, the revocable trust is widely used as a legally accepted substitute for the will as the central document of an estate plan...”).
22 See Whittington v. Whittington, 205 Md 1, 18 (1954); Knell v. Price, 318 Md. at 501, 512 (1990); Schoukroun, 406 Md. at 498 (quoting Johnson v. La Grange State Bank, 73 Ill. 2d 342, 364-65 (1978)).
23 Schoukroun, 406 Md. at 514 (citing White v. Sargent, 875 A.2d 658, 666 (2003)).
24 Id. at 514 (“In the context of [§ 3-203], fraud in the classic sense is not at issue and a court should instead look for an improper circumvention of the marital rights of the surviving spouse. Instead of speaking of fraud, the courts would speak of violation of marital rights.”) (citing White, 875 A.2d at 666 (2003)).
25 Knell, 318 Md. at 512.
26 Whittington, 205 Md. at 23; Gianakos v. Magiros, 234 Md. 14, 29 (1964); see generally Knell, 318 Md. 501 (reversing the judgement in favor of the mistress, which was rendered by the intermediate court of appeals); see also Schoukroun, 406 Md. 469 (reversing the judgment of the intermediate appellate court and remanded the case to the trial court with guidance to consider the nature of the underlying transaction and the decedent's intent, reservation of rights, moral claims, testate provisions for and inter vivos gifts to the spouse, and familial relationships.); see New Fiduciary Decisions: Transfer in Fraud of Marital Rights, WG&L EST. PLANNING J. (2008) (“The non-UPC states have muddled along in uncertainty, as demonstrated by the case of Schoukroun v. Karsenty ... from the Maryland Court of Special Appeals.”).
27 Collins v. Collins, 98 Md. 473, 57 (1904).
estate to a trustee for himself, in order to defeat his wife of dower, such conveyance will be deemed fraudulent and void." 28 The Court went on to state, “[i]f a husband seized in fee should, immediately before his marriage, vest the legal estate in trustees to disappoint his intended wife of dower, such a conveyance would be reckoned fraudulent, because it was made with an ill conscience in order to deprive his wife of the provision made for her by the common law.” 29 Although Collins was based on rights under common law, Maryland’s elective share statute remains inadequate and continues to require intervention from the courts.

Fifty years later in Whittington v. Whittington, the court examining the inter vivos creation of joint bank accounts, wrestled with the doctrine and developed criteria for others to follow:

The completeness of the transfer and the extent of control retained by the transferor, the motive of the transferor, the participation by the transferee in the alleged fraud and the degree to which the surviving spouse is stripped of his or her interest in the estate of the decedent spouse have all been considered material, and no one test has been adopted to the exclusion of all other tests…. There are several other factors which have been or may be considered as pertinent, such as the relative moral claims of the surviving spouse and of the transferees, other provisions for the surviving spouse, whether or not he or she has independent means and the interval of time between the transfer and the death of the transferor. 30

After an examination of the other assets the spouse had received, and noting no fraud or undue influence on the part of the beneficiaries, the court, using the “fraud on marital rights” doctrine, found no basis upon which the joint accounts should be stricken. 31

The struggle with this judicial doctrine did not improve as a result of the replacement of the common law rights with the elective share statute. In Knell v. Price, 32 the estranged surviving spouse successfully

28 Collins, 98 Md. at 479.
29 Id.
30 Schoukroun, 406 Md. at 494-95 (quoting Whittington, 205 Md. at 77).
31 See Whittington, 205 Md. at 14.
32 Knell, 318 Md. at 501.
argued that an *inter vivos* conveyance through a straw man was a fraud on her marital rights. In *Knell*, the Court held the conveyance constituted a fraud on the surviving spouse’s marital rights because the decedent did not part with the absolute dominion and control over the property during his life. In so holding, the court found that “his conveyance, through a straw man, of the remainder of the property pronounce[d] this to be a fraud on marital rights.” In *Knell*, the Court of Appeals of Maryland cited *Whittington* for the proposition that no general rule had yet evolved in Maryland, but did not examine the *Whittington* criteria.

The most recent judicial examination of the doctrine took place in *Karsenty v. Schoukroun*, when the court rejected the terminology of “fraud on marital rights” noting the doctrine had little to do with fraud and was inconsistent with the weight of Maryland precedent. In *Schoukroun*, the court stated:

> Indeed, although we previously referred to this judicial authority as the doctrine of fraud on marital rights, on more than one occasion, we have stated more aptly its purpose 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.... Our reference to ‘fraud’ with respect to the decedent's use of the trust form meant that the *inter vivos* transfers were in bad faith. And, perhaps most significantly, [i]t would be helpful if instead of speaking of ‘fraud’, the courts would speak of ‘violation of marital rights’.... Notwithstanding our previous references to ‘fraud’ on marital rights, because we ultimately are not concerned with whether a decedent intended to deprive her or his surviving spouse of property, we emphasize today that it is more helpful for a court to think of a ‘sham transfer’ in this context as an unlawful frustration of the surviving spouse's statutory share. (emphasis

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34 *Id.*
35 *Id.*
36 *Id.* at 512 (arriving at its decision without discussing any of the *Whittington* factors, and instead, stating “Mr. Knell retained control of the property during his lifetime by establishing a life estate in himself in himself with unfettered power in him, while living (except no will), to dispose of all interests in the property in fee simple.”).
37 *Schoukroun*, 406 Md. at 489.
38 *Id.* at 511.
In *Schoukroun*, the decedent established a revocable trust which, upon the decedent’s death, provided for his minor daughter. The creation of the revocable trust allowed the decedent to single-handedly transfer his property outside the reach of the spouse’s elective share. In *Schoukroun* the surviving spouse argued that her elective share should extend to the decedent’s revocable trust because the decedent maintained complete control over the estate planning vehicle, and that this factor alone amounted to a *per se* fraud on her marital rights. The Court, in reversing the intermediate appellate court, rejected the surviving spouse’s argument and instead required each case to address the *Whittington* criteria where it found the revocable trust did not amount to a sham.

In *Schoukroun*, the Court of Appeals provided three (3) considerations to lessen the cumbersome analysis as to whether an *inter vivos* transfer is considered “a sham.” The first question is whether the decedent retained control or continued benefit over the transferred property. Second, the court should strive to not disrupt the decedent’s legitimate estate planning. Finally, a court should employ the *Whittington* factors when scrutinizing an *inter vivos* transfer to determine whether the transfer was a “sham.” The *Schoukroun* Court suggested that the decedent’s dominion and control over a revocable trust was not a *per se* violation of the surviving spouse’s marital rights.

In Maryland, since a spouse can accumulate and title property individually, state law provides protection against disinheretance by

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39 *Schoukroun*, 406 Md. at 481; see, e.g., *Knell*, 318 Md. 501 (“...it is perfectly clear that Mr. Knell retained control of the property during his lifetime by establishing a life estate in himself with unfettered power in him, while living, to dispose of all interests in the property in fee simple. He did not part with the absolute dominion of the property during his life. His conveyance, through a straw man, of the remainder of the property was not complete, absolute, and unconditional. The law pronounces this to be a fraud on the marital rights of Mrs. Knell. His reluctance to relinquish control over the disposition of the property during his lifetime defeated his intention.”) see also *Vallario*, supra note 13.

40 *Schoukroun*, 406 Md. at 526.

41 *Id.* at 514-16.

42 *Id.* at 515.

43 *Id.*

44 *Id.* (citing *Whittington v. Whittington*, 205 Md. 1 (1954)).

45 See *Schoukroun*, 406 Md. 469.
way of its elective share.46 The existence of Estates and Trusts § 3-203 demonstrates that Maryland has an interest in protecting the spouse from disinheritance.47 Property ownership has gravitated to non-probate arrangements, like the revocable trust, which are not covered by the statute.48 But one spouse should not be able to unilaterally transfer an asset from probate to non-probate and avoid the elective share. This marital right warrants legal protection from that possibility.49

Although the judicial doctrine provides some measure for a disinherited spouse to challenge inter vivos transfers, a spouse should not be required to litigate for legal protection from the revocable trust. Maryland’s inadequate elective share law requires just that. Reforming Maryland’s elective share law is required for Maryland to be the marriage-friendly jurisdiction it aimed for in its passage of the Civil Marriage Protection Act.50 Ideally, Maryland should learn from other successful reform efforts, and mimic those paths, to enact elective share reform.

IV. ROADMAP TO TRUST AND ESTATES REFORM

Maryland has enacted significant legislative reform in the trust and estates area over the last two decades. Successful legislative efforts have been made in the enactment of the Maryland Trust Act,51 the Power of Attorney Act (Loretta’s Law),52 Modified Estate Administration,53 and the Maryland Uniform Disclaimer Act.54

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46 MD. CODE ANN., EST. & TRUSTS § 3-203 (LexisNexis 2018).  
48 See *RESTAT 3D OF TRUSTS*, § 25 (confirming a revocable trust is widely used as a will substitute).  
49 *Shimp*, 315 Md. at 646 (“This Court on other occasions has recognized the strong public policy interest in protecting the surviving spouse’s elective share from the unilateral acts of a deceased spouse.”).  
50 MD. CODE ANN., FAMILY LAW § 2-201 (LexisNexis 2018).  
51 MD. CODE ANN., EST. & TRUSTS §§ 14.5-101-1006 (LexisNexis 2018); (codifying Maryland trust law).  
52 MD. CODE ANN., EST. & TRUSTS §§ 17-101-204 (LexisNexis 2018) (establishing the Limited and General Power of Attorney Act, which established formality requirements, enforcement provisions, and statutory forms).  
53 MD. CODE ANN., EST. & TRUSTS §§ 5-701-10 (LexisNexis 2018) (allowing streamline administration under specified circumstances).  
Uniform Transfers to Minors Act,\textsuperscript{55} the Slayer’s Statute (Ann Sue Metz Law),\textsuperscript{56} Special Needs Trusts,\textsuperscript{57} Pet Trusts,\textsuperscript{58} Digital Assets,\textsuperscript{59} Posthumously Conceived Child,\textsuperscript{60} and the abolition of the Rule against Perpetuities.\textsuperscript{61}

Successful legislative reform efforts require support from the Maryland State Bar Association.\textsuperscript{62} Most importantly there must be a need for the codification, as legislative reform often benefits from a person impacted to spur the legislation.\textsuperscript{63} Additionally, leadership from the estates and trusts and elder law sections of the Maryland bar

\begin{itemize}
  \item \textsuperscript{55} MD. CODE. ANN., EST. & TRUSTS §§ 13-301-24 (LexisNexis 2018) (authorizing a custodian to establish a minor’s trust without court order).
  \item \textsuperscript{56} MD. CODE. ANN., EST. & TRUSTS § 11-112 (LexisNexis 2018); MD. CODE. ANN., CTS. & JUD. PROC. § 10-919 (LexisNexis 2018) (disqualifying from inheritance a person who kills the testator).
  \item \textsuperscript{57} MD. CODE. ANN., EST. & TRUSTS §§ 14.5-1002 (LexisNexis 2018) (repealing an earlier version, MD. CODE. ANN., EST. & TRUSTS § 14-114 (2011) and ratifying Maryland policy to encourage the use of special needs trusts).
  \item \textsuperscript{58} MD. CODE. ANN., EST. & TRUSTS § 14.5-407 (LexisNexis 2018); MD. CODE. ANN., EST. & TRUSTS § 5-407 (LexisNexis 2018) (repealing an earlier version, MD. CODE. ANN., EST. & TRUSTS § 14-112 (2009), and authorizing the creation of a trust to provide for the care of an animals).
  \item \textsuperscript{59} MD. CODE. ANN., EST. & TRUSTS §§ 15-601-20 (LexisNexis 2018) (establishing the Maryland Fiduciary Access to Digital Assets Act; authorizing a user to direct a fiduciary access to digital assets under specified circumstances).
  \item \textsuperscript{60} MD. CODE. ANN., EST. & TRUSTS § 1-205(2) (LexisNexis 2018); (expanding the definition to those born after the decedent from genetic material).
  \item \textsuperscript{61} MD. CODE. ANN., EST. & TRUSTS § 11-102(b)(5) (exempting certain trusts from rule against perpetuities).
  \item \textsuperscript{62} Maryland State Bar Association, Meet the MSBA Team, available at https://www.msba.org/about/staff/ (last visited Sept. 26, 2018) (“…the Director of Legislative Relations…reviews all legislation introduced before the Maryland General Assembly, and refers bills to the appropriate MSBA Sections and Committees.”).
  \item \textsuperscript{63} See Angela M. Vallario, The Elective Share Has No Friends: Creditors Trump Spouse in the Battle over the Revocable Trust, 45 CAP. U. L. REV. 333, 355, n. 3 (2017) (explaining that all legislative reform requires an impetus); see, e.g., Angela M. Vallario, The Uniform Power of Attorney Act: Not a One-Size-Fits-All Solution, 43 U. BALTIMORE L. REV. 85, 85 n.2 (explaining that the Power of Attorney Act’s impetus Loretta Soustek whose niece stole from her) (citing Dennis B. Roddy, Courting Trouble: The Document Granting ‘Power of Attorney’ Often Leads to Abuse, PITTSBURGH POST-GAZETTE, Sept. 2, 2007); see also MD. CODE. ANN., EST. & TRUSTS § 11-112 (LexisNexis 2018 ) (elucidating that the Slayer’s Statute’s impetus was victim Ann Sue Metz, who was murdered by her husband).
(collectively “practice areas”) affected by the reform are required to contribute extensive volunteer hours, establish committees and work groups, draft legislation, educate law makers and testify before the members general assembly.64

The Maryland Trust Act (“MTA”) offers a model for legislative reform and its efforts should be closely examined as a lesson in how to properly reform Maryland’s code. The MTA was enacted in 2014 after multiple years of consistent and cohesive work. The driving force behind the MTA was the competitive pressure to clarify, through codification, the trust laws in Maryland for administrative predictability, and to move Maryland towards the more accepted Uniform Trust Code (“UTC”) model in order to effectively compete with neighboring states.65 The Uniform Law Commissioners (“ULC”)66 undertook significant efforts to provide a comprehensive model for codifying the law on trusts and promulgated the UTC in 2000.67

The original drafters of the MTA, initially the Section Council of the Estate and Trust Law Section of the Maryland State Bar Association, subsequently joined by the Trust Committee of the Maryland Bankers Association (collectively, the “drafters”), used the UTC as a model.68 The drafters formed study groups and began studying the UTC as early as 2002 and introduced the first MTA bill in 2011.69 After its debut in 2011, the MTA was reintroduced each and every year until it became law.70 Each bill inched closer to reform. The MTA passed the general

64 The Estates and Trusts Section Council and its members take the lead in bringing legislation forward trusts and estates legislation, with comment and review from the Elder Law Section and its members. This article will broadly refer to these groups as “practice areas.”
66 The Uniform Law Commissioners provide states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.
assembly in 2014 and was added as Article 14.5 of the Maryland Estates and Trusts Annotated Code.\textsuperscript{71}

Even with passage, however, the MTA work was not done. In the following years, drafters returned with modifications. Several MTA modifications (collectively “MTA”) brought the revocable trust even closer to resembling a will. For example, the shortened statute of limitations (applicable for probate) now are extended to the revocable trust;\textsuperscript{72} and automatic revocation in the event of divorce applicable to wills,\textsuperscript{73} now apply to revocable trusts as well.\textsuperscript{74} The settlor’s capacity required to create, amend, or revoke a revocable trust are cross referenced to be “the same as that to make a will”,\textsuperscript{75} as is the procedure for challenging a revocable trust.\textsuperscript{76} The MTA reform has made the revocable trust a will replacement, for all purposes except the elective share. This unfortunately opens the door for a surviving spouse to be totally disinherited by a revocable trust.

Over the last two decades, an immense amount of trusts and estates reform has been accomplished. The MTA offers a role model for trusts and estates reform. The key to such reform is demonstrated need, unified support from the practice areas, along with consistent building-
block proposals. From its first proposal in 2011, the drafters had a similar and improved-upon bill moving forward each and every year until enactment in 2014. This uniform effort allowed the drafters to educate and re-educate the members of general assembly on comprehensive reform. In learning from the MTA approach, the necessary components of statutory reform are: (1) demonstrated need; (2) support from the Maryland State Bar Association; and (3) unified participation with consistent efforts from the impacted practice areas. With the MTA as its role model, can Maryland follow in its footsteps and enact elective share reform?

V. THE FAILED ATTEMPTS AT ELECTIVE SHARE REFORM

Despite much progress in other areas, Maryland has made no progress with elective share reform even though Maryland has a “strong public policy interest in protecting the surviving spouse.”77 This article examines the elective share reform efforts since 1998 based on broadening the pool of assets from which the elective share can be taken, a concept known as the “augmented estate.”78

Over the last 20 years, there have been five different approaches to elective share reform. Unlike the MTA, the legislation introduced has not remained consistent or steady. The variety of methods include: (1) the 2018 Maryland-specific approach; (2) the 2017 and 2016 federal estate tax approach; (3) the 2015 and 2009 revocable trust-only approach; (4) the 2014 and 2012 Uniform Probate Code (“UPC”) approach; and (5) the 2000 and 1999 modified UPC approach.

Most recently, the Maryland-specific bill represented work completed by the Elective Share Work Group, of which this author was a member.79 This was the first time in the history of elective share reform efforts that legislators were members of the drafting committee.80 The 2018 Maryland-specific proposal defined the

77 Shimp, 315 Md. 624 at 646 (noting that there is a strong public policy in favor of protecting the surviving spouse’s right to receive an elective share) (citing Mushaw, 183 Md. 511).
78 Unif. Probate Code §2-203 (composing “augmented estate” to include: (1) the decedent’s net probate estate; (2) the decedent’s nonprobate transfers to others; (3) the decedent’s nonprobate transfers to the surviving spouse; and (4) the surviving spouse’s probate and nonprobate transfers to others.).
80 Delegate Kathleen M. Dumais, Senator Delores G. Kelley, Delegate Samuel I. Rosenberg were members of the Elective Share Work Group.
“augmented estate” as an all-inclusive mix of the deceased spouse’s probate and non-probate assets. The proposed legislation then reduced that amount by a series of complex exclusions.81 The exclusions represent various arrangements developed over the years for a variety of planning purposes, but also having the effect of allowing the testator to avoid the elective share.82 Unlike any other state, the Maryland-specific proposal includes a judicial “override”, i.e. allowing judicial intervention on a showing of clear and convincing evidence and codifying the Whittington factors as guidance.83

81 S.B. 649, Gen. Assem. Reg. Sess. (Md. 2018); H.B.777, Gen. Assem. Reg. Sess. (Md. 2018) (proposing the estate subject to the election shall be calculated by reducing the value of the decedent’s augmented estate by: … (7) the value of any qualifying lifetime transfer of the decedent described in §3-401(1)(II) of this subtitled where: (I) the initial transfer took place before the decedent’s marriage to the surviving spouse of the decedent; or (II) the decedent’s interest in the property transferred terminated more than 2 years before the decedent’s death; (8) … that occurred before the later of (I) the decedent’s marriage to the surviving spouse of (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 of the real property; and (II) the decedent left estate in the property was created more than 2 years before 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 the policy immediately before the decedent’s death, or in the case of term insure in excess of the total premiums if certain conditions are satisfied.).
82 S.B. 649, Gen. Assem. Reg. Sess. (Md. 2018); H.B.777, Gen. Assem. Reg. Sess. (Md. 2018) (stating life estate deeds were excluded presumably because some estate planners have used that kind of deed to avoid a Medicaid lien after the death of the testator.).
83 S.B. 649, Gen. Assem. Reg. Sess. (Md. 2018); H.B.777, Gen. Assem. Reg. Sess. (Md. 2018) (stating that on the showing of clear and convincing evidence that the court may modify the augmented estate and consider the circumstances of any transfer or arrangement, including: (I) the extent of control retained by the decedent; (II) the motivation for the transfer or arrangement; (III) the familiar relationship between the decedent and the beneficiary of the transfer or arrangement; (IV) 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 augment estate, estate subject to election or spousal benefits; (V) 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; (VII) the length and nature or the relationship between the decedent and the surviving spouse; and (VII) the nature and value of the surviving spouse’s assets.).
The previous two years, the federal estate tax model was the basis for elective share reform.\(^84\) This approach required sophisticated estate and gift tax knowledge. Although this approach was not unique to Maryland, those few states that have adopted it, had done so when the federal estate and gift tax rules had lower thresholds. For example, Delaware follows the federal estate and gift tax model, adopted in Delaware when estates in excess of $600,000 were governed by those tax laws.\(^85\) Currently federal estate tax only applies when client-wealth exceeds $11.2 million for a single person and double that for a married couple.\(^86\) The federal estate tax model posed additional concerns, including a codification of a principle that the purpose of the statute was to balance testamentary freedom with the elective share. That articulated principle is contrary to the underlying purpose of the statute itself, and to Maryland’s strong public policy to protect its spouses from disinheritance.\(^87\) Finally, unlike any other state statute, the federal estate tax approach punished the spouse for electing against the will, by removing the electing spouse from any fiduciary role he or she may have been given.\(^88\)

The Maryland-specific and federal estate tax models were reform efforts taken after the creation of work groups and were supported by the practice areas. Prior to those efforts, there was very little work done to reform Maryland’s elective share law. The 2015 and 2009 revocable-trust only efforts\(^89\) proposed to include a revocable trust in the


\(^{85}\) DEL. CODE ANN. TIT. 12, § 901 (LexisNexis 2018).

\(^{86}\) 26 U.S.C.S. § 2001 (c) (LexisNexis 2018); Maryland Code Ann., Tax § 7-302 (imposing a state tax on a decedent that is a Maryland resident having taxable situs in Maryland which is currently $4 million and scheduled to increase to $5 million in 2019).

\(^{87}\) See SB 881 HB 722 (§3-402 stating the purpose of the bill was to “ensure that a surviving spouse is reasonably provided for during the surviving spouse’s lifetime and … provide a decedent flexibility in ordering the decedent’s affairs.”)


\(^{89}\) H.B. 645, Gen. Assem. Reg. Sess. (Md. 2009) (attempting to codify the idea that a revocable trust should be treated as a probate asset. This bill passed in the House but was unfavorably viewed in the Senate with fears that it would frustrate Medicaid Planning if an institutionalized spouse predeceased the community spouse); H.B. 281, Gen. Assem. Reg. Sess. (Md. 2015).
calculation, were not the result of any work groups and lacked support from the practice areas. In fact, the 2015 revocable-trust only bill passed the House but was defeated in the Senate largely due to opposition from the elder law practicing bar.\textsuperscript{90} Equally, the UPC model approach, sponsored by now Attorney General Brian E. Frosh in years 2014\textsuperscript{91} and 2012,\textsuperscript{92} were proposed without a workgroup study and were rejected by both the estates and trusts and elder law sections of the bar.

Prior to the recent reform efforts, the last time there was comprehensive study of elective share reform was with the modified UPC approach in 2000,\textsuperscript{93} and 1999.\textsuperscript{94} Those bills using the UPC as a starting point, established a committee, drafted legislation, garnered the support of the practice areas, but were defeated because at that time the “augmented estate” concept was new to the members of the general assembly and, like the MTA would have benefited from additional years of consistent work, each year inching closer to reform. Instead, Maryland elective share reform efforts lacked unified support, and were revived in 2016, 2017 and 2018 with different approaches.

Over time, Maryland has offered five different models of elective share reform. The recent reform efforts are different from any other state. This is drastically different from the approach taken by the MTA.

\textsuperscript{90} Jason A. Frank, \textit{Elder Law in Maryland}, (4th ed. 2012) (Testimony before the Senate Judicial proceedings committee was that Medicaid planning included assets that transferred to the community spouse so that the institutional spouse could qualify for Medicaid was titled in a revocable trust. In the event the community spouse predeceases the institutional spouse the proposed bill would expose those revocable trust assets to Medicaid payback to the extent of the elective share.)


\textsuperscript{93} H.B. 265, Gen. Assem. Reg. Sess. (Md. 2000) (proposing that the amount of marital property depends on the duration of the marriage between the surviving spouse and the decedent, with the amount ranging from 10 percent of the elective estate for marriages of less than five (5) years to a max of forty percent (40 %) of the elective estate for marriages of twenty-five (25) years or more) (the minimum share would be the lesser of Fifty Thousand Dollar ($50,000) or one-half (1/2) of the elective estate)); in 2008, an Elective Share Committee was formed to study elective share reform but no bill was adopted.

\textsuperscript{94} H.B. 780, Gen. Assem. Reg. Sess. (Md. 1999) (proposing to authorize a surviving spouse, an attorney in fact, or guardian of specified property to take an elective share of the decedent’s elective estate instead of property left to the spouse by will. Specified the procedures for determining the value and elements of an elective share).
Maryland should not reinvent the wheel but rather adopt an approach more consistent with other states. The UPC proposed a well-established model for elective share reform 50 years ago that should be used. The UPC model has been used by most of the other trusts and estates reform and the uniformity it would bring is particularly relevant now, when people are freely mobile, and Maryland welcomes the uniform bar exam next year.

VI. THE RECONSIDERATION OF THE UNIFORM PROBATE CODE MODEL

Most other separate property jurisdictions have effective elective share reform. The UPC’s model is the starting point for most significant trusts and estate reform. Some jurisdictions have the UPC

95 Vallario, supra note 13, at 544-45 (Discussing the UPC Model first began proposing an augmented estate model in 1969).
97 MD. CODE. ANN., EST. & TRUSTS §§ 14.5-101-1006 Maryland Trust Act); MD. CODE. ANN., EST. & TRUSTS §§ 17-101-204 Power of Attorney Act) MD. CODE. ANN., EST. & TRUSTS §§ 5-701-10 (Modified Administration); MD. CODE. ANN., EST. & TRUSTS §§ 9-201-16 (Uniform Disclaimer Act); MD. CODE. ANN., EST. & TRUSTS §§ 13-301-24 (Uniform Transfers to Minors Act) MD. CODE. ANN., EST. & TRUSTS § 11-112 (Slayer’s Statute) MD. CODE. ANN., EST. & TRUSTS § 14.5-1002 (Special Needs Trusts); MD. CODE. ANN., EST. & TRUSTS § 14.5-407 (Pet Trusts); MD. CODE. ANN., EST. & TRUSTS §§15-601-20 (Digital Assets Act); MD. CODE. ANN., EST. & TRUSTS § 1-205(2) (Posthumously Conceived Child); MD. CODE. ANN., EST. & TRUSTS § 11-102(b) (5) (Rule Against Perpetuities).
99 Lawrence W. Waggoner & John H. Langbein, Redesigning the Spouse’s Forced Share, 22 REAL PROP. PROB. & TR. J. 303, 305 (1987); see Vallario, supra note 13 at 544-58 (discussing augmented estate elective share jurisdictions.).
model without significant modifications whereas others make slight modifications to the UPC model. In Maryland, the UPC and modified UPC reform efforts need to be seriously reconsidered. The UPC’s model, although complicated, is comprehensive and represents many levels of examination and review not possible by individual jurisdictions. Elective share reform cannot satisfy all interest groups. Estate planners want to provide clients with an estate plan that effectuates their clients’ choices. But client goals can result in an unfortunate consequence for the spouse. Elder law attorneys want to engage in asset protection techniques to avoid Medicaid liens which also moves the assets outside the reach of the spouse. Yet Maryland, as a separate property state, has a strong policy in favor or protecting the spouse’s right to receive an elective share.101 There is no easy resolution between all the interest groups that will also adequately protect the spouse. The UPC model may not be viewed as a win-win for all, but today there is a greater need for more consistency among jurisdictions.102 Furthermore, in Maryland there is a movement toward uniformity with the uniform bar exam, which is scheduled to be effective in July 2019. Uniformity makes sense for many reasons and in particular for the spouse’s financial protection after the death of his or her spouse.

However, in light of the nature of Maryland’s recent reform efforts, it appears as if the UPC or modified UPC is highly unlikely to be able to get the support of all the important constituencies. Practice areas have become wed to the various ways in which their clients can legitimately plan their estate plans. However, the revocable trust selection will avoid the elective share under current law. For those practice areas there is no

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101 Shimp, 315 Md. 646.

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turning back. The pattern of inconsistent approaches, coupled with the lack of support from the practice areas, suggests a statutory resolution to the inadequacies of Maryland’s elective share law is not possible. Unlike the MTA, there has been no consistent reform movement for elective share reform. Additionally, the impacted practice areas are not likely to support non-partisan elective share reform as demonstrated by the recent reform efforts and the obvious 16-year gap in unified efforts.\footnote{See S.B. 913, Gen. Assem. Reg. Sess. (Md. 2016); H.B. 1229, Gen. Assem. Reg. Sess. (Md. 2016); H.B. 265, Gen. Assem. Reg. Sess. (Md. 2000) (proposed after work study groups).}

Elective share reform lacks the driving force required for comprehensive reform.\footnote{Angela M. Vallario, The Elective Share Has No Friends: Creditors Trump Spouse in the Battle Over the Revocable Trust, 45 CAP. U. L. REV. 333, 353 (2017).} The parties who would benefit from such law are voiceless spouses, who would not even know about the issue until they were affected by it, and it was too late. This catalyst for reform is unlikely represented. Practitioners have engaged in legitimate estate planning, which avoids the elective share in Maryland with the revocable trust. At this point, elective share reform by practice areas seems unlikely. Since the practice areas are unlikely to advance the UPC model or anything resembling it, as demonstrated by the recent reform efforts advanced by the bar,\footnote{20 S.B. 913, Gen. Assem. Reg. Sess. (Md. 2016); H.B. 1229, Gen. Assem. Reg. Sess. (Md. 2016); S.B.881, Gen. Assem. Reg. Sess. (Md. 2017); H.B. 722, Gen. Assem. Reg. Sess. (Md. 2017); S.B. 649, Gen. Assem. Reg. Sess. (Md. 2018); H.B.777, Gen. Assem. Reg. Sess. (Md. 2018).} the only hope is for judicial intervention.

**VII. COURT INTERVENTION WITH A BRIGHT-LINE RULE FOR REVOCABLE TRUSTS.**

Although ideally a job for the legislature, the time has come for the Maryland courts to intervene and fix the elective share with a bright-line test as it relates to the revocable trust. A revocable trust is used today as a will replacement or substitute.\footnote{See RESTAT 3D OF TRUSTS, § 25 (2012) (noting the widespread use of the revocable trust as a legally accepted substitute for the will).} This estate planning vehicle allows an individual to take his probate asset and transfer it to himself as trustee for the benefit of himself for life, with a dispositive plan consistent with testamentary intentions. The retitling of the assets from probate to a revocable trust is what allows for the assets to escape statutory protection.
For the settlor, the change in legal title from his sole name to his name as trustee does not affect his use and enjoyment of the assets. The *inter vivos* transfer of the settlor’s property to a revocable trust is not a gift for gift tax purposes;\(^{107}\) the assets remain available to the settlor’s creditors;\(^{108}\) and the trust income is reported on the settlor’s individual income tax return.\(^{109}\)

The revocable trust requires the same capacity to execute as a will;\(^{110}\) like a will, provides for automatic revocation in the event of divorce;\(^{111}\) and like a will, provides a payout upon the creator’s death. The only difference is that the dispositive provision after settlor’s death is outside the supervision of the probate administration process.

Upon the settlor’s death, like a will, the revocable trust assets are subject to federal estate at the date of death value;\(^{112}\) the beneficiaries receive a stepped-up basis;\(^{113}\) and estate creditors are limited to the probate period of 6 months.\(^{114}\)

Today, the revocable trust is a will replacement, allowing assets to pass outside the probate administration process, yet for all intents and purposes, the revocable trust is simply a different estate planning vehicle used to accomplish the identical task. However, the decedent’s choice to implement a revocable trust instead of a will allows for those assets, to escape inclusion in the elective share statute with a unilateral *inter vivos* transfer. The exclusion of the elective share to revocable trusts is not fair, is inconsistent with Maryland’s public policy to protect a spouse from disinheritance and is contrary to Maryland’s pro-marriage stance.\(^{115}\)

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\(^{107}\) Treas. Regs. § 25.2511-2(c) (LexisNexis 2018).

\(^{108}\) Md. Code Ann., Est. & Trusts § 14.5-508(a)(1); see also Restat 2d Of Trusts, § 156 cmt. a (1959) (“The interest of the settlor-beneficiary can be reached by subsequent creditors as well as those who were creditors at the time of the creation of the trust, and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors.”).

\(^{109}\) 26 U.S.C.S. § 671 (LexisNexis 2018) (If trustee is settlor the settlor’s social security number is used and no separate tax identification number is needed.)


Years ago in *Sullivan v. Burkin*, the Massachusetts Supreme Judicial court, the highest court in the Commonwealth, appreciated the inequities of its elective share, noting it is not fair nor equitable to prefer divorce over marriage, and that is what Maryland’s elective share statute does. In so noting, the *Sullivan* court created a bright-line rule as to include revocable trusts in the elective share calculation. Massachusetts has not enacted comprehensive elective share reform since that 1984 decision, but at least the Massachusetts Court protected the spouse from the will alternative, the revocable trust.

A lot has changed in the ten years following *Schoukroun*. The MTA makes the revocable trust readily available as a way in which to disinherit a spouse. There are no genuine differences between a will and a revocable trust for estate planning, except that a revocable trust can be used to more easily disinherit a spouse. Although judicial doctrine is available and may be necessary to protect the legal share of the spouse from other *inter vivos* transfers, it should not be required to apply such doctrine for the revocable trust. The revocable trust, used as a “substitute for will and as the central document of the estate plan.” The MTA has extended the desired probate protections to the revocable trust making it ready available to short cut Maryland stated policy against spousal inheritance. Maryland’s elective share statute should be reconsidered by the Court of Appeals and it should create a bright-line rule with respect the inclusion of revocable trusts in the asset pool available for the elective share.

**VIII. CONCLUSION**

A revocable trust is a de facto will as an estate planning device. The choice of the revocable trust over a will should not be treated differently
for purposes of the spouse’s elective share. Other states began fixing this obvious flaw in elective share statutes more than 50 years ago, but Maryland has not.

At this point, elective share reform advanced by the practice areas has failed. The legislation submitted in the past does not fully protect the interests of the voiceless spouse. Recent reform efforts prefer freedom of testation over such protection and are unique to Maryland and should not be advanced. Drafters should return to a more uniform model, because uniformity and objectivity are more important.

Although judicial intervention creating a bright-line test for revocable trusts is not a comprehensive solution to a complicated problem, it creates an immediate remedy for Maryland’s obvious elective share dilemma. Perhaps judicial intervention finding a bright-line for revocable trusts will force practice areas to shore up elective share reform, and it may follow in the footsteps of the MTA. But until lawmakers act, Maryland’s highest court, like that in Massachusetts, and others, should protect spouses from revocable trust disinheritance.