REPORT OF THE PROBATE LAW ADVISORY COMMITTEE ON 2017 HB 2350 REGARDING THE SPOUSAL ELECTIVE SHARE

December 6, 2018

INTRODUCTION

In May 2018, Rep. Blaine Finch asked the Judicial Council to study HB 2350 relating to the calculation of the spousal elective share. The Council accepted the study request and referred it to the Probate Law Advisory Committee. As requested, the Council also appointed Rep. Tim Hodge, who authored HB 2350, as an ad hoc member of the Committee during the study.

In the study request, Rep. Finch asked that the Council review the issues raised by Rep. Hodge that led to his introduction of the bill as well as issues raised by Joan Bowen in her neutral testimony about the approach taken by the bill. The request asked that the Council make a recommendation as to passage of the bill, possible amendments to improve the bill's language, or alternative approaches.

Copies of the study request, bill, and testimony are attached at the end of this report.

BACKGROUND

The current spousal elective share laws were enacted in 1994 at the recommendation of the Judicial Council after several years of study by its Probate Law Advisory Committee. The main purpose of elective share laws is to prevent one spouse from disinheriting the other. *In re Estate of Antonopoulos*, 268 Kan. 178, 183, 993 P.2d 637 (1999). The elective share laws are based on two theories: the partnership theory of marriage and the support theory of marriage. The partnership theory recognizes that both partners have contributed to the couple's assets, and the support theory recognizes that each spouse owes the other a duty of support that continues in some form after death as a claim on the estate. *Antonopoulos*, 268 Kan. at 181-82.

The crux of the elective share laws is the concept of the "augmented estate," which takes into account all of the assets of the decedent and the surviving spouse.

K.S.A. 59-6a203. The augmented estate is then multiplied by a percentage that is based on the length of the marriage to determine the elective share amount. K.S.A. 59-6a202. The elective share is satisfied, in the following order, out of: (1) the decedent's probate and nonprobate assets passing to the surviving spouse, (2) assets that would have passed to the surviving spouse but were disclaimed, (3) a portion of the surviving spouse's property and nonprobate transfers to others, and (4) the value of any real estate recovered under K.S.A. 59-505. K.S.A. 59-6a209(a).

If the elective share amount remains unsatisfied or the spouse is entitled to a supplemental elective share amount, then the decedent's net probate estate and nonprobate transfers to others may be applied pro rata. K.S.A. 59-6a209(b).

HB 2350

Although Rep. Hodge was unable to attend Committee meetings in person, he did provide some input via email and the Committee also reviewed his testimony on the bill. His stated purpose in introducing the bill was to simplify the elective share calculation and ensure that homestead and family allowances are awarded separately from and in addition to the elective share. He argued that the elective share should be calculated as follows:

1. Add together all assets that comprise the augmented estate.

2. Subtract the homestead, any homestead and family allowances, and funeral and administrative expenses.

3. Apply the elective share percentage to what remains.

Rep. Hodge believes this approach is consistent with *In re Estate of Antonopoulos*, 268 Kan. 178, 993 P.2d 637 (1999), which held that computation of the augmented estate excludes the homestead, regardless of whether it passes by joint tenancy or as part of the decedent's probate estate.

The Committee also reviewed the neutral written testimony offered by Joan Bowen. Ms. Bowen interpreted the bill as an attempt to codify the *Antonopoulos* decision as to excluding the homestead from the computation of the augmented estate. Ms. Bowen did not oppose that concept but thought the bill had several problems. Her testimony went on to describe those problems and then set out what kinds of amendments would be needed to achieve the presumed purpose of the bill.

DISCUSSION

The Committee believes there are problems with both HB 2350 and with the calculation described by Rep. Hodge in his testimony and email correspondence. First, the Committee believes that Rep. Hodge's proposed calculation is an over-simplification and could result in homestead or family allowances being paid out of nonprobate assets such as a TOD account, a result which is not currently contemplated under Kansas law. Although the elective share amount may be paid out of nonprobate assets under K.S.A. 59-6a209(b), there is no similar provision allowing a homestead or family allowance to be paid out of nonprobate assets.

Second, the Committee agreed that the bill, as drafted, does not achieve its stated purpose of simplifying the elective share calculation. The Committee agreed with Ms. Bowen's testimony on this point as to the technical problems with the bill. By amending only two statutes and ignoring others that also form part of the elective share calculation, the bill creates more problems and confusion than it resolves.

Furthermore, the Committee believes that simplifying the elective share calculation is neither necessary nor desirable. Although the calculation can be complicated, that is by design: it is intended to account for a number of variables and ensure an equitable result.

The Committee acknowledged that most Kansas attorneys do not handle elective share cases on a frequent basis, but help is available from other practitioners and from the example worksheets set out in the *Judicial Council Probate Forms* and the Kansas Bar Association's Handbook, *Kansas Probate & Trust Administration After Death*. For attorneys who work with the elective share laws frequently and become familiar with them, the laws work well.

As to the *Antonopoulos* decision, the Committee believes that opinion represents settled law and no clarification of the elective share laws on that point is needed.

Homestead allowance

Joan Bowen's testimony raised one additional issue: whether the elective share laws should be amended to make clear that a surviving spouse who receives the homestead by operation of law rather than through the probate estate (*e.g.* as a surviving joint tenant) is not entitled to also claim a homestead allowance under K.S.A. 59-6a215. Some Committee members agreed and would like to clarify that the homestead allowance was never intended to be an entitlement. (Contrary to the holding in *In re Estate of Lane*, 39 Kan. App. 2d 1062, 188 P.3d 23 [2008].) Others, however, don't view this kind of "double-dipping" as a problem because the homestead allowance is only $50,000. As one example, a surviving spouse might receive the homestead as a joint tenant but be unable to pay the mortgage without a homestead allowance. Ultimately, the Committee agreed that this issue is not significant enough to warrant seeking legislative changes.

Premarital waiver of homestead rights

Staff informed the Committee about a recent study request asking the Judicial Council to resolve a perceived conflict between K.S.A. 59-6a213, which authorizes a person to waive homestead rights in a premarital agreement, and case law interpreting the homestead protection found in the Kansas Constitution. Several Committee members were already aware of the Sedgwick county case that presaged the study request, which will be considered by the Council at its December meeting. In that case, a district court ruled that a waiver of homestead rights in a premarital agreement was unenforceable.

During the Committee's brief discussion of the issue, Committee members expressed differing opinions about whether the district court ruled correctly. There was also concern about the number of existing premarital agreements that contain similar provisions waiving homestead rights. The Committee agreed it would be best to wait for some direction from the appellate courts on the issue before suggesting any amendments to the statutes. However, should the Council assign the matter, the Committee will conduct a more in-depth review.

CONCLUSION

The Committee believes that the elective share laws are not broken. There have been only a few appellate decisions interpreting the elective share statutes, and while some issues have arisen relating to homestead rights and valuation, those are not significant enough to merit seeking legislative changes.

COMMITTEE MEMBERSHIP

The current members of the Probate Law Advisory Committee are:

Sarah Bootes Shattuck, Chair, Ashland
Eric N. Anderson, Salina
Shannon Barks, Kansas City
Cheryl C. Boushka, Kansas City
James L. Bush, Overland Park
Prof. Martin B. Dickinson, Jr., Lawrence
Emily Donaldson, Topeka
Rep. Tim Hodge, Newton (ad hoc member)
Mark Knackendoffel, Manhattan
Hon. Edward Larson, Topeka
Kent Meyerhoff, Wichita
Rep. Fred Patton, Topeka
Philip D. Ridenour, Cimarron
Dave Snapp, Dodge City

PLAC

AGENDA ITEM 3d

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May 10, 2018

Nancy Strouse, Executive Director
Kansas Judicial Council
301 SW 10th Avenue
Topeka, Kansas 66612

Dear Nancy:

I am writing to request Judicial Council study of a topic that arose during the consideration of legislation by the House Committee on Judiciary during the 2018 Session. After considering this bill, I believe that a more in-depth consideration of the issues raised by the legislation would be appropriate and desirable before advancing the legislation.

HB 2350 – Clarifying method for calculating the spousal elective share

HB 2350 was introduced in 2017 at the request of Representative Timothy Hodge. In the 2018 House Committee hearing, Representative Hodge testified in favor of the bill, discussing the issues leading to his request for the bill, including the question of the use of homestead and family allowance to fund the elective share and heavy litigation over the elective share statute. Neutral written testimony was provided by Joan Bowen, a Kansas attorney who co-wrote an article with Timothy O'Sullivan for a 1996 issue of the *Journal of the Kansas Bar Association* regarding the elective share statute. Ms. Bowen stated that HB 2350 appears to be an attempt to codify the holding of the Kansas Supreme Court's decision in *In re Estate of Antonopoulos*, 268 Kan. 178, 993 P.2d 637 (1999) and stated she did not disagree with this concept. However, Ms. Bowen identified and discussed several possible issues with the approach taken by the bill.

I believe the Kansas Legislature and citizens of Kansas would benefit from the Judicial Council's study of and recommendation regarding the issues raised by Representative Hodge concerning the elective share statute and those raised by Ms. Bowen regarding the approach taken by the bill. I would appreciate any recommendation by the Judicial Council regarding passage of the bill, possible amendments to improve the bill's language, or alternative approaches.

Should the Judicial Council undertake the requested study, I would appreciate the Council's consideration of adding Representative Hodge as an *ad hoc* member of the advisory committee studying the issue.

Please let me know if I can provide any further information or answer any questions regarding this request.

Thank you.

Sincerely,

Representative Blaine Finch
Chairman, House Committee on Judiciary

Session of 2017

HOUSE BILL No. 2350

By Committee on Judiciary

2-10

AN ACT concerning the probate code; relating to elective share amount; calculation thereof; amending K.S.A. 59-6a204 and 59-6a209 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 59-6a204 is hereby amended to read as follows: 59-6a204. The value of the augmented estate ~~includes the value of the decedent's probate estate,~~ *shall be* reduced by funeral and administration expenses, homestead or homestead allowance, *as defined in K.S.A. 59-401, and amendments thereto*, family allowances, *as defined in K.S.A. 59-403, and amendments thereto* and enforceable demands. *The value of the augmented estate calculated pursuant to this section shall be used to calculate the elective share under K.S.A. 59-6a202, and amendments thereto.*

Sec. 2. K.S.A. 59-6a209 is hereby amended to read as follows: 59-6a209. (a) In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

(1) Amounts included in the augmented estate under K.S.A. 59-6a204, *and amendments thereto,* which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under K.S.A. 59-6a206, *and amendments thereto*;

(2) amounts included in the augmented estate which would have passed to the spouse but were disclaimed and which will pass to issue of the surviving spouse, as defined in K.S.A. 59-615, and amendments thereto, who are not the issue of the decedent;

(3) amounts included in the augmented estate under K.S.A. 59-6a207, *and amendments thereto,* up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in ~~subsection (a) of~~ K.S.A. 59-6a202*(a), and amendments thereto,* as appropriate to the length of time the spouse and the decedent were married to each other; and

~~(5)~~*(4)* the value of any real estate recovered pursuant to K.S.A. 59-505, and amendments thereto.

(b) If, after the application of subsection (a), the elective-share

amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfer to others other than amounts included under ~~subsection (c)(1) or (3) of~~ K.S.A. 59-6a205*(c)(1) or (3), and amendments thereto*, are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and that portion of the decedent's nonprobate transfers to others in proportion to the value of their interest therein.

(c) If, after the application of subsections (a) and (b), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(d) Homestead, as defined in K.S.A. 59-401, and amendments thereto, and an allowance to a spouse and minor children, as defined in K.S.A. 49-403, and amendments thereto, shall not be used to satisfy the elective share, and shall be reduced from the augmented estate before the elective share is calculated.

(e) For the purposes of calculating the elective share, there is no requirement to file a petition for homestead, as defined in K.S.A. 59-401, and amendments thereto, or a petition for an allowance to a spouse and minor children, as defined in K.S.A. 59-403, and amendments thereto.

Sec. 3. K.S.A. 59-6a204 and 59-6a209 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

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TIMOTHY C. HODGE
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Testimony to The House Judiciary Committee

TO: **Chairman Finch and the House Judiciary Committee**
From: **Representative Tim Hodge, JD**
Date: **January 23, 2018**
RE: **Supporting HB 2350**

1. Issues
    a. Surviving Spouses getting disinherited by deceased spouses.
    b. Spouses can elect to take a fair portion of the augmented estate rather than be disinherited.
    c. Do we use the homestead and family allowances to fund the elective share?
    d. Direct Conflicts in the statute have led to heavily litigated cases and a fair amount of condescension among probate lawyers.
    e. There is a simple, statutory solution below.
2. This bill adds up the augmented estate as defined by statute, KSA 59-6a203.
    a. Probate property
    b. Non-probate property
    c. Non-spousal transfers to others within two years.
3. This bill subtracts the homestead and family allowances pursuant to KSA 59-6a204 from the augmented estate.
4. This bill honors KSA 59-6a215 whereby the statute provides that the homestead or homestead allowance is in addition to any share passing to the surviving spouse by way of elective share.
5. This bill calculates the elective share by applying the percentages provided in KSA 59-6a202 to the augmented estate as reduced by the homestead and family allowances.

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January 23, 2018

Blaine Finch
Chairman, Kansas House Judiciary Committee
Kansas State Capitol, Rm 519-N
Topeka, Kansas 66612

Re: HB 2350 Clarifying method for calculating the spousal elective share.

Dear Chairman Finch and Members of the House Judiciary Committee:

Thank you for the opportunity to submit this written neutral testimony on HB 2350. In 1996, Timothy P. O'Sullivan and I co-authored an article for the KBA Journal about the spousal elective share law, which was new at that time. I have attached hereto a copy of this article, which is used by permission of the Kansas Bar Association.

In *In re Estate of Antonopoulos*, 268 Kan. 178, 993 P.2d 637 (1999), the Kansas Supreme Court held that the computation that Mr. O'Sullivan and I included as an example in our article was erroneous. In that example, the homestead of the husband and wife was held in joint tenancy with the right of survivorship and was worth $100,000.[1] The Court held that the computation of the augmented estate excludes the homestead entirely, regardless of whether it passes by joint tenancy or is part of the decedent's probate estate. Further, the value of the homestead is not included as an asset that satisfies the spouse's elective share. I believe that HB 2350 may be an attempt to codify the holding of the *Antonopoulos* case, a concept with which I do not disagree. However, there are several issues in the way that HB 2350 attempts to do so.

A. Proposed Revisions of K.S.A 59-6a204

Under the present statutory scheme, K.S.A. 59-6a203 sets forth how the augmented estate is computed. That statute states that the augmented estate, to the extent provided in K.S.A. 59-6a204 though 59-6a207, is equal to the sum of the following:

- The decedent's net probate estate (calculated as set forth in K.S.A. 59-6a204);
- The decedent's nonprobate transfers to others (calculated as set forth in K.S.A. 59-6a205)

[1] The KBA's Estate Administration Handbook contained a similar example of the computation.

- The decedent's nonprobate transfers to the surviving spouse (calculated as set forth in K.S.A 59-6a206); and
- The surviving spouse's property and nonprobate transfers to others (calculated as set forth in K.S.A. 59-6a207).

HB 2350 amends K.S.A. 59-6a204. However, that statute as it currently exists is correct, and the reference to K.S.A. 59-6a202 that is proposed as an addition to the current version of the statute is unnecessary. For K.S.A. 59-6a-204 to work properly in the augmented estate calculation, it must define the term "net probate estate," which is a term-of-art and the first component of the calculation. The current statue does exactly that (i.e. it defines what is included in and excluded from the "decedent's net probate estate" and sets forth how to calculate it).

As the statute presently exists, the homestead or homestead allowance is excluded from the value of that component of the augmented estate, as is the family allowance. If the words "includes the value of the decedent's probate estate" are removed from the beginning of the statue, then it is not clear that the value of the probate estate that is left after subtracting the items enumerated in the statue is a component of the augmented estate. The term "net probate estate," as used in other statutes, then becomes meaningless. Other than the references to K.S.A. 59-401 and 59-403, which define "homestead" and "family allowance," and the addition of a reference to K.S.A. 59-6a215, which creates the $50,000 "homestead allowance" (that is not provided for in K.S.A. 59-401), the present language of the statute fits properly in the statutory scheme, correctly sets forth the calculation of the "decedent's net probate estate," and should not be changed as proposed.

With respect to calculating the value of the augmented estate, the *Antonopoulos* case addresses computing the "decedent's nonprobate transfers to the surviving spouse" (K.S.A. 59-6a206) and the "surviving spouse's property" (K.S.A. 59-6a207). The Court makes it clear that the homestead must be excluded from the calculations set forth in 59-6a206(a) and 59-6a207(a), which address property that the spouses hold in joint tenancy with the right of survivorship. What the Court is saying is that if such property is the homestead, then it should be excluded from the calculation of the augmented estate.

Property held in joint tenancy with the right of survivorship between spouses is not part of the decedent's probate estate (it passes to the survivor by operation of law), so K.S.A 59-6a204 is not implicated in the *Antonopoulos* case, as the homestead was not part of the decedent's probate estate. Bringing the elective share statutes in line with *Antonopoulos* requires amending K.S.A. 59-6a206 and 59-6a207 to make clear that an interest in a homestead that passes to a surviving spouse by operation of law at the decedent's death (e.g., by joint tenancy property, transfer-on-death beneficiary designation, etc.) is excluded in calculating the value of the decedent's nonprobate transfers to the surviving spouse, and the surviving spouse's interest in the homestead is excluded in calculating the value of the "surviving spouse's property." K.S.A. 59-6a-204 already excludes the homestead from the "net probate estate."

B. Proposed Revisions of K.S.A. 59-6a209

Given the *Antonopoulos* decision, K.S.A. 59-6a209 should be clarified to ensure that the homestead or homestead allowance and family allowance are not assets available to satisfy the surviving spouse's elective share. However, the language of the new proposed subsections (d) and (e) appear to be problematic.

Proposed subsection (d) does not contain a reference to the homestead allowance under K.S.A. 59-6a215. In addition, the reference to K.S.A. "49-403" should be a reference to K.S.A. "59-403." Further, if K.S.A. 59-6a206 and 59-6a207 are revised, as described above, there should be no additional deduction of these amounts from the augmented estate (as it will be computed by excluding these amounts). Thus, the last phrase "and shall be reduced from the augmented estate before the elective share is calculated" should be deleted to eliminate double-exclusion of these amounts.

The most problematic part of the proposed revisions to the statute is the addition of subsection (e). This subsection presupposes that the family allowance to a spouse and minor children under K.S.A. 59-403 is a fixed amount. It is not.

K.S.A. 59-403(b) (emphasis added) provides for:

> A reasonable allowance ***of not more than*** $50,000 in money or other personal or real property at its appraised value in full or part payment thereof, ***with the exact amount of such allowance to be determined and ordered by the court, after taking into account the condition of the estate of the decedent.***

By definition, the amount of the family allowance cannot be determined without filing a petition with the probate court requesting that it decide what that amount is. It is possible that the Court might grant a family allowance of less than $50,000 or no family allowance at all, after taking into account the condition of the decedent's estate (and the overall financial condition of the family, per *In re Estate of Wheat*, 24 Kan. App. 2d 934, 955 P.2d 1339 (1998)).

Further, there is no reference to the homestead allowance provided by K.S.A. 59-6a215 in this subsection.

C. Additional Revisions Needed

I believe that the legislature intended that a surviving spouse should receive either the homestead or a homestead allowance in the amount of $50,000 under K.S.A. 59-6a215. There are practitioners in Sedgwick County who are taking the position (with the probate court's approval) that "homestead" means the homestead right set forth in K.S.A. 59-401. They further argue that K.S.A. 59-401 can only apply to a homestead that is part of the decedent's probate estate.

Therefore, they argue, if a surviving spouse receives the homestead by operation of law instead of through the probate estate (as a surviving joint tenant, for example), there can be no claim for a homestead under K.S.A. 59-401. Thus, the argument goes, the surviving spouse is entitled to the homestead allowance of $50,000.

There is no case law that is helpful in interpreting whether K.S.A. 59-401 applies to a homestead that does not pass to a surviving spouse through the decedent's probate estate. Also, there is no reference to K.S.A. 59-401 in K.S.A. 59-6a215.

This practice allows for "double-dipping," which I do not believe that the legislature intended. To prevent this, a revision of K.S.A. 59-6a215 that clarifies what is meant by "homestead" in that statute (and under *Antonopoulos*, "homestead" includes one that passes to the surviving spouse by nonprobate transfer, such as joint tenancy) to prevent this practice.

I would be happy to answer questions from members of the committee and can be contacted at the number above following the hearing.

Respectfully submitted,

Joan M. Bowen

New Spousal Elective-Share Rights: Leveling the Playing Field

by Timothy P. O'Sullivan and Joan M. Bowen

Kansas law gives a surviving spouse a right to choose whether to take what is provided for him or her under his or her deceased spouse's estate plan or to elect to receive a certain share of a deceased spouse's estate (known as an "elective-share right"). The purpose of the elective-share right is to prevent a person from inequitably disinheriting his or her spouse. A surviving spouse will have this elective-share right unless it has been changed or eliminated by a premarital agreement, a postmarital agreement, or a written consent to the predeceased spouse's estate plan.

The 1994 Kansas Legislature enacted a new law, effective for decedents dying on or after January 1, 1995, that substantially changes both the types of property subject to the elective-share right and the amount of the elective share itself. This new law corrects inequities and inconsistencies created by the former elective-share statute, related statutes, and judicial interpretations of these laws.

Surviving Spouse's Rights Under Prior Law

Under the prior elective-share statute,[1] a surviving spouse had a right to elect to receive one-half of the deceased spouse's probate estate. Other statutes gave the surviving spouse a homestead right in the decedent's principal residence passing through the probate estate,[2] an allowance in cash or property of no less than $1,500 and no more than $25,000,[3] and a right to use certain tangible personal property for one year.[4]

In addition, the Kansas courts had extended the surviving spouse's rights to revocable trusts[5] and IRAs.[6] These rights, however, did not apply to several other types of nonprobate property, including joint tenancy,[7] payable on death (POD) accounts,[8] and tangible personal property distributed under a memorandum referenced in a will or a revocable trust.[9] It is unclear under prior law whether the surviving spouse's elective-share rights would have extended to transfer on death (TOD) accounts or life insurance.[10]

The surviving spouse's elective-share right applied under prior law without taking into account the following factors:

1. The amount of assets that the surviving spouse already owned;
2. The assets passing from the deceased spouse to a surviving spouse through joint tenancy or beneficiary designations at the deceased spouse's death;
3. The duration of the marriage; or
4. Assets that the deceased spouse had given away shortly before death, even if such gifts were made for the purpose of defeating a surviving spouse's elective-share rights.[11]

Thus, the rights of a surviving spouse were the same regardless of whether the parties had been married for 20 years or 20 days. These rights were similarly unaffected by whether the surviving spouse had owned before the deceased spouse's death, or had received as a result of the deceased spouse's death through joint tenancy or beneficiary designations, no assets whatsoever or all of the parties' assets other than property subject to the elective share. In addition, the surviving spouse's rights could be defeated using various types of *inter vivos* transfers that were not subject to the surviving spouse's elective-share rights.

Reasons for Change in the Law

The new elective-share law, which is an adoption of the "Redesigned Elective Share" under the Uniform Probate Code,[12] is intended to correct the inequities that resulted under prior law. The elective share under the Uniform Probate Code was redesigned to embody two concepts. The first was to apply the partnership theory of marriage to the surviving spouse's right to elect to take a share of the deceased spouse's estate.[13] The second was to apply the support theory to this right of election.[14]

Under the partnership theory of marriage, "the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage."[15] The partnership theory of marriage is reflected in community property laws and in the context of divorce in common law states.[16] In Kansas, the courts have applied the theory of "equitable distribution" in divorce situations, viewing marriage as a partnership to which both spouses contribute.[17] Under the partnership theory of marriage, a spouse should have the same rights regardless of whether the marriage terminated by divorce or by death. Consequently, the new law applies similar principles to the rights of the surviving spouse in the event of death.

The other theoretical basis for the redesigned elective share is the "support theory." During their joint lives, spouses owe each other mutual duties of support. Under the support theory, these duties "should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate."[18]

Prior law on the elective-share rights of the surviving spouse in Kansas was incompatible with both the partnership and support theories. Inequitable divisions of property resulted from the surviving spouse having rights to elect to take some types of nonprobate property but not others. In addition, there was no provision under prior law to take into account that the surviving spouse may have owned his or her own property or may have received property outside of the elective-share provisions because of having survived the deceased spouse. There were also uncertainties regarding the rights of a surviving spouse to nonprobate property on which the courts had

FOOTNOTES

1. K.S.A. 59-602 (Supp. 1993).
2. K.S.A. 59-401.
3. K.S.A. 59-403(2) (Supp. 1993).
4. K.S.A. 59-403(1) (Supp. 1993). This property included an automobile and the decedent's personal and household effects.
5. *See Taliaferro v. Taliaferro*, 252 Kan. 192, 843 P.2d 240 (1992); *Newman v. George*, 243 Kan. 183, 755 P.2d 18 (1988); *Ackers v. First Nat'l Bank in Topeka*, 192 Kan. 319, 387 P.2d 840 (1963). These cases were partially codified in K.S.A. 59-602 and 59-603 (Supp. 1993).
6. *See McCarty v. State Bank of Fredonia*, 14 Kan. App. 2d 552, 795 P.2d 940 (1990).
7. *See Eastman v. Mendrick*, 218 Kan. 78, 542 P.2d 347 (1975); *Malone v. Sullivan*, 136 Kan. 193, 14 P.2d 647 (1932).
8. *Snodgrass v. Lyndon State Bank*, 15 Kan. App. 2d 546, 811 P.2d 58, rev. denied 249 Kan. 776 (1991) construing K.S.A. 9-1215, 9-1216.
9. *See* K.S.A. 59-623, 59-2296.
10. For an extensive discussion of prior law concerning the surviving spouse's elective-share rights, *see* Kuether & Thompson, The Capricious Operation of the Kansas Elective Share: Feast or Famine for the Surviving Spouse, 61 J. Kan. B. Ass'n. 32 (1992). Most practitioners believed that life insurance was excepted from the spouse's elective share under prior law.
11. *See Ackers*.
12. Uniform Probate Code §§ 2-201 - 2-214.
13. General Comment, 1993 Revision of Article II, Part 2 of Uniform Probate Code 1993, at 1-5.
14. *Id.* at 5-6.
15. *Id.* at 1. The "fruits of the marriage" include "property nominally acquired by and titled in the sole name of either partner during the marriage (other than property acquired by gift or inheritance)." *Id.*
16. *See id.*
17. *See* K.S.A. 60-1610; General Comment, 1993 Revision of Article II, Part 2 of Uniform Probate Code 1993, at 1; Kuether & Thompson, *supra* note 10, at 37-38.
18. General Comment, 1993 Revision of Article II, Part 2 of Uniform Probate Code 1993, at 5.

not yet ruled (for example, insurance and transfer on death accounts).[19]

The Kansas Legislature thus enacted the new law for the following purposes:

- confer upon married persons broad freedom of disposition;
- provide a protective monetary safety net against spousal disinheritance;
- give increased recognition to the economic partnership of marriage by increasing the protective share for longer marriages than shorter ones;
- adjust for the dispositional problems raised by multiple marriages and multi-family descendants;
- prevent will substitutes from defeating the prior purposes;
- prevent the surviving spouse from electing the forced share when the decedent's estate plan adequately provides for the spouse or when the spouse's personal wealth compares to the decedent's wealth;
- ease administration of the elective-share processes;
- provide predictability for persons who adequately plan their estates.[20]

Surviving Spouse's Rights Under Current Law

The new elective-share law allows a surviving spouse to take an elective-share amount that is equal to the "elective-share percentage" of the "augmented estate."[21] Consistent with the partnership theory of marriage the elective-share percentage, which varies from zero to 50 percent, is defined by statute and is based on the length of time that the surviving spouse and the decedent had been married.[22]

The augmented estate consists of the sum of the following:

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;
4. the surviving spouse's own property; and
5. the surviving spouse's nonprobate transfers to others.[23]

The new law also ensures that the surviving spouse has a minimum of $50,000 from the augmented estate no matter how long the parties had been married.[24] Thus, the surviving spouse will receive the amount needed to make up the deficiency in addition to his or her normal elective-share amount if the the sum of the following amounts is not at least $50,000:

1. the surviving spouse's own property;
2. the surviving spouse's nonprobate transfers to others;
3. property passing to the surviving spouse from the decedent's net probate estate; and
4. the decedent's nonprobate transfers to the surviving spouse.[25]

As under prior law, consistent with the support theory of marriage the elective-share right is in addition to the rights of a surviving spouse to live in the homestead and to receive statutory allowances for support of up to $25,000.[26] The 1994 Legislature also added an additional allowance — the homestead allowance. The surviving spouse may receive a homestead allowance of up to $25,000 where there is no homestead or where the homestead is worth less than $25,000.[27] If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance of $25,000 divided by the number of minor and dependent children of the decedent.[28] The homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the decedent's will, intestate succession, or the elective share.

Components of the Augmented Estate

A. Net Probate Estate

The first component of the augmented estate is the decedent's "net probate estate." The net probate estate is the total value of the decedent's probate estate reduced by funeral and administration expenses, the homestead allowance, the family allowance, and enforceable demands.[29]

19. *See* Kuether & Thompson, *supra* note 10.

20. K.B.A. Real Estate, Probate and Trust Law Section Newsletter and Ballot at 2 (1995) (quoting Averill, Uniform Probate Code in a Nutshell (West 1993)).

21. *See* K.S.A. 59-6a201 - 59-6a217.

22. K.S.A. 59-6a202(a)(1) provides that the elective share percentage is determined as follows:

Number of years decedent and surviving spouse were married	Elective share percentage
less than 1 year	0% of the augmented estate (but surviving spouse would be entitled to a minimum supplemental amount)
1 year but less than 2 years	3% of the augmented estate
2 years but less than 3 years	6% of the augmented estate
3 years but less than 4 years	9% of the augmented estate
4 years but less than 5 years	12% of the augmented estate
5 years but less than 6 years	15% of the augmented estate
6 years but less than 7 years	18% of the augmented estate
7 years but less than 8 years	21% of the augmented estate
8 years but less than 9 years	24% of the augmented estate
9 years but less than 10 years	27% of the augmented estate
10 years but less than 11 years	30% of the augmented estate
11 years but less than 12 years	34% of the augmented estate
12 years but less than 13 years	38% of the augmented estate
13 years but less than 14 years	42% of the augmented estate
14 years but less than 15 years	46% of the augmented estate
15 years or more	50% of the augmented estate

23. K.S.A. 59-6a203.

24. K.S.A. 59-6a202(b).

25. *Id.*

26. *See* K.S.A. 59-401, 59-404; K.S.A. 59-403 was amended to remove the minimum statutory allowance in 1994; see 1994 Kan. Sess. Laws 491, 503. The maximum allowance remains at $25,000. *See* K.S.A. 59-403(b).

27. *See* K.S.A. 59-6a215 (whether the court is to award up to the full amount of the homestead allowance or the difference between the full amount of the homestead allowance and any value of the homestead that the surviving spouse occupies is unclear under the statute. Similarly, the statute does not specify whether the homestead is to be valued using the value of the homestead interest in the property, the full value of the property, or the value of the property less encumbrances. The homestead allowance is a departure from the Uniform Probate Code and is unique to Kansas.

28. *Id.*

29. *See* K.S.A. 59-6a204.

B. The Decedent's Nonprobate Transfers to Others

The second component of the augmented estate is the decedent's nonprobate transfers to others. These transfers include nonprobate property that the decedent owned directly or controlled immediately before death, certain property that the decedent had transferred during the marriage, and certain property that passed both during the marriage and two years immediately preceding the decedent's death.[30]

1. Ownership Interests

One type of nonprobate property that the decedent owned or controlled immediately preceding his or her death is property over which immediately before death the decedent had a "presently exercisable general power of appointment."[31] A presently exercisable general power of appointment is defined as an *inter vivos* general power of appointment.[32] The value of property subject to the power that passed (by exercise, release, lapse, in default, or otherwise) to or for the benefit of any person, other than the decedent's estate or the surviving spouse, is the amount included in the augmented estate. An example of this is property held in the decedent's revocable trust. A general testamentary power of appointment over property that the decedent had held but created before the marriage, or that someone other than the decedent had created, does not pull the property into the augmented estate.[33]

Another type of property that the decedent owned or controlled immediately before death is the decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship.[34] The amount included in the augmented estate is the value of the decedent's fractional interest that passed by right of survivorship to someone other than the surviving spouse.

The third type of property included in the augmented estate under this category is the decedent's ownership interest in property or accounts payable, upon the decedent's death, to another person.[35] The amount included in the augmented estate is the value of the decedent's ownership interest that passed at death to or for the benefit of someone other than the surviving spouse or the decedent's estate.

Finally, the proceeds of insurance, including accidental death benefits, on the decedent's life are included under this category if certain conditions are met.[36] Either the decedent must have owned the insurance policy immediately before death, or immediately before death the decedent alone must have held a presently exercisable general power of appointment over the policy or its proceeds. The amount included in the augmented estate is the value of the proceeds payable at the decedent's death to or for the benefit of someone other than the surviving spouse or the decedent's estate.

2. Transfers with Retained "Strings"

Property that the decedent had transferred during the marriage in which he or she had retained an interest is included in the decedent's nonprobate transfers to others.[37] This includes two types of transfers.

The first is any irrevocable transfer in which the decedent retained the right to possess or enjoy the property or to receive the income from the property, if the decedent's right terminated at or continued beyond his or her death.[38] The amount included in the augmented estate is the value of the fraction of the property to which the decedent's right related, to the extent that this fraction passed outside of probate to or for the benefit of someone other than the surviving spouse or the decedent's estate. Examples of this type of property are gifts in which the decedent had retained a life estate or transfers to a charitable remainder trust in which the decedent had retained a unitrust or annuity interest for life.

...the proceeds of insurance... are included under this category if certain conditions are met.

The second type of transfer with retained strings that causes inclusion of the property transferred in the augmented estate is the transfer of property over which the decedent created a power to appoint the property or income from the property to or for the benefit of the decedent, his or her creditors, his or her estate, or the creditors of his or her estate.[39] This power must be exercisable by the decedent alone or in conjunction with any other person, or by a nonadverse party.[40] If the power was exercisable at the decedent's death to or for the benefit of

30. K.S.A. 59-6a205.

31. K.S.A. 59-6a205(a)(1).

32. K.S.A. 59-6a201(f) states:

> "Presently exercisable general power of appointment' means a power of appointment under which, at the time in question, the decedent, whether or not the decedent then had the capacity to exercise the power, held a power to create a present or future interest in the decedent's self, the decedent's creditors, and the decedent's estate or creditors of such decedent's estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.

A power of appointment also includes the power to designate a beneficiary. K.S.A. 59-6a201(e).

33. See General Comment, 1994 Revision of Article II, Part 2 of Uniform Probate Code, 1993, at 11-12; K.B.A., The New Kansas Law on Spousal Rights at Death at 16 (1994).

34. K.S.A. 59-6a205(a)(2). It is unclear whether inclusion of the decedent's fractional interest in joint tenancy property can be increased or avoided, as the case may be, by proving that the joint tenancy was created for convenience only and thus was not a true joint tenancy. The statute also does not literally provide for different treatment for revocable joint tenancies such as bank accounts.

35. K.S.A. 59-6a205(a)(3).

36. K.S.A. 59-6a205(a)(4).

37. K.S.A. 59-6a205(b).

38. K.S.A. 59-6a205(b)(1). This statutory provision is similar to section 2036 of the Internal Revenue code, which pulls similar retained rights back into the decedent's estate for federal estate tax purposes.

39. K.S.A. 59-6a205(b)(2).

40. K.S.A. 59-6a201(d) defines a nonadverse party as:

> "[A] person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that such person possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

someone other than the surviving spouse or the decedent's estate, the amount included in the augmented estate is the value of the property or income interest subject to the power to the extent so exercisable. If the property passed at the decedent's death (by exercise, release, lapse, in default, or otherwise) to or for the benefit of someone other than the decedent's estate or the surviving spouse, the value of the property or income interest so passing is the amount included in the augmented estate.

3. Deemed Contemplation of Death Transfers

Finally, certain property that the decedent had transferred during marriage and during the two years immediately before the decedent's death are included in the decedent's nonprobate transfers to others.[41] This consists of any property that passed upon termination of a right or interest in, or power over property if the property would have been included in the augmented estate under K.S.A. 59-6a205(a)(1),(2), or (3),[42] or under K.S.A. 59-6a205(c)(2).[43] The amount included in the augmented estate is the value of the property that would have been included, as described in those sections, if the property were valued at the time that the right, interest, or power had terminated. This amount is included only to the extent that the property passed upon termination to or for the benefit of someone other than the decedent's estate or the surviving spouse.

Any property that the decedent had transferred to someone other than the surviving spouse ...is also included in the augmented estate.

Any transfer during the marriage and within two years of death of an insurance policy on the decedent's life also causes the proceeds to be included in the augmented estate if they would have been included had the transfer not occurred.[44] The augmented estate includes the value of the proceeds payable at the decedent's death to or for the benefit of someone other than the surviving spouse or the decedent's estate.

Any property that the decedent had transferred to someone other than the surviving spouse during the marriage and two years before death is also included in the augmented estate.[45] The value of this property is includible only to the extent that the aggregate transfers to any one person in either of the two years were more than $10,000.[46]

C. The Decedent's Nonprobate Transfers to the Surviving Spouse

The third component of the augmented estate is the decedent's nonprobate transfers to the surviving spouse. These consist of the following property passing at the decedent's death outside of the decedent's probate estate: (1) the decedent's fractional interest in property held as a joint tenant with the right of survivorship to the extent that this interest passed to the surviving spouse as surviving joint tenant;[47] (2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner;[48] and (3) all other property passing to the surviving spouse that the decedent had owned or over which the decedent had retained strings.[49] Property passing to a surviving spouse under a qualified retirement plan, such as a joint and survivor annuity, is countable under this statute. However, property passing to the surviving spouse under the federal social security system is not included in the augmented estate.

D. The Surviving Spouse's Property and Nonprobate Transfers to Others

The final component of the augmented estate is property that the surviving spouse owns and the surviving spouse's nonprobate transfers to others. Property that the surviving spouse owns includes the surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship.[50] It also includes the surviving spouse's ownership interest in property or accounts held in co-ownership registration with the right of survivorship.[51] Finally, property that passed to the surviving spouse because of the decedent's death is also considered property that the surviving spouse owns.[52] The surviving spouse's nonprobate transfers to others include nonprobate transfers other than the spouse's fractional interest in joint tenancy property and co-ownership interests,[53] such as outright gifts within two years of the decedent's death or transfers with retained strings.

With certain exceptions, the surviving spouse's property and nonprobate transfers to others are valued at the decedent's death, taking into account the fact that the decedent predeceased the spouse.[54] If, however, the decedent and the surviving spouse were joint tenants or co-owners to

41. K.S.A. 59-6a205(c).
42. *See infra* text accompanying notes 31-35.
43. *See infra* text accompanying note 44.
44. K.S.A. 59-6a205(c)(2).
45. K.S.A. 59-6a205(c)(3).
46. This rule is not tied to the federal gift tax annual exclusion. It is unclear how the rule applies to transfers to irrevocable trusts, such as those with Crummey powers.
47. K.S.A. 59-6a206(a).
48. K.S.A. 59-6a206(b).
49. K.S.A. 59-6a206(c).
50. K.S.A. 59-6a207(a)(1)(A).
51. K.S.A. 59-6a207(a)(1)(B).
52. K.S.A. 59-6a207(a)(1)(C). This, however, does not include the spouse's right to the homestead, the family allowance, or payments under the federal social security system.
53. K.S.A. 59-6a207(a)(2).
54. K.S.A. 59-6a207(b).

avoid a double inclusion (valued at the decedent's date of death), the values of joint tenancy and co-ownership property are determined immediately before the decedent's death. Because the policy has not matured, insurance that the surviving spouse owns on his or her life is valued as if the surviving spouse were not deceased.

E. Property That Is Not Included in the Augmented Estate

The new law specifically excludes some property from the decedent's nonprobate transfers to others in computing the augmented estate. For example, property that the decedent transferred to others for which the decedent received full and adequate consideration in money or money's worth is not included in the augmented estate.[55] Also, the augmented estate excludes property transferred with the written joinder or consent of the surviving spouse.[56]

The value of the decedent's nonprobate transfers to others, the decedent's nonprobate transfers to the surviving spouse, and the surviving spouse's property and nonprobate transfers to others is reduced by enforceable demands against the included property.[57] It also includes the "commuted value" of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, other than the federal social security system.[58]

Funding the Elective-Share Amount

If the surviving spouse exercises his or her elective-share rights, he or she will receive the elective-share percentage of the augmented estate. This amount will be satisfied first by crediting against the elective share amount property in the augmented estate that the surviving spouse possesses or will receive in the following order:[59]

1. amounts in the decedent's net probate estate that pass or have passed to the surviving spouse by will or intestate succession and amounts included in the decedent's nonprobate transfers to the surviving spouse;
2. amounts included in the augmented estate that the surviving spouse had disclaimed and that will pass to the issue of the surviving spouse who are not also the issue of the decedent;
3. the sum of the surviving spouse's own property and nonprobate transfers to others multiplied by the "applicable percentage." The applicable percentage is equal to the elective-share percentage multiplied by two;[60]
4. the amount of all property recovered under K.S.A. 59-505 (*i.e.* one-half of all real estate that the decedent had owned at any time during the marriage and had disposed of without the surviving spouse's written consent);

...original recipients... must make a proportional contribution to satisfy the elective-share amount.

If the surviving spouse's elective-share or supplemental elective share amount is still not fully satisfied by this property amount, the remaining amount will be satisfied from property that the decedent transferred to others. Transfers from the decedent's net probate estate and the decedent's nonprobate transfers to others, except certain transfers to others within two years of death, are applied first to satisfy the elective share.[61] The recipients of this property are liable for the unsatisfied elective-share amount in proportion to the value of their interests in the property. Finally, the recipients of the decedent's other nonprobate transfers to others are liable for any remaining unsatisfied elective-share amount in proportion to the value of their interests in the property.[62]

The original recipients of the decedent's net probate estate and nonprobate transfers to others, and donees of the original recipients who receive this property, must make a proportional contribution to satisfy the elective-share amount.[63] These individuals may either return the decedent's property to the surviving spouse or pay the value of the amount for which the individual is liable. Jurisdictional problems, however, may exist with respect to out-of-state surviving joint tenants or beneficiaries who have already taken property.

Example Illustrating Application of the New Law

The following example illustrates computation of surviving spouse's elective-share rights. Assume that at the

55. K.S.A. 59-6a208(a)(1). Presumably, if the decedent had received inadequate consideration for property transferred to others, the amount of such property that is included in the augmented estate would be reduced by the amount of consideration that the decedent had received.
56. K.S.A. 59-6a208(a)(2).
57. K.S.A. 59-6a208(b). Thus, because conveyances of real estate require the joinder of the spouse, there should be no title problems engendered by the new law.
58. It is unclear how to value payments that are not fixed, such as the surviving spouse's interest in the decedent's credit shelter trust providing for discretionary distributions to the surviving spouse. In *In re Estate of Fisher*, 545 A.2d 1266 (Me. 1988), which was decided under prior provisions of the Uniform Probate Code, the court valued a right to receive discretionary distributions at zero because the beneficiary had no legal right to compel a distribution, even though the trust permitted discretionary distributions for "support and welfare" of the surviving spouse.
59. K.S.A. 59-6a209(a).
60. The applicable percentage would not result in crediting 100% of the surviving spouse's property until the parties have been married at least 15 years. The rationale for not crediting the full amount of the surviving spouse's property for marriages lasting less than 15 years is that until the augmented estate concept is fully phased in after 15 years of marriage, each spouse is considered to own the elective-share percentage of the other's property. Marital property is thus equal to twice the elective-share percentage of each spouse's property. The remaining portion is considered separate and not subject to election or credit.
61. K.S.A. 59-6a209(b).
62. K.S.A. 59-6a209(c).
63. K.S.A. 59-6a210(a).

time of the decedent's death, the decedent and the surviving spouse had been married for 10 years. The decedent had four children by a previous marriage to whom he left his entire estate under his will. The surviving spouse has two children by a previous marriage. The surviving spouse did not consent to the decedent's will or waive her elective-share rights. The following are the decedent's and the surviving spouse's augmented estate assets and their values at the decedent's death:

Home held jointly with spouse	$100,000
Decedent's household goods	9,000
Surviving spouse's household goods	1,000
Decedent's car	20,000
Surviving spouse's car	5,000
Joint bank accounts with spouse	60,000
Decedent's mutual fund account	400,000
Surviving spouse's stocks	4,000
Life insurance owned by decedent and payable to decedent's children	50,000
Life insurance owned by surviving spouse and payable to surviving spouse's children	10,000
IRA owned by decedent and payable to surviving spouse	20,000
Total	**$679,000**

Funeral and administrative expenses with respect to decedent's estate are $10,000.

1. Compute estate allowances:

he homestead allowance is not applicable in this case because the homestead passes to the surviving spouse automatically as surviving joint tenant.

Family allowances:	
Decedent's household goods	$ 9,000
Decedent's car	20,000
Decedent's property	25,000
Total allowances	**$54,000**

2. Compute the decedent's net probate estate:

Probate estate	
Decedent's household goods	$ 9,000
Decedent's car	20,000
Decedent's mutual fund	400,000
Total probate estate	**$429,000**
Less: Family allowances	(54,000)
Funeral and administrative expenses	(10,000)
Enforceable demands	0
Decedent's net probate estate	**$365,000**

3. Compute the decedent's nonprobate transfers to others:

Decedent's nonprobate transfers at death:

Life insurance	$50,000
Decedent's lifetime transfers with retained interests	0
Decedent's lifetime transfers within two years of death	0
Decedent's total nonprobate transfers to others	**$50,000**

4. Compute the decedent's nonprobate transfers to the surviving spouse:

Joint tenancy property:

1/2 of home	$50,000
1/2 of bank accounts	30,000
Total joint tenancy property	80,000
Other nonprobate property	
Decedent's IRA	20,000
Decedent's total nonprobate transfers to surviving spouse	**$100,000**

5. Compute surviving spouse's own property and surviving spouse's nonprobate transfers to others:

Surviving spouse's own property at decedent's death:

1/2 of home	$50,000
Surviving spouse's household goods	1,000
Surviving spouse's car	5,000
1/2 of bank accounts	30,000
Surviving spouse's stocks	4,000
Total of surviving spouse's own property	$90,000

Surviving spouse's nonprobate transfers to others:

Life insurance (cash value)	$10,000
Total	**$100,000**

6. Compute the augmented estate:

Decedent's net probate estate	$365,000
Decedent's nonprobate transfers to others	50,000
Decedent's nonprobate transfers to surviving spouse	100,000
Surviving spouse's own property and surviving spouse's nonprobate transfers to others	100,000
Augmented estate	**$615,000**

7. Compute the elective-share amount:

Augmented Estate	$615,000
x Elective-Share Percentage	x 30%
Elective-share amount	$184,500

8. Compute credits against elective-share amount:

Decedent's net probate estate passing to surviving spouse	$ 0
Decedent's nonprobate transfers to surviving spouse	100,000
Disclaimers by surviving spouse to surviving spouse's issue	0
Spouse's credit (spouse's own property and nonprobate property passing to others multiplied by twice the elective share percentage) ($100,000 X 60%)	60,000
Real estate recovered under K.S.A. 59-505	0
Credits against elective-share amount	$160,000

9. Compute unsatisfied elective-share amount:

Elective-share amount	$184,500
Credits against elective-share amount	(160,000)
Unsatisfied elective-share amount	$ 24,500

This amount comes out of the decedent's net probate estate and the decedent's nonprobate transfers to others. Liability for this unsatisfied balance of the elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests in the property.

Electing To Take the Elective-Share Amount

The surviving spouse bears the burden of pursuing his or her elective-share rights. With respect to probate property of the deceased spouse, the surviving spouse can file a claim against the estate of the deceased spouse in the same manner as under prior law.[64] Securing elective-share rights to nonprobate property, however, will be a more onerous task.

The surviving spouse must initiate the legal proceeding necessary to perfect these rights. It appears that this proceeding must be commenced within six months of the deceased spouse's death if probate proceedings are not otherwise commenced.[65] If probate proceedings are commenced, the surviving spouse must claim the elective-share within six months after the court has given the surviving spouse notice under K.S.A. 59-2233.[66] If the surviving spouse can show good cause for doing so, the court can extend the time for making the election.[67] There is no downside to the election, as there was under prior law, because the surviving spouse does not waive any existing rights by making the election. That is, any elective-share amount would be in addition to the amount to which the surviving spouse is entitled by virtue of the deceased spouse's death.

Payors of augmented estate property, such as a bank on a POD account, generally are not liable for having paid the designated beneficiary rather than the surviving spouse making an elective-share claim to the property.[68] However, this is not the case where the payor had received written notice that the spouse had filed or intended to file a petition to claim the elective-share before the payor has distributed the property to the designated beneficiary.[69]

Limiting the Spouse's Elective-Share Rights Under the New Law

One way to limit a spouse's elective-share rights under the new law is to obtain from the spouse a written waiver of his or her elective-share rights. This may be done using a premarital or postmarital agreement or a written consent to the estate plan (including all probate and nonprobate transfers).[70]

As under the Kansas Uniform Premarital Agreement Act,[71] a written waiver of the spouse's rights under the new elective-share law will not be enforceable if (a) it was not given voluntarily or (B) it was unconscionable when it was executed and the surviving spouse:

1. was not given a fair and reasonable disclosure of the decedent's assets and financial obligations;
2. did not voluntarily and expressly waive his or her entitlement to disclosure of the decedent's property or financial obligations beyond what was provided; and
3. did not have, or reasonably could not have had, adequate knowledge of the decedent's property or financial obligations.[72]

A waiver of "all rights," or similar language, to the property or estate of a present or prospective spouse is sufficient to waive elective-share rights, homestead rights, and allowances.[73]

In addition, placing assets in revocable joint tenancies, such as bank accounts with someone other than the surviving spouse, would not seem to trigger the two-year contemplation of death provision. These transfers are not completed gifts for gift tax purposes, yet arguably they

64. K.S.A. 59-6a211.
65. K.S.A. 59-6a211(a).
66. *Id.*
67. K.S.A. 59-6a211(b).
68. K.S.A. 59-6a214(a).
69. *Id.* K.S.A. 59-6a214(b) provides:
"The written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action."
70. K.S.A. 59-6a213(a).
71. *See* K.S.A. 23-801 - 23-811.
72. *See* K.S.A. 59-6a213(b).
73. K.S.A. 59-6a213(d).

cause only the decedent's fractional interest in the property to be included in the augmented estate. Presumably, the surviving spouse could employ the same technique to reduce his or her contribution to the augmented estate.

Business entities such as family limited partnerships or limited liability companies might also be used to limit the surviving spouse's rights to assets. Holding property in these entities can reduce the value of marital assets and restrict a surviving spouse's ability to secure the benefits of the entity's underlying assets.

A surviving spouse's elective-share rights can also be limited by gifting. However, gifts of over $10,000 that were made during the marriage and during either of the two years before death are subject to the surviving spouse's elective-share rights.[74]

Finally, the surviving spouse's rights may be limited by creating jurisdictional hurdles. For example, naming a beneficiary of a POD account who resides out of state or transferring property to an irrevocable *inter vivos* trust with an out-of-state situs may hinder the surviving spouse's ability to satisfy the elective-share amount from this property.

Conclusion

The new elective-share law eliminates most of the inequities created under prior law. It will eliminate a large number of elective-share claims that were unfair because of the failure to consider length of marriage, property already owned by surviving spouse, nonprobate transfers received by surviving spouse, and nonprobate property that the decedent transferred to others. Consistent with the partnership theory of marriage, the new law will bring the surviving spouse's rights at death more in line with those of a former spouse at divorce.[75] Although there is complexity inherent in permitting a surviving spouse to pursue additional types of nonprobate property transferred to others to satisfy the elective share, this complexity was unavoidable in order to eliminate inequities and uncertainties under the prior law.[76] ■

74. See *supra* notes 45-46 and accompanying text.

75. A few inconsistencies remain. For example, after 15 years of marriage all property is considered marital property under the elective share law, even if it was brought into the marriage or received by gift. Such might not be the case under K.S.A. 60-1610. Secondly, there is no "give back" provision in favor of the decedent spouse's estate for the surviving spouse's own property exceeds his or her own portion of the augmented estate.

76. That is not to say that, as noted in this article, the law is not in need of corrective and clarifying legislation or example,

1. Serious consideration should be given to the repeal of K.S.A. 59-505 because it is both unnecessary and inconsistent with the new law.

2. Consideration should be given to providing different treatment of revocable joint tenancies and joint tenancies for convenience than the fractional interest rule stated in K.S.A. 59-6a205(a)(2).

3. Clarification should be given regarding valuation of annuities, fixed income trusts, and discretionary trusts under K.S.A. 59-6a208(b)(2).

4. Clarification should be provided regarding valuation of the surviving spouse's interest in the homestead under K.S.A. 59-6a212, and

5. Clarification should be provided regarding the application of the $10,000 gift exclusion under K.S.A. 59-6a205(b)(3) to gifts in trust.

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