



**KANSAS BAR
ASSOCIATION**

TO: **The Honorable Lance Kinzer, Chair**
 And Members of the House Judiciary Committee

FROM: **Tim O’Sullivan**
 On Behalf of the Kansas Bar Association

RE: **SB 395 – Repealing K.S.A. 59-505 Intestate Succession**

DATE: **March 15, 2012**

Chairman Kinzer and Members of the House Judiciary Committee:

I am Tim O’Sullivan. I am an attorney in Wichita specializing in probate and trust matters. I am appearing on behalf of the Kansas Bar Association (KBA) in support of SB 395 (the Bill), which repeals K.S.A. 59-505. The Bill was proposed by the KBA Real Property, Probate and Trust Section, approved by the KBA Legislative Committee and then subsequently approved by the KBA Board of Governors.

Repeal of K.S.A. 59-505

This statute provides that a spouse who was a resident of the state of Kansas at any time during the marriage is entitled to one-half of the real property conveyed by a decedent spouse during the marriage without the written consent of such spouse. It was enacted in 1939 and was retained in the law notwithstanding the passage of the Kansas Spousal Elective Share Act (the Act) in 1994. At the time of the passage of 59-505 and up to the time of the passage of the Act more than five decades later, the surviving spouse was entitled to a forced inheritance of one-half of all probate property (judicially construed in such intervening years to include revocable trust property and IRAs) of the predeceased spouse.

It was passed at a time the Kansas economy was decidedly more agrarian than it is today (with its concomitant much higher concentration of wealth in real property, particularly farm real property, than in personal property) in order to prevent one spouse from defeating such spouse’s forced inheritance with respect to real property by conveying away real property without the written consent of the surviving spouse. The statute does not delineate any statute of limitations on the assertion of such right by a surviving spouse. The Act did not repeal 59-505, but does provide for the elective share amount a surviving spouse was entitled to under the Act to be reduced by the value of real property recovered thereunder. K.S.A. 59-6a209(a)(4).

Such statute is not needed to protect the surviving spouse’s homestead rights, which are separately protected both constitutionally and statutorily under another statute. Article 15, Section 9 of the Kansas Constitution provides not only creditor protection for the homestead (one acre within a city

and 160 contiguous acres of farmland outside a city), but also precludes its alienation by a married person without the consent of his or her spouse. K.S.A. 60-2301 statutorily codifies this constitutional provision. Consequently, when real property is being referenced herein in the context of 59-505, such reference is intended to be exclusive of homestead property.

In hindsight, it has become clear that the retention of K.S.A. 59-505 when the Act was passed was not well thought out. Little to no apparent consideration was given as to whether its retention may not only have been unnecessary with the passage of the Act, but would even have an adverse effect on its objectives and purposes. It is time to rectify this oversight.

For the reasons enunciated below, the Real Property, Probate and Trust Section of the Kansas Bar Association, the Legislative Committee of the Kansas Bar Association and the Board of Governors of the Kansas Bar Association all have approved the repeal of K.S.A. 59-505.

Purpose for Which Statute was Enacted No Longer Existed with Passage of the Act

The erstwhile one-half spousal inheritance right 59-505 was designed to protect ceased to exist with the enactment of the Act. Unlike the Act, prior law provided no protection for property irrevocably conveyed prior to death. Moreover, the primarily rural and agrarian economy which was its environs had long since departed the Kansas landscape by the time of its enactment. It would be one thing if the title, real property transfer, and inequitable recovery problems discussed below under 59-505 were justified by its protection of spousal rights after passage of the Act. However, such is clearly not the case.

The Act provides a much more protective, inclusive and equitable regimen in determining spousal elective share rights than heretofore existed under prior statutory law. It does so by taking into account all tangible and intangible real and personal property of the predeceased spouse (including certain property previously transferred with a “retained interest”), irrespective of how the property passes at death to others (e.g., joint tenancy, beneficiary designations, under provisions of a revocable trust or through probate). In determining the amount of the elective share, the Act also takes into account the length of the marriage, property owned by both spouses as of date of death, and all property of the predeceased spouse passing to the surviving spouse outside of probate as a result of the predeceased spouse’s death. In so doing, the formula will not reach its maximum 50% spousal right until the couple has been married fifteen years. Moreover, as addressed more fully below, due to the adjustments for property of the surviving spouse and property the surviving spouse receives from the predeceased spouse outside of the probate estate through joint tenancy, beneficiary designations or under the provisions of the predeceased spouse’s revocable trust, even under a marriage of a 15 year or greater term, more often than not the elective share is zero and in the balance of situations is far less than 50% portion of the predeceased spouse’s property. Finally, all property, whether real or personal property, transferred by the predeceased spouse through a donative transfer within two years of death is included in the “augmented estate” for purposes of determining the surviving spouse’s elective share. K.S.A. 59-6a205(c).

Creates an Unjustifiable Demarcation Between Real and Personal Property

K.S.A. 59-505 creates a non-justifiable special spousal right with respect to real property not accorded personal property, or any type of property for that matter, under the Act. Any and all types of personal property, including ownership interests in an entity which owns real property, have no similar

requirement that a spouse must consent to the transfer thereof or subject such transferred interest to a forced right of inheritance to one-half of such property.

Results in Inequitable Spousal Recoveries

In the vast majority of circumstances, the application of K.S.A. 59-505 will inequitably result in the surviving spouse receiving a greater elective share right than the surviving spouse would have had in the absence of the transfer of real property by a spouse by one spouse without the written consent of the other spouse. This is because the right under the Act to a spousal elective share right of one-half is not reposed in the surviving spouse until the marriage is at least of a fifteen year term. Moreover, as noted above, even a right to one-half of the predeceased spouse's "augmented estate" is reduced by a formula which takes into account the surviving spouse's "augmented estate" prior to the predeceased spouse's death and all property the surviving spouse receives as a result of the predeceased spouse's death. Thus, not only is it seldom that the elective share amount would even approach a 50% elective share of the predeceased spouse's property not otherwise passing to the spouse as a result of the predeceased spouse's death, in far more than one-half of such situations it is reduced to zero in consideration of such factors.

This is a statistical certainty because in approximately one-half of the situations, the spouse with the larger portion of the augmented estate will be the survivor. In a significant percentage of the remainder of the situations, the property the surviving spouse will receive by virtue of the death of the predeceased spouse, e.g., through joint tenancy, beneficiary designations, or under the provisions of the predeceased spouse's will or revocable trust, substantial other property which would reduce the elective share of the surviving spouse under the Act to zero. It clearly would be a rare situation indeed when the surviving spouse's elective share amount under the Act would amount to a full 50% of the predeceased spouse's property which did not otherwise pass to the surviving spouse.

Nonetheless, under 59-505, there is an automatic 50% right to real property conveyed by the predeceased spouse without the surviving spouse's consent. Although the Act gives a credit for a satisfied claim under 59-505, a claim under K.S.A. 59-505 is not offset under the Act to the extent it would exceed any amount the surviving spouse would otherwise be entitled to under the Act. As noted above, there would be an inability to offset any of such 59-505 recovery in a substantial majority of such situations, let alone most or all of it.

This inequity is further compounded by the fact that 59-505 provides no offset for sales at fair market value, which one would expect represent the vast majority of real property transactions. Thus, to the extent an "fmv" sale of real property occurred without the surviving spouse's consent, the vendor spouse's estate (and the surviving spouse's elective share) would not have been reduced by such conveyance, yet the surviving spouse would nonetheless be entitled to a "windfall" of an additional legal right to one-half of such real property.

Similar inequitable consequences could occur if the predeceased spouse had conveyed real estate to an entity for family planning or commercial purposes with third parties without the predeceased spouse's consent, receiving an ownership interest in the entity in return. The interest in the entity would be includible in the decedent spouse's estate for purposes of the elective share; yet, the surviving spouse could nonetheless claim a one-half interest in real property conveyed to the entity. The potential collateral disruptive aspects of such a claim to any third party owners in the entity are obvious.

In sum, there is little question but that with the passage of the Act, K.S.A. 59-505 was instantly transformed into a punitive provision which in the vast majority of situations affords the surviving spouse, simply because a predeceased spouse did not procure his or her spouse's consent with respect to any conveyance of real property in which the surviving spouse had no ownership interest, a much greater cumulative spousal elective share right than the surviving spouse would have had in the absence of such conveyance. This makes absolutely no sense.

Problems Compounded by Common Law Marriages

K.S.A. 59-505 is a particularly nettlesome problem due to the continued retention of common law marriages in Kansas. Because what constitutes a common law marriage is poorly understood by the general public, and its facets are of a somewhat amorphous nature, individuals who might be judicially considered to be common law married may not even consider themselves as such and thereby convey property as single individuals. Moreover, any property conveyed by an individual as a single person is potentially subject to a later claim by an alleged "common law spouse" upon the death of the grantor even if such "spouse" would otherwise have had no claim under the Act. This makes conveyances of real property by a person who considers him or her to be "single" subject to expensive and unnecessary litigation when there is an asserted common law marriage claim, which is easy to bring and often lacking in merit. Moreover, as noted above, should such common law marriage claim prove successful, it will likely result in the surviving spouse being entitled to far more property than he or she would otherwise have been entitled had there been no conveyance in the first instance.

Creates Title Problems

In addition to the palpable title problems common law marriages pose under 59-505, there are title problems presented in every other situation in which a married person conveys real property without the other spouse's consent. This can occur because a person intentionally represents himself or herself as a single person in order to avoid having to procure a spousal consent. It also occurs in the not infrequent occurrence where a deed is signed without indicating the marital status of the vendor. One title insurance company indicated to me that such situation resulted in a \$40,000 claim due to the title insurance company having failed to check the marital status of a prior vendor in the chain of title.

Results in Unnecessary Logistical and Estate Planning Problems When Spouse is Disabled

This statutory provision can create unnecessary logistical and estate planning problems when the non-grantor spouse is legally disabled and unable to join in the conveyance due to being under a disability and has not executed a comprehensive durable power of attorney. Real property owned solely by the non-disabled spouse would not be able to be conveyed in any circumstance where the vendee is getting title insurance without the disabled spouse's consent, even though the property is being sold for its fair market value. This can present a particular problem in Medicaid planning circumstances.

Poses Unreasonable Obstacle to Real Property Sales in Discordant Marital Situations

In situations where there is marital discord, 59-505 can provide an unjustifiable obstacle to the sale of real property. Even though one spouse may own the entire interest in real property and is selling it for fair market value, his or her spouse can block the sale simply by not consenting to its sale. This can be especially problematic in business transactions.

Uniform Commissioners Chose Not to Include Such Right

The Act comes from the Uniform Probate Code and its provisions were unquestionably both well-reasoned and fully vetted by the Uniform Commissioners. Thus, perhaps most persuasive in the panoply of reasons to repeal 59-505 is that the Act's counterpart in the Uniform Probate Code does not include any elective share or inheritance right similar to K.S.A. 59-505. If the argument in retention of 59-505 is to prevent conveyance of real property just prior to death to avoid a spousal claim, as noted above, the Act already brings within its grasp all types of property transferred within two years of death. The Commissioners determined that including gratuitous transfers within two years of death was sufficient to snare property that was conveyed in anticipation of death in order to avoid a spousal claim.

Yet, 59-505 stands in sharp contrast to the principles of the Commissioners and those embodied in the Act. It incongruously provides for an additional right having application only to real property, which has no limitation period prior to death, which inequitably distorts the share of the surviving spouse in the vast majority of circumstances, and applies even when the real property is conveyed for full consideration and thus could in no manner prejudice the elective share rights of a non-consenting spouse.

If there is any potential spousal elective share issue under existing law with regard to conveyances of any property without spousal consent, it would have to be solely with whether the "two year period" under the Act is sufficient, not whether 59-505 should be retained.

Real Life Situation

The author was involved in a litigation matter which was emblematic of the adverse consequences of the retention of 59-505. The author represented an individual who conveyed large parcels of real property to a limited partnership owned by his revocable trust and an irrevocable trust he had created for estate planning and management purposes. The author's client then made substantial gifts of partnership interests to the irrevocable trust. Such real property was conveyed by the author's client as a single person, a status the author's client believed was accurate. Although the author's client was involved in a relationship with another person at the time, both had separate residences and filed income tax returns as single taxpayers.

A few years later the author's client and such other person entered a statutory marriage without benefit of a premarital agreement. An attempt to procure a spousal consent to the estate plan of the author's client proved futile. Six years after the statutory marriage, the author's client passed away. The decedent's spouse then filed for a spousal elective share. Although the spouse's elective share percentage when based on her statutory marriage was quite limited (an 18% elective share portion due to the six year term of the statutory marriage), the decedent's spouse asserted that the elective share portion was nonetheless 50% due to there being a common law marriage which preceded the statutory marriage by more than nine years. When it became nonetheless evident that the elective share amount under the Act nonetheless was likely to be little, if any, after giving consideration of the surviving spouse's assets at the time of the decedent's death (the surviving spouse also had a relatively substantial estate) and a bequest of the decedent to the decedent's surviving spouse under the provisions of the decedent's revocable trust, the decedent's surviving spouse asserted a right to one-half of the real property conveyed by the decedent to the limited partnership during the term of the alleged common law marriage.

Although the author felt the evidence was such that no common law marriage would be judicially found to have existed, considerable legal costs were incurred by my client's estate and the payment of a not insubstantial settlement amount was required to bring the matter to an end.

We respectfully ask that you give it your support.

On behalf of the Kansas Bar Association, I thank you for your time this morning and would be available to respond to questions.

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 7,200 members, including lawyers, judges, law students, and paralegals.
www.ksbar.org