

WHAT IS A SURVIVING SPOUSE ENTITLED TO HAVE?

The 1994 Kansas legislature has made some changes that may drastically affect those married couples who do no estate planning or who have not planned properly. What they desire to have happen on the death of the first spouse may not happen at all. Those that will be affected the most will be those who plan for substantial transfers of property or interests in property to nonspouses on the death of the first spouse.

This change is being referred to as the **New Kansas Uniform Elective Share Provision (effective January 1, 1995)**. It is the result, in part, of recognizing that a vast amount of assets and interests in property are being transferred after death through what the new law refers to as "nonprobate transfers". It is an attempt to protect the rights and meet the needs of a surviving spouse, however, there are many problems that have been created for all who have a reason to plan for the transfer of assets or interests in property to nonspouses on the death of the first spouse.

THE CONCERN IS FOR PEOPLE WHO ARE MARRIED AND WHO HAVE A REASON TO PLAN FOR PROPERTY TO BE TRANSFERRED OR DISTRIBUTED TO SOMEONE OTHER THAN A SURVIVING SPOUSE. A COMMON SITUATION INVOLVES INDIVIDUALS WHO ARE IN A SECOND MARRIAGE.

The assets and interests in property that are affected by the new spousal elective-share provision, which is an amendment to the Kansas Probate Code include joint tenancy with the right of survivorship, pay on death accounts, beneficiary designations (including life insurance), living trusts, powers of appointment over property (the right to control or direct distributions of property), disclaimers, i.e., virtually any interest held in property at the death of the first spouse. The sad result is that for those people who do not plan well, it will allow the probate forum to control nonprobate assets and undo what planning a married couple or married individual may have in place. **It gives the surviving spouse or his or her personal representative the authority to control and pull into probate and claim a portion of those nonprobate transfers from the persons who otherwise would have received them. In certain instances it will allow the probate proceeding where the spousal elective-share is demanded to control more than 50% of the value of the assets which were transferred outside of probate!**

Additional problems that we foresee for individuals who are not aware of these new changes in the law, include litigation over valuation of assets, delays due to need to discover and trace asset transfers and locate property, increased fees and expense in the probate process, additional delays beyond the already lengthy probate process due to concern over the possible spousal election, including delays in transferring assets to beneficiaries, as well as delays in completing estate and inheritance tax returns, litigation over the validity of waivers and consents to transfers and waivers of rights, in determination of whether or not there has been full disclosure of assets.

One of the greatest concerns we have is for second marriage situations where one spouse

may have provided for children from the first marriage through the use of nonprobate transfers such as joint tenancy or beneficiary designations without the benefits of a prenuptial agreement or valid consents or waivers from the current spouse. It could certainly make for a good fight between the surviving spouse and the step-children.

So, what is it that has been changed?

The amendment to the probate code is set forth in (Kansas Statutes Annotated) K.S.A. 59-2233, and was previously titled Election to take under will or by intestate succession. Prior to this new change, it only involved assets controlled by the probate administration of the estate. In a very basic sense, probate administration of a decedent's assets until now has included only those assets or interests in property that were titled or held in the decedent's name alone at the time of his or her death. Until now, the scope of the spousal elective share provision has been quite limited and has not provided for the control of many assets or interests in property for which transfer of title, ownership or control was provided outside of probate, i.e., joint tenancy with the right of survivorship, pay on death designations, most death beneficiary designations, etc. The administration of an estate through probate was reserved primarily for those assets for which no other way of transferring title or ownership was provided.

So, what is the spousal elective share?

What this has meant in the past is that a surviving spouse had a choice to make as to what assets that surviving spouse would be entitled. Remember, this only affected those assets controlled by the probate proceeding. If no consent to the will had been signed, then the surviving spouse could elect to take under the will (as the will provided), or the spouse could elect to take the intestate share that he or she would be entitled to if there had not been a will. (Intestate means that the decedent died without a will.) Under the prior law, the spouse was entitled to one-half of the probate estate, plus a homestead and family allowance. If the surviving spouse was incapacitated, then a person (called a commissioner) was appointed to determine if the election should be made. Very simply, if the surviving spouse would get more property under the election, then the court made the election for them. All of this has now been changed dramatically because of the right that has been granted a surviving spouse to reclaim any and all assets that may otherwise be transferred outside of probate.

What do these new provisions allow the surviving spouse?

In amending the provisions relating to the spouse's ability to elect to take against the will, as it was previously referred to, the Kansas legislature has formulated a new concept known as the "augmented estate."

WHAT IS THE AUGMENTED ESTATE?

The definition is tied to value because it is to be used in determining the spousal elective share. The value of the augmented estate consists of the values of all property that constitute the

decedent's net probate estate (property controlled by the court through the administration of these assets through the probate process), the decedent's nonprobate transfers to others (property not controlled by the court through the administration of assets through the probate process), the decedent's nonprobate transfers to the surviving spouse, and the surviving spouse's property and nonprobate transfers to others; and in most instances with a lookback period of two years preceding the decedent's death to see what may have been transferred prior to death, and to include the value of these transfers prior to death as well.

The value of the augmented estate is reduced dollar for dollar by funeral and administration expenses, homestead, family allowances and enforceable demands. Additionally, the value of any property is excluded from the decedent's nonprobate transfers to others (1) to the extent that the decedent received adequate and full consideration in money or money's worth for a transfer of the property or (2) if the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse. Also, the value of property:

(1) Included in the augmented estate is reduced in each category by enforceable demands against the included property; and

(2) includes the present value (which may be difficult to determine) 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, exclusive of the federal social security system.

FORMULA FOR DETERMINING ELECTIVE SHARE

The surviving spouse of a decedent who dies a resident of this state has a right of election, under the limitations and conditions stated in the act, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and decedent were married to each other, in accordance with the following schedule:

| Duration or length of marriage | Elective share percentage |
|---------------------------------|-----------------------------|
| Less than 1 year | Supplemental amount only |
| 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 |

If the decedent and the surviving spouse were married to each other more than once, all periods of marriage to each other are added together for purposes of this subsection. Periods between marriages are not counted. This scheme assumes that the value of the "assets of the marriage" are twice the value of the percentage set forth above. This further assumes that the percentage of marital assets grow proportionately over a period of time, up to fifteen years, at which time all property is assume to be marital property.

SUPPLEMENTAL ELECTIVE-SHARE!
SURVIVING SPOUSE ENTITLED TO EVERYTHING-UP TO \$50,000

If, after determining the spousal elective share, the sum of the amounts to which the surviving spouse would be entitled is less than \$50,000, the surviving spouse is entitled to a supplemental elective-share amount for the difference between the summ already determined and \$50,000. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedents nonprobate transfers to others in order of priority set forth in the new law.

HOMESTEAD AND FAMILY ALLOWANCES ARE IN ADDITION
TO ELECTIVE-SHARE AND SUPPLEMENTAL ELECTIVE-SHARE!

If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, and family allowance, if any, are not charged against but are in addition to the elective=share and supplemental elective-share amounts.

HOMESTEAD ALLOWANCE IN \$'S IN SOME INSTANCES WHERE THERE IS NO
HOMESTEAD, OR THE VALUE OF THE HOMESTEAD IS LESS THAN \$25,000

Where there is no homestead or the homestead is valued at less than \$25,000 a decedent's surviving spouse is entitled to a homestead allowance not to exceed \$25,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$25,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all demands against the estate. The homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.

HOW IS THE ELECTION FOR THE NEWLY DEFINED SPOUSAL ELECTIVE-
SHARE MADE?

The election is to be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within six months after the date of the

decedent's death, or within six months after notice of the right to the elective share, whichever is later. The surviving spouse must give notice of the time and place set for hearing, in such manner as ordered by the court, to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. The decedent's nonprobate transfers to others are not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than six months after the decedent's death.

THE SIX MONTH PERIOD MAY BE EXTENDED

Within six months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within six months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court for good cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's nonprobate transfers to others are not excluded from the augmented estate for the purpose of computing the elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

HOW IS THE ELECTIVE SHARE DETERMINED?

After notice and hearing, the court (the Kansas District Court located in the county in which the decedent was a resident at the time of death) shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate. If it appears that a fund or property included in the augmented estate has not come into possession of the personal representative, or has been distributed by the personal representative, the court shall nevertheless fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than such person would have been had relief been secured against all persons subject to contribution.

An order or judgment of the court may be enforced by the surviving spouse, as necessary, to obtain contribution or payment in other courts of this state or other jurisdictions (may be difficult to acquire jurisdiction and control over individuals and property outside the state of Kansas). The decedent's personal representative shall not be required to enforce contributions from the assets of the reclaimable estate.

RECLAIMABLE ESTATE!!!

Recipients of nonprobate transfers are thus liable to make a proportionate contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective -share

amount. **The decedent giveth and the spousal election taketh away!** This is when heads will roll and the unsuspecting recipients of nonprobate transfers affected by this legal "now you see it, now you don't", will demand to know why the decedent's planning regarding nonprobate transfers fouled up. It would appear that there could be potential liability for some or all involved in the planning and titling processes. (as with all potential plaintiff's lawsuits, probably anyone with a deep pocket should be concerned)

THIS ELECTION MUST BE MADE IF THE SURVIVING SPOUSE IS
INCAPACITATED.

If the surviving spouse shall is an incapacitated person, it shall be the duty of the court to appoint some suitable person as commissioner, who shall ascertain the value of the provision made by will in lieu of the rights in the estate secured by statute and the value of the rights secured by statute. The commissioner shall make his or her verified written report to the court. Notice of time and place of the hearing of the petition for appointment of a commissioner and of the hearing on the commissioner's report shall be given to the surviving spouse and his or her conservator, if any, and all other persons interested in such manner and for such length of time as the court shall direct. After the hearing on the report the court shall make such election for such spouse under disability as is more advantageous to the spouse, which election shall be deemed as effectual as if made by the spouse when fully competent.

DO THE HOMESTEAD AND FAMILY ALLOWANCES
STILL EXIST IN ADDITION TO THE SPOUSAL
ELECTIVE-SHARE AND SUPPLEMENTAL ELECTIVE SHARE?

YES.

A homestead to the extent of 160 acres of land lying without, or one acre lying within, the limits of an incorporated city, or a manufactured home or mobile home, occupied by the decedent and family, at the time of the owner's death, as a residence, and continued to be so occupied by the surviving spouse and children, after such death, together with all the improvements on the same, shall be wholly exempt from distribution under any of the laws of this state, and from the payment of the debts of the decedent, but it shall not be exempt from sale for taxes thereon, or for the payment of obligations contracted for the purchase thereof, or for the erection of improvements thereon, or for the payment of any lien given thereon by the joint consent of husband and wife. The title to the homestead property of a decedent shall pass the same as the title to other property of the decedent.

What about basic family allowances to spouse and minor children?
(These are in addition to the elective share.)

When a resident of the state dies, testate or intestate, the surviving spouse shall be allowed, for the benefit of such spouse and the decedent's minor children during the period of their minority, from the personal or real property of which the decedent was possessed or to which the decedent was entitled at the time of death, the following:

(a) The wearing apparel, family library, pictures, musical instruments, furniture and household goods, utensils and implements used in the home, one automobile, and provisions and fuel on hand necessary for the support of the spouse and minor children for one year.

(b) A reasonable allowance of not more than \$25,000 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.

The property shall not be liable for the payment of any of decedent's debts or other demands against the decedent's estate, except liens thereon existing at the time of the decedent's death. If there are no minor children, the property shall belong to the spouse; if there are minor children and no spouse, it shall belong to the minor children. The selection shall be made by the spouse, if living, otherwise by the guardian of the minor children. In case any of the decedent's minor children are not living with the surviving spouse, the court may make such division as the court deems equitable.

PRIORITY FOR APPLICATION OF ASSETS FROM AUGMENTED ESTATE TO SATISFY THE ELECTIVE-SHARE AND SUPPLEMENTAL ELECTIVE-SHARE

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 which pass or have passed to the surviving spouse;

(2) amounts included in the augmented estate which would have passed to the spouse but were disclaimed and which will pass to the issue of the surviving spouse, who are not the issue of the decedent;

(3) amounts included in the augmented estate up to the applicable percentage thereof. The "applicable percentage" is twice the elective-share percentage set forth above as been determined appropriate to the length of time the spouse and the decedent were married to each other; and

(4) the value of any real estate recovered. (The surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing, or by a will, or by an election as provided by law to take under a will, except such real estate as has been sold on execution or judicial sale, or taken by other legal proceeding: Provided, That the surviving spouse shall not be entitled to any interest under the provisions of this section in any real estate of which such decedent in his or her lifetime made a conveyance, when such spouse at the time of the conveyance was not a resident of this state and never had been during the existence of the marriage relation.)

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.

RIGHT TO RECLAIM PROPERTY TRANSFERRED TO OTHERS
WITHIN 2 YEARS OF THE DATE OF DEATH
IF ELECTIVE SHARE NOT SATISFIED AFTER RECLAIMING
PROPERTY TRANSFERRED TO OTHERS AFTER DEATH

If, 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 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.

FROM WHOM CAN PROPERTY BE RECLAIMED?

The original recipients of the decedent's nonprobate transfers to others, and the donees (this means the recipient of the property and the persons or persons to whom they may give the property) of the recipients of the decedent's nonprobate transfers to others to the extent the donees have the property or the property's proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfer to such person or to pay the value of the amount for which such person is liable. (This would not include good-faith purchasers of the property.)

THIRD PARTIES WHO TRANSFER PROPERTY WITH A GOOD FAITH
RELIANCE ON THE GOVERNING INSTRUMENT
NOT LIABLE IF TRANSFER DONE BEFORE RECEIPT OF A WRITTEN
NOTICE OF THE EXERCISE OF THE ELECTIVE-SHARE

Although a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other

actions taken after the payor or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

HOW IS NOTICE OF THE ELECTION TO BE DELIVERED TO THOSE WHO MAY CLAIM AN INTEREST IN ANY OF THE PROPERTY SUBJECT TO THE ELECTIVE SHARE?

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. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedent's estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination, shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time, or, if filed, the demand for elective-share is withdrawn, the court shall order disbursement to the designated beneficiary. Payments or transfers to the court or deposits made to the court discharge the payor or other third party from all claims for value of amounts so paid or the value of property so transferred or deposited.

Upon petition to the district court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with chapter 59 of the Kansas Statutes Annotated, and amendments thereto.

WHAT IS NECESSARY TO CONSENT TO TRANSFERS AND WAIVE RIGHTS?

(a) The right of election of a surviving spouse and the rights of the surviving spouse to either the homestead or the family allowance, or both of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, consent to any instrument, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) The surviving spouse did not execute the waiver voluntarily; or

(2) the waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:

(A) Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(C) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to such spouse from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

ARE EXISTING ACCOUNTS AND PLANNING IN PLACE AS OF JANUARY 1, 1995 "GRANDFATHERED" IN, OR IS IT NECESSARY TO MODIFY PLANNING THAT MAY ALREADY BE IN PLACE?

NO.

The new law provides that it applies all existing plans, assets, and interests in property, and that none are "grandfathered" in under the changes, with the exception that "Any act done in any proceeding or any irrevocably accrued right acquired, before the effective date of the new law, which is January 1, 1995."

Chances are, then, that even if you have planning in place that includes a spousal consent, that the consent which has been signed is not far reaching enough and may not be sufficient to wave all spousal rights and prevent the spousal elective share from being the controlling factor, rather than your own intent. It is very important that you have the planning you may have in place reviewed and additional and new consents and waivers signed, if determined necessary.