Beyond Moribund: The Case for Repeal of K.S.A. 59-505

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> *"Dower: An ancient, archaic, common-law interest created to protect helpless women."*[1]

> K.S.A. 59-505 provides in pertinent part as follows:

> [T]he 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. 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 such decedent's 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 spouse's entitlement under this section shall be included as part of the surviving spouse's property under K.S.A. 59-6a207, and amendments thereto.[2]

K.S.A. 59-505 (below, sometimes just "59-505") is an anachronistic, hidebound law enacted in 1939 that has endured to this day.[3] It was retained in the law even following the passage of the Kansas Spousal Elective Share Act (the "Act") in 1994, which was taken from the 1990 version of the elective share law embodied in the Uniform Probate Code.[4] The only change made to 59-505 occurred in 1996, with the addition of the last sentence.[5] That sentence did not diminish the primary import of the statute; it in effect simply reduced the amount of the elective share that a surviving spouse would be otherwise entitled to by the amount the surviving spouse was able to recover thereunder. The Act itself revolutionized the entire nature and degree of statutory spousal survivorship rights in Kansas. At the time of 59-505's passage up to the passage of the Act more than five decades later, the surviving spouse, by "electing against the will," was entitled to a forced inheritance of one-half of the probate estate, which was the same intestate share a surviving spouse would receive when the deceased spouse also left at least one surviving descendant, thereby relinquishing all property the surviving spouse was otherwise entitled to under the will of the predeceased spouse.[6] Being strictly mechanical in nature, in establishing the survivorship amount, this prior spousal right did not consider such equitable factors as the length of the marriage, the value of the property the surviving spouse owned at the time of the predeceased spouse's death, and the value of the property the surviving spouse received as a result of the death of the predeceased spouse, whether under the probate estate or through non-probate transfers. Before the enactment of the Act, despite its literal wording, this prior right had been extended by the courts to assets held in revocable trusts and IRAs.[7] It did not consider any lifetime property transfers of the predeceased spouse, even with respect to transfers in the immediacy of death.[8] This right was in addition to the spousal rights to real property under 59-505, unless a surviving spouse had waived this right before the predeceased spouse's death or had otherwise consented to the provisions of the predeceased spouse's estate plan.

As opposed to prior law, the Act much more equitably determines a surviving spouse's elective share right to the predeceased spouse's property by factoring in the foregoing previously unconsidered factors in the elective share amount.[9] Conceptually speaking, the Act provides for a maximum percentage right of 50% of all subject property of both spouses, however received or already possessed, at the time of the predeceased spouse's death (the "augmented estate").[10] The Act also, with limited exceptions, covers property that the predeceased spouse transferred within two years of death.[11] The longer the marriage, the greater the percentage that the surviving spouse can elect to receive.[12] The maximum elective share percentage of 50% is reached upon the couple having been married for at least 15 years.[13]

As thoroughly discussed elsewhere, unless duly waived under Kansas law, in addition to including a spousal support element by providing for a minimum amount for a surviving spouse even if the elective share would otherwise be zero, the Act incorporates a partnership theory of marriage, acknowledging the contributions each spouse makes to the marriage and the marital estate by, in essence, fully phasing in the equal ownership of an all spousal property concept for elective share purposes after 15 years of marriage.[14] The minimum "support allowance" of $50,000 in the Act is augmented by any spousal allowance to which the surviving spouse would be statutorily entitled under Kansas probate law.

The complex nature of determining the actual amount of the spousal elective share under the Act is well beyond the scope of this Article. The reader is best referred to a prior Journal article on the Act published not long after its enactment.[15] Nonetheless, as elaborated upon below, because of such foregoing equitable factors coming into play, the elective share amount in the vast majority of situations is not only greatly reduced from its potential maximum 50% amount of the augmented estate, but is also in the majority of situations, even in the absence of a waiver, actually zero. Moreover, under the Act, as there is no required alternative election under it to "take under the will," such rights are in addition to any rights under 59-505, albeit amounts recoverable thereunder correspondingly reduce any amounts otherwise allowable.

The discussion that follows analyzes the purpose of 59-505, the problems it poses, its inequities, its failure to have a cogent purpose following the passage of the Act, and its inconsistency both with the purpose and principles of the Act and with Kansas being a separate property law state. Before delving into this discussion, it is important to point out that even with a repeal of 59-505, a surviving spouse's homestead rights would remain protected both statutorily (under K.S.A. 60-2301) and constitutionally.[16] 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 prohibits its alienation by a married person without the consent of a spouse.[17] K.S.A. 60-2301 statutorily codifies this constitutional provision.[18] Consequently, repealing 59-505 would not remove the constitutional and statutory protection of spouses with respect to homestead property. Thus, even if 59-505 is repealed, spousal consent will remain obligatory for one spouse to be able to convey homestead property free of the other spouse's constitutional and statutory homestead rights.

Analysis and Discussion

Apparently, when the Act was proposed, it was decided it would appear without much forethought, that all that was needed to reconcile 59-505 with the provisions of the Act was to provide for an offset against the elective share amount for amounts recovered under 59-505. But reflection ▶

and experience have shown that the Act itself rendered the retention of 59-505 unnecessary, inequitable, and its retention inapposite with the Act's objectives. For reasons more fully enunciated below, the author and many other attorneys have concluded that it should not be retained in Kansas. The KBA Real Estate, Probate and Trust Section, the KBA Title Standards Committee, the KBA Legislative Committee, and the KBA Board of Governors have all called for its repeal.

Purpose of 59-505 Rendered Moot with the Passage of the Act

The spousal inheritance right to real property that 59-505 was designed to protect ceased to exist immediately with the passage of the Act. Unlike the Act, outside of this statute relating solely to real property conveyances, prior law provided little to no protection or redress for a surviving spouse with respect to property passing through beneficiary designations or other types of property conveyed by a predeceased spouse without such surviving spouse's consent, thereby substantially vitiating the efficacy in a high percentage of circumstances a surviving spouse's election against the will with respect to such property.[19] Absent a spousal consent, 59-505 in effect statutorily ensured such real property was either in the probate estate of the predeceased spouse subject to a surviving spouse's election against the will to receive one-half of all probate property, including real property, or preserved the surviving spouse's right to recover one-half of real property disposed of without the surviving spouse's consent.[20] Consequently, such erstwhile survivorship right was afforded some protection by 59-505, but only regarding real property.

By the time of the passage of the Act, however, the primarily rural and agrarian economy that was the environs when 59-505 was enacted had long since departed the Kansas landscape.[21] When 59-505 was enacted, a much larger amount of marital wealth was in real property, and a very substantial amount of that was agricultural in nature.[22] Consequently, the aforementioned focus of 59-505, as with dower or dower-like rights in general, at that time was primarily on precluding husbands from transferring real estate away without the consent of their wives, thereby otherwise avoiding the inheritance right the surviving spouse would have otherwise had under Kansas law had the real property been retained, either with respect to a one-half share by electing against the will or at least a one-half share of an intestate estate.

The desire to protect wives from a husband's transfer of real property without their consent is itself an antediluvian vestige of English common law dower rights, which originated in the Middle Ages.[23] Dower rights, which are generally defined as real property rights of a surviving spouse in the property of a deceased spouse, are referenced in the Magna Carta.[24] They originated at a time when land could not be owned by women. The clear purpose of dower rights was to ensure that wives would not be left impoverished by their husbands' transfer of real property.[25] Dower common law rights were rights reposed in wives who survive their husbands to the income for life in one-third of the real property of their deceased husbands.[26] Of more recent vintage, in order to avoid equal protection challenges, many states that still had dower statutes modified them to encompass transfers of real property and survivorship rights by either spouse.[27]

> But reflection and experience have shown that the Act itself rendered the retention of 59-505 unnecessary, inequitable, and its retention inapposite with the Act's objectives.

Kansas is termed by the author as having a "dower-like" statute in that surviving spouses under 59-505 are given a right only in the real property of a predeceased spouse transferred without the requisite consent of the surviving spouse.[28] As noted above, when 59-505 was passed and for the subsequent 55 years up to the passage of the Act, a surviving spouse was not entitled to a specific interest in a predeceased spouse's real property, but could "elect against the will" of a predeceased spouse to which there was no consent and take one-half of the entire probate estate of the deceased spouse, including both real and personal probate property.

The frequency of a surviving spouse being left impoverished in the absence of protective statutes in modern society has become increasingly rare. The vast majority of surviving spouses are in the labor force or retired, receiving Social Security as well as IRA and qualified retirement benefits. Surviving spouses also are typically in receipt of joint tenancy property or other property as a spousal beneficiary, including IRAs, qualified retirement plan benefits and life insurance. Also, the vast majority of potential elective share claims would be expected to involve surviving spouses owning more than an insignificant amount of property in their own right, particularly in second marriages.

The Act provides a comprehensive, modern, inclusive, gender neutral, and equitable way to determine spousal elective share rights. Because it is comprehensive, it also provides much greater assurance than did prior law that a surviving spouse would not be left impoverished by providing for a minimum amount of $50,000 as a spousal allowance under the Act.[29] At the same time, it also more equitably provides from a marital partnership theory perspective the amount of the augmented estate of both spouses to which the surviving spouse is entitled. In the vast majority of situations, this minimum amount would be exceeded by the elective share itself because of consideration of the portion of the total augmented estate already held by the surviving spouse and testate and non-testate property of the predeceased spouse that passes to the surviving spouse. The Act is thus more than adequate to protect a surviving spouse from impoverishment. As such, the singular issue involving spousal impoverishment under the Act should only be regarding the appropriate level of such minimum amount.

With the vast amount of wealth no longer being held in real property, but rather in tangible and intangible personal property, and the avoidance of spousal impoverishment not being otherwise justified as a rationale for their retention, plus the passage of more comprehensive elective share rights such as the Act, dower rights themselves have been statutorily discarded in all but a few states that once had them either as common law or statute, including Kansas.[30] There is no shortage of articles disparaging their retention in the law.[31] For these reasons and others addressed below, Kansas' continued retention of 59-505 to protect a spousal survivorship right that is only applicable to real property is similarly lacking in merit.

59-505 Can Be Circumvented, or "Trap" for Unwary

It is important to acknowledge prior to further discussion that, as was the case under prior elective share law, any spousal survivorship rights 59-505 might legitimately provide are quite tenuous. As the statute only applies to spousal transfers of real property, it does not require the consent of a spouse for conveyances of real property from a revocable trust, even ostensibly by a spouse serving as sole trustee of his or her revocable trust. The spouse's consent appears to only be required for the initial transfer into the trust. Similarly, it should not apply to conveyances of real property from a partnership or limited liability company ("LLC") funded by a spouse. Revocable trusts are now the principal estate planning instrument employed by estate planning attorneys.[32] This increases the ease of grantors transferring property from ▶

spousal claims under 59-505. As for an LLC, the transfer of an interest therein is a transfer of personal property, not of real property, even if the LLC owns real property. Therefore, 59-505 provides no protection to spouses against transfers of real estate out of LLCs or any other entity.

The same types of basic estate planning transfers that can be utilized as a means of circumventing 59-505 and which are routinely utilized in estate planning also can be a "trap" for the unwary that can result in transfers coming within its ambit, i.e., non-consented spousal transfers of real property to revocable or irrevocable trusts, LLCs, corporations, and partnerships (both general and limited).

Creates an Unjustifiable Distinction Between Real and Personal Property

At its core, K.S.A. 59-505 creates an arbitrary spousal survivorship right solely with respect to real property but not personal property. No transfer of any personal property, including ownership interests in an entity which owns real property (as noted above) has a similar spousal consent requirement. This is particularly significant as wealth held in the population has massively shifted during the duration of the statute from outright ownership of real property to tangible and intangible personal property, not the least of which is related to the holding of real property in business entities such as LLCs.

Based upon a review of several studies applying different aspects of wealth consisting of real property, the author has concluded that the percentage of wealth held in real property in the United States outside of a personal residence is less than 10%.[33] Because Kansas over a long period of time, although in the bottom quarter of urbanized states, is nonetheless approximately 75% urbanized in its land holdings, the author submits it would appear reasonable to conclude that such a percentage in Kansas would at best only approach and not exceed the national average.[34] That means that any justifiable protection afforded by 59-505, when balanced against its detriments, is only afforded to a very small percentage of the wealth held by Kansas residents, and correspondingly only to a very small percentage of Kansas residents.

In short, the exposure to the detriments of 59-505 caused by its retention are borne by all Kansas citizens, with any benefits thereof redounding upon only a very small percentage of the population.

Results in Inequitable Spousal Recoveries

In most circumstances, the successful application of 59-505 to unconsented real property transfers will result in a surviving spouse unfairly receiving an increased survivorship share. This is largely the result of a surviving spouse no longer having to "elect against the will" to be entitled to an elective share under the Act. Thus, a surviving spouse is entitled to a subject real property interest irrespective of any benefits of the surviving spouse under the Act. As noted above, the right under the Act to a spousal elective share of one-half of the total augmented estate only gradually vests in a surviving spouse, not becoming fully vested until the marriage is at least of 15 years duration.[35]

Further, as previously noted, the right under the Act to one-half of the "augmented estate" is reduced by a statutory formula. This formula not only takes into account the surviving spouse's portion of the "augmented estate" at the time of the predeceased spouse's death, but also all property the surviving spouse receives as a result of the predeceased spouse's death, whether by testamentary or non-probate transfers.[36] Consequently, the elective share amount seldom approaches 50% of the predeceased spouse's property constituting a portion of the augmented estate. Indeed, in more than half of such situations, the elective share is reduced to zero because of these factors. Even if the marriage is of a 15-year duration, for the surviving spouse's elective share amount to even approach 50% of the predeceased spouse's portion of the augmented estate, the surviving spouse would have to otherwise not be receiving any portion of the augmented estate of the predeceased spouse by virtue of their death and the portion of the augmented estate upon the predeceased spouse's death of the surviving spouse would have to be essentially zero. Obviously, that would seldom be the case.

In short, the Act itself comprehensively and equitably determines the amount to which a surviving spouse is entitled regarding the assets of a predeceased spouse. Therefore, any additional amount a surviving spouse would be entitled to under 59-505 would have to be considered an inequitable "windfall."

Under 59-505, the right to 50% of non-consensually conveyed real property exists irrespective of the length of the marriage or of the other factors considered under the Act. Although the Act, in essence, gives a credit for a recoverable claim under 59-505, a claim under 59-505 cannot be offset under the Act to the extent it would exceed an amount the surviving spouse would otherwise be entitled to under the Act. As noted above, there would be an inability to offset such a 59-505 recovery in the majority of situations, for such a claim would typically far exceed the amount the surviving spouse was entitled to otherwise take under the Act.

It is also important to point out that the surviving spouse is not only entitled to a 50% interest in all real property conveyed by the predeceased spouse without the surviving spouse's consent, but as the statute can also be interpreted to apply to all real property disposed of by will, or revocable trust by a "transfer on death" beneficiary designation without the surviving spouse's consent, a non-consenting surviving spouse could incongruously be inequitably entitled to 50% of any such real property dispositions, whether occurring during lifetime or upon death, irrespective of what would otherwise be the surviving spouse's elective share of the predeceased spouse's estate under the Act. Coupled with the aspect that 59-505 is an independent right that appears to have no apparent statute of limitations (discussed infra), one could conceive of a situation in which a surviving spouse files for the elective share under the Act and subsequently under 59-505 with respect to real property conveyances considered to be within its ambit. In fact, the author was made aware of just such a situation addressed infra.

This inequity in spousal survivorship rights under 59-505 is compounded by the fact that 59-505 provides no offset for sales at fair market value of real property by a predeceased spouse, which one would expect to be present in a very high percentage of real property transfers by a predeceased spouse. Thus, in the event any fair market value sale of real property occurred without the surviving spouse's consent, the grantor spouse's estate (and the surviving spouse's elective share under the Act) would not have been disadvantaged from an economic standpoint by such conveyance at its fair market value, yet the surviving spouse would nonetheless be entitled to a "windfall" beyond that provided under the Act by an additional legal right to half of previously transferred real property. That is not only inequitable with respect to the size of the surviving spouse's right under 59-505, but also regarding an innocent purchasing party and his or her successors in interest.

Similar inequitable consequences could also occur if the predeceased spouse had conveyed real estate to an entity for family estate planning or commercial purposes, such as in the formation of a corporation, partnership, or limited liability company 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 under the Act, yet the surviving spouse could nonetheless additionally inequitably claim a one-half interest in real property conveyed to the entity. The potential collateral disruptive aspects of such a claim to other third-party owners in the entity are equally apparent.

In any event, to the extent this statute could or would be so construed as to provide a special right to all real property of the predeceased spouse, whenever held, and even when brought into the marriage, not accorded to any other type of property, a total cumulative survivorship economic benefit in a surviving spouse far in excess of that accorded under the Act could result simply because the predeceased spouse held real property in his or her name during the marriage that was either held until disposed of other than to a surviving spouse at death or conveyed without the consent of the surviving spouse during the marriage.

In sum, there is little question but that with the passage of the Act, K.S.A. 59-505 was transformed into a punitive provision having no legitimate purpose, and 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, be it during lifetime or at death — a much greater cumulative spousal survivorship right than the surviving spouse would have had under the Act in the absence of such conveyance. This not only contravenes the purpose of the Act, but also results in significant collateral damage impacting transferees, including innocent purchasers of such property, lenders, or third-party owners of business entities to which such real property may have been contributed.

Problems Compounded by Common Law Marriages

K.S.A. 59-505 is a particularly nettlesome problem in Kansas, being one of a small minority of states that continues to recognize common law marriages.[37] Because what constitutes a common law marriage is poorly understood by the general public, and its requisite legal elements can be of a somewhat nebulous nature in application — as attested to by the numerous judicial decisions involving their interpretation — individuals who might be judicially considered to have a common law marriage often do not even consider themselves as such and thereby may convey real property as single individuals.[38] Consequently, any real property conveyed by an individual as a single person is potentially subject to a subsequent claim by an alleged "common law spouse" upon the death of the grantor. This means conveyances of real property by an individual in a relationship who considers himself or herself to be "single" may nonetheless be subjected to an economically costly common law marriage claim that is easy to bring and frequently lacking in merit, which can have a substantial impact upon the intended devolution of the estate.

Creates Title Problems

In addition to problems resulting from common law marriages, title defects can appear in many other situations, with this statute being one of the most frequent causes of title problems. These problems can occur intentionally or inadvertently. A person may represent himself or herself as a single person in a real estate conveyance, or when borrowing from a third-party lender to whom a mortgage is granted, simply to avoid having to procure a spousal consent. It also may occur where a deed or mortgage inadvertently fails to ▶

indicate the marital status of the grantor or borrower.[39] One such situation of which the author is aware resulted in a $40,000 title insurance claim because the title company had failed to check the marital status of a prior grantor in the chain of title.

There also can be evidentiary difficulties in proving that the spouse of the grantor was not residing in Kansas at the time of the real property conveyance such that the subject conveyance does not fall within 59-505.[40] Title insurance companies may therefore require an out-of-state spouse's signature on the conveyance document even though 59-505 technically does not apply. Finally, evidentiary problems can also arise if the legal representative of a non-owner spouse contests the legal capacity of such spouse to give a valid consent to a real property transfer even in circumstances where the conveyance document was signed by the non-owner spouse.

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Can Result 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-consenting spouse is legally disabled and therefore unable to join in a spousal conveyance. If (as frequently happens) the non-owner spouse fails to sign a comprehensive durable power of attorney, 59-505 could preclude a real property sale by the owning spouse or such spouse's conveyance of real property to a revocable trust for estate planning purposes or arguably even a severance of an equal joint tenancy interest. As many elder law attorneys are acutely aware, this consent requirement can also unreasonably impede legitimate Medicaid estate planning for a couple.

Poses Unreasonable Obstacles to Real Property Sales in Discordant Marital Situations

As a large number of business and real property attorneys have unfortunately experienced, in situations where there is marital discord or the spouses are estranged, 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 unilaterally block the sale for any reason and refuse to give written consent to it. A corollary problem, as noted above, is the problem of a spouse signing a real property conveyance as a single person simply because such spouse simply did not want to risk a spousal objection.

No Apparent Statute of Limitations

Unlike spousal rights claims under the Act, there is no apparent statute of limitations prescribed under 59-505. This potentially subjects real property conveyed without the consent of a spouse to spousal claims for an indefinite period following a predeceased spouse's death, far beyond claims that must be timely presented by a surviving spouse under the Act.[41] Defending a claim under 59-505 would involve asserting that such a limitation impliedly falls within the Act's statute of limitation because of a recovery thereunder being affected by any such recoverable property or because of its provisions falling under the probate code. Perhaps there is no statute of limitations prescribed or applicable because of a surviving spouse thereby having an immediate inchoate one-half interest in such real property under the statute vesting upon the non-consenting spouse surviving the death of the predeceased spouse.

If there is no statute of limitations, one can envisage a surviving spouse bringing an elective share claim under the Act and subsequently seeking further rights at a later date under 59-505 for additional property at a time when it is too late for such a claim to factor against the prior elective share claim previously allowed under the Act.

Uniform Laws Commissioners Did Not Include Such Right

Kansas has not adopted the entire Uniform Probate Code, but it did adopt the UPC's elective share regime as the Act. In this regime, K.S.A. 59-6a205(c) — the equivalent to UPC § 2-205(3) — provides that, in certain circumstances, a surviving spouse, in determining the amount of their elective share, may consider property transferred by the deceased spouse within two years of their death.[42]

Its provisions were well-reasoned and fully vetted by the Uniform Laws Commissioners. Thus, probative among 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 favor of the retention of 59-505 is to prevent conveyance of real property in anticipation of death to avoid a spousal claim, as noted above, the Act already brings within its grasp most donative transfers of property transferred within two years of death, not being strictly limited to real property. The commissioners eschewed a plenary application to all spousal transfers during the marriage, determining that including only certain transfers within two years of death was a sufficient period to snare in its grasp most conveyances in anticipation of death, likely for the purpose of avoiding a post-death spousal claim.

K.S.A. 59-505 thus stands in sharp contrast to the principles of the Uniform Laws Commissioners and those embodied in the Act. It incongruously provides for an additional survivorship right with respect to all transfers of real property without the consent of a spouse, irrespective of when made or for what purpose, including transfers for full consideration.

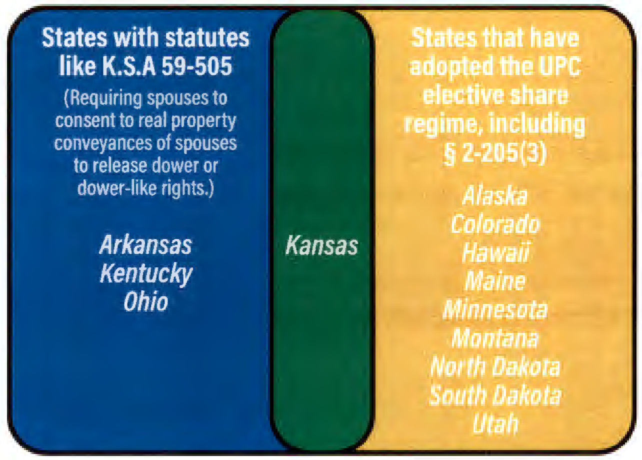
Inapposite with Separate Property Principles and Rationale for Spousal Survivorship Rights

There are only two intelligible purposes that have been articulated for statutorily providing post-death spousal survivorship rights in non-community property states like Kansas with respect to the property interests of a predeceased spouse: spousal support and ensuring a surviving spouse is entitled to an equitable claim of the predeceased spouse's estate by virtue of their marriage. The former purpose, which was historically primal, is to ensure the surviving spouse is not left impoverished and a possible burden to the state.[43] The latter, such as incorporated in the Act, is of more modern development. As discussed herein and elsewhere, in addition to including a spousal support element in providing for a minimum allowance amount for a surviving spouse, even if the surviving spouse's share of the augmented estate was otherwise zero, the Act incorporates a partnership theory to the elective share, recognizing the contributions, material and otherwise, that each spouse brings to the marriage.[44] This manifests, at its essence, by phasing in an equal ownership of the augmented estates of both spouses in a marriage of 15 years duration, so as to ensure that the surviving spouse receives, or already possesses, at least a 50% interest in the augmented estate of both spouses under the estate plan of the deceased spouse or an elective share interest of the predeceased spouse's estate necessary to achieve this interest level.

Following passage of the Act, K.S.A. 59-505 had no conceivable connection to either foregoing purpose. It arbitrarily singles out only real property transfers, protecting against one spouse transferring any real estate that could defeat or reduce the inchoate spousal elective share right of a surviving spouse that is no longer extant under the Act, i.e., a right to elect against the will and take half of a predeceased spouse's real estate and all other assets of the predeceased spouse's estate.

Inconsistent with Laws of Other States

Of the 10 states that have adopted the 1990 elective share provisions of the Uniform Probate Code, Kansas stands alone



in having any statute requiring a written spousal consent in order for a real property conveyance to divest an otherwise spousal survivorship interest.[45] Our neighboring separate property state of Colorado adopted the UPC in the 1970s, and following its adoption of the 1990 Uniform Commissioners' version of the elective share law in the UPC, repealed a statute resembling 59-505 almost three decades ago in 1994.[46] Another contiguous separate property state, Oklahoma, although having spousal survivorship rights unrelated to those in the UPC, nonetheless does not require a non-owner spouse to join in a conveyance of real property that is not the homestead.[47]

There is good reason that the vast majority of states have repealed dower rights in favor of more gender neutral, more comprehensive, and more equitable approaches to spousal survivorship rights, such as that found in the UPC. A simple Venn diagram illustrates the states that have enacted the UPC elective share provisions and those that have statutes similar to 59-505.[48] Kansas stands alone as the singular state that has enacted the UPC elective share provisions and yet retained a similar dower-like statutory provision. In point of fact, there are only a very small minority of states that still have dower or dower-like statutes like Kansas.

The reason for such almost total abolition of dower throughout the states is that, as opposed to marital property states, the essence of separate property laws is the belief that each spouse should be free to dispose of his or her separate property in any manner of their choosing without the consent of their spouse, and that precluding spousal transfers of real property without a spousal consent constitutes an unreasonable and economically damaging restraint on alienation of property.[49] K.S.A. 59-505 even applies to transfers of real property brought into the marriage or received during the marriage by inheritance, a marital interest not even accorded spouses in community property states.

There are a mere three states left reposing actual dower rights in a surviving spouse: Arkansas, Ohio, and Kentucky are regularly listed as still having such rights.[50] All other states who previously reposed such rights in a spouse have repealed them, in whole or in part. The Act, in conjunction with the Kansas spousal allowance statute, ensures that a surviving spouse will not be impoverished, irrespective of whether the augmented estate consists primarily of personal or real property without the unquestionably problematic, costly, and inequitable consequences of the retention of 59-505. Thus, the Act can and should stand alone in fully securing both an appropriate guaranteed level of spousal support as well as the appropriate amount of spousal survivorship rights resulting from the marriage and thus only target lifetime transfers, whether of personal property or real estate, likely intended to defeat spousal survivorship rights provided under the Act. In that regard, as noted above and infra, the "two-year transfer period" prior to death in the Act was determined by the Uniform Laws Commissioners to sufficiently address the vast majority of pre-death transfers intended to defeat such rights.

Illustrative Scenarios

The author has experienced matters illustrative of the foregoing adverse consequences of the retention of 59-505 after the Act's passage. They have included estate plans in which during an asserted marriage relationship, individuals conveyed large parcels of farmland to limited partnerships for estate planning purposes only to face both claims under the Act coupled with 59-505 claims on all real property transfers to the limited partnership without the surviving spouse's consent, notwithstanding that the retained limited partnership interests were in the predeceased spouse's augmented estate. There has even been a common law marriage claim before a formal marriage seeking to increase the duration of the marriage and consequently the amount of the elective share with little substantive evidence in support thereof. Such litigation can be quite expensive irrespective of its merits.

Relating to the author's noting that 59-505 poses problems in not having a delineated statute of limitations, the author is also made aware of a situation in Wichita in which a surviving spouse made an elective share claim, and once that was fully satisfied made an additional 59-505 claim against an entire section of real property previously conveyed by her deceased spouse, in essence doubling up on both claims.

Rationales Expressed for Its Retention

The opposition to the repeal of 59-505 has come from various perspectives. A statute that has been "on the books" as long as it has — in this case for the better part of a century — has its own kind of inertia that realistically, but unfortunately, makes it overly resistant to an objective review of its continued retention and metaphorically often "dons a cloak" of intransigence, placing the burden on proponents of repeal that the statute has deleterious or burdensome consequences rather than having a cynosure on whether it has sufficient benefits meriting its retention. That is why the author termed the 83-year-old statute "hidebound." For example, some opponents of repeal argue that 59-505 poses no significant problems as title insurance companies will demand a spouse's signature in conveyances of real property by a married person.[51] This is basically a "no harm, no foul" argument that avoids an objective determination of the statute's underlying merit. Such an argument has no application to inter vivos conveyances, private sales, or gifting situations not involving the purchase of title insurance. Nor does this objection articulate public policy objectives served by its continuing retention. Further, the objection is inconsistent with separate property concepts, dismissive of the foregoing problems it poses when spouses refuse to consent to conveyances, problems posed by common law marriages, problems presented when deeds do not include a spousal consent or state marital status, by the statute's lack of a statute of limitations, and by the patent inequities its application poses in conjunction with the Act.

Senate Bill 395, sponsored by the Kansas Bar Association, sought the repeal of 59-505 in 2012.[52] Despite having previously passed the Senate on a 40-0 vote, it failed to pass the House Judiciary Committee.[53] The committee may have been influenced by objections expressed by some attorneys to the repeal of 59-505. Consequently, the author would be remiss if such adverse opinions were not addressed in some detail.

First, it was argued that 59-505 is useful when clients gift real property to their children and their spouses. According to this argument, such gifts, in addition to removing property from their taxable estate using the annual federal gift tax exclusion for both the child and in-law, gives comfort to clients that the spouses of their children who are additional recipients of such transfers will be unable to sell or validly convey such gifted real property free of a possible 59-505 claim without their child's consent. But such a risk would have to be objectively considered as quite remote. The risk is especially remote with regard to a sale. Notably, a sale of such interest by an in-law would involve a relatively unmarketable tenancy in common interest that few purchasers would welcome absent a deep valuation discount. Further, the recipient in-law would have to know his or her spouse would likely learn quickly of a subsequent owner's interest in his or her property. Further, using that technique also means the donee child is likewise constricted from making any subsequent transfer without their spouse's consent.

This rationale for keeping 59-505 lacks merit for other reasons. First, from a practical standpoint, gifting to children or any other donee for estate tax planning reasons has become quite uncommon in recent years. This is because the applicable estate tax exemption since 2012 has continued to remain quite high (currently being approximately $13 million) from a historical perspective and is likely to remain so for the foreseeable future.[54] Consequently, only a very small percentage of the population has a taxable estate.

Second, irrespective of the size of the estate, estate planning attorneys should advise clients to consider eschewing outright transfers of property, including real property, to their descendants. This advice is particularly sound regarding gifts of real property to a child and an in-law. Whether the gift is as tenants in common or joint tenancy, an in-law recipient of such a transfer immediately becomes the current owner of half of the gifted property (unless the conveyance, rather uncommonly, provides for unequal ownership), clearly favoring the in-law in the event of a marital property division in a divorce.[55] It also exposes the donated property to the claims of creditors of both spouses.

The author is aware of a situation in which a parent transferred a large parcel of real property to a child and the child's spouse only to have the entire gifted real property set aside to an in-law in a subsequent divorce. The author submits that the risk and impact of a subsequent divorce between a donee child and the child's spouse or a creditor attaching the couple's gifted property significantly outweighs any risk that an in-law spouse will convey his or her tenancy in common interest without the consent of the donor's child.

A far more prudent estate planning strategy is to transfer real property in trust for descendants. In a properly drafted trust, a descendant may serve as sole trustee thereof in its management, distribution, and sale without giving an in-law an interest therein, or claim to, such real property in the event of a divorce. Such trusts can be structured to qualify gifts thereto for the annual gift tax exclusion for both the donor's child and spouse and are normally far more desirable from numerous estate planning, management of property, asset protection, and tax-savings perspectives than are outright transfers of property. The author cannot recall a single client making significant transfers of real property outright to descendants when advised of the foregoing risks and alternative strategies.

Another much more prudent strategy would be to place farm real property in an LLC with transfer restrictions and then gift a portion of such interests, perhaps just non-voting interests, to a child and in-law. Such interests would not only be immune from further transfers without the consent of other LLC members, but highly resistant to creditor claims against either as well.

It has also been said that the unintended consequences of the repeal of 59-505 would be "catastrophic" to agricultural estate planning.[56] The author respectfully submits that the repeal of 59-505 unequivocally poses no palpable impediment to the use of prudent estate planning techniques. In any event, whatever benefit may conceivably be gleaned by 59-505 being supportive of estate planning, it hardly justifies retaining it on the books.

Yet there have also been assertions that 59-505 protects against transfers to avoid the elective share. But, as noted above, the two-year transfer "look back" in the Act was enacted solely for that purpose. Its sole objective was to sufficiently remedy the vast majority of pre-death transfers of all types of property interests intended to defeat such survivorship rights. It has no other purpose.

Nonetheless, it has been asserted that the two-year period is arbitrarily short in protecting spousal rights, whereas 59-505 affords spousal protection for the entire duration of the marriage. Neither the author nor any other estate planning attorney in his office can recall any client considering transferring real or personal property for the purpose of avoiding the provisions of the Act, let alone outside the "look back" period. One cannot help but query what spousal protection is alluded to outside of the provisions of the Act. The Act protects against spousal impoverishment and provides for a fair and equitable distribution of the spousal estates in favor of the surviving spouse. Nonetheless, there seems to be an unarticulated opinion that a marriage should also include an inherent right of one spouse not only to be advised of any intended disposition of a predeceased spouse's separate real property during the entire term of the marriage prior to a spouse's death, but also must consent to any disposition thereof. In the author's experience, a high frequency of spousal elective share proceedings do not involve first marriage situations, but do involve the children of a prior marriage and a surviving stepparent as adversarial parties. An extended period would thus encompass requiring a spousal consent to any such disposition of real property in second marriages, as well, irrespective of whether such a transfer involved property brought into the marriage or property that was conveyed for full consideration. No state other than Kansas, by its retention of 59-505, has in effect practically extended such a consent requirement on real property transfers, except the three remaining states that still have a dower right in a surviving spouse in real property during their lifetime or an inchoate right at the time of a predeceased spouse's death; those states being Arkansas, Kentucky, and Ohio.

Some divorce attorneys have argued that 59-505 (or similar legislation in other states) protects spouses from transferring property to avoid a spousal claim in the event of a divorce, ▶

and from one spouse's mortgaging real property without the other spouse's consent. However, this asserted benefit is not within a spousal right 59-505 was intended to protect, i.e., an inheritance right of a surviving spouse to real property. Nor does such a strictly inchoate right even tangentially touch upon what is marital property and divisions of property in a divorce. Divorce severs such an inchoate right in any event.

Even in the absence of 59-505, transfers by one spouse to defeat a spousal right in the event of a divorce would be subject to a fraudulent conveyance action by the other spouse, in the same manner as any transfer to defeat a creditor. Further, any such transfer would have to be of real property solely owned by the grantor spouse. If that was real property brought into the marriage, such a transfer would probably be of limited benefit to the grantor spouse in a property division, because the grantor spouse would likely retain most of the economic benefit of such property in such property division. Third, if the property was sold for fair market value, the proceeds would be considered part of the grantor spouse's property in a property division or a fraudulent conveyance of the cash if transferred for such purpose. Fourth, most real property in modern marriages is typically held, unless part of a mutual estate plan, jointly by both spouses, thus requiring both signatures to have a valid transfer of such property.

With respect to an argument that 59-505 protects against one spouse incurring a debt secured by real property owned by such spouse without the consent of their spouse, such consent and mutual obligation to pay is typically independently required by lenders on real property. In any event, even when otherwise not required, the intent of 59-505 in avoiding the impoverishment of a surviving spouse is not furthered by retention of the statute. Even if this argument otherwise had some efficacy in avoiding the impoverishment of a spouse, that purpose is beyond the intent of the statute and would have no application to ordinary contractual obligations or the full panoply of personal debts left unsecured by real property. Construing 59-505's application to preclude a spouse from securing a debt with their separate real property in the absence of a spousal consent has no more relevance to, and is as immiscible in modern marital finances as, would a required spousal concurrence prior to either spouse incurring a debt of any size.

Much of the opposition to repealing 59-505 appears to be rooted simply in opposition to Kansas' statutory spousal elective share. Admittedly, some attorneys consider the Act to be overly complex, unintelligible to most estate planners and judges, and inordinately expensive to administer, notwithstanding the enactment of the law was supported by the Probate Advisory Committee to the Judicial Council.[57] What is noticeably absent in this objection is an assertion that its application does not reach an equitable result or there is a better alternative that does. The author submits that the more equitable the intended outcome in a complex situation, the more complex — typically out of necessity — must be the statutory factors addressed in reaching the intended result. Rare, indeed, is it when you find a simple solution to a complex problem.

The Act has unquestionably greatly reduced elective share claims, not because it is too complex and expensive to pursue, but because it has greatly reduced the number of situations in which a surviving spouse is entitled to an equitable elective share. Some attorneys have also asserted that 59-505 prevents individuals from converting real property to personal property to avoid the import of the spousal elective share.[58] If these attorneys are obliquely alluding to a transfer of real property to an entity such as an LLC, the resulting LLC interest would nonetheless be part of such spouse's augmented estate for determining the elective share.

A final assertion of which the author is aware regarding the repeal of 59-505 is that the "unintended consequences" of the repeal of 59-505 would be "staggering."[59] If that was the case, why would none of the other states having the 1990 Uniform Commissioners' version of the spousal elective share, as does Kansas, not have included, retained, or reinstated a similar provision? The author could not find any articles that asserted such was or should be the case.

In sum, arguments in favor of retaining 59-505 are typically lacking in substantive merit, illusory, apply to isolated, unlikely situations, or focus on situations that have little to no connection with the purposes for which the statute was enacted.

Conclusion

As articulated herein, K.S.A. 59-505 is highly problematic and inequitable from a number of perspectives. It is inimical to separate property concepts, is sexist in nature and origin, and creates an irrational demarcation in the type and amount of survivorship rights by focusing solely on real property ownership, which is a rapidly diminishing portion of the wealth of most individuals' estates. It is not a reasonable way to effectuate its intended purpose of protecting surviving spouses from impoverishment. Nor does its arbitrariness respect a surviving spouse's equitable share of marital property. Such purposes are much more comprehensively and equitably effectuated by the Act.

Perhaps the most glaring equitable objection to 59-505 is that, when property is recovered under its provision, in the vast majority of circumstances, 59-505 provides a greater survivorship right than would have been obtained had the property been retained until the death of the transferring spouse, for the real property interest recovered under 59-505 is likely to be worth far more than any recovery under the Act.

The foregoing problems, inequities, and lack of a coherent rationale discussed herein almost assuredly are reasons why no state other than Kansas has both the elective share provisions of the Uniform Probate Code and dower-like rights in land like those provided by 59-505. Thus, the only spousal elective share issue under existing Kansas law regarding property transferred without a spousal consent should be whether the "two-year period" under the Act is sufficient to address avoidance of the Act's provisions, not whether 59-505 should be statutorily retained.

The acid test of the case for the repeal of 59-505 is considering whether, if 59-505 was not presently in the law, it would have sufficient merit to be seriously considered currently for passage into law after passage of the Act almost three decades ago. The author submits that, for the foregoing reasons, there is little doubt but that it would not. If it would not, then it should follow that its repeal has merit.

In sum, 59-505 is beyond moribund and has grown even more outdated with the passage of time. Arguments for its retention are ephemeral in nature, typically bear little to no connection with the purpose for which 59-505 was enacted, and simply underscore the case for its repeal. The author respectfully submits that it is well past time to do so. ◆

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References

1. Alicia Kreh, Dower: Reigniting Equal Protection Claims in Response to the Legalization of Same-Sex Marriage and the Resulting Changes to Property Rights (2015) (article submitted in partial fulfillment of the requirements of the King Scholar Program, Michigan State University College of Law), https://www.law.msu.edu/king/2014-2015/Kreh.pdf (citing Professor Clark-Johnson).
2. Kan. Stat. Ann. § 59-505.
3. *Id.*; *see also* John C. Peck, *Some Issues Concerning the Property of Married Persons in Kansas*, 68 J. Kan. Bar Ass'n 18, 20 (1999) (describing 59-505 as providing an "inchoate dower interest" that "acts as a constraint with respect to real estate").
4. Elective Share of Surviving Spouse, Kan. Stat. Ann. §§ 59-6a201–59-6a217; *see also* Timothy P. O'Sullivan & Joan M. Bowen, *New Spousal Elective-Share Rights: Leveling the Playing Field*, 65 J. Kan. Bar Ass'n 18, 18–20 (1996).
5. Kan. Stat. Ann. § 59-505 ("The spouse's entitlement under this section shall be included as part of the surviving spouse's property under K.S.A. 59-6a207, and amendments thereto.").
6. *Id.*
7. O'Sullivan & Bowen, *supra* note 4, at 19; *see also* Taliaferro v. Taliaferro, 843 P.2d 240, 242 (Kan. 1992) (noting that "it is established Kansas law that the surviving spouse may reach assets in a revocable inter vivos trust set up by the deceased spouse but to which the surviving spouse did not consent when necessary to obtain for the survivor his or her lawful distributive share of the decedent's estate" and also discussing IRAs).
8. O'Sullivan & Bowen, *supra* note 4, at 19.
9. Elective Share of Surviving Spouse, Kan. Stat. Ann. §§ 59-6a201–59-6a217; O'Sullivan & Bowen, *supra* note 4, at 26 (noting that factors considered under the Act include the "length of marriage, property already owned by surviving spouse, nonprobate transfers received by surviving spouse, and nonprobate property that the decedent transferred to others"); *In re* Estate of Antonopoulos, 993 P.2d 637, 642 (Kan. 1999) (citing O'Sullivan & Bowen).
10. Kan. Stat. Ann. § 59-6a202(a)(1).
11. Kan. Stat. Ann. § 59-6a205(c).
12. Kan. Stat. Ann. § 59-6a202(a)(1).
13. *Id.*
14. *Id.*; *see also In re* Estate of Antonopoulos, 993 P.2d at 642 (stating that "[t]he partnership theory of marriage recognizes that both partners have contributed to the accumulated estate" and citing O'Sullivan & Bowen).
15. O'Sullivan & Bowen, *supra* note 4.
16. Kan. Stat. Ann. § 60-2301; Kan. Const. art. 15, § 9; Peck, *supra* note 3, at 21.
17. Kan. Const. art. 15, § 9.
18. Kan. Stat. Ann. § 60-2301.
19. O'Sullivan & Bowen, *supra* note 4, at 19–21.
20. *Id.*
21. *See* Joann M. Stone, *Decedents' Estates: Complicating Kansas's Family Protection Law* (*In re* Wheat, 955 P.2d 1339 (Kan. Ct. App. 1998)), 39 Washburn L.J. 1005, 1011–12 (1999) (discussing the Act and noting that "[i]nstead of holding wealth in the form of real estate, many people now invest in payable on death accounts, trusts, etc."); *see also* Isabel V. Sawhill & Christopher Pulliam, *Six Facts about Wealth in the United States*, Brookings (June 25, 2019), https://www.brookings.edu/blog/up-front/2019/06/25/six-facts-about-wealth-in-the-united-states/ (stating that "[a]lmost three-quarters of aggregate household assets are in the form of financial assets—namely stocks and mutual funds, retirement accounts, and closely-held businesses"); Jonathan Eggleston, Donald Hays, Robert Munk & Briana Sullivan, *The Wealth of Households: 2017*, U.S. Census Bureau (August 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p70br-170.pdf.
22. *See* G. Michael Bridge, Note, *Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate*, 74 Cornell L. Rev. 511, 515 (1989) (asserting that "land no longer represents the principal source ▶

of wealth in this country" and that "most states have realized that protection of the spouse must extend beyond real property to include personal property"); Van Foreman McClellan, *Inter Vivos Transfers: Will They Stand Up Against the Surviving Spouse's Elective Share?*, 14 OKLA. CITY UNIV. L. REV. 605, 607 (1989) (asserting that "[i]n our American economy today, the majority of wealth is held in personal property rather than real property"); *Ohio's Dower Law: Should It Stay or Should It Go?*, TUCKER ELLIS LLP (Sept. 2018), https://www.tuckerellis.com/alerts/ohios-dower-law-should-it-stay-or-should-it-go/ (discussing Ohio's dower law and noting that it "dates back to the agrarian days of the 1800s, when farms provided the primary (or only) source of income for most families"); Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. UNIV. L. REV. 519, 527–28 (2003) (discussing the shift in the United States from being an agrarian society to being an industrial nation).

23. *See* John F. Kuether & Willard B. Thompson, *The Capricious Operation of the Kansas Elective Share: Feast or Famine for the Surviving Spouse*, 61 J. KAN. BAR ASS'N 32, 38 (1992); Christopher A. Richardson, *Dower – An Old Law with New Headaches*, NAT'L L. REV. (July 27, 2012), https://www.natlawreview.com/article/dower-old-law-new-headaches (noting that the concept of dower "dates back to at least the middle ages").
24. Richardson, *supra* note 23 ("Since marriage in the western world traditionally meant that the wife gave up all legal identity, and thus, she could not own property, dower was created as a security for the benefit of a woman who may survive her husband."); *see also* J. Cliff McKinney, *With All My Worldly Goods I Thee Endow: The Law and Statistics of Dower and Curtesy in Arkansas*, 38 U. ARK. LITTLE ROCK L. REV. 353, 355 (2016) (noting that "[t]he concept of dower was enshrined in English common law more than eight hundred years ago through the seventh clause of the Magna Carta").
25. *See* Naomi Cahn, *Empirical Analysis of Wealth Transfer Law: What's Wrong About the Elective Share "Right"?*, 53 U.C. DAVIS L. REV. 2087, 2094 (2020) (noting that the purpose of dower was "protecting the wife from disinheritance to ensure her support").
26. Cahn, *supra* note 25, at 2094–95 (stating that "[d]ower accorded the widow a life estate in one-third of her husband's lands").
27. *See generally* James C. McLoughlin, Annotation, *Statutory or Constitutional Provision Allowing Widow But Not Widower to Take Against Will and Receive Dower Interests, Allowances, Homestead Rights or the Like as Denial of Equal Protection of Law*, 18 A.L.R.4th 910 (1982); Kreh, *supra* note 1, at 2 (stating that "[m]odern critics of dower attack the system based on its gender-based distinctions and claim the system is an unconstitutional violation of the Equal Protection Clause").
28. The author is not alone in his assertion that K.S.A. 59-505 is dower-like. *See* Peck, *supra* note 3, at 20 (asserting that 59-505 provides an "inchoate dower interest" that "acts as a constraint with respect to real estate").
29. KAN. STAT. ANN. § 59-6a202(b) ("If the sum of the amounts described in K.S.A. 59-6a207, subsection (a)(1) of K.S.A. 59-6a209 and that part of the elective-share amount payable from the decedent's probate estate and non-probate transfers to others under subsections (b) and (c) of K.S.A. 59-6a209 is less than $50,000, the surviving spouse is entitled to a supplemental elective-share amount equal to $50,000, minus the sum of the amounts described in those sections.").
30. As will be discussed *infra*, Ohio, Arkansas, and Kentucky are the only states that retain dower rights.
31. *See, e.g.*, Ann Ellen Acker, *The Abolition of Dower: An Occasion for Re-Examining the Surviving Spouse's Rights in Illinois*, 3 LOY. UNIV. CHI. L.J. 94 (1972); J. Rodney Johnson, *The Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation*, 7 U. RICH. L. REV. 99 (1972); Vallario, *supra* note 22, at 528 n.41 (stating that dower "was completely eliminated by statute in most of the United States" and emphasizing that dower "diminished the alienability of land; made it difficult for title examiners to clear title; went against public policy in light of the growing recognition of women's property rights; and were antithetical to the evolution away from land's status as the principal source of wealth in the United States"); Thomas E. Simmons, *Prequel to Homestead*, 62 S.D. L. REV. 332, 363 n.183 (2017) (stating that dower has "been abolished in most states, including in South Dakota"); Joslyn R. Muller, Comment, *Haven't Women Obtained Equality? An Analysis of the Constitutionality of Dower in Michigan*, 87 U. DET. MERCY L. REV. 533, 542–43 (2010) (asserting that "abolishing common law dower and enacting gender-neutral statutory dower schemes has been a trend in the United States from as early as 1913, when the Nebraska Legislature altered common law dower to provide equal support for surviving husbands and wives" and further noting that "a vast majority of state legislatures have abolished common law dower and enacted gender-neutral statutory dower schemes").
32. *See generally* Charles A. Barragato, *Revocable Trusts and the Grantor's Death: Planning and Pitfalls*, TAX INSIDER (Mar. 25, 2021), https://www.thetaxadviser.com/newsletters/2021/mar/revocable-trusts-grantors-death.html (asserting that "[p]lanning with revocable trusts has become increasingly popular in recent years").
33. *See* Sawhill & Pulliam, *supra* note 21 (asserting that "[a]lmost three-quarters of aggregate household assets are in the form of financial assets—namely stocks and mutual funds, retirement accounts, and closely-held businesses"); *Primary Residence Value as a Percentage of Net Worth Guide*, FIN. SAMURAI (Nov. 5, 2022), https://www.financialsamurai.com/primary-residence-value-as-a-percentage-of-net-worth-guide/#:~:text=In%20conclusion%2C%20shoot%20for%20your,it%20also%20appreciates%20in%20value. (asserting that "[t]he typical American has over 70% of their net worth in their primary residence"); Eggleston, Hays, Munk & Sullivan, *supra* note 21 (analyzing the composition of wealth by asset type across all U.S. households); *Urban Percentage of the Population for States, Historical*, IOWA ST. UNIV., https://www.icip.iastate.edu/tables/population/urban-pct-states (last visited Dec. 18, 2022) (analyzing the total population in urban areas and noting that this percentage in 2010 in Kansas was 74.2%).
34. *Urban Percentage of the Population for States, Historical*, *supra* note 33.
35. KAN. STAT. ANN. § 59-6a202(a)(1).
36. *Id.*
37. The Kansas statute pertaining to common law marriages is only one sentence long, and it does not discuss the elements required, merely stating, "The state of Kansas shall not

recognize a common-law marriage contract if either party to the marriage contract is under 18 years of age." *See* Kan. Stat. Ann. § 23-2502; *see also Common Law Marriage by State*, NCSL (Mar. 11, 2020), https://www.ncsl.org/research/human-services/common-law-marriage.aspx (stating that common law marriage "is allowed in a minority of states," and listing Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas, and Utah as being those states).

38. *See, e.g.*, State v. Sedlack, 787 P.2d 709, 710 (Kan. 1990) (discussing "the three requirements which must coexist to establish a common-law marriage in Kansas" and stating that these requirements are (1) a capacity to marry, (2) a present marriage agreement, and (3) a holding out of each other as husband and wife to the public); Chandler v. Cent. Oil Corp., 853 P.2d 649, 652 (Kan. 1993) (stating that "well-settled law in Kansas" recognizes common-law marriage when its three elements are present); *see generally Common Law Marriage*, Plog & Stein P.C., https://www.plogsteinlaw.com/denver-common-law-marriage/ (last visited Dec. 18, 2022) (stating that common law marriage "is a concept often misunderstood by the general public").
39. Peck, *supra* note 3, at 21 (asserting that although K.S.A. 59-505 does not expressly prohibit the sale of real estate without the signature of that person's spouse, prudent buyers will not accept such a conveyance" and noting that "the buyer of real estate always wants the signatures of both spouses on the deed because of the inchoate dower interest provided" in K.S.A. 59-505).
40. *See generally* Ackers v. First Nat'l Bank, 387 P.2d 840, 846 (Kan. 1963) (stating that "[i]t has long been the law of this state that a wife need not join in a conveyance of Kansas real estate made by her husband, if the wife has never been a resident of the state"); McGill v. Kuhn, 348 P.2d 811, 814 (Kan. 1960) ("Resident wives have an inchoate interest in the real estate of their husbands somewhat resembling dower and should join in deeds made by the husband . . . .").
41. Under the Act, claims by the surviving spouse must be brought "within six months after the date of the decedent's death, or within six months after the notice of the right to the elective share pursuant to K.S.A. 59-2233, and amendments thereto, whichever limitation later expires." Kan. Stat. Ann. § 59-6a211(a).
42. Kan Stat. Ann. § 59-6a205(c); Unif. Prob. Code § 2-205(3).
43. Cahn, *supra* note 25, at 2094.
44. Vallario, *supra* note 22, at 530–35; O'Sullivan & Bowen, *supra* note 4, at 19–20.
45. The ten states that have adopted the 1990 elective share provisions of the Uniform Probate Code are Alaska, Colorado, Hawaii, Maine, Minnesota, Montana, North Dakota, South Dakota, Utah, and Kansas. *See* Alaska Stat. §§ 13.12.202, 13.12.205; Colo. Rev. Stat. §§ 15-11-202, 15-11-205; Haw. Rev. Stat. §§ 560:2-202, 560:2-205; Me. Stat. tit. 18-C, §§ 2-202, 2-205; Minn. Stat. §§ 524.2-202, 524.2-205; Mont. Code Ann. §§ 72-2-232, 72-2-235; N.D. Cent. Code §§ 30.1-05-01, 30.1-05-02; S.D. Codified Laws §§ 29A-2-202, 29A-2-205; Utah Code Ann. §§ 75-2-202, 75-2-205; Kan. Stat. Ann. §§ 59-6a202, 59-6a205.
46. Beren v. Beren, 349 P.3d 233, 239 (Colo. 2015) (noting that Colorado adopted the UPC in 1974, that "Colorado's 1994 elective-share amendments brought its Probate Code into line with major revisions to the UPC," and that "[i]n revising the elective share, the framers of the UPC, and thus Colorado's General Assembly, set out to better reflect the contemporary view of marriage as an economic partnership").
47. Okla. Stat. tit. 16, § 13.
48. The states that have enacted the UPC elective share provisions are Alaska, Colorado, Hawaii, Maine, Minnesota, Montana, North Dakota, South Dakota, Utah, and Kansas. *See supra*, note 45. The states that have statutes similar to 59-505 (requiring spouses to consent to real property conveyances of spouses to release dower or dower-like rights) are Arkansas, Kentucky, and Ohio. *See* Ark. Code Ann. §§ 28-11-301, 28-11-305; Ky. Rev. Stat. Ann. § 392.020; Ohio Rev. Code Ann. § 2103.02.
49. *See* Vallario, *supra* note 22, at 528 n.41.
50. *See* Ark. Code Ann. §§ 28-11-301, 28-11-305; Ohio Rev. Code Ann. § 2103.02; Ky. Rev. Stat. Ann. § 392.020; *see also* Miranda Crace, *Dower Rights: What You Need to Know*, Quicken Loans (Feb. 4, 2021), https://www.quickenloans.com/learn/dower-rights#:~:text=A%20dower%20right%20is%20a,states%20that%20retain%20dower%20rights. ("Ohio, Arkansas and Kentucky are the only states that retain dower rights."); Kristin Rosan, *Ohio to Abolish Dower Rights*, Hondros Coll. (Dec. 7, 2018), https://www.hondros.com/resources/blog/ohio-abolish-dower-rights/ ("Currently Ohio is one of only 3 states that recognize dower rights. The other two states are Arkansas and Kentucky.").
51. *See, e.g.*, Letter from Philip Ridenour to the House Committee on Judiciary (Mar. 14, 2012) [hereinafter Letter to House Committee on Judiciary], http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_jud_1_20120315_02_other.pdf (arguing in opposition to the repeal of 59-505); *see also Minutes of the House Judiciary Committee*, Kan. Leg. (July 13, 2012), http://www.kslegislature.org/li_2012/b2011_12/committees/resources/ctte_h_jud_1_20120315_min.pdf (documenting a 2012 House Committee on Judiciary meeting where both opponents of repeal and proponents of repeal were heard).
52. S.B. 395 (2012). The bill's history is available online. *See SB 395*, Kan. Leg., http://www.kslegislature.org/li_2012/b2011_12/measures/sb395/ (last visited Dec. 18, 2022).
53. *See SB 395*, Kan. Leg., http://www.kslegislature.org/li_2012/b2011_12/measures/sb395/ (last visited Dec. 18, 2022).
54. *What's New – Estate and Gift Tax*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax (containing a chart listing the estate tax exemption amount for every year since 2011).
55. *See* Cady v. Cady, 581 P.2d 358, 362–63 (Kan. 1978) ("The filing for divorce . . . has a substantial effect upon the property rights of the spouses. At that moment each spouse becomes the owner of a vested, but undetermined, interest in all the property individually or jointly held. The court is obligated to divide the property in a just and equitable manner, regardless of the title or origin of the property.").
56. Letter to House Committee on Judiciary, *supra* note 51.
57. *Id.*
58. *Id.*
59. *Id.*