

Approved: 4-5-96
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on March 7, 1996 in Room 514-S of the Capitol.

All members were present except: Senator Brady (excused)
Senator Feleciano (excused)
Senator Oleen (excused)
Senator Martin (excused)

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee: Randy Hearrell, Judicial Council
Professor John Kuether, Probate Committee of the Judicial Council

Others attending: See attached list

The Chair called the meeting to order and called on Senator Vancrum to discuss **SCR 1623**.

SCR 1623--Residential building contractors task force.

Senator Vancrum stated that this resolution relates to the residential building industry in Kansas. The conferee stated that the Local Government Committee has approved conceptually the forming of a task force. The conferee stated that area he represents was replete with building problems and that legislation has been proposed for the last three years to deal with the local enforcement and the liability issues. The conferee stated that this concurrent resolution will establish a task force comprised of representatives from industry, consumer groups, legislature and municipalities. Senator Vancrum stated that the legislators are the only persons getting compensation. The conferee stated that the original bill was drafted without legislative compensation.

A motion was made by Senator Vancrum seconded by Senator Parkinson to recommend SCR 1623 favorably for passage. The motion carried.

HB 2743--Amendments to the elective share of surviving spouse statutes.

Randy Hearrell spoke in support of **HB 2743** and introduced Professor John Kuether.

Professor Kuether stated that he is member of the Probate Committee of the Judicial Council and is in support of **HB 2743**. The conferee explained the way the statute works and what changes **HB 2743** will provide. The conferee stated that some of the changes this amendment will make are conforming to law to standard language. The conferee discussed a substantive change this bill will provide by giving an example of property transferred during a marriage without the surviving spouse's knowledge.

The conferee discussed fractional interest in property held in joint tenancy. The conferee stated that the amendments to lines 42-44 provides new language that allows rebuttal of the presumption of an immediate gift of a prorated share. The conferee stated that this change conforms the section to Kansas property law generally, as was explained by the Kansas Supreme Court in Walnut Valley State Bank and Trust Co. v. Stovall. The conferee explained that this provision allows a parent to show that a predeceasing child did not own any portion of a joint tenancy account where the parent opened the account and intended it only as a will substitute. The conferee continued to explain both the technical changes and the changes requested by the Judicial Council and the Probate Law Advisory Committee. (Attachment 1)

The Committee members and conferee discussed recommended changes concerning the value of the homestead, and other clarifying changes.

The Chair closed the hearing on **HB 2743**.

A motion was made by Senator Bond, seconded by Senator Petty to recommend HB 2743 favorably for passage. The motion carried.

The Chair referred to subcommittee hearing schedules for the upcoming week and a minor change in subcommittee member assignments.

The Chair adjourned the meeting at 10:40 a.m.

The next meeting is scheduled for March 13, 1996.

SENATE JUDICIARY COMMITTEE
TESTIMONY OF JOHN KUETHER
HOUSE BILL 2473

K.S.A. 59-505

59-505. Same; half of realty to surviving spouse. Also
Except as provided further, 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 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.

Comment

The first three minor amendments in lines 16, 22 and 24 of
House Bill 2473 are from the office of the Revisor of Statutes.

The amendments in lines 27-29 are by the Kansas Judicial
Council and the Probate Law Advisory Committee. When the new
elective share was adopted, K.S.A. 59-505 was retained, allowing
the surviving spouse to receive one-half of any conveyance of
realty during the marriage to which the surviving spouse did not
consent if the spouse was a resident. Because the surviving
spouse has this nonuniform protection from conveyances during the
marriage, it is fair that the surviving spouse account for any
receipts under K.S.A. 59-505 in computing the elective share.
The existing K.S.A. 59-6a209 already mentions that any K.S.A. 59-
505 rights are to be used first in satisfying the elective share.

SEN. JUD.
3-17-96
ATTACH 1

K.S.A. 59-6a201

(a) "Decedent's nonprobate transfers to others" means the decedent's nonprobate transfers to persons, other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors, that are included in the augmented estate under K.S.A. 59-6a205, and amendments thereto.

Comment

The amendment in line 35 is by the Revisor.

K.S.A. 59-6a201

(b) "Fractional interest in property held in joint tenancy with the right of survivorship," whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants, unless there is proof of some other proportional ownership, legal or equitable.

Comment

The amendment to lines 42-44 is from the Judicial Council and the Probate Law Advisory Committee. The new language allows a rebuttal of the presumption of an immediate gift of a prorated share. It conforms the section to Kansas property law generally, as was explained by the Kansas Supreme Court in Walnut Valley State Bank and Trust Co. v. Stovall, 223 Kan. 459, 574 P.2d 1382 (1978). In a common possible application, it will allow a parent to show that a predeceasing child did not own any portion of a joint tenancy account where the parent opened the account and intended it only as a will substitute. The child's surviving spouse will not be able to elect against the account.

K.S.A. 59-6a201

(j) "Transfer" as it relates to a transfer by or of the decedent, includes (1) an exercise or release of a presently exercisable general power of appointment held by the decedent, (2) a lapse at death of a presently exercisable general power of appointment held by the decedent, and (3) an exercise, release, or lapse of a general power of appointment that the decedent created in the decedent's self and of a power described in subsection (b)(2) of K.S.A. 59-6a205, and amendments thereto, that the decedent conferred on a nonadverse party.

Comment

The amendment on page 2, line 31, is by the Revisor.

K.S.A. 59-6a201

(k) "Value of the homestead." For the purposes of article 6a of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, where the surviving spouse exercises the right to the homestead, the homestead shall be valued as a life estate interest in the equity of the real estate comprising the homestead in the manner provided by the federal estate tax in 26 U.S.C. 2031, and amendments thereto.

Comment

The amendments on page 2, lines 33-38, are by the Judicial Council and the Probate Law Advisory Committee. Because homestead is a possessory interest which can be abandoned and generally cannot be reduced to cash, it would be very difficult to value. This provision values it as a life estate, which should approximate its value if the survivor plans to use and occupy it.

K.S.A. 59-6a204

59-6a204. Decedent's net probate estate. The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead or homestead allowance, family allowances and enforceable demands.

Comment

The amendment on page 2, line 42, makes it clear that neither the homestead allowance nor the value of the homestead is part of the augmented estate. Homestead is in addition to the elective share amount under both the old and the new elective share calculations. When the act was passed in 1994, K.S.A. 59-6a215 provided for either a homestead or for a homestead allowance. We neglected to mention both possibilities in this provision.

K.S.A. 59-6a205

The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under K.S.A. 59-6a204, and amendments thereto, of any of the following types, in the amount provided respectively for each type of transfer.

(a) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included in this category consists of:

(2) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent that such fractional interest passed by right of survivorship at the decedent's death to the surviving joint tenant other than the decedent's surviving spouse.

Comment

The amendment on page 3, line 4, is by the Revisor.

The amendment on line 19 is by the Judicial Council and the Probate Law Advisory Committee and corrects a typographical error by substituting "than" for "that."

K.S.A. 59-6a207

(a) Except to the extent included in the augmented estate under K.S.A. 59-6a204 or K.S.A. 59-6a206, and amendments thereto, the value of the augmented estate includes the value of:

(1)(C) property that passed to the surviving spouse by reason of the decedent's death, but not including, the spouse's right to homestead or homestead allowance, family allowance, or payments under the federal social security system; and

(b) Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of subparagraphs (a)(1)(A) and (B), the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or coowner of the property or accounts. For purposes of subparagraph (a)(2), proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under subsection (a)(4) of K.S.A. 59-6a205, and amendments thereto, are not valued as if such spouse were deceased.

Comment

The amendment on page 5, line 6, is by the Revisor.

The amendment on line 16 is by the Judicial Council and the Probate Law Advisory Committee. As with the amendment adding homestead allowance to K.S.A. 59-6a204, discussed above, this makes it clear that the elective share is in addition to the homestead or homestead allowances, and statutory allowances. We neglected to mention the possibility of the two different types of homestead interests in the 1994 act.

The amendment in line 30 is by the Revisor.

K.S.A. 59-6a215

59-6a215. Homestead allowance. ~~Where there is no homestead or the homestead is valued at less than \$25,000~~ A decedent's surviving spouse is entitled to ~~the homestead, or in lieu thereof the surviving spouse may elect to receive~~ a homestead allowance ~~not to exceed of~~ \$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 or~~ homestead allowance is exempt from and has priority over all demands against the estate. The ~~homestead or~~ 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.~~

Comment

The amendments to this section, starting at page 5, line 34, are intended to clarify and simplify the section. In 1994 we adopted the homestead allowance provision from the statutory allowance provisions that were applicable in intestacy. Unfortunately the references to children, who are involved in intestacy but are not involved in the elective share provisions, were not removed. Under current and under prior law, the surviving spouse is the only person entitled to elect against the decedent's estate plan. Thus the references to a child or children are inappropriate and are stricken here.

K.S.A. 59-2233

59-2233. ~~Except where the court has previously determined the validity and binding consent to a will, when a will is admitted to probate~~ **Upon the appointment and qualification of any administrator or executor, the filing of a petition to determine descent or the filing of a petition for an order refusing to grant letters of administration or the filing of an affidavit pursuant to K.S.A. 59-618a, and amendments thereto,** the court shall forthwith ~~transmit to the surviving spouse a certified copy thereof~~ **cause a copy of the will, if any,** together with a notice statement **to be mailed** to the surviving spouse stating: "Under K.S.A. 59-6a201 through 59-6a217, **and amendments thereto,** you might have ~~valuable rights to take a share of conveyances~~ **a right to take a share of property owned by the decedent at death, in whole or in part, and of transfers of property** made by the decedent prior to death." ~~If such spouse has consented to the will as provided by law, such consent shall control, otherwise such spouse shall be deemed to have elected to take under the testator's will unless such spouse shall have filed in the district court, within six months after the notice of the right to the elective share, an instrument in writing to take by the laws of intestate succession. If such spouse files an election before the inventory and valuation of the estate is filed, the election shall be set aside upon petition of the spouse made within 30 days after the filing of the inventory and valuation. For good cause shown, the court may permit an election within such further time as the court may determine, if a petition therefor is made within such period of six months, to be mailed to the surviving spouse.~~ **Such notice shall be mailed within 10 days of the qualification of the administrator or executor, the filing of a petition to determine descent, the filing of a petition for an order refusing to grant letters of administration or the filing of an affidavit pursuant to K.S.A. 59-618a, and amendments thereto. Proof shall be by affidavit filed with the court.**

Comment

This section was totally redrafted by the Judicial Council and the Probate Law Advisory Committee to simplify it and coordinate it with the procedures in K.S.A. 59-6a211. It now provides a more accurate description of the spouse's rights to set aside transfers made by the decedent, whether by will, nonprobate transfer or deathbed gift.

The reference to giving notice to the spouse on the filing of a petition to determine descent was stricken because that procedure would cause great uncertainty by potentially allowing the spouse to elect years after the decedent's death. K.S.A. 59-6a211 restricts the right to elect to six months following the date of the decedent's death, as did prior law. A spouse who receives too little by intestate succession will know it soon after the decedent's death.

Other language clarifies the procedure for notice, and the material on the election procedure was stricken because it overlapped with K.S.A. 59-6a211.