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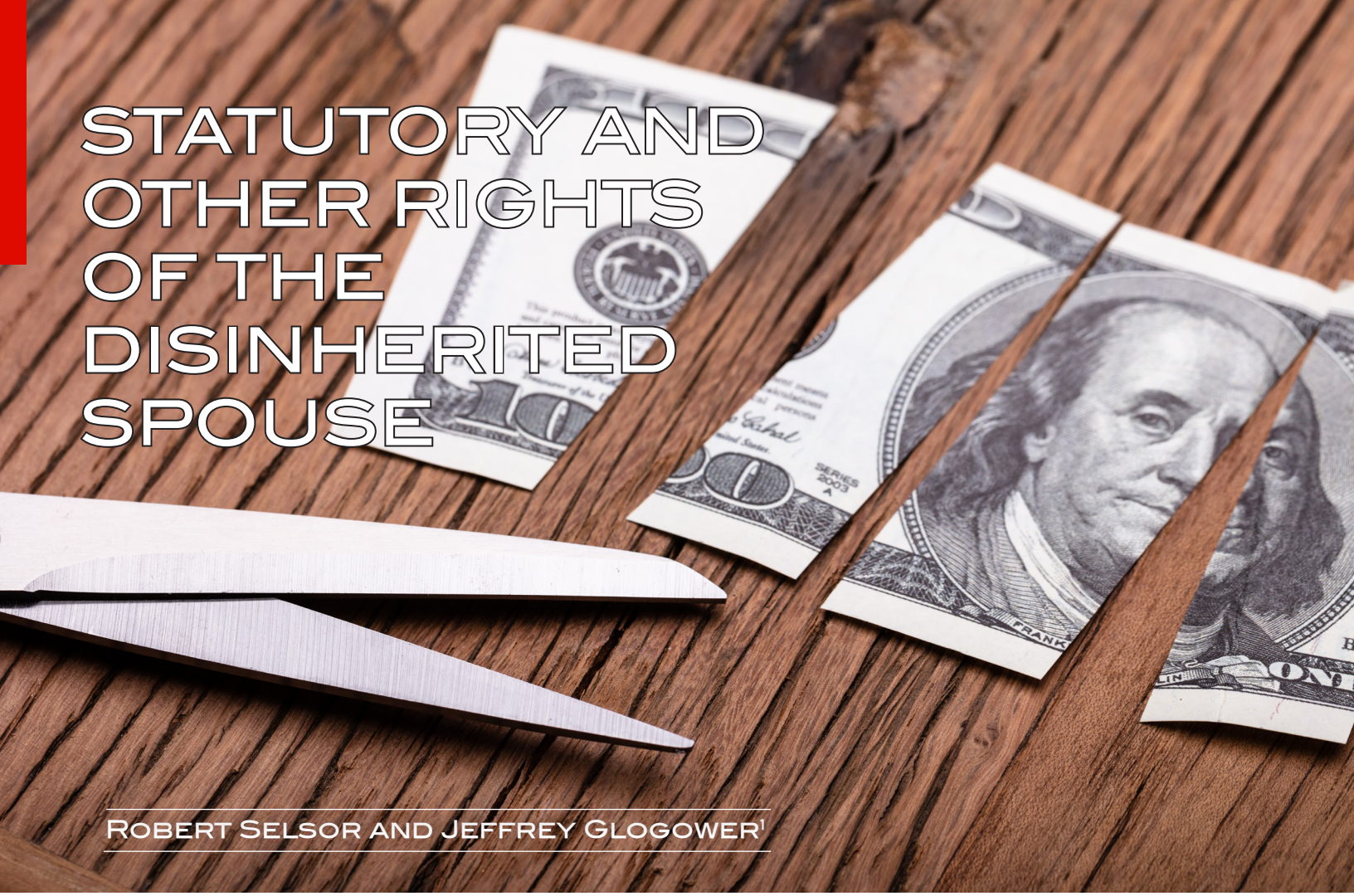

Statutory and Other Rights of the Disinherited Spouse

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Cicero wrote that the "first bond of society is marriage; next children; and then the family."[2] In its landmark decision in Obergefell v. Hodges,[3] the U.S. Supreme Court recited a list of the beneficial aspects of marital status in the United States, including "inheritance and property rights," and "the rights and benefits of survivors." Those benefits, though undeniable in the context of the law of inheritance, often come with the caveat that a person's marital status does not guarantee a substantial devise or bequest if their deceased spouse was not inclined to affirmatively favor them.

Although there are safeguards for a surviving spouse built into both state and federal law, this patchwork of protections is far from the financial bulwark that the law once provided or that many imagine today. This article examines the breadth and extent of default spousal rights in Missouri in the absence of an express and formal reservation of benefits for a surviving spouse.

Without explicit mention in a will, trust, or beneficiary designation, what are a surviving spouse's rights at law to a deceased spouse's estate? Many people seem to think those rights are substantial. And, indeed, they once were at a time when a decedent's assets usually passed exclusively through probate or were otherwise owned in tenancy by the entirety and thus passed automatically to a surviving widow or widower. In the face of a spouse who sought to disinherit his or her surviving marital partner, society had imposed robust obstacles. The common law at the time, for example, had strong prohibitions on the transfer of real estate without a spouse's assent, in part to ensure that a surviving widow would not wake up the day after her husband's death to find herself homeless or penniless.[4]

Transfers of other major assets could be challenged as well. "Curtesy" was a husband's common law right to a life estate in the land that his wife owned during their marriage, so long as a live child was born to the couple.[5] "Dower," which is traceable in one form at least back to Magna Carta (1215), was the somewhat corresponding right of a wife to a life estate in one-third of the land owned by her late husband in fee.[6] Missouri abolished both estates in the 1950s pursuant to § 474.110, RSMo in the probate code. In their stead were enacted statutes providing for a spousal "forced share" of the decedent's probate estate and codified rights to recover asset transfers in "fraud" of marital rights.[7]

But in modern times, far more assets pass by non-probate transfer than by probate, and many or most people of substantial means in the 21st century utilize trusts to carry out their estate planning. Many of the protections applicable to a well-funded probate estate did not find their way into the law of trusts or to laws governing non-probate transfers. Still, in spite of the shifting landscape of estate and wealth planning, a number of modest default rights and protections remain.

What Assets Comprise the Probate Estate?

Since this article has already foreshadowed that a surviving spouse's rights are different depending on how the decedent's assets are categorized, a threshold inquiry requires a determination of what is, and is not, in a probate estate.

At death, the real and personal property of a decedent, with the exception of exempt property described in § 474.250, RSMo, passes to the individual to whom it is devised under the decedent's last will or to the decedent's heirs at law if there is no valid will.[8] These presumptive rights are subject to the personal representative's right of possession and the surviving spouse's right of election.[9] But many assets titled in a decedent's name before death are nevertheless not part of his or her probate estate after death. In *Cook v. Barnard,*[10] the court held that non-probate transfers and joint tenancy property should not be inventoried in probate because such property is not "decedent's *at his death*."[11] "Non-probate transfers . . . are not testamentary; nor do they pass by descent, [but instead] pass by operation of law."[12] Consistent with this reasoning is *Potter v. Winter,*[13] which holds that creating and funding a revocable trust is not a testamentary transfer, but instead an *inter vivos* transfer. Thus, non-probate transfers, joint tenancy property, and transfers to *inter vivos* trust categories comprising a huge portion of net worth of many substantial individuals — are immediately off the table for purposes of inheritance through probate unless they can be pulled back into a probate estate under one of several legal theories.[14]

Exempt Property

Assuming that a probate estate is open and that there are probate assets, the starting point for any surviving spouse's entitlement is the right to exempt property. Section 474.250, RSMo provides that a surviving spouse is "absolutely entitled" to certain items of tangible property without regard to their value. The statute lists those items as follows: "the family bible and other books, one automobile or other passenger motor vehicle, including a pickup truck, with its means of propulsion, all wearing apparel of the family, all household electrical appliances, all household musical and other amusement instruments and all household and kitchen furniture, appliances, utensils and implements." For most estates, the value of exempt property will be modest, or even merely sentimental. But for some, an estate with antique furniture, rare books, or an expensive car makes this a valuable spousal right.

Spousal Allowances

Regardless of the terms of a will, regardless of exempt property, and regardless of whether a surviving spouse has sought an "elective share" of the estate under provisions found elsewhere in the probate code (*see infra*), the code provides for two "allowances" available to a surviving spouse. The first is the one-year support allowance provided for in § 474.260, RSMo, and the other is the "homestead" allowance provided for in § 474.290, RSMo.

One-Year Support Allowance

Section 474.260, RSMo, provides that the surviving spouse is entitled to a reasonable allowance in money out of the estate for his or her maintenance during the period of one year after the death of the spouse. The statute, besides setting up the standard of reasonableness, mandates the court shall take into account the previous standard of living and the condition of the decedent's estate. The court is also mandated to "consider the aggregate value of non-probate property coming to the surviving spouse from the decedent by means described in section 474.163."[15] This support analysis is in the nature of an equitable proceeding.[16] Given the factors that the court must consider, the award of this support allowance, also known as the "family allowance," can vary greatly from one family to the next.

The statute also allows the spouse to receive property in lieu of a money allowance. It likewise provides that the allowance is not chargeable against any benefit or share passing to the surviving spouse by will, unless otherwise provided. The same applies with intestacy. And the family allowance is exempt from all claims, giving it a priority status over creditors.[17] A claim for the family allowance, however, must be made within a reasonable time.[18]

For some probate estates, the award of a large support allowance may exhaust the assets of the estate. And since access to non-probate transfers is also permitted to ensure that the allowance is fully funded — as will be discussed later in this article — for many surviving spouses, the support allowance is the most valuable right that they have.

The Homestead Allowance

The other "allowance" that a surviving spouse may claim is the homestead allowance, § 474.290, RSMo. This statutory allowance was created to replace the dower and homestead rights in a decedent's property that existed to the time of the code revisions in 1956. The amount of the allowance is now modest in terms of 21st century dollars. While it is set at 50% of the value of the estate exclusive of exempt property, it is subject to a cap that *"in no case shall… exceed fifteen thousand dollars."*[19] As with the support allowance, the homestead al-

lowance may be taken in personal or real property, or as a credit toward the purchase of estate property. But unlike the support allowance, application for the homestead allowance must be made within 10 days after the probate claim period has run or the allowance is deemed waived, and it is also offset against the spouse's distributive share of the estate.

Refusal of Letters and Termination of Administration

Another notable right that a surviving spouse may invoke is the right to seek a "refusal of letters" pursuant to § 473.090, RSMo. This means a surviving spouse (as well as surviving children and creditors under some circumstances) may request that the probate division refuse, or forego, granting letters of administration altogether if the value of the estate is no greater than the exempt property and the support allowance combined. The court's authority to grant this relief is discretionary, but if the order is given, the surviving spouse may move forward without the burden of probate administration. The widow or widower, as well as others granted standing under the statute, may collect and sue directly for all the personal property belonging to the estate. If there is real estate, the surviving spouse may likewise obtain title to such property through a refusal of letters order so long as the net value of the real estate falls within the financial limits that are dictated by the amount of the support allowance.

Sometimes an estate may be open and a personal representative appointed before the surviving spouse or other entitled parties can make their case for a refusal of letters. In such circumstances, § 473.092, RSMo, allows the party to make an application, and, if the requirements for refusal of letters are established, then the court may order the pending estate closed on that basis.

Spousal Rights Under Intestacy

Assuming that there is a pot of probate assets, the next inquiry is whether a valid will has been left to direct their distribution. If there is no will, the laws of intestacy will apply. Even today, the surviving spouse of a person who has died intestate has substantial rights in an intestate probate estate. Whether that estate has substantial assets is a separate issue. But according to the general rules of descent set forth in § 474.010, RSMo, a surviving spouse receives the entire estate if there is no surviving issue of the decedent. If there *is* surviving issue of the couple, then the surviving spouse receives the first $20,000 in value of the intestate estate, plus half of the balance. If the decedent had surviving issue from someone other than the surviving spouse, then the surviving spouse's portion is a straight one-half share.

These generous spousal intestacy rights can be waived, however, by way of a written contract disclosing the rights to be waived and accurately detailing the nature and extent of each party's property interests. Section 474.120, RSMo, provides the general framework of such prenuptial and post-nuptial agreements and requires that there be "fair consideration under all the circumstances."[20] On rare occasions, a statutory bar to such rights arises under § 474.140, RSMo, when the surviving spouse previously "abandoned" the decedent or lived in a state of adultery as proscribed by the statute.[21]

Spousal Rights When There is a Will

When a decedent dies testate — that is, with his or her last will and testament properly executed and available for probate — the terms of the will normally will govern the rights of a surviving spouse. Public policy generally leaves a decedent free to leave as much — or as little — to a loved one as he or she wishes. But in the case of a surviving spouse, a miserly bequest may not be the last word in terms of what that spouse may receive. Based on a public policy that disfavors the total disinheritance of a surviving spouse, under some circumstances such a spouse may take a "forced share" of the probate estate; in other words, she or he may override the stated terms of the will and "elect against" the will, or in the case of a spouse whose marriage arose after the will was executed, make a claim as an "omitted spouse."

Electing Against the Will

Missouri law affords a spouse two methods for taking a "forced share" of a probate estate — an election against a will, and an omitted spouse share. Sections 474.160 to 474.230, RSMo, govern the rights and procedures for spousal election against a will. Under § 474.160, a surviving spouse may elect one-half of "the estate," subject to payment of claims if there are no lineal descendants of the testator. If the testator did leave lineal descendants, then the surviving spouse's election is reduced to one third of "the estate," as such estate is specifically defined by statute, again subject to payment of claims. Under either scenario, the surviving spouse is also separately entitled to exempt property under § 474.250 (e.g., automobile, clothing, household furniture, etc.) and a potential one-year support allowance under § 474.260, RSMo,[22] without any reduction in the elective share. The surviving spouse's homestead allowance under § 474.290, RSMo, however, is offset against the elective share. As referenced above, that once-generous allowance from decades ago is capped at $15,000 and thus will be only a modest offset for most elective shares. And, if an election is taken, the surviving spouse is deemed to take by descent and cannot also take under the terms of the will.[23]

Calculating the Value of the Election

The calculation of the elective share is governed by § 474.163, RSMo. That section sets forth a rather involved formula for calculating a surviving spouse's final benefit from the election. This statute has been a source of confusion for many practitioners because it references "the estate" as part of the calculation and then goes on to also later make reference to trusts, insurance, annuities, and other assets related to the decedent that are separate from a probate estate. But "the estate" referenced in the statute is *not* the probate estate. This "estate" is an amalgam of valuations that indeed starts with probate assets, but then subtracts certain expenses, claims, and allowances, and then adds back to the calculation the value of benefits received by the surviving spouse from the decedent (such as from a trust, insurance, annuities, etc.) that are not part of probate. The end product of this give and take is often referred to as the "augmented estate" or a type of "hotchpot," although neither term is referenced in the statute.[24] This augmented estate is typically larger than

the probate estate because of the addition of assets or benefits received by the spouse from outside of the probate estate.[25]

Whatever the final value of the augmented estate, the spouse's elective share fraction (one-third or one-half) is applied to that value. From there, the value of what the surviving spouse has already received from the decedent outside of probate ("property derived […] from the decedent"), is then offset against the elective share.[26] Thus, a spouse who has benefitted substantially from a deceased spouse *outside of probate* may see his or her elective share reduced or eliminated by the offset or debit that the statute contemplates.

To illustrate this process, assume there is a gross probate estate with a million dollars of assets. There is a will, but it specifically disinherits a surviving husband or makes no mention of him. There is one child from the marriage. There are funeral and administration expenses totaling $60,000 and $100,000 in enforceable claims against the estate. The exempt property is worth $20,000 and the court awarded a family or support allowance of $50,000. The surviving husband received $150,000 from his late wife's *inter vivos* trust. The husband takes a homestead allowance and also elects against the will. Under this scenario, the calculation of the final elective share goes like this:

	$1,000,000	Decedent's money/property at death
Minus	$60,000	Funeral and administrative expenses
Minus	$100,000	Enforceable claims
Minus	$20,000	Exempt property
Minus	$50,000	Family support allowance
Add	$150,000	Distribution from wife's trust
	$920,000	The augmented estate

One-third of $920,000 = $306,636

$306,636 minus $150,000 = $156,636

$156,636 minus $15,000 homestead allowance = **$141,636**
The net elective share

Thus, the disinherited husband comes out ahead with his election. Had he received $300,000 from his wife's trust, his election would have yielded him no additional benefit.

Obviously, a major element of the equation is whether the spouse has received benefits outside of probate. Thus, it is important for the spouse and other interested parties to be familiar with this component of the equation. The list of benefits, funds, and assets constituting "property derived from the decedent" for offset purposes in the elective share formula is rather extensive and not necessarily intuitive. Sections 2 through 5 of § 474.163, RSMo, provide a non-exclusive list of offsetting assets and benefits, and presumptions, as follows:

> *2. Property derived from the decedent includes, but is not limited to:*
>
> *(1) Any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime;*
>
> *(2) Any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of persons other than the spouse;*
>
> *(3) Any proceeds of insurance, including accidental death benefits, on the life of the decedent attributable to premiums paid by him;*
>
> *(4) Any lump sum immediately payable, and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant, attributable to premiums paid by him;*
>
> *(5) The commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent; and*

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(6) The value of the share of the surviving spouse resulting from rights in community property in any other state formerly owned with the decedent.

Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

3. When immediately before the decedent's death the surviving spouse was a cotenant or remainderman with respect to money, property, a trust fund or an account in a bank or other financial institution and, incident to such death, the surviving spouse became the sole owner thereof or the owner of a life interest therein, the whole value of such sole ownership or life interest shall be deemed to have been received from the decedent, except as to the proportion of such value, if any, derived from contributions toward the acquisition, establishment or creation of the money, property, fund or account made by the surviving spouse or ascendant or collateral blood relatives of the surviving spouse, other than the decedent.

4. Property owned by the surviving spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

5. Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent, except to the extent that the surviving spouse establishes that it was derived from another source.

It is important to note that if a will does leave something to a surviving spouse and he or she elects against it, sometimes the election may end up being less advantageous to the spouse than the bequest set forth in the will. In that event, the spouse has a right under § 474.163.6 to rescind the election. And § 474.163.7 makes clear that nothing in the statute will require the surviving spouse to refund to the estate any property or money received from the decedent. Likewise, it is important to understand that the extensive listing in the statute of sources of assets and benefits outside of probate, such as trusts and joint accounts, does not mean that an electing surviving spouse now has a claim to those assets. The elective share provisions of the probate code do not create a vehicle for claims against those assets. They are mentioned because — to the extent that a surviving spouse was previously given a designated benefit or interest in those assets — the value of that benefit becomes part of the formula for determining the augmented estate, and then on the back end of the equation is deducted to yield the spouse's elective share. The elective share statutes, however, only give a right to a forced share from the *probate estate*, nothing more.

Procedures for Filing an Election

Chapter 474 spells out the procedures for making the election and the limitations on that right — from the initial notice to the surviving spouse, to filing the election, renouncing the will, or waiving the right election.

Section 474.170, RSMo, provides that the clerk of the court shall mail a written notice to the surviving spouse at his or her last known address advising that a written election must be filed in order to take against the will. The notice should give a presumptive deadline for the election that falls 10 days after the will contest period. Failure of the clerk to send the notice, or of the spouse to receive it, does not toll the time for making the election. Section 474.180 qualifies this deadline by providing that various categories of litigation related to the will or the administration of the estate will toll the election deadline until *"ninety days after the final determination of the litigation."*

Section 474.190, RSMo provides a sample form for making the election and requires that it be signed by the surviving spouse or his or her guardian ad litem, and filed with the clerk:

> I, A. B., surviving wife (or husband) of C. D., late of the county of _____ and state of _____ do hereby elect to take my legal share in the estate of the said C. D., and do hereby renounce all provisions in the will of the said C. D. inconsistent herewith.
>
> Signed, _____
>
> (Acknowledgment) (Signature)

Per § 474.200, RSMo, the surviving spouse's right of election is personal to him or her, is thus not transferable, and cannot be exercised after death. It may be exercised, not only by the surviving spouse directly, but also by his or her guardian ad litem or conservator. An interested person may apply to seek an order directed to such a fiduciary to elect for the surviving spouse. As with other rights afforded to the surviving spouse, the right to elect may be waived by a valid prenuptial or ante-nuptial agreement, which may then be filed with the court by an opposing party in the same manner that the election is filed.[27]

A surviving spouse who chooses to simply take a distribution that is provided for in the will retains the right to exempt property, a homestead allowance, and the one-year support allowance *"unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights or any of them."*[28]

The Omitted Spouse

Sometimes the failure to provide for a spouse in a will is because the will predates the marriage. Either the spouse is nowhere mentioned by name, or he or she is mentioned in some other capacity, such as a friend. In those circumstances, the omitted spouse has another option to take from the probate estate under § 474.235, RSMo, namely the choice to receive a spousal intestate share. Under the law of intestacy, the surviving spouse may take at least half of the probate estate and, unlike with an election against the will, is not automatically penalized for other benefits or support received

from the testator through other sources. But even this more generous option can be negated by an indication in the will itself that the omission was intentional.[29]

Separately, the omitted spouse share may also be negated by proof that the testator provided for the spouse by transfer outside of the will and intended that transfer to be in lieu of a benefit under the will. Section 474.235 recites that such intent may be shown by statements of the testator, the amount of the transfer, or other evidence.[30] If an omitted spousal share is taken, however, remaining devises under the will shall be reduced or "abated" according to § 473.620, RSMo.

A surviving spouse's name need not be entirely absent from the will before an omitted spouse election may be made. In *Estate of Groeper v. Groeper,*[31] an omitted spousal share was allowed despite the fact that the spouse was nevertheless a beneficiary under the will. The court found that the surviving spouse was not "provided for" as a spouse because the decedent executed his will before the marriage and clearly did not contemplate that his then-friend would be his future wife at the time he executed the will. "Substantially different considerations underlie a person's bequest to a friend or relative and that person's testamentary provision for the well-being of a spouse."[32] The surviving spouse bears the burden of proving that a pre-marriage provision for him or her was not made in contemplation of marriage.[33]

The election to take against the will and the omitted spouse election may both be initially pursued so that the surviving spouse may "determine which avenue would be most beneficial."[34] Eventually, however, a choice must be made.

Can Section 461.300 "Clawback" Be Utilized to Collect Spousal Allowances, an Elective Share, or Omitted Spousal Share?

Section 461.300, RSMo, is an oft-used tool for satisfying certain creditor claims where there are insufficient assets in the estate to cover those claims.[35] By its terms, the statute allows for a money judgment against certain non-probate transferees to satisfy *"statutory allowances to the decedent's surviving spouse and dependent children,"* and also unpaid claims. As referenced above, there are only two statutory allowances for a surviving spouse — the homestead allowance and the family allowance.[36] In cases, for example, where the probate estate is minimal and a substantial one-year support allowance is granted, the ability to satisfy that allowance from non-probate transfers is a valuable right.

An elective share and an omitted spouse's share, however, are separate from the statutory allowances, and neither share constitutes an unpaid claim. By definition, each share is satisfied with a percentage of what is already in the probate estate. As with legatees under a will, the statute offers no remedy beyond the probate estate for a surviving spouse seeking either type of forced share. With regard to unintentional disinheritance, § 461.059.1, RSMo, puts a fine point on the issue by affirmatively mandating that "*[n]o law intended to protect a spouse or child from unintentional disinheritance by the will of a testator shall apply to a nonprobate transfer.*"

Challenging Asset Transfers in Fraud of Marital Rights

Before there was a probate code, the common law of Missouri had long provided that a spouse could not "give away his property without consideration with the intent and purpose of defeating the marital rights of the other spouse."[37] This body of common law was then codified into the 1955 Probate Code in § 474.150, RSMo. That statute, which was amended slightly in 2018, now provides that *"[a]ny gift made by a married person, whether dying testate or intestate, in fraud of the marital rights of the surviving spouse to whom the decedent was married at the time of such gift and who may share in the decedent's estate, shall, at the election of such surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from the decedent without adequate consideration and applied to […] the spouse's share, as in case of his or her election to take against the will."*[38] The 2018 amendment principally modifies the statute to make clear that only transfers made during the marriage can be challenged. Prior case law had allowed consideration of transfers occurring soon before the marriage, consistent with prior common law.[39] The new revisions thus create a bright line for commencement of standing under the statute arising on the date of the marriage, but not before.

The surviving spouse's marital rights, as this article describes, include the statutory allowances, exempt property, and right of election. A decedent who has previously decimated his asset holdings — and thus his eventual probate estate — by gratuitous transfers will have largely stymied the surviving spouse's ability to benefit from the decedent's estate, but for this remedy. Such transfers may be inviolate if the transferring spouse did not make them with fraudulent intent.[40] Thus the decedent's intent is the lynchpin of an action under this statute.

The "fraud" referenced in the statute is not common law fraud,[41] but rather refers to gifts made by a person with the intent and purpose of defeating the spouse's marital rights.[42] It is not the fact of the transfer alone, but the transferring spouse's intent at the time of the transfer, that controls in determining whether a transfer is in fraud of marital rights. And it does not matter whether the transferred asset was acquired before the marriage and would be considered "non-marital" or "separate" property in the divorce context.[43] Such assets become probate assets on death without any such distinction and the surviving spouse's rights in the probate estate are thus unaffected by their prior lifetime characterization.[44]

Whether a transfer was made in fraud of the surviving spouse's marital rights is determined by the facts and circumstances that existed at the time of the transfer.[45] Where there is no *direct* evidence of the decedent's intent to defraud, the courts look to certain "badges of fraud" to determine whether the decedent made the challenged transfers with fraudulent intent.[46] The badges of fraud that have been recognized as relevant to determining whether one spouse had the intent to defraud the other include: (1) the lack of consideration for the transfer; (2) the retention of control by the transferring spouse of the transferred property; (3) the disproportionate value of the transfer compared to the total value of the estate; and (4) the failure to make the transfer openly and with frank disclosure.[47] However, in determining the decedent's intent, courts may consider and weigh all the

facts and circumstances in evidence.[48] Accordingly, Missouri courts have considered other relevant factors in addition to the above four badges of fraud.[49]

The *McKenna* decision also introduced an additional consideration into the mix that may arise in future cases where there is a prenuptial agreement. In *McKenna*, the decedent and surviving widow had entered into a prenuptial agreement that purported to waive the widow's marital rights. The decedent then made a series of transfers into a revocable trust that placed those assets beyond his ownership as a natural person, and thus outside of his eventual probate estate. After his death, the widow sued, claiming the transfers were in fraud of her marital rights. The trial court struck down the prenuptial agreement as being unconscionable under the facts presented, but found that the parties' mutual belief that the agreement was enforceable precluded any finding that the decedent possessed the necessary state of mind to make the transfers fraudulent. The court of appeals affirmed the lower court: "[W]e find, as the trial court did, that their shared belief *affirmatively demonstrates* that Decedent did *not* make the challenged transfers with fraudulent intent."[50] The court held that the "Widow failed to carry her burden of proving that [Decedent] made the challenged transfers with *the intent to defeat Widow's marital rights* — Decedent believed Widow had already waived them."[51]

The surviving spouse's burden is not based on the familiar preponderance of the evidence standard. Rather, marital fraud must be proven by the higher standard of clear, cogent, and convincing evidence.[52] And knowledge and consent on the part of the spouse to such transfers will free the transaction from any implication of fraud against the marital rights of the other spouse.[53] Subsection 2 of the statute modifies the burden of proof, however, where real estate is involved. Unlike the situation with transfers of funds, stocks, or other personalty, a conveyance of real estate by a married person without the joinder or other written express assent of the surviving spouse "is deemed to be in fraud of [marital rights] unless the contrary is shown." Thus, with real estate transfers, the surviving spouse's burden of proof is removed and it is the opposing party, usually the transferee or grantee of the property, that must come forward with proof.[54] The surviving spouse's signature on the deed transferring title rebuts the presumption of fraud.[55]

"The statute gives the surviving spouse the right to elect to treat transfers in fraud of marital rights as though the transferred property were part of the decedent's estate for purposes of electing to take against the will…."[56] The right to challenge the transfer on the basis of fraud belongs to the surviving spouse in his or her own name, individually.[57] A favorable decree by the court creates a special lien against the conveyed interest in favor of the surviving spouse.[58] If the spouse prevails on a claim of transfer in fraud of marital rights, he or she receives an elective share out of the fraudulently transferred property, and the balance remaining will belong to the original transferee.[59] The analysis does not end there, however. As with all spousal elections, if the surviving spouse has received sufficient property or benefits from the decedent by non-probate means per the provisions of § 474.163, then his or her elective share may be entirely offset.[60] In other words, whether the elective share involves assets in the probate estate, or a hypothecated elective share in a fraudulently transferred asset outside of the probate estate, offsets against such share may still apply. Accordingly, the wise practitioner will undertake to calculate the final elective share in the first instance before embarking upon an action under § 474.150 to pursue transferred assets.

A transfer in fraud of marital rights before death must involve an interest that could have been part of a probate estate. Thus, a change in the beneficiary of a life insurance policy is not a transfer under § 474.150 because life insurance proceeds would not be a part of the decedent's probate estate.[61] A retirement account was likewise not subject to marital rights under this statute because those types of assets do not become part of a decedent's estate.[62] In *Bishop v. Eckhard*, a widow's marital rights did not attach to the contributions the decedent made to his retirement account prior to his death. The court held that the beneficiary (a daughter) was a third-party beneficiary of the contract between decedent and the retirement plan offeror. The accumulated contributions therefore "constituted no part of decedent's estate," and "marital rights could not attach."[63]

Federal Law

ERISA and REA Requirements

State law is not the only source of rights for a surviving spouse. The Employee Retirement Income Security Act of 1974 ("ERISA") is a federal law that regulates the administration of employee-based retirement plans. Retirement accounts under such plans are often the single largest asset that many people own. The Retirement Equity Act of 1984 ("REA") revised the ERISA rules to add requirements that certain employee-based retirement plans provide benefits to the participant's spouse. For example, all pension plans, some profit-sharing plans, and some 403(b) plans must provide certain annuity benefits to the participant's surviving spouse. Plans that are generally exempt from the REA requirements include IRAs, Roth IRAs, and some 403(b) plans.

If a retirement plan is covered by the REA, the participant may waive the benefit to his or her spouse, so long as his or her spouse *consents* to the waiver in a timely and correct manner. Spousal consent is not required if the participant and his or her spouse are divorced, legally separated, if the spouse has abandoned the participant, or if the spouse cannot be located.[64] In the case of divorce, the spouse may receive a share of the benefits through a "qualified domestic relations order" issued in connection with the divorce.[65] The requirements for a valid spousal consent are set forth in IRC § 417 and the corresponding regulations. To ensure that a spouse's consent is valid, the participant must be provided with a written explanation of: (i) the terms and conditions of the interest being waived and consented to; (ii) the participant's right to make, and the effect of, an election to waive that interest; (iii) the rights of the participant's spouse regarding the waiver; and (iv) the participant's right to make, and the effect of, a revocation of an election to waive the interest.[66] Failure to provide this disclosure may invalidate the spousal consent.[67] Although the disclosure must be provided to the participant rather than to the spouse, the spouse's consent

must acknowledge the effect of the waiver.[68] This ordinarily means that the spouse should be given the same disclosures provided to the participant, in order for the spouse to understand the effect of the waiver.

The spouse's consent (i) must be in writing; (ii) must designate a beneficiary or form of benefits that may not be changed without spousal consent, or alternatively, must expressly permit the participant to make changes without the spouse's further consent; and (iii) must be witnessed by a plan representative or a notary public.[69] For more information on the form of spousal consent, the IRS has published conforming sample language.[70] If the spouse consents to the participant naming a trust as beneficiary, later amendments to the trust do not require subsequent spousal consent.[71] It should also be noted that a spouse's consent is binding only as to that spouse, and not as to subsequent spouses.[72] If the spouse is legally incompetent to give consent, his or her legal guardian may give consent, even if the guardian is the participant.[73]

ERISA and REA Preempt State Law

In most cases, requirements under ERISA and the REA preempt state law regarding spousal rights.[74] This is true even with respect to state revocation on divorce statutes.[75] For example, the Supreme Court held that Washington's revocation on divorce statute was ineffective to automatically revoke a designation on a life insurance policy and a pension plan designating the owner's spouse on dissolution of marriage.[76] In *Egelhoff v. Egelhoff ex rel. Reiner*, the husband worked for The Boeing Company, which provided him with a life insurance policy and a pension plan, both of which were governed by ERISA. The husband designated his wife as beneficiary of both the insurance policy and the pension plan. Subsequently, they divorced. Shortly thereafter, husband was killed in an automobile accident. He died intestate and was survived by two children of a previous marriage. The proceeds of the life insurance policy were paid to the ex-wife. The children brought suit to recover the insurance policy proceeds and, in another suit, to recover the proceeds of the pension plan as the decedent's heirs at law. The children relied on the Washington statute that provided for automatic revocation, upon divorce, of any designation of spouse as beneficiary of a non-probate asset. The Supreme Court held that the Washington statute was preempted, as it applied to ERISA benefit plans, as a state law "related to" ERISA plans, which directly conflicted with ERISA's requirement that plans be administered, and benefits paid, in accordance with plan documents.

With respect to Missouri's revocation on divorce statute, § 461.051, RSMo, in *Estate of Merrit ex rel. Merritt v. Wachter,*[77] the Missouri Court of Appeals held that the statute was preempted by ERISA. In that case, upon divorcing his wife, the husband was awarded his ERISA-governed retirement account, but failed to remove his former wife as the designated beneficiary. After the husband's death, the trial court, following the provisions of § 461.051, ordered removal of the former wife as a beneficiary of the account. The former wife filed suit claiming that § 461.051 was not operative, citing as authority the holding in *Egelhoff*. Reversing the trial court's order, the Missouri Court of Appeals held that the provisions of § 461.051 had indeed been preempted by federal law and the ex-spouse was thus entitled to the proceeds of the ERISA-governed account.

IRAs, Roth IRAs, and 403(b) Plans Not Covered by ERISA and the REA

As mentioned above, IRAs, Roth IRAs, and some 403(b) plans are generally not governed by ERISA and the REA, so they do not include the same protections for spouses. Thus, an IRA owner may be able to eliminate his or her spouse's right to inherit or make a claim against the IRA without spousal consent. This is true even if a covered plan, such as a 401(k), is rolled into an IRA. For example, in *Charles Schwab & Co., Inc. v. Debickero,*[78] a husband rolled his 401(k) into an IRA after he retired. He named his children as beneficiaries. After he died, his wife claimed that she was entitled to the funds as his surviving spouse. She argued that because her husband rolled his 401(k) into the IRA, she should receive the same protections that the 401(k) gave her. The court disagreed, finding that the IRAs are excluded from ERISA coverage even if the funds originated in a 401(k).

Social Security Benefits

Consideration should also be given to Social Security benefits that may be available to a surviving spouse.[79] These benefits, while generally insufficient to support more than a subsistence standard of living on their own, are nevertheless a substantial source of funds for many surviving spouses.

A one-time payment of $255 can be paid to the surviving spouse if he or she was living with the deceased; or, if living apart, was receiving certain Social Security benefits on the deceased's record. The surviving spouse may also be eligible for certain monthly survivor benefits, which are based on the earnings of the deceased worker. The more the deceased paid into Social Security, the higher the benefits will be. The monthly amount is a percentage of the deceased's basic Social Security benefit and is dependent on the survivor's age and type of benefit the survivor is eligible to receive. If the deceased was receiving reduced benefits, then the survivor benefits will be based on that amount. The surviving spouse can: (i) receive full benefits at full retirement age for the survivor or reduced benefits as early as age 60; (ii) begin receiving benefits as early as age 50 if the survivor is disabled and the disability started before or within seven years of the deceased worker's death; or (iii) receive survivor benefits at any age, if the survivor has not remarried and takes care of the deceased worker's child who is under age 16 or is disabled and receives benefits on the worker's record. If the surviving spouse remarries after reaching age 60 (or age 50, if disabled) the remarriage will not affect the surviving spouse's eligibility for survivor benefits. However, a surviving spouse who remarries before reaching age 60 (or age 50, if disabled) cannot receive survivor benefits while married.

A surviving divorced spouse may also receive the same benefits as a surviving non-divorced spouse so long as the marriage lasted 10 years or more. Benefits paid to a surviving divorced spouse should not affect the benefits paid to other family members receiving benefits on the deceased

worker's record. Even if the surviving divorced spouse subsequently remarries after reaching age 60 (or age 50, if disabled), the remarriage will not affect the surviving divorced spouse's eligibility for survivor benefits. If the surviving divorced spouse is caring for a child who is under age 16 or who is disabled, and who receives benefits on the record of the former spouse, the surviving divorced spouse does not have to meet the length-of-marriage rule; however, the child must be the former spouse's natural or legally adopted child.

Conclusion

In terms of the laws of inheritance, marriage is not what it used to be. While default rights under both state and federal law provide notable benefits and protections for a typical widow or widower, the fact remains that a determined person of substantial means can largely disinherit a surviving spouse. The execution of a valid prenuptial or post-nuptial agreement can further limit default rights or, to the contrary, guarantee a substantial inheritance capable of enforcement upon death. The complexity of these situations is further compounded by multiple marriages with children from different partners, as well as the reality that most households now have more than one breadwinner, with both partners now having access to meaningful career opportunities. Nonetheless, the practitioner advising a client who is about to marry must look past the romantic ideals of the institution and give dispassionate consideration to the realities of multiple possible outcomes. While many or most people may make loving preparation for the well-being of their surviving spouse,[80] the law is only a lukewarm surrogate for the love of a good man or woman.

Endnotes

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1 Mr. Selsor is a shareholder and Mr. Glogower is an associate at Polsinelli PC in St. Louis.

2 See De Officiis 57 (W. Miller transl. 1913).

3 135 S. Ct. 2584, 2601 (2015).

4 Richard F. Storrow, *Family Protection in the Law of Succession: The Policy Puzzle*, 11 Ne. U. L. Rev. 98 (Spring 2019).

5 *Curtesy,* Black's Law Dictionary (7th ed.1999).

6 *Newton v. Newton*, 61 S.W. 881 (Mo. 1901).

7 *See* the analysis *infra*.

8 Section 473.260, RSMo (2018).

9 Discussed *infra*. *Id*.

10 100 S.W.3d 924 (Mo. App. W.D. 2003).

11 *Id*. at 927–28 (emphasis added).

12 *Id*.

13 280 S.W.2d 27, 34 (Mo. 1955).

14 *See, e.g.,* §§ 461.300 and 473.267, RSMo (2018), regarding "clawback" of assets available for payment of creditors. *See also* actions in fraud of marital rights, *infra*.

15 *Matter of Estate of Arndt*, 814 S.W. 2d 712, 713 (Mo. App. W.D. 1991).

16 *In re Pauli's Estate*, 613 S.W.2d 467, 468 (Mo. App. E.D. 1981).

17 *See* § 474.260.2, RSMo (2018).

18 *In re Estate of Guthland*, 438 S.W.2d 12, 16 (Mo. App. E.D.1969).

19 *See* § 474.290.1, RSMo (2018).

20 *See also* § 474.130, RSMo (2018), dealing with the failure of such agreements. See also 5 Mo. Prac., *Probate Law and Practice*, Section 21, 3d Ed., *Antenuptial and Postnuptial Agreements*; 5B Mo. Prac., *Probate Law and Practice*, Section 1242, 3d ed., *Contractual Bar of Marital Rights — Modern Law*; 5 Mo Prac., *Probate Law and Practice*, Section 42, 3rd ed., *Rights of Surviving Spouse – Waiver of Right to Elect*.

21 *See Estate of Heil v. Heil*, 538 S.W.3d 382 (Mo. App. W.D. 2018) (wife's election against will challenged per § 474.140). *See also Harris v. Davis*, 587 S.W.3d 362 (Mo. App. S.D. 2019). (Separation does not equal abandonment but giving up the relation of husband or wife without reasonable cause and with no intention to resume it is abandonment.)

22 This allowance may be shared with certain minor children who the decedent was obliged to support or was in fact supporting.

23 Section 474.160.1(2), RSMo (2018).

24 *See Matter of Estate of Curtis*, 663 S.W.2d 420, 426 (Mo. App. S.D. 1983).

25 That will not be the case for a spouse who has received nothing from the decedent and in that instance the augmented estate will be less than the gross probate estate.

26 *See Estate of Brewster*, 809 S.W.2d 183 (Mo. App. S.D. 1991).

27 Section 474.220, RSMo (2018).

28 Section 474.230, RSMo (2018).

29 *Id*.

30 Evidence that a surviving spouse retains funds from a joint account with the deceased spouse, however, does not necessarily constitute a transfer for the benefit of the surviving spouse if there is no proof as to the origin of the funds. *Estate of Groeper v. Groeper*, 665 S.W.2d 367, 369 (Mo. App. E.D. 1984). *See also In Re Estate of Honse*, 694 S.W. 2d 505, 508 (Mo. App. S.D. 1985).

31 665 S.W.2d 367, 369-70 (Mo. App. E.D. 1984).

32 *Id*. *See also In Re Estate of Honse*, 694 S.W. 2d 505 (Mo. App. S.D. 1985) (The purpose of the omitted spouse statute is to protect the surviving spouse by requiring the testator to provide for the surviving spouse with the testator's assets.).

33 *Groeper*, 665 S.W.2d at 369.

34 *In re Estate of Ferguson*, 130 S.W.3d 656, 661 (Mo. App. E.D. 2004).

35 *See* Robert Selsor, *Fattening Up the Skinny Estate — The Non-Probate Transfer Statute's Remedies for Pursuing a Decedent's Assets*, 67 J. Mo. B., 286 (2011).

36 *See* UPC Comment for § 6-107, UPC to 4A Mo. Prac., Probate & Surrogate Laws Manual § 461.300 (2d ed.).

37 *Nelson v. Nelson*, 512 S.W. 2d 455, 459 (Mo. App. W.D. 1974).

38 *See also In Estate of McKenna*, 500 S.W.3d 850, 856 (Mo. App. E.D. 2016) (quoting from an earlier version of the statute). *See also In re Estate of Brown*, 800 S.W.2d 137, 138 (Mo. App. E.D. 1990).

39 *See Loe v. Downing*, 325 S.W.2d 479, 482 (Mo. 1959).

40 5B Mo. Prac., *Probate Law & Practice*, § 1193 (3d ed.), citing *Haushalter v. Crawford*, 496 S.W. 2d 818 (Mo. 1973).

41 For a case discussing the elements of common law fraud, *see Trimble v. Pracna*, 167 S.W.3d 706 (Mo. 2005).

42 *McDonald v. McDonald*, 814 S.W.2d 939, 945 (Mo. App. S.D. 1991).

43 *McDonald*, 814 S.W.2d at 948. *See also In re Marriage of McIntosh*, 126 S.W.3d 407, 411 (Mo. App. S.D. 2004). *See also* the scholarly opinion in *Hoyt v. Robertson*, 2019 WL 5555789 (Mo. App. E.D. 2019). "The single limitation on a spouse's ability to convey separately-inherited property is that the conveyance cannot be in fraud on the other spouse's marital rights."

44 *Id*.

45 *McKenna*, 500 S.W.3d at 856.

46 *See McKenna*, 500 S.W.3d at 856, and *Nelson*, 512 S.W.2d at 459-60.

47 *McKenna*, 500 S.W.3d at 856, *Estate of Fleischmann v. Fleischmann*, 723 S.W.2d 605, 610 (Mo. App. E.D. 1987) (citing *Matter of Estate of LaGarce*, 532 S.W.2d 511, 515-16 (Mo. App. 1975)).

48 *McKenna,* 500 S.W.3d at 856; *LaGarce*, 532 S.W.2d at 515 (citing *Potter v. Winter*, 280 S.W.2d 27, 36 (Mo. banc 1955)).

49 *See, e.g., Id*. at 516-17 (considering, in addition to the four most commonly listed factors, whether the decedent made the challenged transfers in contemplation of death; the timing of the transfers in relation to the decedent's separation from his surviving spouse; whether, around the time of the transfers, the decedent placed jointly-held assets beyond her control; and the effects of the transfers on the reasonable expectations of the surviving spouse).

50 *McKenna*, 500 S.W. 3d at 856 (emphasis in original).

51 *Id*. at 857.

52 *Matter of Mitchell's Estate*, 610 S.W.2d 681 (Mo. App. E.D. 1980).

53 *Dillard v. Dillard*, 266 S.W.2d 561 (Mo. 1954). But *see also Estate of Bernskoetter,* 693 S.W.2d 249, 254 (Mo. App. W.D.1985) (surviving spouse had no duty to investigate regarding transfers given the duty of candor between married persons).

54 *Nelson*, 512 S.W.2d at 459.

55 *Hoyt v. Robertson*, 2019 WL 5555789 (Mo. App. E.D. 2019).

56 5 B Mo. Prac., *Probate Law and Practice*, Section 1193 (3rd ed.).