
**The
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College of
Trust
and Estate
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Study 10:

**Surviving Spouse's Rights To Share
In Deceased Spouse's Estate**

Compiled by

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SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

ALABAMA

Lyman F. Holland, Jr.
Mobile, AL
April 14, 1998

All statutory citations
are to Ala. Code
(1975).

- (a) (1) First \$50,000 plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of estate [43-8-41].
(2) First \$100,000 plus 1/2 of balance of estate if either of decedent's parents survives; otherwise, entire estate [43-8-41].
- (b) Either (i) decedent's entire estate reduced by value of spouse's "separate estate" (i.e., real and personal property owned by spouse immediately after decedent's death not passing under will, all property acquired by surviving decedent, and other contractual benefits acquired by spouse) [43-8-70] or (ii) 1/3 of decedent's estate, whichever is less [43-8-70]. However, if will executed before marriage and spouse is omitted, same share as provided in answer (a) above; if it appears omission is intentional or testator provided for spouse outside will, same share as provided in answer (i) and (ii) above [43-8-90].
- (c) Yes.
- (d) Not applicable.

- (a) None [43-8-70 and 43-8-73].
- (b) Not provided for under AL law — (but may apply to out of state real estate since elective share is taken from "all of the estates of the deceased" [43-8-70]).
- (c) Determined by law of decedent's domicile [43-8-70].

- (a) None [43-8-57].
- (b) None [43-8-57].
- (c) Allowance of \$6,000 for spouse domiciled in AL (only indirectly affects share by reducing divisible estate; but, if will so provides, benefits under will can be reduced and/or eliminated) [43-8-110 and 43-8-74]. Constitutional right of homestead exemption not exceeding 80 acres and dwelling not exceeding value of \$2,000 is to be set off against above statutory homestead [43-8-110(b) and Ala Const art X, sec 205, sec 206, and sec 208].
- (d) Personal property exemption of \$3,500 in value over liens and encumbrances and family allowance of reasonable amount not to exceed \$500 per month with a maximum of \$6,000 (only indirectly affects share by reducing divisible estate; but, if will so provides, benefits under will can be reduced and/or eliminated). Family allowance can be raised or lowered by court [43-8-74, 43-8-111, 43-8-112, and 43-8-113].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

ALABAMA

- (a) Either by written contract with adequate consideration that is fair, just, and equitable or waiver in writing after fair disclosure [43-8-72 and *Tibbs v. Anderson*, 580 So2d 1337 (1991)].
- (b) Rights apply only to probate estate assets; no statutory right to assets validly transferred during lifetime [43-8-70].
- (c) Forfeited if spouse (i) obtained or consented to divorce or annulment in another state not valid in AL, unless decedent and spouse subsequently marry or live together as spouses (decree of separation does not destroy status of spouse), (ii) participated in proceeding to terminate all marital rights, or (iii) feloniously and intentionally killed decedent [43-8-252 and 43-8-253].

Petition filed with court and mailed or delivered to personal representative within 6 months of death or 6 months after probate of decedent's will, whichever is later (court may extend time for election for cause before deadline) [43-8-73].

- (a) After payment of funeral expenses, expenses of administration, and debts, first out of property passing to spouse under will and then proportionately among other beneficiaries [43-8-75].
- (b) In cash and/or in kind [43-8-75 and 43-8-73].

- (a) Terminates [43-8-71].
- (b) By court order upon finding of necessity to provide adequate support for spouse during probable life expectancy [43-8-71].

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 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

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- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
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- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

ALASKA

Peter B. Brautigam
Anchorage, AK
February 19, 1999

All statutory citations
are to Alaska Stat.

- (a) (1) Entire estate if all issue of decedent and spouse are same [13.12.202(a)(1)(B)]; otherwise, (i) first \$150,000 plus 1/2 of balance of estate if decedent and spouse have same issue but spouse also has other issue or (ii) first \$100,000 plus 1/2 balance of estate if any of decedent's issue are not spouse's issue [13.12.202(a)].
(2) First \$200,000 plus 3/4 of balance of estate if decedent has no surviving issue, but parent of decedent survives decedent; otherwise, entire estate [13.12.102(a)(1) and (2)]. There are special provisions for settlement stock issued pursuant to 43 USC 1601, *et seq.* [13.12.102(b)].
- (b) 1/3 of augmented estate [i.e., probate estate and property described in 2(a) and 4(b)] [13.12.202(a)].
- (c) Yes [13.11.125, 13.11.130, and 13.11.135].
- (d) Not applicable.

- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those assets transferred by spouse that would have been included in spouse's augmented estate if spouse had been decedent instead [see answer 4(b) also] [13.12.203-13.12.208].
- (b) Not provided for under AK law.
- (c) Determined by law of decedent's domicile [13.12.202(d)].

- (a) None.
- (b) None.
- (c) Intestate share is determined after homestead allowance. Elective share is in addition to homestead allowance [13.12.202(c) and .204].
- (d) Intestate share is determined after allowances. Elective share is in addition to allowances [13.12.202(c) and .204]. Reasonable family allowances are allowed with no limitation as to amount except may not extend beyond 1 year if estate not adequate to pay for allowed creditor's claims [13.12.404] and exempt property allowance of \$10,000 [13.12.404 and 13.12.403].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

ALASKA

- (a) Elective share, exempt allowance, and family allowance may be waived wholly or partially, before or after marriage, by written contract, agreement, or waiver signed by spouse [13.12.213].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those in full value or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death to extent such property transferred to any donee in either year exceeded \$10,000 [13.12.205 and 13.12.208].
- (c) Forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in AK, (ii) participated in proceeding to terminate all marital rights, or (iii) feloniously kills decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence) [13.12.802 and 13.12.803].

Petition filed with court and mailed or delivered to personal representative, if any, within 6 months after probate of decedent's will or within 9 months of death, whichever expires later (court may extend time for election if spouse shows cause within deadline) [13.12.211].

- (a) After payment of funeral and administration expenses, homestead allowance, family allowance, and exemptions, first out of property passing to spouse and then proportionately from residual distributees [13.12.209 and .210].
- (b) In cash and/or in kind [13.12.209].

- (a) Terminates [13.12.212].
- (b) Right of election may be exercised by spouse's conservator, guardian, or agent under authority of power of attorney [13.12.212].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

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- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

ARIZONA

Stephen S. Case
Scottsdale, AZ
May 9, 2004

All statutory citations
are to Ariz Rev Stat
Ann.

- (a) (1) 1/2 of sole and separate probate property and none of decedent's half of community property estate if decedent's issue are not spouse's issue; otherwise, entire estate [14-2102].
(2) Entire estate [14-2102].
- (b) None except unintentionally omitted spouse takes intestate share if marriage occurs after decedent's will [14-2301].
- (c) Yes [14-3902].
- (d) Not applicable.

- (a) Not applicable.
- (b) Not provided for under AZ law.
- (c) Not provided for under AZ law.

- (a) None .
- (b) None.
- (c) Allowance in lieu of homestead of \$18,000 (reduces intestate share or share under will dollar for dollar) [14-2402].
- (d) Exempt property allowance of \$7,000 [14-2403]. Reasonable allowance for maintenance of spouse and children [14-2404]. Both reduce spouse's intestate share or share under will dollar for dollar.

ARKANSAS

W. Wilson Jones
Little Rock, AR
May 29, 1993

All statutory citations
are to Ark. Stat. Ann.

- (a) (1) None [28-9-214(1)].
(2) Entire estate if married 3 or more years or if no other heirs; otherwise, 1/2 of estate [28-9-214(2) and 28-9-215(1)].
- (b) None (other than benefits described in answer 2) [28-39-401].
- (c) Yes [28-9-206].
- (d) Not applicable.

- (a) See answer 3(b).
- (b) Governed by law of situs [*Apperson v. Bolton*, 29 Ark 418 (1874)].
- (c) Determined by AR law as if resident decedent [*Apperson v. Bolton*, 29 Ark 418 (1874)].

- (a) Dower is life interest in 1/3 of all real property of which husband seized during marriage and absolutely in 1/3 of personal property of which he died seized [28-11-301(a) and 28-11-305]. If husband leaves no issue, dower is 1/2 of both real and personal property absolutely as against collateral heirs and 1/3 as against creditors (except if real estate is ancestral property, dower right is 1/2 for life as against collateral heirs and 1/3 as against creditors) [28-11-307] (only indirectly affects share by reducing heritable estate) [28-9-206].
- (b) Widower's curtesy is same as widow's dower (only indirectly affects share by reducing heritable estate) [28-11-301(a), 28-11-305, and 28-11-307].
- (c) If spouse has no separate homestead, spouse and minor children may claim homestead limited to \$2,500, but in all events homestead shall not be less than 1/4 acre of urban property or 80 acres of rural property [28-39-201, 28-39-203, Ark. Const. Art. 9 §§ 4 & 5, and *Price v. Price*, 527 SW2d 322 (1975)] (only indirectly affects share by reducing heritable estate).
- (d) Spouse is entitled to statutory allowance of \$2,000 as against distributees and \$1,000 as against creditors (only indirectly affects share by reducing divisible estate) [28-39-101].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

ARIZONA

- (a) After full disclosure, any right may be waived in writing before or after marriage [14-2207 and 25-201].
- (b) Spouse has rights only in probate, which may be defeated by trusts, joint tenancy, and transfers during life.
- (c) All rights are forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in AZ, (ii) participated in proceeding to terminate all marital rights, or (iii) feloniously and intentionally killed or aided in killing decedent (final judgment of conviction is conclusive but court may also find civil guilt by preponderance of evidence) [14-2802(B) and 14-2803].

Not applicable.

- (a) Not applicable.
- (b) Not applicable.

- (a) Not applicable.
- (b) Not applicable.

ARKANSAS

- (a) After fair disclosure, rights may be waived before marriage [9-11-403 and 9-11-406]. After marriage, agreement may be amended or revoked only by signed, written agreement [9-11-405].
- (b) Elective rights apply only to probate assets (unless fraudulent conveyance), except that spouse's dower or curtesy interest in real property cannot be extinguished without consent for period of 7 years from date deed is recorded [28-11-203(a)].
- (c) Rights barred by murder of spouse [28-11-204].

By filing written election with court within 1 month after expiration of period for filing claims against estate (i.e., 3 months from date of first publication of notice) unless litigation regarding will, heirs, or shares is pending, in which case election must be filed within 1 month after date of final order adjudicating issue in litigation [28-39-402 and 28-39-403].

- (a) Priority items are dower, curtesy, homestead, statutory allowance, rights of surviving spouse in joint return income tax refund, and claims allowed in administration [28-9-206].
- (b) In kind [28-53-114], unless sale authorized by probate court [28-35-306].

- (a) Terminates [28-39-405(a)].
- (b) Guardian may, when authorized by court having jurisdiction of ward, elect on ward's behalf [28-39-405(b)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

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What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

CALIFORNIA

Susan S. Briggs
San Francisco, CA
April 30, 2004

All statutory citations are to Cal. Prob. Code except as otherwise noted.

- (a) (1) All community and quasicommunity property and 1/3 of separate property (1/2 of separate property if only 1 child or issue thereof survives) [6401]. NOTE: Quasicommunity property is all personal property wherever situated and all real property situated in CA acquired by decedent (i) while domiciled outside CA, which would have been community property had decedent been domiciled in CA when acquired, and (ii) in exchange for real or personal property, wherever situated, which would have been community property had decedent been domiciled in CA when property so exchanged was acquired [66].
(2) All community and quasicommunity property plus 1/2 of separate property if either of decedent's parents or issue of parents survives (if otherwise, all separate property) [6401].
 - (b) None, except for right of (i) spouse to petition to have estate with net value of \$20,000 set aside to spouse [6600-6615] and (ii) "omitted spouse" (spouse who married testator after will was made) to receive intestate share [6560-6562].
 - (c) Not applicable.
 - (d) Not applicable.
- (a) See 4(b). Also, community property and quasi community property transferred to revocable trust are presumed to retain their character as such [104.5].
 - (b) Not provided for under CA law.
 - (c) If not community property, determined by law of decedent's domicile [120].
- (a) None except for noncommunity real property belonging to a nonresident decedent [6412, 120].
 - (b) None except for noncommunity real property belonging to a nonresident decedent [6412, 120].
 - (c) Spouse entitled to retain possession of family dwelling, wearing apparel, household furniture, and decedent's other property exempt from enforcement of a money judgment until 60 days after filing inventory with court (or such other period as ordered by court); after filing of inventory, court may provide that spouse receive (i) decedent's personal property exempt from enforcement of a money judgment and (ii) a homestead (not in excess of spouse's lifetime) out of decedent's community, quasicommunity, or separate property (only indirectly affects share by reducing divisible estate) [6500-6528].
 - (d) Reasonable allowance for maintenance according to circumstances during administration (only indirectly affects share by reducing divisible estate) [6540-6545].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
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How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

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- (a) With what priority?
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Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

CALIFORNIA

- (a) After full disclosure of property and obligations and independent representation by counsel, any right may be waived in writing before or after marriage; however, court may refuse to enforce waiver in whole or in part if enforcement would be unconscionable when enforcement is sought [140-147].
- (b) Most *inter vivos* transfers of decedent's community property are ineffective without spouse's consent [Family Code 1100]; spouse has no right to other property transferred (except that spouse may require restoration of 1/2 of quasi-community property transferred without adequate consideration where decedent retained substantial quantum of ownership or control of property at death) [102].
- (c) All rights are lost if spouse intentionally caused death of decedent [250-257]. Dissolution or annulment revokes all will provisions for former spouse, unless will specifically provides otherwise [6122].

Not applicable.

- (a) Not applicable.
- (b) Not applicable.

- (a) Not applicable.
- (b) Not applicable.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

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- (d) Spouse's, family, etc. allowances

COLORADO

Victor Quinn
Denver, CO
March 30, 1998

All statutory citations
are to Colo Rev Stat.

- (a) (1) Entire estate if all issue of decedent and spouse are same [15-11-102(1)(b)]; otherwise, (i) first \$150,000 plus 1/2 of balance of estate if decedent and spouse have same issue but spouse also has other issue or if any of decedent's issue are not issue of spouse but all of decedent's issue are adult children (ii) 1/2 of estate if any of decedent's issue are not spouse's issue and decedent has one or more minor children [15-11-102(1)(b),(3),(4), and (5)].
(2) Entire estate if no issue or parent of decedent survives [15-11-102(1)(a)]. If a parent but no issue survives, first \$200,000 plus 3/4 of balance of estate [15-11-202(2)]. Alternatively, spouse may elect up to 1/2 share of augmented estate, depending on length of marriage [see answer (b) below].
 - (b) Varying percentage of augmented estate [i.e., probate estate plus other property described in answers 2(a) and 4(b)], depending on length of marriage (i.e., 5% up to 50% if married 1 to 10 years, or more), or supplemental amount of \$50,000 if greater than percentage amount [15-11-201(1) and (2)].
 - (c) No.
 - (d) If spouse elects fraction of augmented estate, exempt property and family allowances reduce estate for this purpose [15-11-202(2)(a)]. Homestead probably is not deduction in computing augmented estate [see 38-41-201], but probably may be subtracted from probate estate as allowance [see *Estate of Dodge*, 685 P.2d 260 (Colo. Ct. App., 1984) and *Shaw, Colorado Homestead Statutes: Exemption or Allowance*, 17 Colo. Lawyer 827 (May 1988)]. If decedent died intestate and spouse does not elect augmented estate share, exempt property and family allowances are treated as claims and thus reduce estate against which intestate share applies [15-11-403 and 15-11-404(2)].
- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except life and accidental insurance and retirement benefits payable to persons other than spouse or estate [15-11-202(2) and (3)].
 - (b) Augmented estate includes value of decedent's "probate estate," which is defined to include property, real or personal, movable or immovable, wherever situated, that would pass by intestate succession if decedent died without valid will [15-11-202(2)(a) and (1) (a)(VIII)].
 - (c) Determined by law of decedent's domicile [15-11-201(4)].
- (a) None.
 - (b) None.
 - (c) Homestead allowance of \$30,000 in value over liens and encumbrances [38-41-201] is not listed as reduction to reach augmented estate as are exempt property and family allowances [see answer 1(d)] [15-11-202(2)(a)]. However, if CO courts treat homestead as *allowance*, it may then constitute "property that passed to spouse by reason of decedent's death" [15-11-202(d)(l)(C)] for calculating augmented estate share.
 - (d) Exempt property allowance of \$15,000 [15-11-403] and "reasonable" family allowance [15-11-404] are considered claims, which are in addition to any share passing to spouse by will (unless it provides otherwise), intestate succession, or elective share (augmented estate is reduced by these allowances, so base for spouse's elective share is reduced) [15-11-202(2)(a)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

COLORADO

- (a) Elective share, exempt property allowance, family allowance, and homestead exemption may be waived wholly or partially before or after marriage after fair disclosure [15-11-207(1)].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in any year exceeded \$10,000 [15-11-202(2) and (3)].
- (c) Rights lost if (i) obtained or consented to divorce or annulment (even if not valid in CO unless they subsequently purport to marry each other) [15-11-802(2)(a)], (ii) following an invalid divorce or annulment obtained by decedent, participates in marriage ceremony or enters into common law marriage with another, (iii) party to valid proceeding concluded by an order purporting to terminate all marital rights, or (iv) feloniously (first or second degree murder or manslaughter) killed or aided in killing decedent (final judgment of conviction is conclusive but court adjudicating question may find guilt by preponderance of evidence) [15-11-802(2), 803(2) and (7)].

Petition filed with court and mailed or delivered to personal representative, if any, within later of (i) 6 months after decedent's will is admitted to probate or (ii) 9 months after decedent's death [15-11-205(1)]. Spouse may petition court for extension of time to make election within 9 months after decedent's death [15-11-205(2)].

- (a) After payment of funeral and administration expenses, exempt property allowances, family allowances and enforceable claims, first out of property passing to spouse by testate or intestate succession and by nonprobate transfers to spouse which are included in augmented estate [15-11-203(1)]. Then by classes of property (included in probate estate or nonprobate transfers) passing to others proportionately [15-11-203(2) and (3)].
- (b) In cash and/or in kind [15-11-203(1)]. Transferee liable to make a contribution can also choose to respond in cash or in kind [15-11-204(1)].

- (a) Terminates if death occurs before petition is filed [15-11-206(1)].
- (b) Election may be made by spouse's conservator, guardian, or agent under authority of power of attorney [15-11-206(1)], in which case court sets aside elective share in trust for spouse's support [15-11-206(2) and (2)(a)]. If spouse regains capacity, spouse may terminate trust and acquire full ownership of trust property [15-11-206(2)(b)]. Otherwise, at spouse's death, trust property passes (i) under residuary clause of decedent's will as if decedent had died immediately after death of spouse or (ii) if no residuary clause to decedent's heirs determined under 15-11-711.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

CONNECTICUT

Frank S. Berall
Hartford, CT
April 29, 2004

All statutory citations
are to Conn Gen
Stat.

- (a) (1) First \$100,000 plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of estate [45a-437(a)].
- (2) First \$100,000 plus 3/4 of balance of estate if either of decedent's parents survives; otherwise, entire estate [45a-437(a)].
- (b) Life use of 1/3 in value of all "legally or equitably owned" property of decedent "after payment of all debts and charges against the estate" [45a-436(a)]. This statutory share is computed before deduction of taxes [*Cranley v. Schirmer*, 236 A2d 332 (1967)].
- (c) Yes [45a-433(a) and 45a-437(a)].
- (d) Not applicable.

- (a) None (rights are only to property decedent owned at death) [*Cherniack v. Home National Bank & Trust Co.*, 198 A2d 58 (1964)].
- (b) None [*See Bankers Trust of New York v. Greims*, 147 A 290 (1929)].
- (c) Rights to real estate will be governed by law of this state if decedent's will is proved in this state and will provides for application of law of this state [45a-287(c)]. In all other cases, CT rule is unclear.

- (a) None.
- (b) None.
- (c) None.
- (d) Allowance for support available to spouse or family in discretion of court during settlement of estate [45a-320], but with postponement of possession of statutory share for period of allowance (only indirectly affects share by reducing divisible estate) [45a-436(d)].

DELAWARE

Thomas P. Sweeney
Wilmington, DE
April 29, 2004

All statutory citations
are to Del Code Ann
tit 12.

- (a) (1) First \$50,000 of personal estate plus 1/2 of balance of personal estate plus life estate in real estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of personal estate plus life estate in real estate [502].
- (2) First \$50,000 of personal estate plus 1/2 of balance of personal estate plus life estate in real estate if either of decedent's parents survives; otherwise, entire estate [502].
- (b) 1/3 of "elective estate" [amount of decedent's adjusted gross estate for federal estate tax purposes, regardless of whether 706 is filed and without regard to IRC 2040(b), less deductions allowable under IRC 2053 and 2054 and less amount of all of decedent's lifetime transfers includable in federal adjusted gross estate that were made with written consent or joinder of spouse] less transfers to spouse by decedent [901 and 902].
- (c) Yes [902(a)(1) and 2105].
- (d) Not applicable.

- (a) Nonprobate items included in federal gross estate are part of elective estate for purposes of computing elective share. However, such items are not part of contributing estate (i.e., spouse may not satisfy elective share from nonprobate items) [902, 908].
- (b) If included in decedent's adjusted gross estate for federal estate tax purposes, it is subject to satisfaction of elective share [902].
- (c) Determined by law of decedent's domicile [901(b)].

- (a) None [511].
- (b) None [511].
- (c) None.
- (d) Spouse's allowance of \$2,000 is payable as debt of estate if demanded within 6 months from date letters are granted or 9 months from date of death, whichever is shorter (only indirectly affects share by reducing divisible estate) [2308(a)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

CONNECTICUT

- (a) Rights can be waived by written agreement before or after marriage [45a-436(f); *McHugh v. McHugh*, 436 A2d 8 (1980)]. Validity of agreement entered into after marriage without consideration is unclear [See *Sacksell v. Barrett*, 43 A2d 79 (1945)].
- (b) Elective share applies only to probate assets legally or equitably owned by decedent at time of death [45a-436(a) and *Cherniack v. Home National Bank & Trust Co.*, 198 A2d 58 (1964)].
- (c) Forfeited if abandoned decedent without sufficient cause and continued abandonment until death [45a-436(g)]. A person adjudged guilty of murder cannot inherit from deceased [45a-447(a)].

Written notice to probate court within 150 days from date of appointment of first fiduciary (failure to give notice will bar claim) [45a-436(c)].

- (a) After payment of all debts and charges against estate (including allowance for support) [45a-433(a)].
- (b) Real or personal or both (in cash and/or in kind) [45a-436(e)].

- (a) Probably can still have life (of a few months) use if fiduciary for spouse makes timely election [See *Bankers Trust of New York v. Greims*, 147 A 290 (1929) (statutory interest of spouse vests at decedent's death)].
- (b) Conservator can exercise rights with probate court approval [45a-436(c)].

DELAWARE

- (a) Right may be waived, wholly or partially, after fair disclosure by written agreement before or after marriage [905].
- (b) See answer to question 2(a).
- (c) If spouse pleads guilty or nolo contendere to, or is convicted of, offenses listed in §632, §635, or §636 of title 11 (murder or manslaughter) of decedent, spouse is deemed to have predeceased decedent [2322(a) and (b)].

Filing petition with court and personal representative within 6 months after letters testamentary or of administration have been granted [906].

- (a) After payment of administration expenses, fees, and commissions, spouse's allowance, funeral expenses, and enforceable claims, first out of property passing to spouse and not expressly renounced by spouse and then proportionately from recipients of decedent's "contributing estate" —i.e., portion of elective estate [see answer 1(b)] of which decedent was sole legal owner at death (does not include jointly owned property, insurance proceeds payable other than to estate, or property held in trust) [2105 and 908].
- (b) In cash and/or in kind [901(a)].

- (a) Terminates [904].
- (b) None (right may be exercised by guardian or trustee by court order) [904].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

DISTRICT OF COLUMBIA

Julian E. Markham, Jr.
Washington, DC
February 25, 1999

All statutory citations are to DC Code Ann unless otherwise specified.

- (a) (1) 1/3 of real and personal estate [19-303].
(2) 1/2 of real and personal estate if parent, sibling, or child of deceased sibling survives; otherwise, entire estate [19-302 and 19-304].
- (b) Such share in real or personal property if deceased spouse had died intestate, not to exceed 1/2 of estate; dower may be elected in lieu of legal share of real estate and share of personal estate is 1/2 [19-113e].
- (c) Yes (but no as to dower) [See *Kilcoyne v. Reilly*, 249 F2d 472 (DC Cir 1957)].
- (d) No priority items subtracted if spouse elects dower.

- (a) None, except for fraud or special circumstances [See *Windsor v. Leonard*, 475 F2d 932 (1973)].
- (b) Determined by law of state in which property is situated [In re *Gray's Estate*, 168 F Supp (1958)].
- (c) Determined by DC law as if resident decedent [19-301].

- (a) Entitles spouse to elect life estate in 1/3 of real estate owned by decedent during marriage (forfeits any other share in real estate) [19-102].
- (b) None [19-102].
- (c) None, except right to reside in principal residence for 40 days after death of spouse (no effect on share) [19-102].
- (d) Family allowance of \$10,000 out of personal estate for spouse or minor children [19-101].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

DISTRICT OF COLUMBIA

- (a) Rights may be waived before or after marriage if disclosure of assets is full and agreement is fair and voluntary [19-113(f) and *Burtoff v. Burtoff*, 418 A2d 1085 (1980)].
- (b) Except for dower, rights are lost if transfer is made in good faith (factors considered include completeness of transfer, motive, participation by transferee in any alleged fraud, time between transfer and death, and extent to which spouse is left without support) [*Windsor v. Leonard*, 475 F2d 932 (1973)].
- (c) All rights are forfeited if spouse is convicted of felonious homicide of decedent [19-320]. Right to dower is forfeited if spouse has abandoned or deserted decedent and is convicted of adultery [19-103].

By written renunciation in statutory form filed with court within 6 months after admission of decedent's will to probate (time may be extended for reasonable cause) [19-113].

- (a) After payment of administration expenses, funeral expenses, family allowance, death taxes, claims for rent in arrears, judgments, and decrees in DC courts, and all other just claims [20-906 and 31 USC § 3713].
- (b) In kind to extent possible [20-1102].

- (a) Terminates [*Payne v. Newton*, 323 F2d 621 (1963)].
- (b) Guardian, conservator, or committee may renounce will within statutory period and, if fiduciary improperly fails to elect, court of equity may exercise right of renunciation after expiration of statutory period or after death of incompetent [*Mead v. Phillips*, 135 F2d 819 (1943) and *Payne v. Newton*, 323 F2d 621 (1963)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

FLORIDA

Dennis R. White
Naples, FL
March 16, 1999

All statutory citations
are to Fla Stat.

- (a) (1) First \$20,000 (valued at date of death fair market value) plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of estate [732.102(1)(b) and (c)].
 - (2) Entire estate [732.102(1)(a)].
- (b) 30% of net probate estate (after deduction of valid claims, and mortgages, liens and security interests on assets) [732.207].
- (c) Yes.
- (d) Not applicable.

- (a) None [732.206].
- (b) None [732.206 and 732.207].
- (c) None [732.205].

- (a) None [732.111].
- (b) None [732.111].
- (c) Homestead (consists of decedent's residence not to exceed 160 acres outside municipality or 1/2 acre in municipality owned by decedent). Homestead is not part of probate estate and has no effect on elective share. Homestead may be devised to spouse in absence of minor children; if not devised, spouse takes life estate in homestead with vested remainder in issue at death of homesteader (if no issue, all to spouse) [732.208 and 732.401].
- (d) Family allowance of up to \$6,000, payable in lump sum or in installments, may be granted by court (apportioned as court directs) to spouse and/or lineal heirs (either ancestors or issue) whom decedent was either legally obligated to support or in fact supporting (no effect on elective share, which is computed on probate estate less claims and liens, apparently without reduction for family allowance) [732.403]. Family allowance is not predicated upon need. Reasonableness of allowance must be established [*DeSmidt v. DeSmidt*, 563 So.2d 193 (Fla. 2nd DCA 1990)]. Exempt property consists of property not specifically devised including (i) \$10,000 of net market value of household furnishings, furniture, and appliances and (ii) all automobiles held in decedent's name and used by decedent or members of immediate family as their personal automobiles (subject to any perfected security interests). If exempt property is specifically or demonstratively devised to spouse or, if no spouse to children of decedent, devised property may be exempted from unsecured claimants. Persons entitled to exempt property waive their rights unless petition is filed within 4 months of first publication of notice of administration (or within 40 days after termination of any matter affecting any part of estate subject to inclusion as exempt property). Value of exempt properties are not deducted (directly or indirectly) in computing elective share [*Paredes v. McLucas*, 561 So.2d 439 (Fla. 5th DCA 1990)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

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Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

FLORIDA

- (a) Any right may be waived before or after marriage (disclosure required only after marriage) [732.702]. Waiver of "all rights," or equivalent language, is waiver of all rights to elective share, intestate share, pretermitted share, homestead property, exempt property, and family allowance by each spouse in property of other and renunciation by each of all benefits that would otherwise pass to either from other by intestate succession or by provisions of any will executed before waiver or property settlement.
- (b) Rights apply only to probate estate assets [732.206].
- (c) Forfeited if spouse is found by greater weight of evidence to have unlawfully and intentionally killed decedent [732.802].

Filing written election within later of 4 months of first publication of notice of administration or 40 days from date of termination of all proceedings involving construction, admission to probate, or validity of will or on any other matter affecting estate (e.g. determination of size of estate including validity and amount of claims) whereby complete extent of estate subject to elective share may be in doubt [732.212].

- (a) After payment of all valid claims (includes funeral expenses) paid or payable from estate and all mortgages, liens, and security interests, on assets, paid first out of spouse's benefits under will, if any, next out of residue, and lastly out of other testamentary gifts [732.207, 732.209(1), and 733.805].
- (b) First with such cash or property which spouse would have received under decedent's will and then in cash and/or in kind under priority of appropriation statute [732.209(1), 732.214, and 733.805].

- (a) Terminates [732.210].
- (b) Spouse's guardian may make election [732.102 and 744.444(9)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

GEORGIA

John M. Graham, III
Rome, GA
March 9, 1998

All statutory citations
are to Ga Code Ann.

- (a) (1) 1/3 of estate or child's part, whichever is greater [53-2-1(b)(1)].
(2) Entire estate [53-2-1(b)(1)].
- (b) None [53-4-1].
- (c) Yes as to answer (a) above since share is reduced by spouse's right to year's support [53-3-1 *et seq.*], expenses of administration, and payment of debts of decedent [53-2-1]; not applicable as to answer (b).
- (d) Not applicable.

- (a) Not applicable.
- (b) Not applicable.
- (c) Not applicable.

- (a) None.
- (b) None.
- (c) Homestead exemption is allowed for real and/or personal property up to \$5,000 (only indirectly affects share by reducing divisible estate) [44-13-1]. This amount is reduced by value of property taken as year's support [*Donaldson v. Anderson*, 30 SE 883 (1897), 44-13-100(c)] with respect to intestate insolvent estates where decedent is survived by a widow or child.
- (d) Upon application (before spouse's remarriage or death) within 24 months of death, spouse may receive property for support and maintenance for 12 months from decedent's death [53-3-1(c)] (only indirectly affects share by reducing divisible estate). This support allowance is superior to any encumbrances or debts and overrides testamentary bequest to another [*Goodman v. Independent Life Accident Ins. Co.*, 397 SE2d 56 (1990)]. Decedent's will may require election to take under will or year's support [53-3-3].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

GEORGIA

- (a) After disclosure of all material facts, any rights may be waived in writing before or after marriage unless agreement is unconscionable or facts and circumstances have changed so much that enforcement of agreement would be unfair or unreasonable [*Scherer v. Scherer*, 292 SE2d 662 (1982)].
- (b) Spouse's rights apply only to probate estate assets [44-13-1, 53-3-1 *et seq.*].
- (c) Not provided for under GA law.

Not applicable (except for right to year's support).

- (a) Not applicable.
- (b) Not applicable.

- (a) Not applicable.
- (b) Not applicable.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

HAWAII

Arthur B. Reinwald
Honolulu, HI
October 2, 1998

All statutory citations
are to Haw Rev Stat.

- (a) (1) Entire estate if all issue of decedent and spouse are same; otherwise, (i) first \$150,000 plus 1/2 of balance of estate if decedent and spouse have same issue but spouse also has other issue or (ii) first \$100,000 plus 1/2 balance of estate if any of decedent's issue are not spouse's issue [560:2-102].
 - (2) (i) Entire intestate estate if no issue or parent of decedent or
 - (ii) First \$200,000 plus 3/4 of balance if a parent but no issue survives [560:2-102].
 - (b) Varying percentage of augmented estate [i.e., probate estate plus other property described in answers 2(a) and 4(b)], depending on length of marriage (i.e., 3% up to 50% if married 1 to 15 years, or more), or supplemental amount of \$50,000 if greater than percentage amount [560: 2-202].
 - (c) Intestate estate fraction applies to estate not effectively disposed of by will but passes by intestate succession. [560:2-101]. Priority items (homestead allowance, exempt property and family allowance) are in addition to any share passing to spouse by will, intestate succession, or elective share [560:2-402, 403, 404]. Elective share percentage of augmented estate includes net probate estate which is probate estate reduced by funeral expenses, homestead allowance, family allowance, exempt property and enforceable claims [560:2-204].
 - (d) Priority items are not subtracted to determine intestate share [see (c) above].
- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] [560: 2-203 through 207].
 - (b) Augmented estate includes real estate wherever situated [560: 2-203].
 - (c) Right of election applies to spouse of decedent who dies domiciled in HI. For non-domiciliary decedent, elective share of intestate property is governed by law of decedent's domicile at death. [560: 2-202].
- (a) None [560: 2-112].
 - (b) None [560: 2-112].
 - (c) Spouse's homestead allowance is \$15,000 [560: 2-402].
 - (d) Spouse's exempt property allowance is \$10,000 [560: 2-403]. Spouse's and children's family allowance is \$18,000 [560:2-404].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

HAWAII

- (a) Spouse's right of election and rights to homestead allowance, exempt property, and family allowance may be waived, wholly or partially, before or after marriage in writing unless spouse proves that waiver was (i) not executed voluntarily or (ii) unconscionable when executed and, before execution, spouse was not provided fair and reasonable disclosure of decedent's property or financial obligations or did not voluntarily and expressly waive, in writing, any right to such disclosure beyond disclosure provided and did not have, or reasonably could not have had, adequate knowledge of same [560: 2-213].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 3 years of death where total of such property transferred to any donee in any year exceeded \$20,000 [560: 2-205].
- (c) Disclaimers, divorce, and participation in decedent's homicide terminates status and rights of a spouse [526-5, 526-6, 560, 802, 803].

By filing petition for elective share within 9 months after death or within 6 months after probate of will, whichever is later. Time may be extended by court order if petition for extension is filed within 9 months after death [560:2-211].

- (a) Payment of elective share is made first from net probate estate, decedent's nonprobate transfer to spouse, spouse's property and nonprobate transfers to others, and then from decedent's nonprobate transfers to others [560:2-209].
- (b) Payment can be in cash or in kind [560: 2-211].

- (a) Spouse must be living at time of election [560:2-212].
- (b) Election may be exercised by spouse's conservator, guardian or agent under authority of power of attorney [560:2-212].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

IDAHO

Joseph H. Uberuaga, II
Boise, ID
April 30, 2004

All statutory citations
are to Idaho Code.

- (a) (1) 1/2 of decedent's separate property plus 1/2 of balance and all of decedent's 1/2 share of community property [15-2-102].
(2) 1/2 of decedent's separate property and all of decedent's 1/2 share of community property if either of decedent's parents survives; otherwise, entire estate [15-2-102(a)(1) and (b)(1)].
- (b) 1/2 of total augmented quasicommunity property estate [15-2-203]. Also, spouse may be entitled to intestate share as "omitted spouse" if married after execution of will [15-2-301].
- (c) Not applicable.
- (d) Not applicable.

- (a) Included in augmented estate [15-2-203]. If community property funds used to purchase asset, spouse entitled to 1/2 value as share in community property and other 1/2 interest in decedent's estate.
- (b) 1/2 of quasicommunity property if state where property lies allows Idaho's laws to apply (other 1/2 is in decedent's estate) [15-2-201].
- (c) Determined by law of decedent's domicile unless property is community property [15-2-209].

- (a) None.
- (b) None.
- (c) Allowance of homestead under probate code is available if homestead has not been selected under real estate laws [15-2-402 and 55-1010]. Probate homestead is lesser of \$50,000 or value of certain real estate, mobile homes and improvements. [55-1003]. Allowance is in addition to other benefits mentioned in this question [15-2-401 and 404].
- (d) Exempt property allowance of \$10,000 [15-2-402] and reasonable family allowance (\$1,500 per month for 12 months, lump sum of \$18,000, or higher as authorized by court) during period of administration, not to exceed 1 year if estate is inadequate to discharge allowed claims (reduces share in quasicommunity property but not separate property) [15-2-403 and 15-2-404].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

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Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

IDAHO

- (a) Right of election, homestead allowance, exempt property, and family allowance may be waived wholly or partially before or after marriage after fair disclosure [15-2-208].
- (b) Spouse may require transferee of quasicommunity property without adequate consideration and without consent of spouse to return 1/2 of such property, 1/2 of its proceeds, or 1/2 of its value when transferred if decedent (i) retained possession, enjoyment, or right to income of property, (ii) retained power alone or in conjunction with any other person to invade, consume, or dispose of property, (iii) held property with right of survivorship, or (iv) transferred property within 2 years of death to extent that aggregate transfers to any donee exceeded then current U.S. gift tax annual exclusion amount in any 1 year [15-2-202].
- (c) Forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in Idaho, (ii) participated in proceeding to terminate all marital rights, or (iii) feloniously and intentionally killed or aided in killing of decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence) [15-2-802 and 15-2-803].

By filing election with court and personal representative within 9 months after decedent's death or 6 months after filing petition for probate, whichever is later [15-2-205].

- (a) After payment of administration expenses, homestead allowance, family allowance, exempt property, and enforceable claims, first from property devised to spouse or received by intestate succession or property in augmented estate not renounced to reduce amount due from other recipients of shares of augmented estate and then proportionately from beneficiaries of will and transferees of augmented estate [15-2-203 and 15-2-207].
- (b) In cash and/or in kind [15-2-207(c)].

- (a) Terminates [15-2-204].
- (b) By court order after finding in protective proceeding for disabled spouse that election is necessary for spouse's adequate support during probable life expectancy [15-2-204].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

ILLINOIS

Judith W. McCue
Chicago, IL
April 19, 2004

All statutory citations
are to Illinois
Compiled Statutes.

- (a) (1) 1/2 of estate [ch. 755, 5/2-1(a)].
(2) Entire estate [ch. 755, 5/2-1(c)].
- (b) 1/3 of estate if issue of decedent; otherwise, 1/2 of estate [ch. 755, 5/2-8 and *Estate of Grant*, 415 NE2d 416 (1980)].
- (c) Yes, but reduction in gross probate estate includes death taxes.
- (d) Not applicable.

- (a) None in absence of intent to defraud [ch. 755, 25/1].
- (b) None [*Brinkerhoff v. Huntley*, 223 Ill App 591 (1921)].
- (c) Determined by law of IL (residency of decedent not distinguished) [ch. 755, 5/2-8].

- (a) None [ch. 755, 5/2-9].
- (b) None [ch. 755, 5/2-9].
- (c) \$7,500 homestead interest in decedent's residence (only indirectly affects share by reducing divisible estate) [ch. 735, 5/12-901].
- (d) \$10,000 for spouse and \$5,000 for each minor and adult dependent child of decedent who resides with spouse at decedent's death, or such higher amount as court deems reasonable for spouse's or child's proper support for 9 months after resident decedent's death (only indirectly affects share by reducing divisible estate) [ch. 755, 5/2-1(a), 5/2-8, 5/15-1 *et seq.*, and 5/18-10].

INDIANA

Thomas C. Bigley, Jr.
Columbus, IN
June 15, 2004

All statutory citations
are to Ind Code Ann
(West).

- (a) (1) 1/2 of estate [29-1-2-1].
(2) 3/4 of estate if parent of decedent survives; otherwise, entire estate [29-1-2-1].
- (b) 1/2 of estate [29-1-3-1].
- (c) Yes (may only elect against probate assets — claim is against net estate [29-1-3-1]).
- (d) Not applicable.

- (a) None [29-1-3-1].
- (b) Not provided for under IN law.
- (c) Determined by IN law as if resident decedent [29-1-3-1].

- (a) None [29-1-2-11].
- (b) None [29-1-2-11].
- (c) None [29-1-4-1].
- (d) Allowance of \$15,000 in personal property or residence or combination of both (only indirectly affects share by reducing divisible estate) [29-1-4-1].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

ILLINOIS

- (a) Rights may be waived in writing before or after marriage [*Kuhnen v. Kuhnen*, 184 NE 874 (1933), *Genung v. Hagemann*, 242 NE2d 790 (1968), and *Weinebrod v. Rohdenburg*, 175 NE 379 (1931)]; Uniform Premarital Agreement Act enacted [ch. 750, 10/1 *et seq.*].
- (b) None in absence of intent to defraud [ch. 755, 25/1].
- (c) Forfeited by murdering decedent [ch. 755, 5/2-6].

Filing written instrument declaring renunciation with court in which will was admitted to probate within 7 months after admission of will (court may allow extension if, within 7 months or before expiration of any extended period, spouse files petition showing that litigation is pending that affects spouse's share) [ch. 755, 5/2-8].

- (a) After payment of all just claims, including federal estate tax, with no other priority provided for under IL law [ch. 755, 5/2-8 and *Estate of Grant*, 415 NE2d 416 (1980)].
- (b) Not provided for under IL law.

- (a) Terminates [ch. 755, 5/2-8(b) and *Rock Island Bank & Trust v. First National Bank*, 185 NE2d 890 (1962)].
- (b) By court order after petition by personal representative, guardian, or next friend [*Leonhart v. Reighard*, 100 NE2d 657 (1951) and *First National Bank v. McMillan*, 145 NE2d 60 (1957)]. Court will consider only spouse's interests in determining whether to approve renunciation [*Kinnett v. Hood*, 185 NE2d 888 (1962)].

INDIANA

- (a) Right of inheritance or election may be waived before or after marriage by written contract, agreement, or waiver signed by party waiving this right. Waiver must be made after full disclosure of nature and extent of right being waived and must be supported by fair consideration under all circumstances (promise of marriage is deemed to be adequate consideration) [29-1-2-13; 29-1-3-6 also 31-11-3-1 *et seq.*].
- (b) Not provided for under IN law (but some indication in case law that intent to defraud spouse may affect validity of transfer).
- (c) Forfeited by murdering decedent [29-1-2-12.1], living in adultery [29-1-2-14], or abandoning spouse [29-1-2-15].

By written election filed with court within 10 days after expiration of time within which to file claims [29-1-3-3 and 29-1-3-2].

- (a) After payment of administration and funeral expenses, personal property allowance, and claims [29-1-14-9]. Not otherwise provided for under IN law.
- (b) In cash and/or in kind [29-1-3-1].

- (a) Terminates [29-1-3-4].
- (b) Court may appoint guardian to make election [29-1-3-4]. Attorney in fact may also elect for spouse if has general authority with respect to estates under 30-5-5-15(a)(4) [29-1-3-4].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

IOWA

J. Edward Power
Des Moines, IA
April 23, 2004

All statutory citations are to Iowa Code.

- (a) (1) If all issue are also issue of spouse, all real and personal property; otherwise, 1/2 of realty plus exempt personal property plus 1/2 all other personal property (minimum of \$50,000 as to all property) [633.211 and 212].
(2) All real and personal [633.211].
- (b) 1/3 of realty plus all exempt personal property plus 1/3 of all other personal property not necessary to pay debts and charges [633.238].
- (c) Yes.
- (d) Not applicable.

- (a) None.
- (b) Not provided for under Iowa law.
- (c) Determined by IA law as if resident decedent [633.236].

- (a) None.
- (b) None.
- (c) Spouse may elect to occupy homestead in lieu of share of realty (only indirectly affects share by reducing divisible estate) [633.240].
- (d) Court may make allowance for spouse and dependents as part of costs of administration (only indirectly affects share by reducing divisible estate) [633.374].

KANSAS

John F. Kuether
Topeka, KS
October 8, 1998

All statutory citations are to Kan. Stat. Ann.

- (a) (1) 1/2 of estate [59-504] plus 1/2 of any realty owned by decedent during marriage and while spouse was resident that was conveyed without spouse's consent [59-505].
(2) Entire estate [59-504] plus 1/2 of any realty owned by decedent during marriage and while spouse was resident that was conveyed without spouse's consent [59-505].
- (b) Varying percentage of augmented estate [i.e., probate estate plus other property described in answers 2(a) and 4(b)], depending on length of marriage (i.e., 3% up to 50% if married 1 to 15 years, or more) or supplemental amount of \$50,000 if greater than percentage amount [59-6a202(a)].
- (c) Yes, but it also applies to nonprobate transfers to others if decedent had sufficient control of those assets [59-6a201 *et seq.*].
- (d) Not applicable.

- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] [59-6a203, 59-6a204 and 59-6a205].
- (b) Expressly excluded from administration of estate [59-1401] but not expressly excluded by elective share provisions [59-6a201 *et seq.*].
- (c) Determined by law of decedent's domicile [59-806(b) and *In re Estate of Phillips*, 604 P.2d 747 (1980)].

- (a) Replaced by elective share. See answer 2(a).
- (b) Replaced by elective share. See answer 2(a).
- (c) Possessory homestead right in dwelling and its accompanying land to extent of 160 acres outside, or one acre inside, city limits owned by decedent and occupied by spouse and family [59-401 and 59-402]. Spouse taking homestead and elective share may take \$25,000 homestead allowance in lieu of homestead [59-6a215]. Applies to intestate succession, testate succession unless will directs otherwise, and to elective share.
- (d) Family allowance from decedent's estate includes wearing apparel, family library, pictures, musical instruments, furniture and household goods, utensils and instruments used in home, one automobile, and provisions and fuel on hand necessary for support for one year. In addition, reasonable allowance of not more than \$25,000 in money, personal or real property as determined by court, considering condition of estate. Award is made to spouse or to spouse for spouse and decedent's minor children [59-403 and 59-404]. Applies to intestate succession, testate succession unless will directs otherwise, and to elective share.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

IOWA

- (a) Rights may be waived in writing before but not after marriage [597.2].
- (b) Elective share applies only to probate estate assets (but spouse must join in conveyances of real property to relinquish rights) [633.211, 633.212].
- (c) Feloniously causing death precludes spouse (or others) from receiving "any interest" in estate [633.535 *et seq.*].

If spouse is executor filing with court written election within 4 months of second publication of notice of admission of will or, if spouse is not executor, within 4 months of service of notice on spouse [633.237]. If spouse is not executor service of notice (to elect) is to occur within 2 months of second publication of notice of admission of will [633.237].

- (a) After payment of debts and charges, which include administration and funeral expenses, family allowances, federal and state estate taxes and claims [633.3(4), 633.3(10), 633.238 and 633.374].
- (b) In cash and/or in kind [633.238].

- (a) Terminates [633.242].
- (b) Election is made by court [633.244].

KANSAS

- (a) All rights may be waived by prenuptial or postnuptial agreements [59-6a213 and 23-801]. Premarital waiver of homestead may, however, be prohibited by prior case law [*In re Estate of Neis*, 225 P.2d 110 (1950)].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income (ii) retained at death power to revoke, consume, invade, or dispose of such property (iii) held such property at death with another with right of survivorship or (iv) transferred property within 3 years of death where total of such property transferred to any donee in any year exceeded \$10,000 plus decedent's life insurance transferred within 2 years of death [59-6a205]. Also, 1/2 transfers of realty during marriage without spouse's consent may be recaptured [59-505].
- (c) Spouse forfeits interest by consenting to transfers [see (a)] or if convicted of killing or procuring killing of decedent [59-513].

By filing in court and with decedent's personal representative election within 6 months after later of death or probate of will and notice thereof to spouse [59-6a211]. Court may grant extension for good cause. Will of resident decedent must generally be probated within 6 months of date of death [69-617]. Some rules apply for election against decedent's nonprobate transfers to others.

- (a) Satisfied after homestead and family allowances [59-401 through 59-404], payment of administration and funeral expenses, and debts [59-6a204]. It is satisfied on pro rata basis [59-6a209]. Some rules apply for election against decedent's nonprobate transfers to others.
- (b) Satisfaction from probate estate can be in cash or in kind [59-1407 and 59-6a212]. Recipients of nonprobate transfers which are recaptured in augmented estate may satisfy obligation to electing spouse in cash or in kind [59-6a210(a)].

- (a) Personal representative can make election on behalf of spouse for spouse's successors [59-6a212].
- (b) By court order after written report by court appointed commissioner [59-6a212 and 59-2234].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

KENTUCKY

Mark Pfeifer
Owensboro, KY
November 10, 1998

All statutory citations
are to Ky Rev Stat.

- (a) (1) Estate in fee for 1/2 of surplus realty spouse was seized of at death, life estate in 1/3 of realty seized by decedent during coverture but not at death, and 1/2 of surplus personalty of decedent [392.010 and 392.020].
 - (2) Same as above if survived by parent, brother or sister, or their issue; otherwise, entire estate [391.010(4) and 391.030(1)].
- (b) Same as intestate share except that share in any real estate of which decedent died seized is instead 1/3 [392.080(1)].
- (c) Yes [392.020, 392.080].
- (d) Not applicable.

- (a) Not provided for under KY law.
- (b) Not provided for under KY law.
- (c) Not provided for under KY law.

- (a) See answer 1(a) [392.020].
- (b) See answer 1(a) [392.010].
- (c) \$5,000 (in lieu of dower or elective share) [427.060].
- (d) Spouse may petition court to distribute up to \$7,500 of cash or personal property (only indirectly affects share by reducing divisible estate) [391.030(1)(c)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

KENTUCKY

- (a) Rights may be forfeited or relinquished [392.020].
- (b) Sale, conveyance, or encumbrance of real property during marriage (other than property sold to extent proceeds are used to satisfy encumbrances created before marriage) shall not bar spouse's right unless spouse joins therein or releases rights by separate instrument [404.030 and 392.040].
- (c) Forfeited if spouse voluntarily left and lived in adultery without subsequent reconciliation, was living in bigamous relationships, or was convicted of feloniously killing decedent [392.090, 392.100, and 381.280].

Filing with court written renunciation of benefits and claim of statutory share within 6 months after admission of will or, if a will contest, within 6 months after disposition of action. Court may grant 6 month extension upon application therefor within 6 months of admission of will [392.080].

- (a) After payment of spousal allowance and debts [392.080 and 391.030(1)(c)].
- (b) In cash and/or in kind [392.080 and 392.020]. Specific and general devisees have right of contribution to extent devise consumed in whole or part to satisfy spouse's share [394.480].

- (a) Terminates [*Preece v. Queen*, 549 SW2d 507 (1976)].
- (b) By court order after finding spouse is incompetent [*Preece v. Queen*, 549 SW2d 507 (1976)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

LOUISIANA

Carey J. Messina
Baton Rouge, LA
May 15, 1998

All statutory citations are to La Civ Code Ann (West) unless otherwise specified.

- (a) (1) Usufruct interest (terminates on death or remarriage) over decedent's 1/2 of community property and no interest or right as to decedent's separate property [890]. If decedent dies "rich" in comparison to spouse (i.e., when spouse's assets are less than 1/5 in value to those of decedent's), spouse is entitled to claim "marital portion" (not over \$1,000,000), being (i) 1/4 of succession in full ownership if decedent died without children, (ii) usufruct interest as to 1/4 of succession if decedent is survived by 3 or fewer children, or (iii) child's share in such usufruct if decedent is survived by more than 3 children [2432 and 2434].
(2) Spouse succeeds to decedent's share of community property [889] and all of decedent's separate property if there are no surviving parents, siblings, or issue of them [894]; otherwise, spouse has no right to decedent's separate property unless decedent died rich in comparison to spouse, in which case spouse may claim marital portion as described above.
 - b) As to decedent's spouse's separate property and undivided 1/2 interest in community property, bequest to spouse unlimited except as to forced portion reserved by law to forced heirs (i.e., children 23 years of age or younger or children of any age, who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at decedent's death. Issue of later degree can be forced heirs in certain circumstances. Forced portion is 1/4 if there is 1 forced heir and 1/2 if there are 2 or more forced heirs, but forced heir's forced portion cannot exceed intestate share. Balance ("disposable portion") may be left to spouse [1493-1514]. If survived by issue, decedent may grant spouse usufruct for life or for shorter period over all former community property of decedent and over all of decedent's separate property [1499]. When decedent dies rich in comparison to spouse, spouse is entitled to claim marital portion as discussed above. Legacy left by decedent to spouse and payments due spouse as result of death are deducted from marital portion [2435].
 - (c) Yes.
 - (d) Not applicable.
- (a) None.
 - (b) Determined by law of state in which property is situated [3534].
 - (c) Determined by LA as if resident decedent, except that Louisiana's forced heirship law does not apply if decedent was domiciled outside LA at death and left no forced heirs domiciled in LA at death [3533].
- (a) None.
 - (b) None.
 - (c) \$15,000 homestead (personal residence) exempt from seizure except for certain specified debts, such as taxes and purchase price of said property (exemption extends to spouse and minor children of decedent and does not reduce marital portion) [La Rev Stat Ann (West) 20:1].
 - (d) Interim allowance during administration of succession, provided sums advanced are within amount eventually due (directly reduces share) [3321]. If it appears that spouse will be entitled to marital portion, spouse has right to demand periodic allowance (reduces marital portion) [2437].
"Widow's homestead" provides that spouse or children in necessitous circumstances may claim sum that added to amount of property owned by them will total \$1,000 (no effect on share) [3252]. Wife also entitled to receive \$10,000 from bank or other depository, which amount may be withdrawn from separate or community account (directly reduces share) [La Rev Stat Ann (West) 9:1513].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

LOUISIANA

- (a) May not before or during marriage renounce or alter marital portion or established order of succession [2330].
- (b) Such transfers, which deplete community assets, without concurrence of spouse are not effective (spouse may file claim and be treated as creditor) [2347, 2349, 2353, and 2369].
- (c) If spouses judicially separated and spouse at fault, may not claim marital portion [2433]. Homestead exemption may be waived in whole or in part by signing written waiver [La Rev Stat Ann (West) 20:1(D)].

Petition claiming marital portion filed with court within 3 years from death [2436 and *Succ. of Smith*, 515 So2d 1096 (1987)].

- (a) Payment of marital portion will be made after payment of funeral and administration expenses and other enforceable claims, but prior to payments to heirs and legatees [3252].
- (b) If decedent died without children, payment may be made in cash and/or in kind; otherwise, marital portion is given in usufruct [2434].

- (a) Terminates [2436].
- (b) Curator may assert rights [389 *et seq.* and La Code Civ Proc (West) (4541 *et seq.*)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

MAINE

Philip C. Hunt
Portland, ME
April 20, 2004

All statutory citations
are to Me Rev Stat tit
18-A

- (a) (1) Either (i) first \$50,000 plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of estate or (ii) 1/3 of augmented estate [i.e., probate estate and property described in answer 4(b)] [2-102 and 2-201].
(2) Either (i) first \$50,000 plus 1/2 of balance of estate if either of decedent's parents survives or, if otherwise, entire estate or (ii) 1/3 of augmented estate [i.e., probate estate and property described in answer 4(b)] [2-102 and 2-201].
- (b) 1/3 of augmented estate [i.e., probate estate plus property described in answers 2(a) and 4(b)] [2-201].
- (c) Yes as to both probate and augmented estates.
- (d) Not applicable.

- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except life and accident insurance, joint annuities, and pensions [2-202].
- (b) Included for purposes of determining augmented estate [2-201].
- (c) Determined by law of decedent's domicile [2-201].

- (a) None.
- (b) None.
- (c) Homestead allowance of \$10,000 (only indirectly affects share by reducing divisible estate) [2-401].
- (d) Spouse and minor children entitled to reasonable allowance for maintenance for 1 year (not chargeable against other benefits or shares and has priority over all claims, except homestead allowance) and \$7,000 in exempt property (only indirectly affects share by reducing divisible estate) [2-403].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

MAINE

- (a) Elective share, exempt property allowance, and family allowance may be waived wholly or partially before or after marriage after fair disclosure [2-204].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in either year exceeded \$3,000 [2-202 (1)]. Transfers to trusts revocable by decedent are not effective [*Staples v. King*, 443 A2d 407 (1981)].
- (c) Forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in ME, (ii) participated in proceeding to terminate all marital rights, or (iii) feloniously and intentionally killed or aided in killing of decedent (final judgment of conviction is conclusive but court may find guilt by clear and convincing evidence) [2-802 and 2-803].

Petition filed with court and mailed or delivered to personal representative, if any, within 9 months after death or within 6 months after admission of will, whichever is later (court may extend time for election for cause shown) [2-205].

- a) After payment of funeral and administration expenses, homestead allowance, personal property exemption, family allowance, and enforceable claims, first out of property passing to spouse and then proportionately from other distributees of augmented estate property [2-207].
- (b) In cash and/or in kind [2-205].

- (a) Terminates [2-203].
- (b) By order of court after finding that exercise is necessary to provide adequate support [2-203].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

MARYLAND

Robert M. Thomas
Baltimore, MD
November 3, 1998

All statutory citations
are to Md Est & Trust
Code Ann.

- (a) (1) First \$15,000 plus 1/2 of balance of net estate if no surviving minor child; otherwise, 1/2 of estate [3-102(b) and (c)]. Net estate is decedent's property inclusive of family allowance and enforceable claim, but without reduction of US and MD estate tax.
- (2) First \$15,000 plus 1/2 of balance of net estate if either of decedent's parents survives; otherwise, entire estate [3-102(d) and (e)].
- (b) 1/3 of net estate with issue surviving; otherwise, 1/2 of estate [3-203].
- (c) Yes.
- (d) Not applicable.

- (a) None [1-101(p) and (r)], except for *inter vivos* transfers constituting fraud on marital rights. See answer 4(b).
- (b) Not provided for under MD law.
- (c) Determined by MD law as if resident decedent [*Bish v. Bish*, 31 A2d 348 (1943)].

- (a) None.
- (b) None.
- (c) None.
- (d) Family allowance of \$5,000 for personal use of spouse plus \$2,500 for use of each unmarried child of decedent under age 18 at decedent's death (only indirectly affects share by reducing divisible estate) [3-201 and *Shimp v. Huff*, 556 A2d 252 (1989)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

MARYLAND

- (a) Any right may be waived in writing before or after marriage [3-205].
- (b) *Inter vivos* transfer by decedent absolutely and unconditionally relinquishing control over transferred property precludes spouse from exercising rights with respect thereto [*Grove v. Frame*, 402 A.2d 892 (1979)]. *Inter vivos* transfer by decedent retaining a life estate with full power to dispose of all interests in transferred property during life is fraud on marital rights of spouse whose elective rights would apply thereto [*Knell v. Price*, 569 A.2d 636 (1990)]. Otherwise, on case by case basis.
- (c) All rights forfeited if (i) voluntary appearance by spouse in proceeding in which divorce a vinculo or annulment is obtained, even though not recognized in MD [1-202 (b)], (ii) conviction of bigamy while married to decedent [1-202(d)], or (iii) murder or voluntary manslaughter of decedent (actual conviction not required) [*Price v. Hitaffer*, 165 A 470 (1933), *Chase v. Jennifer*, 150 A2d 251 (1958)].

Filing with court written election not later than 7 months after the date of first appointment of personal representative under will (before expiration, court may extend time for election for up to 3 months at a time) [3-207 and 3-206 (a)].

- (a) After payment of funeral and administration expenses, family allowance, and other enforceable claims, proportionately from all legatees other than spouse who is precluded from receiving property under will [1-101(p), 3-203, 3-208].
- (b) In kind, although beneficiary may pay cash (or transfer property acceptable to spouse) equal to value of spouse's proportional interest in specific property as of election date [3-208(b)].

- (a) Terminates [3-204].
- (b) Election may be exercised by order of court having jurisdiction of person or property of spouse under disability [3-204].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

MASSACHUSETTS

Jonathan Strong
Boston, MA
June 21, 2004

All statutory citations
are to Mass Gen
Laws Ann (West).

- (a) (1) 1/2 of estate [ch. 190, 1].
(2) First \$200,000 plus 1/2 of balance of estate if surviving kindred (blood relations according to the laws of consanguinity); otherwise, entire estate [ch. 190, 1].
 - (b) If surviving issue, 1/3 of estate or, if kindred only, first \$25,000 plus income from 1/2 remaining personalty held in trust and life estate in 1/2 remaining realty; otherwise, first \$25,000 and 1/2 of balance of estate [ch. 191, 15].
 - (c) Yes [ch. 190, 1 and ch. 198, 1].
 - (d) Not applicable.
- (a) None (applies only to property passing under will) [ch. 191, 15] [but see answer 4(b)].
 - (b) Extends to all jurisdictions where decedent left property passing under will [*Russell v. Shapleigh*, 175 NE 100 (1931)].
 - (c) Determined by law of decedent's domicile [*Shannon v. White*, 109 Mass 146 (1872)].
- (a) Statutory dower entitles either spouse to life estate in 1/3 of real property other than "wild land" owned by decedent at death (deprives spouse of rights in real estate but not of rights in personal property) [ch. 189, 1 and 3].
 - (b) None, but see statutory dower described above.
 - (c) Spouse entitled to rent free possession of home up to 6 months after death [ch. 196, 2]. Also, a homestead right may be created by inclusion in deed by which property is acquired or thereafter by filing in registry of deeds description thereof accompanied by claim of homestead. A homestead right in mobile home may be created by filing proper documents with local city or town clerk. Once created, owner who has family and intends to occupy home as principal residence has right to claim up to \$300,000 in value of land and buildings. After owner's death, homestead right continues for spouse and minor children until later of (i) youngest unmarried child reaches age 18 or (ii) spouse's remarriage or death (only indirectly affects share by reducing divisible estate) [ch. 188, 1, 2, and 4].
 - (d) Depending on circumstances, court may grant allowance to spouse for "necessaries" of spouse and family or up to \$100 to each minor child if no spouse (only indirectly affects share by reducing divisible estate) [ch. 196, 2].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

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Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

MASSACHUSETTS

- (a) Any right may be waived by agreement executed fairly and free from fraud, deception, or overreaching [*Tarbell v. Tarbell*, 92 Mass (10 Allen) 278, 280 (1865) and *Price v. Price*, 170 NE2d 346 (1960)].
- (b) Rights are precluded [*Kerwin v. Donaghy*, 59 NE2d 299 (1945), *but see, Sullivan v. Burkin*, 460 NE2d 572 (1984), in which court upheld *Kerwin* but announced that assets in certain revocable trusts created or amended after 01/23/84 will be subject to spouse's rights].
- (c) Intestate, elective, and dower rights are forfeited for desertion [ch. 209, 36].

Filing with court written waiver within 6 months of probate of will. If legal proceedings are commenced to question validity of will, court may, upon petition filed within 6 months of probate of will, extend time until 6 months after proceedings have terminated [ch. 191, 15].

- (a) After payment of allowances, funeral and administration expenses, and debts, first out of property passing to spouse and then proportionately from residual beneficiaries [ch. 191, 15, ch. 196, 2 and ch. 198, 1].
- (b) In cash and/or in kind (first from personalty, then from real property) [ch. 191, 15].

- (a) Terminates [ch. 191, 15, *Friedman v. Andrews*, 200 NE 575 (1936)].
- (b) Upon approval of court, guardian or conservator may file waiver of will with court on behalf of spouse [ch. 201, 20 and 45].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

MICHIGAN

Carol J. Karr
Grand Rapids, MI
June 17, 2004

All statutory citations
are to Mich Comp
Laws Ann.

- (a) (1) Either (i) statutory dower [which entitles widow to life use of 1/3 of lands of which her husband died seized [(558.1)] or (ii) first \$100,000 plus 1/2 of balance of estate if none of decedent's issue are issue of spouse or, if otherwise, first \$150,000 plus 1/2 of balance of estate [700.2102(1)(f) and (b), (d), (e)]. Specific dollar amounts are multiplied by cost-of-living adjustment factor for calendar year in which decedent dies beginning 1/1/01 [700.2102(2) and 700.1210].
 - (2) Either (i) statutory dower or (ii) first \$150,000 plus 3/4 of balance of estate if either of decedent's parents survives or, if otherwise, entire estate [700.2102(1)(c) and (a)]. Specific dollar amount is multiplied by cost-of-living adjustment factor for calendar year in which decedent dies beginning 1/1/01 [700.2102(2) and 700.1210].
 - (b) Either statutory dower or 1/2 of intestate share [both are described above] less 1/2 of "property derived" from decedent other than by testate or intestate succession [i.e., transfers (i) within 2 years of death to extent subject to federal gift or estate taxes, (ii) before death subject to retained power and subject to federal estate tax, and (iii) effectuated by death through joint ownership, tenancy by entireties, insurance beneficiary, or similar means] [700.2202(1) and (6)].
 - (c) Yes [700.3805].
 - (d) Not applicable.
- (a) None (unless a fraudulent conveyance is shown) [700.2202(1)(b) and 700.3710].
 - (b) Not provided for under MI law.
 - (c) Determined by law of decedent's domicile [700.2202(5)].
- (a) "Statutory" dower [as described in answer 1(a)(1)] is not reduced by any other benefits. "Probate" dower [700.2201] includes (i) elective rights in answer 1(b), (ii) homestead allowance [see answer (c) below], (iii) "exempt property" equal to \$10,000 adjusted for cost-of-living [as described in answer 1(a)] (no effect on share) [700.2404], and (iv) family allowance [see answer (d) below].
 - (b) None (but probate dower described above applies to widowers as well as widows).
 - (c) Homestead allowance is \$15,000 adjusted for cost-of-living [as described in answer 1(a)] (no effect on share) [700.2402].
 - (d) Family allowance (amount is in court's discretion) is available to spouse during period of administration or, if estate is insolvent, 1 year after death (only indirectly affects share by reducing divisible estate) [700.2403]. Personal representative may set the amount of family allowance up to \$18,000, adjusted for cost-of-living as described in answer 1(a), without court order, but subject to court review upon request by interested party [700.2405(2)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

MICHIGAN

- (a) After fair disclosure, any right may be waived in writing before or after marriage [700.2205 makes it clear that dower is a right that can be waived].
- (b) Rights apply only to probate estate assets (unless conveyance is fraudulent) [700.2202 and 700.3710].
- (c) Intestate rights, rights of election, homestead allowance, exempt property, and family allowance are forfeited if 1 year before death spouse was willfully absent from, deserted, neglected or refused to support decedent [700.2801(2)(e)]. All rights are forfeited if spouse was living in bigamous relationship [700.2801(2)(d)] or feloniously and intentionally killed or aided in killing of decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence) [700.2803(1) and (6)].

Filing with court written election within 63 days after date for presentment of claims or within 63 days after filing of proof of service of inventory upon spouse, whichever is later [700.2202(2)]. Upon petition of spouse prior to estate closing, court may permit delayed election if due to litigation, further claims, or other cause [700.2203(b)]. If estate closed without election, election may be made re: newly discovered assets before closing of supplemental estate only upon spouse showing good cause [700.2203(a)].

- (a) After payment of administration and funeral expenses, exempt property and allowances, and claims, first out of residue, next out of general devise (unless will provides otherwise or testamentary plan or devise's express or implied purpose would be defeated) [700.3805 and 700.3902 (1) and (3)] (700.3902 makes it clear that there is no special rule of abatement pertaining to satisfaction of elective share).
- (b) Unless will indicates contrary intent, distribution is in kind to extent possible although residuary estate can be distributed in any equitable manner [700.3906].

- (a) Terminates [700.2202(2)].
- (b) By court order after finding in protective proceeding for disabled spouse that election is necessary for spouse's adequate support [700.2202(4)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

MINNESOTA

Ronald A. Eisenberg
Minneapolis, MN
June 14, 2004

All statutory citations
are to Minn Stat Ann
(West).

- (a) (1) If all of decedent's issue are also issue of spouse, spouse receives entire intestate estate [524.2-102(1)(ii)]; otherwise, first \$150,000 plus 1/2 of balance [524.2-102(2)].
(2) Entire estate [524.2-102(1)(i)].
- (b) Varying percentage of augmented estate [i.e., probate estate plus other property described in answers 2(a) and 4(b)], depending on length of marriage (i.e., 3% up to 50% if married 1 to 15 years, or more), or supplemental amount of \$50,000 if greater than percentage amount [524.2-202]. Augmented estate includes assets and certain transfers of both spouses [524.2-203]. Spouse's share of augmented estate is first reduced by spouse's own assets and transfers [524.2-209(a)(3)].
- (c) Yes as to both probate and augmented estates [524.2-204].
- (d) Not applicable.

- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] [524.2-203 to 208].
- (b) Yes [524.2-203].
- (c) Determined by law of nonresident decedent's domicile [524.2-202(d)].

- (a) None.
- (b) None.
- (c) Life estate in homestead if there are issue of decedent surviving, remainder to decedent's issue [524.2-402(a)]. Homestead rights are not charged against elective share, but are in addition to it [524.2-202(c)].
- (d) Spouse is entitled to \$10,000 in value of household furniture, furnishings, appliances and personal effects (subject to award of sentimental value property under 525.152) plus one automobile regardless of value [524.2-403(a)(1) and (2)]. Spouse is also entitled to reasonable family allowance, not exceeding \$1,500 per month, for 18 months if estate is solvent (or 12 months if estate is insolvent) [524.2-404(a) and (b)]. Both allowances are not charged against elective share but are in addition to it [524.2-202(c)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

MINNESOTA

- (a) All rights may be determined by prenuptial agreement, provided there is full disclosure and opportunity to consult with legal counsel [519.11]. Postnuptial agreements may waive spouse's right of election, as well as rights to homestead, exempt property, and family allowance after fair disclosure and with separate counsel [519.11, subd. 1a]. Waiver of "all rights" is waiver only of right to elective share [524.2-213].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in any year exceeded \$10,000 plus decedent's life insurance transferred within 2 years of death [524.2-205].
- (c) Forfeited (i) if spouse feloniously and intentionally killed decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence) or (ii) with respect to spouse's inchoate rights in real estate only, if court finds by clear and convincing evidence that spouse is incapacitated person under section 525.54, that spouse has deserted for at least one year or "that other similar circumstances warrant" [519.07].

Petition filed with court and mailed or delivered to personal representative, if any, within later of 9 months after death or 6 months after admission of will (court may extend time for good cause shown) [524.2-211].

- (a) After payment of funeral and administration expenses, homestead rights, family allowances and exemptions, liens, mortgages and enforceable claims [524.2-204].
- (b) Following are applied in cash or in kind first to satisfy elective share amount: (1) amounts included in augmented estate which pass or have passed to spouse by testate or intestate succession, and decedent's nonprobate transfers to spouse; (2) amounts included in augmented estate which would have passed to spouse but were disclaimed; and (3) spouse's own property and nonprobate transfers to others, up to twice applicable elective share percentage [524.2-209(a)]. If elective share is not fully satisfied, then other amounts included in probate estate and nonprobate transfers to others are applied under 524.2-209(b) and (c). Amounts applied are equitably apportioned among those who would otherwise have received those amounts. Value of spouse's interest in life estate or trust is deemed to be 1/2 of value of property subject to life estate or trust property, unless a higher or lower value is established by proof [524.2-208(c)(2)].

- (a) Terminates [524.2-212].
- (b) By court order after finding that exercise is necessary to provide adequate support for protected person and that election will be consistent with best interests of natural bounty of protected person's affection [524.2-212].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

MISSISSIPPI

W. McDonald Nichols
Jackson, MS
June 14, 2004

All statutory citations are to Miss Code Ann unless otherwise specified.

- (a) (1) Child's part of estate; if no children, entire estate [91-1-7].
(2) Entire estate [91-1-7].
- (b) Same as intestate share but no more than 1/2 of estate even if no surviving issue [91-5-25]. However, if spouse has separate estate, right to renounce will may be eliminated or share may be reduced depending on value of such estate in relation to decedent's estate [91-5-29].
- (c) Yes.
- (d) Not applicable.

- (a) Elective share does not include irrevocable trusts, life insurance, jointly owned real estate and personal property, or gifts [40 MLJ 286 (1969)].
- (b) Determined by law of property's situs (not included in MS estate for elective share purposes) [*Banks v. Junk*, 264 So2d 387 (1972)].
- (c) Determined by MS law as if resident decedent [*Banks v. Junk*, 264 So2d 387 (1972)].

- (a) None [93-3-5].
- (b) None [93-3-5].
- (c) Spouse entitled to use and occupancy of homestead, irrespective of value, until death or remarriage [*Stockett v. Stockett*, 337 So2d 1237 (1976)]. No statutory or case law on whether this right directly or indirectly affects spouse's intestate or elective share.
- (d) Court may authorize payment of family allowance for 1 year and order that all or part of it be paid directly to widow (only indirectly affects share by reducing divisible estate) [91-7-141].

MISSOURI

George R. Haydon, Jr.
Kansas City, MO
May 5, 2004

All statutory citations are to Mo Rev Stat.

- (a) (1) First \$20,000 plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of estate [474.010-1].
(2) Entire estate [474.010-1].
- (b) 1/2 (1/3 if issue) of estate less money and property "derived" from decedent (i.e., property or rights in property, including beneficial interests, received from decedent by any means other than testate or intestate succession) [474.160 and 474.163-1].
- (c) Yes [474.160.1(1) and 474.163.1].
- (d) Not applicable.

- (a) None (except against gifts in fraud of marital rights) [474.150-1].
- (b) Not provided for under MO law.
- (c) Determined by law of decedent's domicile [473.675].

- (a) None [474.110].
- (b) None [474.110].
- (c) Allowance to spouse of amount not exceeding lesser of \$15,000 or 1/2 of estate (exclusive of exempt property and family allowance described below). Homestead allowance is offset against elective share [474.160-2 and 474.290].
- (d) Spouse is entitled to exempt property (as enumerated) without regard to value, and spouse and minor children whom decedent was obligated to support and children who were in fact being supported by decedent are entitled to reasonable allowance in money for maintenance for 1 year after death, taking into account previous standard of living of applicant, condition of estate, income and other assets available to applicant and applicant's expenses (only indirectly affects share by reducing divisible estate) [474.250 and 474.260].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

MISSISSIPPI

- (a) Rights may be waived by premarital agreement [*Estate of Hensley v. Estate of Hensley*, 524 So2d 325 (1988)] or by postnuptial agreement [*Roberts v. Roberts*, 381 So2d 1331 (1980)].
- (b) Rights apply only to probate estate assets [*Jones v. Somerville*, 28 So 940 (1900)].
- (c) Not available if spouse willfully caused or procured death of decedent or entered into bigamous marriage [91-1-25, 91-5-33, and *Rowell v. Rowell*, 170 So2d 267 (1964)].

Petition filed in court where probated within 90 days after admission of will [91-5-25 (Supp 1980)].

- (a) After payment of debts of decedent, administration expenses, funeral expenses, and all estate taxes [*Banks v. Junk*, 264 So2d 387 (1972)].
- (b) In cash and/or in kind [*Banks v. Junk*, 264 So2d 387 (1972)].

- (a) Right to elect terminates [*Shattuck v. Tyson*, 508 So2d 1077 (1987)] unless will made no provision for surviving spouse, in which event will renounced by operation of law [*McBride v. Haynes*, 247 So2d 129 (1971)].
- (b) Right to renounce will may be exercised by guardian [*Mullins v. Mullins*, 125 So2d 93 (1960)].

MISSOURI

- (a) Any rights may be waived by written contract executed before or after marriage [474.120 and 474.220].
- (b) Rights apply only to probate assets (unless conveyance is in fraud of marital rights) [474.150-1].
- (c) Joinder or other written express assent to conveyance of real estate [474.150-2].

Filing with court written, signed, and acknowledged election within 10 days after expiration of will contest period (i.e., 6 months after probate of will or first publication of notice of granting of letters, whichever is later) [473.083], except that filing deadline is within 90 days after final determination of any pending litigation which would affect amount of spouse's share [474.180 and 474.190].

- (a) After payment of funeral and administration expenses, exempt property, family allowance, and enforceable claims [474.160, 474.163-1, and 473.397].
- (b) In cash and/or in kind [474.160].

- (a) Terminates [474.200].
- (b) Guardian ad litem or conservator may elect with court approval or, on application of interested party, court may order guardian ad litem or conservator to elect [474.200].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

MONTANA

David L. Johnson
Billings, MT
April 30, 2004

All statutory citations
are to Mont Code
Ann.

- (a) (1) Entire estate if all issue of decedent and spouse are same; otherwise, (i) first \$150,000 plus 1/2 of balance of estate if decedent and spouse have same issue but spouse also has other issue or (ii) first \$100,000 plus 1/2 balance of estate if any of decedent's issue are not spouse's issue [72-2-112].
(2) Entire estate if no surviving parent; otherwise, first \$200,000 plus 3/4 of balance of estate [72-2-112(2)].
 - (b) Varying percentage of augmented estate [i.e., probate estate plus other property described in answers 2(a) and 4(b)], depending on length of marriage (i.e., 3% up to 50% if married 1 to 15 years, or more), or supplemental amount of \$50,000 if greater than percentage amount [72-2-221].
 - (c) Yes as to spouse's intestate share [72-2-112]. Yes as to spouse's elective share [72-2-221].
 - (d) Not applicable.
- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except life and accident insurance and retirement benefits payable to persons other than spouse or decedent's estate [72-2-222].
 - (b) Included in augmented estate [72-2-222].
 - (c) Determined by decedent's domicile at death [72-2-221].
- (a) None [72-2-122].
 - (b) None [72-2-122].
 - (c) Homestead allowance of \$20,000 (only indirectly affects share by reducing divisible estate) [72-2-412]. Spouse is also entitled to \$10,000 in household furniture, automobiles, furnishings, appliances, and personal effects in excess of any security interests therein (only indirectly affects share by reducing divisible estate) [72-2-413].
 - (d) Family allowance (which has priority over all claims but not over homestead allowance) of reasonable amount for maintenance is available to spouse and minor children whom decedent was in fact supporting or was obligated to support (only indirectly affects share by reducing divisible estate) [72-2-414].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

MONTANA

- (a) After fair disclosure, any right may be waived in writing before or after marriage or after death [72-2-224].
- (b) Augmented estate includes all property transferred during marriage of decedent and spouse (other than those for adequate consideration, life insurance and retirement benefits, or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in any year exceeded amount of U.S. gift tax annual exclusion then in effect [72-2-222].
- (c) Forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in Montana, (ii) participated in marriage ceremony with third person following invalid divorce, (iii) participated in proceeding to terminate all marital rights, or (iv) feloniously and intentionally killed or aided in killing of decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence) [72-2-812 and 72-2-813].

Petition filed with court and mailed or delivered to personal representative within later of 9 months after death or 6 months after admission of will [72-2-225].

- (a) After payment of all funeral and administration expenses, claims, and allowances, share is first reduced by amounts included in augmented estate which pass or have passed to spouse (or which would have passed to spouse but were disclaimed) and then borne on equitable apportionment basis by other recipients of augmented estate in proportion to value of their interests therein [72-2-222 and 72-2-227].
- (b) First from such cash or property which spouse received from augmented estate and would have received if not disclaimed, then in cash and/or in kind [72-2-227].

- (a) Terminates (right of election may be exercised only if spouse is living when petition is filed in court) [72-2-223].
- (b) Election may be made by the spouse's conservator, guardian, or agent under a durable power of attorney. By court order, elective share amount is then placed in a support trust for spouse.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NEBRASKA

William E. Olson, Jr.
Lincoln, NE
April 15, 2004

All statutory citations
are to Neb Rev Stat.

- (a) (1) First \$50,000 plus 1/2 of balance of estate if all surviving issue are also issue of spouse; otherwise, 1/2 of estate [30-2302].
(2) First \$50,000 plus 1/2 balance of estate if decedent had surviving parent(s); otherwise, entire estate [30-2302].
 - (b) Up to 1/2 of augmented estate [i.e., probate estate plus property described in answers 2(a) and 4(b)] [30-2313 and 30-2314(a)].
 - (c) Yes as to both probate and augmented estates [30-2301-3, 30-2325, 30-2487, and 30-2314(a)].
 - (d) Not applicable.
- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except life and accident insurance, joint annuities, and pensions payable to any person other than spouse [30-2314].
 - (b) If included in augmented estate, it is subject to satisfaction of elective share [30-2314 and 30-2317(e)].
 - (c) Determined by law of decedent's domicile [30-2313(b)].
- (a) None [30-104].
 - (b) None [30-104].
 - (c) Homestead exemption is limited to \$7,500 (only indirectly affects share by reducing divisible estate) [30-2322].
 - (d) Spouse is entitled to exempt property valued at \$5,000 in excess of security interests thereon (only indirectly affects share by reducing divisible estate) and family maintenance allowance (payable either in lump sum or installments aggregating \$9,000 for up to 1 year, or such other reasonable amounts as determined by court order) (only indirectly affects share by reducing divisible estate) [30-2323, 30-2324, and 30-2325].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NEBRASKA

- (a) After fair disclosure, any right may be waived in writing before or after marriage [30-2316].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income; (ii) retained at death power to revoke, consume, invade, or dispose of such property; (iii) held such property at death with another with right of survivorship; or (iv) transferred property within 3 years of death where total of such property transferred to any donee in any year exceeded \$3,000 [30-2314].
- (c) Forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in NE; (ii) married third individual following decree terminating marital rights; (iii) participated in proceeding to terminate all marital rights; or (iv) feloniously and intentionally killed or aided in killing of decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence) [30-2353 and 30-2354].

Petition filed with court and mailed or delivered to personal representative, if any, within later of 9 months after death or 6 months after probate of decedent's will (court may extend time for election if spouse shows cause within such period) [30-2317].

- (a) After payment of all funeral and administration expenses, claims, and allowances, share is first reduced by amounts included in augmented estate which pass or have passed to spouse (or which would have passed to spouse but were renounced) and then borne on equitable apportionment basis by recipients of augmented estate in proportion to value of their interests therein [30-2317(d) and 30-2319].
- (b) In cash and/or in kind from augmented estate or by contribution from estate beneficiaries as appropriate [30-2317(d) and 30-2319].

- (a) Terminates [30-2315].
- (b) By court order after finding in protective proceeding for disabled spouse that election is in disabled spouse's best interests [30-2315].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NEVADA

Charles W. Johnson
Las Vegas, NV
March 25, 1993

All statutory citations
are to Nev Rev Stat.

- (a) (1) All community property [134.010 and 123.250] and 1/2 of separate property if decedent is survived by 1 child or issue of 1 child (1/3 if decedent is survived by 2 or more children or their issue) [134.040].
(2) All community property [134.010 and 123.250] and 1/2 of separate property if either of decedent's parents or their issue survives (all if no parents or issue thereof) [134.050].
- (b) None as to decedent's 1/2 of community and separate property (i.e., spouse retains ownership of other 1/2 of community property only) [123.250]. Nevada recognizes "community property with right of survivorship" as nonprobate form of ownership unaffected by testamentary disposition [111.064 and 40.470].
- (c) Not applicable.
- (d) Not applicable.

- (a) Not applicable (however, nonprobate assets are subject to spouse's 1/2 interest in community property although employers, trustees, and insurance companies paying death benefits for employees are not liable to spouse under certain conditions) [123.250, 123.230, and 123.240].
- (b) Not provided for under NV law.
- (c) Not applicable (however, spouse can claim any community property rights in real property even though not domiciled in Nevada or any other community property state) [111.055 and 123.220].

- (a) None [123.020]
- (b) None [123.020].
- (c) Community residential real property (or mobile home) not exceeding \$90,000 vests immediately in spouse if selected as homestead and recorded by either decedent or spouse while married (only indirectly affects share by reducing divisible estate) [146.050 and 115.020].
- (d) Court may temporarily set apart previously undesignated homestead property, exempt property, and other estate property for support of spouse unless spouse receives reasonable maintenance from other property (only indirectly affects share by reducing divisible estate) [146.010 to 146.050].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NEVADA

- (a) Community property rights and succession rights may be waived or modified by written contract (marriage agreements must also be acknowledged) [123.070, 123.080, 123.220, and 123.270].
- (b) Community real property may be transferred only with joinder of both spouses. Community personal property may be transferred only with express or implied consent of both spouses. Business assets managed by only 1 spouse can be sold in ordinary course of business without consent of other [123.230]. Survivorship rights under community property with right of survivorship can probably be severed unilaterally by either spouse [111.064].
- (c) Relinquishment of community property rights or failure to select and record homestead [123.220 and 146.050]. Decedent's separate property and 1/2 of community property pass to other heirs or devisees if spouse is convicted of murdering decedent [123.250 (1)(a) and 134.007].

Not applicable.

- (a) Not applicable.
- (b) Not applicable.

- (a) Not applicable.
- (b) Not applicable.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NEW HAMPSHIRE

John C. Ransmeier
Concord, NH
June 15, 2004

All statutory citations
are to NH Rev Stat
Ann.

- (a) (1) First \$250,000 plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse, and no other issue of spouse survive decedent; first \$150,000 plus 1/2 balance of estate if all of decedent's issue are also issue of spouse and spouse has one or more surviving issue not issue of decedent; first \$100,000 plus 1/2 balance of estate if decedent's issue are not all issue of spouse [561:1].
 - (2) First \$250,000 plus 3/4 of balance of estate if either of decedent's parents survives; otherwise, entire estate [561:1].
- (b) 1/3 of personalty and 1/3 of realty if survived by issue; first \$10,000 of personalty, first \$10,000 of realty, plus 1/2 of balance if survived by parent or sibling; otherwise, first \$10,000 together with \$2,000 for each full year of marriage, plus 1/2 of balance of personalty and same as to real estate [560:10].
- (c) Yes [560:10 and 561:1].
- (d) Not applicable.

- (a) None (unless fraudulent conveyance's shown) [*Ibey v. Ibey*, 43 A2d 157 (1945), *Hamm v. Piper*, 201 A2d 125 (1964), and *Hanke v. Hanke*, 459 A2d 246 (1983)].
- (b) Determined by law where property is situated [*Sinclair v. Sinclair*, 109 A2d 851 (1954)].
- (c) Determined by NH law [*Sinclair v. Sinclair*, 109 A2d 851 (1954)].

- (a) None [560:3].
- (b) None [560:3].
- (c) Homestead exemption of \$100,000 [480:1] (appears to reduce intestate share if claimed — exemption must be waived if elective share is claimed) [560:10].
- (d) Widow is entitled to "reasonable allowance" from personal estate which may be charged in whole or in part against her distributive share of personalty as court deems reasonable (but shall be charged against her share if she elects to take a share of real estate against will) [560:1]. Widow is entitled to occupy rent free decedent's house for 40 days after his death and to have reasonable sustenance from his estate which shall be taken into account in her allowance [560:2].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NEW HAMPSHIRE

- (a) Rights may be waived by prenuptial agreement conferring a "settlement" in lieu of homestead right or distributive share (status of postnuptial agreements is unclear but probably effective if supported by full disclosure and not inequitable) [560:15 and 16].
- (b) Rights apply only to probate estate assets (unless conveyance is fraudulent or for purpose of defeating spouse's marital rights) [*Ibey v. Ibey*, 43 A2d 157 (1945), *Hamm v. Piper*, 201 A2d 125(1964), and *Hanke v. Hanke*, 459 A2d 246 (1983)].
- (c) Rights of election and homestead are forfeited if (i) widower abandoned decedent or willfully neglected to support her for 3 years before death or (ii) decedent was justifiably living apart from spouse because spouse was guilty of conduct which constitutes cause for divorce ("irreconcilable differences" under NH no fault divorce statute are not sufficient) [560:18, 560:19, and *In re Hitchcock*, 391 A2d 882 (1978)]. Intentional or unlawful killing of decedent by spouse does not bar spouse's rights (but constructive trust will be imposed where appropriate to prevent unjust enrichment [*Kelley v. State*, 196 A2d 68 (1963)]).

Filing with court written waiver or release within 6 months after personal representative's appointment (deadline may be extended by court on spouse showing good cause) [560:14]. Where real estate is involved, waiver and release must also be recorded in registry of deeds for county in which real estate is situated [560:14].

- (a) After payment of administration expenses, funeral expenses, allowances, and debts, first out of residue and then ratably from specific gifts [560:10 and *Ellis v. Aldrich*, 47 A 95(1899)].
- (b) In cash and/or in kind [562:1 and *In re Estate of Saye-wich*, 413 A2d 581 (1980)].

- (a) Terminates [*Penhallow v. Kimball*, 61 NH 596 (1882)].
- (b) None (election may be made for spouse's benefit by guardian) [*Hogan v. Roche*, 63 A2d 794 (1949)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NEW JERSEY

Rodney N. Houghton
Newark, NJ
June 4, 1998

All statutory citations
are to NJ Stat Ann
(West).

- (a) (1) First \$50,000 plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of estate [3B:5-3(c) and (d)].
(2) First \$50,000 plus 1/2 of balance of estate if either of decedent's parents survives; otherwise, entire estate [3B:5-3(b) and (a)].
 - (b) 1/3 of augmented estate [i.e., probate estate plus property described in answers 2(a) and 4(b)] [3B:8-1].
 - (c) Yes, except that intestate fraction may be applied to the balance minus \$50,000 [see answer 1(a) above]; while elective share is applied to the augmented estate [see answer 1(b) above].
 - (d) Not applicable.
- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except life and accident insurance, joint annuities, and pensions payable to person other than spouse, and transfers made by decedent on or before 05/28/80 [3B:8-3 to 3B:8-9].
 - (b) If included in augmented estate, out of state real estate is subject to satisfaction of elective share [3B:8-3].
 - (c) Determined by law of decedent's domicile [3B:8-2].
- (a) None [3B:28-2].
 - (b) None [3B:28-2].
 - (c) Exempt property allowance of decedent's clothing and \$5,000 worth of personal property if spouse domiciled in state. Such rights are effective only against creditors, not against the will [3B:16-5].
 - (d) Family allowance available to spouse (if ceremonially married and living with decedent at time of death) or decedent's children or grandchildren pending will contest (only indirectly affects intestate share but directly reduces elective share if paid to spouse) [3B:3-30].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NEW JERSEY

- (a) After fair disclosure, rights may be waived wholly or partially before or after marriage [3B:8-10].
- (b) Augmented estate, against which spouse may elect, includes property transferred during marriage to other than bona fide purchaser if decedent retained specified rights or powers and, as to transfers made within 2 years of death, to extent transfers to donee in either of 2 years exceed \$3,000 *unless* made with spouse's consent or joinder [3B:8-3 to 3B:8-7].
- (c) Consent or joinder in transfers as described above, waiver of "all rights" or equivalent language, complete property settlement in anticipation of separation or divorce, intentionally killing decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence), or living apart from decedent at death either after judgment of divorce from bed and board or under circumstances which would have given decedent cause of action for divorce or nullity under NJ law [3B:8-10, 3B:7-4, 3B:7-6, and 3B:8-1].

Complaint filed with court within 6 months of appointment of personal representative (court may extend time for election if spouse shows cause within such 6 month period) [3B:8-12 *et seq.*].

- (a) After payment of funeral and administrative expenses and enforceable claims, *first* out of (i) all property owned by spouse at decedent's death (includes property passing to spouse as result of decedent's death and property which would have passed to survivor had survivor not renounced it) and (ii) property transferred by decedent to spouse during marriage for less than full consideration, which survivor transferred to third person for less than full consideration and which would have been included in survivor's augmented estate had survivor predeceased decedent and *second* proportionately from other recipients of augmented estate [3B:8-18, 3B:8-6, 3B:8-19].
- (b) In cash and/or in kind [3B:8-19].

- (a) Terminates [3B:8-11].
- (b) By order of court, which has appointed fiduciary to manage spouse's property, after finding that exercise is necessary to provide adequate support during spouse's probable life expectancy [3B:8-11].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NEW MEXICO

Robert P. Worcester
Santa Fe, NM
March 3, 1993

All statutory citations
are to NM Stat Ann.

- (a) (1) All community property and 1/4 of separate property [45-2-102].
(2) All community property and all separate property [45-2-102].
- (b) None as to decedent's 1/2 of community property and separate property (i.e., spouse becomes owner of other 1/2 of community property only) [45-2-804].
- (c) Not applicable.
- (d) Not applicable.

- (a) Nonprobate assets are subject to spouse's 1/2 interest in community property [40-3-8 and 40-3-12].
- (b) Not provided for under NM law.
- (c) Not provided for under NM law (although NM law applies as to determining rights of claimants, purchasers, distributees, and others) [45-4-207].

- (a) None [45-2-113].
- (b) None [45-2-113].
- (c) Spouse is entitled to \$20,000 in dwelling house and land or in occupied dwelling house although on land owned by another (no effect on share) [42-10-9].
- (d) Spouse is entitled to family allowance of \$10,000 and personal property not exceeding \$3,500 in excess of any security interest therein in form of household furniture, automobiles, furnishings, appliances, and personal effects (if there is not sufficient property or if value of unencumbered chattels is not sufficient to equal \$3,500, spouse is entitled to other assets to make up \$3,500 value) (no effect on share passing by intestate succession or by will, unless will provides otherwise) [45-2-401 and 45-2-402]. These allowances are in lieu of other statutory exemptions [45-2-405] (i.e., homestead exemption, \$500 of personal property other than money, 1 motor vehicle, clothing, furniture, \$1,500 of tools of trade, books, medical/health equipment used for health and not for profession, and any interest in or proceeds from pension or retirement fund of every person supporting only themselves [42-10-2], any beneficiary fund not exceeding \$5,000 of benevolent association or society [42-10-4], and exemption from debts of decedent of life insurance proceeds unless there is special contract or arrangement in writing [42-10-5]).

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NEW MEXICO

- (a) Spouses may designate property as separate property by written agreement which will have an effect upon power of testamentary disposition [40-3-8]. Contract to make will or devise or to die intestate, if executed after 07/01/76, can be established only by will stating material provisions of contract, express reference in will to contract, or writing signed by decedent evidencing contract [45-2-701].
- (b) Except for purchase money mortgages, both spouses must join in transfers, conveyances, mortgages, and leases exceeding 5 years of community real property and separate real property held in joint tenancy or as tenants in common (if there is failure of joinder, transfer, conveyance, mortgage, or lease is void) [40-3-13]. Management and control of other community personal property, including power to dispose of and incumber, can be by either spouse except where (i) only 1 spouse is named in document evidencing ownership (or, in agreement between spouse and third party, only 1 spouse so named may manage, control, dispose of, or encumber such community property) or (ii) both spouses are named in agreement with third party which provides that both spouses must join in document evidencing ownership [40-3-14].
- (c) All rights are forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in NM, (ii) participated in proceeding to terminate all marital rights, or (iii) feloniously and intentionally killed or aided in killing of decedent (final judgment is conclusive but court may find guilt by preponderance of evidence) [45-2-802 and 45-2-803].

Not applicable.

- (a) Not applicable.
- (b) Not applicable.

- (a) Not applicable.
- (b) Not applicable.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NEW YORK

John J. Barnosky
Uniondale, NY
April 20, 1998

All statutory citations are to NY Est, Powers & Trusts Law (McKinney) unless otherwise specified.

- (a) (1) First \$50,000 plus 1/2 of balance of estate [4-1.1(a)(1)].
(2) Entire estate [4-1.1(a)(2)].
- (b) Pecuniary amount equal to greater of (i) \$50,000 or (ii) 1/3 of augmented estate [i.e., probate estate and property described in answer 2(a)]. [5-1.1-A(a)(5); 5-1.1(c)(1)(D) and (G)].
- (c) Yes as to both probate and augmented estates [5-1.1-A(a)(2)].
- (d) Not applicable.

- (a) Augmented estate includes: gifts causa mortis; post 08/31/92 irrevocable transfers of property during marriage (except certain transfers involving pension rights) for less than adequate consideration within 1 year of death if not within gift tax exclusions under IRC § 2503(b) and (e); Totten trusts; joint accounts, joint tenancies and tenancies by entirety to extent of decedent's contribution; trusts revocable either alone or in conjunction with a nonadverse party; transfers to extent decedent retained a life interest after 08/31/92; property subject to a general power of appointment exercisable during decedent's lifetime held by decedent immediately before death or exercised/released within 1 year of death; certain pension benefits; and U.S. bonds payable at death to a third party. Life insurance proceeds are not testamentary substitutes. [5-1.1-A(b) (1)(A)-(H)].
- (b) Subject to right of election [5-1.1-A(c)(7)].
- (c) None unless decedent elected to have disposition of such property governed by NY law [5-1.1-A(c)(6)].

- (a) None [except as to marriages occurring prior to 09/01/30 if action is brought within 2 years of decedent's death, in which case spouse receives 1/3 of decedent's land acquired during marriage and before 09/01/30 (precludes election against will)] [Real Prop Law 190 (McKinney), Real Prop Acts Law 1001 (McKinney), and 5-1.1-A(c)(8)].
- (b) None [Real Prop Law 189 (McKinney)].
- (c) None.
- (d) To extent available, spouse is entitled to exempt items that consist of (i) \$10,000 of household furniture and furnishings, appliances, fuel, provisions, and clothing of decedent, (ii) \$1,000 of books and pictures, (iii) \$15,000 of domestic animals, farm machinery, and 1 tractor and 1 lawn tractor, (iv) 1 motor vehicle worth \$15,000 [spouse may elect to receive either a motor vehicle worth more than \$15,000 (even if decedent owned another motor vehicle worth less than \$15,000) upon payment of such excess to estate or cash equal to lesser of \$15,000 or motor vehicle's value], and (v) \$15,000 of other personal property (only indirectly affects share by reducing divisible estate) [5-3.1].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NEW YORK

- (a) Waiver or release of right may be made before or during marriage if in writing, subscribed by maker, and acknowledged or proved in manner required for recording conveyance of real property [5-1.1-A(e)].
- (b) Right is not applicable to all irrevocable transfers effected before marriage, transfers that fall within IRC §2503(b) (\$10,000 annual gift tax exclusion) or §2503(e) (transfers for educational or medical purposes), and certain irrevocable transfers that occur after marriage but before 08/31/92 or not within 1 year of decedent's death [5-1.1-A(b)(1)(B)].
- (c) Spouse's right of election is barred if (i) marriage was void as incestuous, bigamous, or prohibited, (ii) spouse had procured divorce or annulment outside New York which is invalid under New York law, (iii) final valid decree of separation was rendered against spouse and was in effect at decedent's death, (iv) spouse abandoned decedent and abandonment continued until death, (v) spouse having support duty and having means to support failed or refused to support decedent until death, or (vi) spouse feloniously and intentionally killed decedent [5-1.2 and *Riggs v. Palmer*, 115 NY 506 (1989)].

Filing notice with court and service on personal representative within 6 months from issuance of letters testamentary or of administration, but no later than 2 years after decedent's death (court may extend election period up to 6 additional months and for additional periods where spouse is under legal disability) [5-1.1-A(d)(1)-(3)].

- (a) After payment of debts, administration expenses, reasonable funeral expenses, [5-1.1-A(a)(2)] and exempt property [see answer 3(d)], elective share is satisfied ratably by all beneficiaries other than spouse unless will specifies otherwise [5-1.1-A(c)(2)].
- (b) In cash and/or in kind as determined by person required to make contribution [5-1.1-A(c)(2)].

- (a) Terminates [5-1.1-A(c)(3)].
- (b) Right can be exercised by guardian of a minor spouse's property or by incompetent spouse's committee, conservator, or by spouse's guardian ad litem when court so authorizes [5-1.1-A(c)(3)(A)-(D)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NORTH CAROLINA

Michael H. Godwin
Greensboro, NC
April 23, 1999

All statutory citations
are to NC Gen Stat.

- (a) (1) Either life estate share (i.e., life interest in 1/3 of decedent's real estate or life interest in decedent's homeplace and fee simple ownership of household furnishings) or intestate share (i.e., first \$30,000 plus 1/2 of balance of estate if decedent is survived by only 1 child or by any issue of only 1 deceased child; otherwise, first \$30,000 plus 1/3 of balance of estate) [29-14(a) and (b) and 29-30].
(2) Either life estate share [see answer (a)(1)] or intestate share (i.e., first \$50,000 plus 1/2 of balance of estate if either of decedent's parents survives; otherwise, entire estate) [29-14(a) and (b) and 29-30].
- (b) If decedent is survived by issue of former marriage and there are no issue of present marriage, 1/2 of intestate share; otherwise, same as intestate share, but no more than 1/2 of estate [30-3(a) and (b)].
- (c) Yes [29-2(5), (6), 30-3(a), and *Phillips v. Phillips*, 252 SE2d 761 (1974)].
- (d) Not applicable.

- (a) Assets of *inter vivos* trust over which decedent had substantial control until death are included in determining decedent's "net estate" against which spouse may elect; other nonprobate assets are not included [*Moore v. Jones*, 261 SE2d 289 (1980) and *In Re Estate of Francis*, 394 SE2d 150 (1990)].
- (b) Not provided for under NC law.
- (c) Not provided for under NC law.

- (a) None.
- (b) None.
- (c) None.
- (d) Allowance assigned either by magistrate (\$10,000 for spouse and \$1,000 for each dependent child) [30-15 and 30-17] or assigned in superior court (when estate is solvent and personal property exceeds \$10,000, depending on "estate and condition of decedent", allowance may be up to 1/2 of the average annual net income of decedent for 3 years next preceding death) [30-27 *et seq.*]. If decedent died intestate, allowance is in addition to intestate share [*In re Estate of Connor*, 168 SE2d 245(1969)]. If decedent died testate and spouse does not dissent, allowance is charged against spouse's share [30-15]. If decedent died testate and spouse dissents, allowance is in addition to share obtained by dissent [*First Union National Bank v. Melvin*, 130 SE2d 387(1963)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NORTH CAROLINA

- (a) Rights may be waived before or after marriage, after full disclosure [52-10 and 52B-1 *et seq.*].
- (b) Elective share applies only to probate assets and *inter vivos* trusts over which decedent retained substantial control until death [*Moore v. Jones*, 261 SE2d 289 (1980)].
- (c) Forfeited if spouse (i) voluntarily separated from decedent and lived in uncondoned adultery, (ii) abandoned decedent and was not living with decedent at death, (iii) obtained divorce which was not valid in NC, (iv) contracted bigamous marriage, (v) is guilty of willfully killing decedent (conclusive upon final judgment of conviction, pleas of guilty or *nolo contendere*, and (vi) is found guilty of willfully killing decedent in civil action brought within 1 year after decedent's death (or spouse dies or commits suicide before having been tried for offense and before estate is settled) [31A-1 and 31A-3].

Filing written dissent with court within 6 months after issuance of letters of appointment to personal representative or, if litigation affecting share of spouse is then pending, within additional time allowed by court [30-2].

- (a) After payment of administration expenses, family allowances and enforceable claims (except that, if life estate share is elected, property is not subject to payment of decedent's debts which are not secured by such property), and election diminishes pro rata the shares of devises and legatees under will [29-2(5), (6), 29-30(g), and 30-3, and *Phillips v. Phillips*, 252 SE2d 761 (1979)].
- (b) In cash and/or in kind [29-14 and 30-3].

- (a) Terminates [30-2].
- (b) Guardian or authorized attorney may file dissent on behalf of spouse; if spouse is incompetent, 6 month filing deadline runs from date guardian is appointed [30-2 and *First Citizens Bank and Trust Company v. Willis*, 125 SE2d 359 (1962)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

NORTH DAKOTA

Robert E. Rosenvold
West Fargo, ND
June 4, 2004

All statutory citations
are to ND Cent Code.

- (a) (1) Entire estate if all issue of decedent and spouse are same; otherwise, (i) first \$150,000 plus 1/2 of balance of estate if decedent and spouse have same issue but spouse also has other issue or (ii) first \$100,000 plus 1/2 balance of estate if any of decedent's issue are not spouse's issue [30.1-04-02].
(2) Entire estate if no issue or parent of decedent survives decedent; or first \$200,000 plus 3/4 of any balance of intestate estate if no issue of decedent survives decedent but a parent of decedent survives [30.1-04-02].
 - (b) 1/2 of augmented estate [i.e., probate estate plus property described in answers 2(a) and 4(b)] [30.1-05-01].
 - (c) Yes (as to both probate and augmented estates).
 - (d) Not applicable.
- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except life and accidental insurance, joint annuities, and retirement benefits payable to persons other than spouse [30.1-05-02].
 - (b) If included in augmented estate [see answer 4(b)], it is subject to satisfaction of elective share [30.1-05-02].
 - (c) Determined by law of decedent's domicile [30.1-05-01(4)].
- (a) None [30.1-04-13].
 - (b) None [30.1-04-13].
 - (c) Homestead estate, which is real property up to \$80,000 in value over encumbrances, is limited to life interest or until remarriage (only indirectly affects share by reducing divisible estate) [30-16-02 and 47-18-01].
 - (d) \$10,000 to include household furnishings and personal effects (only indirectly affect share by reducing divisible estate) plus family allowance to spouse and minor children whom decedent was obligated to support of up to \$18,000 payable in lump sum of periodic installments not exceeding \$1,500 per month for one year (additional family allowances may be paid upon court approval) (only indirectly affect share by reducing divisible estate) [30.1-07-01, 30.1-07-02, and 30.1-07-03].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

NORTH DAKOTA

- (a) May be waived by written agreement [30.1-05-04].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in either year exceeded \$10,000 [30.1-05-02].
- (c) Rights are reduced to extent of property owned or transferred without adequate consideration by spouse [30.1-05-02] and forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in ND, (ii) participated in proceeding to terminate all marital rights, or (iii) feloniously and intentionally killed or aided in killing of decedent [30.1-10-02 and 30.1-10-03].

Petition with notice to interested parties within later of 9 months after death or 6 months after admission of will [30.1-05-05].

- (a) After payment of funeral and administration expenses, homestead estate and allowances, and enforceable claims, first out of property passing to spouse and then proportionately from other distributees of augmented estate property [30.1-05-02 and 30.1-05-07].
- (b) In cash and/or in kind [30.1-05-07].

- (a) Terminates [30.1-05-06].
- (b) May be exercised on spouse's behalf by spouse's conservator, guardian or agent under authority of power of attorney [30.1-05-06].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

OHIO

David F. Allen
Marysville, OH
April 16, 2004

All statutory citations are to Ohio Rev Code

- (a) (1) First \$60,000 plus 1/3 (1/2 if only 1 child or issue thereof) of balance of estate if spouse is natural or adoptive parent of each child of decedent; otherwise, first \$20,000 plus 1/3 (1/2 if only 1 child or issue) of balance of estate [2105.06(B) and (C)].
- (2) Entire estate [2105.06(D)].
- (b) 1/3 of net probate estate if 2 or more of decedent's children or their issue survive; otherwise 1/2 of estate [2106.01(C)].
- (c) Yes.
- (d) Not applicable.

- (a) None [See, e.g., 2107.39, 2105.06, and *Smyth v. Cleveland Trust*, 179 NE2d 60 (1961) *Dumas v. Estate of Dumas*, 627 NE2d 978 (1994)].
- (b) Not provided for under OH law.
- (c) Determined by OH law as if resident decedent [*In re Gould's Estate*, 140 NE2d 793 (1956), *aff'd*, 140 NE2d 801 (1956), and *Pfau, Administrator v. Moseley*, 222 NE2d 639 (1966)].

- (a) Either spouse has right to receive estate for life in 1/3 of real property of which decedent was seized as estate of inheritance at any time during marriage. Such dower interest terminates upon decedent's death except as to any such real property, with respect to which such spouse's dower interest was not relinquished or barred, which was (i) conveyed by decedent during marriage or (ii) encumbered by mortgage, judgment, lien (except tax lien), or otherwise or aliened by involuntary sale (only indirectly affects share by reducing divisible estate) [2103.02].
- (b) None [2103.09].
- (c) Spouse may elect to receive entire interest of decedent in mansion house, adjacent lands used in conjunction with it, and household goods within house at their appraised value, with deduction of that portion of all liens existing at decedent's death and attributable to his interest (directly reduces share) [2106.10]. Spouse may also elect to purchase at appraised value through land sale petition filed between time of filing of inventory plus 30 days after approval of inventory [2106.16].
- (d) Spouse is entitled to receive (i) \$40,000 in money or property as allowance for support (only indirectly affects share by reducing divisible estate), although court has discretion to divide allowance with minor children of decedent if they are not also children of spouse [2106.13] and (ii) two motor vehicles used in family transporting [2106.18] and boat and motor [2106.19]. Value of second vehicle will be charged against spouse's family allowance.

OKLAHOMA

J.C. Joyce
Tulsa, OK
June 23, 2004

All statutory citations are to Okla Stat tit 84 unless otherwise specified.

- (a) (1) 1/2 of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of property acquired by joint industry during coverture and equal share of estate with each child then living and issue of deceased child by right of representation [213B1(c) and (d)].
- (2) All of such estate as is acquired during coverture by joint industry plus 1/3 of remaining estate if decedent survived by sibling or parent; otherwise, entire estate [213B1(a) and (b)].
- (b) 1/2 of such estate as is acquired during coverture by joint industry [44B2].
- (c) Yes.
- (d) Not applicable.

- (a) None (absent fraud, etc.) [*Sanditen v. Sanditen*, 496 P2d 365 (1972) and *Black v. Haynes*, 145 P 362 (1914)].
- (b) Not provided for under OK law.
- (c) Determined by law of decedent's domicile.

- (a) None.
- (b) None.
- (c) Homestead, which is not subject to administration, may be occupied in whole by spouse (title passes subject to homestead as other property) (only indirectly affects share by reducing divisible estate) [Okla Stat tit 58, 311, and Okla Const art XII, sec 1].
- (d) In discretion of court, reasonable amount for maintenance according to circumstances during settlement of estate (1 year limit on insolvent estates) (only indirectly affects share by reducing divisible estate) [Okla Stat tit 58, 314].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

OHIO

- (a) After full and fair disclosure, spouse may waive elective rights prior to marriage [*Troha v. Sneller*, 159 NE2d 899 (1959)]. Agreements made after marriage are ineffective to preclude spouse from exercising elective rights [3103.06 and *Dubois v. Coen*, 125NE121 (1919)].
- (b) Rights apply only to probate estate assets [*Smyth v. Cleveland Trust*, 179 NE2d 60 (1961); *Dumas v. Estate of Dumas*, 627 NE2d 978 (1994)].
- (c) Elective right not available if spouse is convicted of or pleads guilty to or complicity in voluntary homicide of decedent [2105.19].

Made in person before probate judge or deputy clerk within 1 month after service of probate court's citation to elect (on motion filed within such 1 month period, court may allow further time for making of election for good cause shown) [2106.02 and 2106.06].

- (a) After payment of expenses of administration, fees, debts, allowance, and estate taxes, first out of residue and then from specific gifts (unless will provides otherwise) [*Weeks v. Vandever*, 233 NE2d 502 (1968); *Winters National Bank & Trust Co., Ex'r v. Riffe*, 206 NE2d 212 (1965); and *Dunlap v. McCloud*, 95 NE 774 (1911)].
- (b) In cash and/or in kind [2113.53].

- (a) Terminates [2106.04].
- (b) By court order only after finding in a special proceeding that because of age, resources, and other circumstances it is necessary to provide support to spouse during spouse's life expectancy [2106.08].

OKLAHOMA

- (a) Rights may be waived or affected by prenuptial agreement (postnuptial agreements are void) [44].
- (b) Transfers by gift or sale, whether in trust or otherwise, may be made so long as the action taken is not in fraud of marital rights [*Sanditen v. Sanditen*, 496 P2d 365 (1972)].
- (c) Surviving spouse cannot take if convicted of 1st or 2nd degree murder or 1st degree manslaughter of decedent [231].

File written election in court prior to hearing on petition for final distribution [44B3].

- (a) After payment of debts and expenses of administration, first out of property disposed of by will for such payment, next out of property not disposed of by will, then out of residue, and lastly out of property specifically devised or bequeathed [3 and 4].
- (b) In cash and/or in kind [44 and 213].

- (a) Terminates [44B4].
- (b) Guardian duly appointed may file election [44(4)]. Court may apply equity for benefit of incompetent spouse [*Turner v. First National Bank*, 262 P2d 897 (1953) and *Matter of Dawson's Estate*, 561 P2d 150 (1976)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

OREGON

Laurie Neilson Lee
Portland, OR
November 23, 1998

All statutory citations
are to Or Rev Stat.

- (a) (1) Entire estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of net estate [112.025(1) and (2)].
(2) Entire estate [112.035].
- (b) 1/4 of estate share reduced by value of following property given to spouse under decedent's will: property given outright to spouse (and to trusts subject to spouse's withdrawal rights) and present value of spouse's legal life estate, right to income or right to annuity; however, elective share cannot exceed 1/2 of total of all property passing to spouse under will, most of nonprobate estate (e.g., joint bank accounts, jointly owned real property, Totten trusts, life insurance, revocable trusts, etc.), and certain gifts made by decedent (for this purpose, spouse is considered to receive any property, including life insurance, in which spouse is given all income and general power of appointment over principal) [114.105 (1) (a), (b), and (c), and 114.125].
- (c) No [reduction is only by some of priority items listed in answer 6(a)].
- (d) (1) Spouse's 1/2 net intestate share applies to gross probate estate reduced by administration and funeral expenses, homestead rights and support allowance, claims and taxes, and devises under will.
(2) Spouse's 1/4 elective share applies to gross probate estate reduced by administration and funeral expenses, homestead rights and support allowance, claims, and taxes.

- (a) None (except as to share being limited to 1/2 of all properties, both by will and otherwise, passing to spouse) [114.125].
- (b) To extent out of state real property is community property in such state, then 1/2 of it is not subject to testamentary disposition or right to elect against will [112.735].
- (c) Determined by law of decedent's domicile [114.105].

- (a) None [112.685].
- (b) None [112.685].
- (c) Decedent's spouse and dependent children (or any of them) may continue to occupy decedent's principal place of abode until 1 year after death (or, if decedent's homestead is leasehold estate or estate for lifetime of another, until 1 year after decedent's death or earlier termination of estate) [114.005]. This homestead right only indirectly affects spouse's intestate or elective share by reducing divisible estate.
- (d) Spouse or dependent child may petition court to order necessary and reasonable provision for support of spouse and dependent children; such support order is separate from temporary support also allowed by court order [114.015-114.075]. This support right only indirectly affects spouse's intestate or elective share by reducing divisible estate.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

OREGON

- (a) Spouse may be precluded from exercising elective right by written agreement signed by both spouses entered into either before or after marriage [114.115].
- (b) Spousal elective rights apply only to probate estate assets (but limited as described in answer 1) [114.105(1)(a), (b), and (c), and 114.125].
- (c) Spousal elective rights may be forfeited in court's discretion if decedent and spouse were living apart at decedent's death, whether or not there was decree for legal separation [114.135]. Killing of decedent by spouse [112.455-555].

Filing written election with court (after service upon personal representative or attorney therefor) within later of 90 days after admission of will to probate or 30 days after filing of inventory [114.145].

- (a) Absent other provisions in will and after payment of administration and funeral expenses, homestead rights and support allowance, and claims and taxes, first from any intestate property and then ratably from other devisees, except that testamentary plan of decedent shall be preserved so far as possible [114.165].
- (b) Probably in cash only [114.105].

- (a) Not provided for under OR law (terminates under prior law).
- (b) Spouse's conservator or court may file election against will if additional assets are needed for spouse's reasonable support after taking into account spouse's probable needs, provisions of will, any nonprobate property arrangements made by decedent for spouse's support, and any other assets available for such support (whether or not owned by spouse) [114.155].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

PENNSYLVANIA

Robert L. Freedman
Philadelphia, PA
April 19, 2004

All statutory citations
are to 20 Pa Cons
Stat.

- (a) (1) First \$30,000* plus 1/2 of balance of estate if all of decedent's issue are also issue of spouse; otherwise, 1/2 of estate [2102(3) and (4)].
(2) First \$30,000* plus 1/2 of balance if either of decedent's parents survives; otherwise, entire estate [2102(1) and (2)].
* If there is partial intestacy, any property received by spouse under will shall satisfy pro tanto this \$30,000 amount.
- (b) 1/3 of property passing from decedent by will or intestacy and of specified *inter vivos* conveyances [2203].
- (c) Yes.
- (d) Not applicable.

- (a) 1/3 of (i) income or life use of property conveyed by decedent during marriage to extent decedent at death had use thereof or interest in or power to withdraw income thereof, (ii) property conveyed by decedent during lifetime to extent decedent at death had power to revoke conveyance or to consume, invade, or dispose of its principal for decedent's own benefit, (iii) property conveyed by decedent during marriage to himself and another with right of survivorship to extent of any interest in property decedent had power at death unilaterally to convey absolutely or in fee, (iv) survivorship rights conveyed to beneficiary of annuity contract to extent it was purchased by decedent during marriage and decedent was receiving annuity payments therefrom at death, and (v) property conveyed by decedent during marriage and within 1 year of death to extent aggregate amount to each donee exceeds \$3,000 [2203(a)]. Excluded are (i) property conveyed by decedent for adequate consideration [2205], (ii) property passing under power of appointment from another, (iii) life and accidental death insurance, and (iv) pension, deferred compensation, profit sharing, death, or other benefits under broad based employer plan for employees [2203(b)].
- (b) Subject to elective share [2211(a)]. Orders or decrees of Pennsylvania court in county of decedent's domicile relating to spouse's elective share may be enforced as necessary by suits in other courts and transfers of such property may be enjoined by court order [2211(c) and (d)].
- (c) Determined by law of decedent's domicile (subject to rights of Pennsylvania fiduciaries, custodians, and obligors and of transferees for value and lien holders for value) [2202].

- (a) None [2105].
- (b) None [2105].
- (c) None.
- (d) None (although there is separate, unrelated family exemption of \$3,500 to which spouse is entitled if certain conditions are met and exemption has not been forfeited) [3121].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

-
- PENNSYLVANIA**
- (a) Election may be waived, wholly or partially, before or after marriage, or before or after decedent's death [2207] (full and fair disclosure is required by case law).
 - (b) Precluded by transfers for adequate consideration or irrevocable gifts (outright or in trust) made more than 1 year before death with no retained interest or by transfers with express consent or joinder of spouse [2205, 2203(a) and (b)]. See answer 2(a) for those transfers which would not preclude exercising such rights.
 - (c) Forfeited if spouse willfully deserted, neglected, or failed to perform duty to support for 1 year before death or willfully and unlawfully killed decedent or participated therein as principal or accessory [2208, 2106, and 2507(5)].

By filing election with court with notice to personal representative within 6 months after later of death or admission of will (deadline may be extended by court upon application filed within foregoing time limit) [2210].

- (a) After payment of administration expenses, family exemption, funeral and burial expenses, medical, nursing, and hospital services within 6 months of death, gravemarker, rental for decedent's residence within 6 months of death, and all other claims [3392], first out of intestate property, next out of each separate conveyance (including testamentary gifts) on fractional basis, although disproportionate allocation of items within each conveyance is permitted so as to give maximum effect to testator's intent [2211(b)]. However, court has power to depart from usual order of allocating spouse's share and other shares to carry out presumed intention had decedent known of election [2211(b)]. Nonelective shares subject to order of abatement [3541].
- (b) In cash and/or in kind [2211].

- (a) Terminates [2206].
- (b) Exercisable by incompetent's guardian or his attorney in fact in accordance with 5603(d) and 5604, but in each case only by order of court after finding that exercise is advisable [2206].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

RHODE ISLAND

David T. Riedel
Providence, RI
June 16, 2004

All statutory citations
are to RI Gen Laws.

- (a) (1) Life estate in spouse in decedent's real estate held in fee at death, together with 1/2 of residue of decedent's personal property [33-25-2 and 33-1-10].
- (2) Life estate in spouse in decedent's real estate held in fee at death (but, upon petition, probate court may grant \$75,000 in fee) together with \$50,000 plus 1/2 of residue of decedent's personal property [33-1-5, 33-25-2, and 33-1-10].
- (b) Life estate in spouse in decedent's real estate held in fee at time of decedent's death, no rights as to personal property [33-25-3 and 33-25-4].
- (c) Yes.
- (d) Not applicable.

- (a) None [33-25-4] but see *Pezza v. Pezza*, [690 A.2d 345 (1997)], where indicated through *dicta* that if decedent's predeath transfer of real estate to trust was illusory (i.e., transfer did not intend at transfer to divest all ownership and control over property), spouse could assert right of election against real estate transferred — implication being that transfer of real estate to revocable trust (and perhaps other transfers of real estate) could not serve to defeat rights of spouse.
- (b) Not provided for under RI law.
- (c) No direct provision under RI law, but disposition of real estate owned by nonresident is presumably governed by same principles as disposition of real estate owned by resident. Life estate granted by sections 33-25-2 and 33-25-3 is not limited to RI residents.

- (a) None. Dower has been abolished [33-25-1]. Statutory life estate is granted to spouse in all real estate owned by deceased spouse at time of death [33-25-2].
- (b) None. Curtesy has been abolished [33-25-1]. Statutory life estate is granted to spouse in all real estate owned by deceased spouse at time of death [33-25-2].
- (c) None.
- (d) Family allowance available for 1 year (only indirectly affects share by reducing divisible estate) [33-10-3]. If no issue, court may set off more real estate for life in addition to rights to real estate described in answer 1(a) or (b) [33-10-4].

SOUTH CAROLINA

S. Alan Medlin
Columbia, SC
April 16, 1998

All statutory citations
are to SC Code Ann.

- (a) (1) 1/2 of estate [62-2-102].
- (2) All of estate [62-2-102].
- (b) Elective share entitlement of 1/3 of probate estate, defined as property passing by will or intestacy [62-2-201 and 62-2-202]; omitted spouse entitlement of amount equal to intestate share if will executed before marriage and no contrary intent of decedent [62-2-301].
- (c) Yes [62-2-202].
- (d) Not applicable.

- (a) By express provisions of statute, elective share inapplicable to nonprobate transfers [62-2-201 and 62-2-202]; South Carolina Supreme Court ruling in *Seifert v. Southern National Bank of South Carolina*, 409 SE2d 337 (1991), invalidated revocable *inter vivos* trust *subjudice* as avoidance technique; questionable effect of decision on other nonprobate transfers.
- (b) Not provided for under SC law.
- (c) Governed by law of decedent's domicile at death [62-2-201].

- (a) None.
- (b) None.
- (c) \$5,000 exempt property set aside [62-2-401 and 62-2-402]; directly reduces elective share [62-2-206].
- (d) None.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

- RHODE ISLAND**
- (a) Spouse may contract away right to exercise rights by premarital agreement [15-17-3]. Postmarital amendments to premarital agreement are contemplated [15-17-5]. Postmarital agreements are not specifically provided for by RI law.
 - (b) See response 2(a). Right of spouse to preclude other spouse from exercising rights in real estate by *inter vivos* transfer may be limited in case of transfers to irrevocable and revocable trusts [Pezza v. Pezza, 690 A.2d 345 (1997)]. Married woman (and presumably married man) may bar right of life estate by joining with spouse in deed conveying real estate [15-4-6]. Practice has been not to require spouse to join in deed to property owned by other spouse.
 - (c) Not directly provided for under RI law. See response 2(a) and 4(b).

By filing with probate court (and also in land evidence records of city or town if land is situated elsewhere) within 6 months after admission of will written statement waiving and renouncing devise and bequest and claiming life estate [33-25-4].

- (a) Before all claims and charges of decedent and of decedent's estate, except those secured by lien or any form of encumbrance on real estate [33-25-3].
- (b) Satisfied only from real estate owned by decedent in fee simple at death [33-25-2].

- (a) Terminates [33-25-2].
- (b) Not provided for under RI law.

SOUTH CAROLINA

- (a) Elective share may be wholly or partially waived in writing before or after marriage and after fair disclosure [62-2-204].
- (b) Express terms of statute offset elective share only by probate assets (those passing by will or intestacy) [62-2-206 and 62-2-202].
- (c) Felonious and intentional killing of decedent [62-2-803]; acquiescence to attempted divorce or participation in proceeding culminating in order purporting to terminate all marital property rights [62-2-802].

Must file petition for election in court and mail or deliver to personal representative by later of 8 months after death or 6 months after probate [62-2-205].

- (a) After payment of funeral and administration expenses and enforceable claims [62-2-202].
- (b) From probate estate (property passing by will or intestacy) [62-2-201 and 62-2-202]; elective share reduced by probate assets received by will or intestacy or exempt property set aside [62-2-206]; remaining elective share paid pursuant to statutory order of abatement [62-2-207 and 62-3-902]; whether in cash or in kind depends on order of abatement.

- (a) Right to exercise election terminates at death [62-2-203].
- (b) May elect through attorney in fact or court in which protective proceedings pending [62-2-203].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

SOUTH DAKOTA

Merle Johnson
Sioux Falls, SD
April 7, 1998

All statutory citations
are to SD Codified
Laws Ann.

- (a) (1) Entire intestate estate if all issue are also issue of spouse; otherwise, first \$100,000, plus 1/2 of balance of intestate estate [29A-2-102].
(2) Entire estate [29A-2-102].
- (b) Varying percentage of augmented estate [i.e., probate estate plus other property described in answers 2(a) and 4(b), depending on length of marriage (i.e., 3% up to 50% if married 1 to 15 years, or more), or supplemental amount of \$50,000 if greater than percentage amount [29A-2-202].
- (c) Yes.
- (d) Not applicable.

- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] [29A-2-209].
- (b) Included in augmented estate [29A-2-203].
- (c) Determined by law of decedent's domicile [29A-2-202(d)].

- (a) None [29A-2-112].
- (b) None [29A-2-112].
- (c) Homestead right in addition to elective share [29A-2-402].
- (d) Family allowance in addition to elective share [29A-2-403].

TENNESSEE

W. Ovid Collins, Jr.
Nashville, TN
April 28, 2004

All statutory citations
are to Tenn Code
Ann.

- (a) (1) Either child's share or 1/3 of entire estate, whichever is greater [31-2-104(2)], or elective share amount under 31-4-101 depending on length of marriage.
(2) Entire estate [31-2-104 (1)].
- (b) 1/3 of net estate as defined [31-4-101].
- (c) No as to intestate estates. Yes as to testate estates.
- (d) See answer 1(a).

- (a) Right of election applies only to decedent's real and personal property subject to disposition under decedent's will or intestate succession. Nonprobate transfers to spouse reduce elective share amount [31-4-101].
- (b) Same as answer (a) above.
- (c) Same as answer (a) above.

- (a) None [31-2-102].
- (b) None [31-2-102].
- (c) Exempt right of occupancy of lands to value of \$5,000 or court may order payment of \$5,000 in cash or personal property to spouse (only indirectly affects intestate share by reducing divisible estate — directly reduces elective share) [Tenn Const art XI sec 11; 30-2-201 *et seq.*; and 31-4-101(b)].
- (d) Reasonable allowance in money out of estate for maintenance for 1 year according to previous standard of living taking into account condition of estate plus personal property in decedent's principal residence and motor vehicle(s) not to exceed \$50,000 in value [30-2-101] (only indirectly affects intestate share by reducing divisible estate — directly reduces elective share) [30-2-102 and 31-4-101].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

SOUTH DAKOTA

- (a) Elective share, homestead, exempt property, and family allowance may be waived in writing wholly or partially before or after marriage after fair disclosure [29A-2-213].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in any year exceeded \$10,000 plus insurance transferred within 2 years of death [29A-2-205].
- (c) Forfeits all benefits by (i) divorce or annulment or (ii) feloniously and intentionally killing decedent [29A-2-802 and 29A-2-803].

Petition filed with court and mailed or delivered to personal representative within 9 months after death or within 4 months after admission of will to probate, whichever is later, with notice to persons interested in estate and to persons whose interest may be adversely affected [29A-2-211].

- (a) After payment of funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims, share is first reduced by amounts included in augmented estate which pass or have passed to spouse, amounts which would have passed to spouse but were disclaimed, and surviving spouse's property and non-probate transfers [29A-2-207], up to applicable percentage thereof, and then equitably apportioned among recipients of probate estate and portion on non-probate transfers to others in proportion to value of their interests therein [29A-2-204 and 29A-2-209].
- (b) In cash and/or in kind whichever appears appropriate to court.

- (a) Right vests on filing petition for election and may not be terminated by death or any subsequent event. If time for making election has not expired, surviving spouse's personal representative may make election [29A-2-212].
- (b) Petition may be filed by surviving spouse's conservator or agent under power of attorney (right vests on filing petition) [29A-2-212].

TENNESSEE

- (a) Elective rights may be waived by specific provisions of prenuptial agreement entered into freely, knowledgeably, and in good faith without exertion of duress or undue influence [36-3-501] or by postnuptial property settlement agreement [31-1-102(3)].
- (b) Fraudulent conveyances to defeat rights of spouse are voidable at election of spouse [31-1-105].
- (c) All right to property is forfeited by spouse who killed or conspired with another to kill decedent [31-1-106].

Petition filed with court and mailed to personal representative within later of 9 months after death or 6 months after appointment of personal representative [31-4-102 (a)(1)] (time may be extended because of pending litigation preventing election to dissent or if personal representative fails to give full disclosure of estate's assets) [31-4-102(a)(2)].

- (a) After funeral and administration expenses, homestead, exemptions, year's support, and secured debts [31-4-101].
- (b) Out of real and personal property [31-4-101].

- (a) None (spouse's personal representative may make election within statutory time limit) [31-4-105] provided spouse survives decedent by 120 hours [31-3-120].
- (b) Upon petition by guardian, conservator, or next friend within 1 year from probate or extension of time, alleging to be in interest of spouse to take elective share, court of proper jurisdiction may appoint guardian ad litem, hear proof, and declare or not declare election [31-4-104].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

TEXAS

Allan Howeth
Fort Worth, TX
March 16, 1998

All statutory citations are to Tex Prob Code Ann (Vernon) unless otherwise specified.

- (a) (1) All of decedent's 1/2 community property if spouse is parent of all decedent's issue; none of decedent's 1/2 community property if spouse is not parent of all decedent's issue [45(a)]. 1/3 of decedent's separate personalty and 1/3 life estate in decedent's separate realty [38(b)1].
(2) All of decedent's community property, all of decedent's separate personal property, and 1/2 of decedent's separate realty if parent, sibling or their issue survives; if none survives, all property [38(b)2].
- (b) None, except that spouse owns 1/2 community interest without restrictions [Tex Fam Code 3.002]. If decedent attempted to dispose of any of spouse's property, spouse may elect to take under will and take bequests thereunder or elect to take own property and forego bequest [*Wright v. Wright*, 274 SW2d 670 (1955)].
- (c) Not applicable.
- (d) Not applicable.

- (a) Not applicable (other than spouse's own community 1/2).
- (b) Not provided for under TX law.
- (c) Not provided for under TX law.

- (a) None.
- (b) None.
- (c) (i) occupied residence up to 200 acres rural, (ii) city lot or lots amounting to not more than 1 acre with improvements of unlimited value, or (iii) allowance up to \$15,000 in lieu of homestead (homestead applies to community real property or decedent's separate real property) [Tex Const art XVI, sec 51].
- (d) Spouse or children may claim exempt personal property (or allowance up to \$5,000 in lieu of), if estate insolvent. Spouse or children may claim family allowance for up to 1 year's support, unless will provides election to take property in lieu of such rights [270-293 and *Miller v. Miller*, 235SW2d 624 (1951)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

TEXAS

- (a) Prenuptial and postnuptial agreements may alter character of income from community to separate [Tx. Family Code 4.103], and may provide for waiver of homestead, exempt property, and family allowance rights [*Williams v. Williams*, 569 SW2d 867 (1978)].
- (b) *Inter vivos* transfer of community or separate property residential homestead by 1 spouse is void as to other spouse [*Lindsley v. Lindsley*, 163 SW2d 633 (1942)]. No restrictions on *inter vivos* transfers of exempt property or cash available for family allowance, except cannot affect spouse's community 1/2 if in fraud of spouse's right [*Hardin v. Volunteer State Life Insurance Co.*, 197 SW2d 105 (1946)].
- (c) Spouse may lose rights in homestead, exempt property, and family allowance by abandonment of decedent and home prior to decedent's death [*George v. Reynolds*, 53 SW2d 490 (1932)].

Not applicable.

- (a) Not applicable.
- (b) Not applicable.

- (a) Not applicable.
- (b) Not applicable.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

UTAH

Mark E. Lehman
Salt Lake City, UT
December 28, 1998

All statutory citations
are to Utah Code
Ann.

- (a) (1) Entire estate if all issue is also issue of spouse, spouse receives entire estate; otherwise, first \$50,000 plus 1/2 of remaining estate [75-2-102]. Alternatively, 1/3 of augmented estate [75-2-202].
 - (2) Entire estate [75-2-102]. Alternatively, 1/3 of augmented estate [75-2-202].
- (b) 1/3 of augmented estate [i.e., probate estate plus property described in answers 2(a) and 4(b)] [75-2-202].
- (c) Yes as to both probate and augmented estates.
- (d) Not applicable.

- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except property owned by decedent at time of marriage, property acquired by decedent during marriage through gift or inheritance, and proceeds of life insurance payable to others in excess of greater of premiums paid or cash surrender value of policy [75-2-203, 75-2-205 and 75-2-208].
- (b) If included in augmented estate, it is subject to satisfaction of elective share [75-2-203].
- (c) Determined by law of decedent's domicile [75-2-202].

- (a) None.
- (b) None.
- (c) Homestead allowance of \$15,000 in value from any of estate's real or personal property. Allowance is chargeable against any share or benefit received by spouse under will, intestate succession, elective share, and nonprobate transfer [75-2-402].
- (d) Exempt personal property allowance of \$10,000 and reasonable family allowance. These allowances are chargeable against any share or benefit received by spouse under will, intestate succession, elective share, and nonprobate transfer [75-2-403 and 75-2-404].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

UTAH

- (a) Intestate and elective share, homestead and exempt personal property allowance, and family allowance may be waived wholly or partially before or after marriage after fair disclosure [75-2-213].
- (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in any year exceeded \$10,000 [75-2-205].
- (c) All rights forfeited if spouse (i) obtained or consented to divorce or annulment even though not valid in UT or (ii) feloniously and intentionally killed or aided in killing of decedent (final judgment of conviction is conclusive but court may find guilt by preponderance of evidence) [75-2-802 and 75-2-803].

Petition filed with court and mailed or delivered to personal representative, if any, within later of 6 months after admission of will or 9 months of death (court may extend time for election if spouse shows cause before expiration of election period), but nonprobate transfers shall not be included in augmented estate if petition is filed later than 9 months from death [75-2-211].

- (a) After payment of funeral and administration expenses, homestead allowance, personal property exemption, family allowance, and enforceable claims, first out of property passing to spouse and then proportionately from other recipients of augmented estate property [75-2-209].
- (b) In cash and/or in kind [75-2-209, 75-2-210 and 75-3-906].

- (a) Terminates [75-2-212].
- (b) Conservator, guardian, or agent may make election, in which case property is set aside in trust for spouse (if regains capacity, spouse can terminate trust and take full ownership; if spouse dies without regaining capacity, property in trust goes to predeceased spouse's devisees or heirs) [75-2-212].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
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- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

VERMONT

R. Clarke Smith
Rutland, VT
December 9, 1993

All statutory citations
are to Vt Stat Ann.

- (a) (1) Articles of wearing apparel and ornament and such portion of personal estate as court may assign, but not less than 1/3 [14:401] plus 1/3 in value of real estate [14:461 and 474].
(2) Either (i) 1/3 in value of real estate or (ii) \$25,000 plus 1/2 of remainder if there are kindred capable of inheriting [14:551(2)]. If no kindred, entire estate [14:551(2)].
- (b) Same as answer (a) above [14:551(2)].
- (c) Yes, in most cases (but complete statement of all material facts is necessary since spouse's rights depend on so many variable factors).
- (d) Not applicable.

- (a) None (unless a fraudulent transfer) [14:473].
- (b) Not provided for under VT law (but presumably beyond jurisdiction of VT law).
- (c) Not provided for under VT law (but presumably subject to) 14:461, 474].

- (a) None.
- (b) None.
- (c) Homestead to value of \$30,000 passes to spouse (only indirectly affects share by reducing divisible estate) [27:101].
- (d) Household goods [14:403] and reasonable allowance for support of widow and minor children for not more than 8 months (only indirectly affects share by reducing divisible estate) [14:404].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

VERMONT

- (a) May be barred or modified by jointure or by antenuptial or postnuptial agreement [14:402, 465].
- (b) Conveyance during coverture to take effect at death with intent to defeat widow's rights are void [14:473].
- (c) Forfeited if spouse is convicted of killing decedent [14:551(6)].

Filing written election within 8 months of allowance or within such further time as court, in its discretion, may allow [14:465(3); V.R.P.P. 13(b)].

- (a) Spouse's statutory interest in real estate has priority over payment of debts and expenses [14:461, 462; *Blanchard v. Blanchard's Estate*, 8 A2d 648 (1938)]. Spouse's statutory interest in personalty is subject to debts, funeral and administration expenses [14:401 and 1205(a)].
- (b) In kind and/or in cash [14:466, 467, 462].

- (a) Terminates [14:402 and *In re Estate of David*, 274 A2d 491 (1971)].
- (b) Not provided for under VT law.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

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What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

VIRGINIA

J. William Gray, Jr.
Richmond, VA
June 25, 2004

All statutory citations
are to Va Code Ann.

- (a) (1) Either (i) 1/3 of augmented estate [64.1-16] or (ii) entire estate if all of decedent's issue are also issue of spouse; otherwise, 1/3 of real and personal estate [64.1-1 and 64.1-11].
- (2) Either all real estate and personal estate [64.1-1 and 64.1-11] or 1/2 of augmented estate [64.1-16].
- (b) 1/3 of augmented estate (1/2 if decedent dies without issue) [64.1-16].
- (c) Yes [64.1-16.1].
- (d) Not applicable.

- (a) Nonprobate assets are included in augmented estate if decedent had lifetime right to income or possession, revocation power, power to invade principal, or survivorship right. Insurance, retirement benefits, annuities, pension plans, deferred compensation arrangements and employee benefit plans are specifically included to extent owned, vested in, or subject to control of decedent at death or irrevocably transferred during lifetime. [64.1-16.1].
- (b) Not provided for under VA law, although spouse's rights appear to be governed by law of jurisdiction in which real estate is located [*Cf. French v. Short*, 151 SE2d 354 (1966) (prior law)] unless that jurisdiction also has adopted UPC-based augmented estate system.
- (c) Determined by law of nonresident decedent's domicile [64.1-13(B)].

- (a) Abolished (except interests vested before 01/01/91 and rights of creditors or other interested third parties in any real estate subject to right of curtesy) [64.1-19.2].
- (b) Same as dower.
- (c) Allowance of \$15,000 if spouse does not claim elective share (in lieu of any share passing by will or intestate succession except to extent share is less than \$15,000) [64.1-151.3].
- (d) Reasonable family allowance available to spouse and minor children during estate administration (period limited to 1 year if estate cannot discharge all allowed claims) [64.1-151.1]. Allowance limited to \$18,000 lump sum (or \$1,500 per month for one year) without circuit court approval [64.1-151.4]. Exempt property allowance of \$15,000 in excess of security interest also available [64.1-151.2]. Allowances only indirectly affect share by reducing divisible estate.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

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Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

VIRGINIA

- (a) Elective share, homestead allowance, family allowance, and exempt property allowance may be wholly or partially waived before or during marriage after fair disclosure [64.1-151.6 and 20-147 *et seq.*].
- (b) Value of property (except tangible personal property) derived by spouse from decedent without full consideration, before or during marriage, is charged against spouse's 1/3 or 1/2 share of augmented estate [64.1-16.1 and 64.1-16.2A]. Property transferred to third parties during marriage is excluded from augmented estate if (i) transfer was irrevocable on 01/01/91, (ii) transfer was made with spouse's written consent or joinder, (iii) decedent had acquired property from a third party by gift, will, intestate succession, or any other means to extent received without full consideration and maintained it as separate property, (iv) decedent had retained no rights in property, aggregate transfers did not exceed \$10,000 per donee per calendar year, and transfer was not made in year of death or 5 preceding years, (v) transfer was for full and adequate consideration, or (vi) transfer was to bona fide purchaser [64.1-16.1].
- (c) Rights precluded from being exercised upon consent to transfer of property, waiver (as to homestead allowance only), willful desertion or abandonment of decedent, annulment of marriage or divorce, or conviction of decedent's murder [64.1-16.1, 64.1-16.3, 64.1-59, 64.1-151.6, and 55-401].

Filing with court (or clerk's office) proven or acknowledged written claim to elective share of augmented estate or personal appearance before court declaring claim to elective share within 6 months after later of (i) admission of will or (ii) qualification of administrator on intestate estate [64.1-13]. Upon spouse's petition within 6 month period, court may permit claim after 6 month period if equity suit to determine amount or value of property passing under will to spouse or composition or value of augmented estate is pending (but time may not be extended beyond 90 days after entry of final order in equity suit) [64.1-14].

- (a) After payment of funeral and administration expenses, debts, exempt property allowance, family allowance, and homestead allowance, elective share will be satisfied first by (i) charging against spouse's share all augmented estate property that passed to or disclaimed by spouse and (ii) apportioning liability for balance of elective share (plus 8% (6% as of July 1, 2004) simple interest from death) equitably among recipients of augmented estate in proportion to value of their interests [64.1-16.2].
- (b) Only original transferees from or appointees of decedent and subsequent gratuitous *inter vivos* donees or persons claiming by testate or intestate succession must contribute, and then only to extent they still have such property or its proceeds [64.1-16.2C]. Persons liable may elect to (i) reconvey portion of augmented estate property, (ii) pay cash, (iii) convey other property acceptable to spouse, or (iv) use combination of those methods. If court has determined parties' contribution liability, each person liable may file written statement specifying payment method within 30 days after court's determination becomes final; otherwise, court will enter order specifying payment method [64.1-16.2E].

- (a) Terminates [64.1-13].
- (b) Court having jurisdiction over estate administration apparently may claim or decline to claim elective share of decedent's augmented estate for incompetent spouse [See *First National Bank v. Hughson*, 74 SE2d 797 (1953) (decided under prior law)]. Competency standard is greater than will but less than contract [see *Jones v. Peacock*, 591 SE2d 83 (2004)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
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Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

WASHINGTON

George F. Velikanje
Yakima, WA
February 25, 1999

All statutory citations
are to Wash Rev
Code.

- (a) (1) All of decedent's share of net community estate plus 1/2 of decedent's separate estate [11.04.015].
(2) All of decedent's share of net community estate plus 3/4 of decedent's separate estate if either of decedent's parents or issue of parents survives; if none, entire separate estate [11.04.015].
- (b) None (spouse retains all of spouse's share of net community estate — no elective right against decedent's share of community property or decedent's separate property) [11.02.070]. However, if decedent attempts to dispose of spouse's share of community property, spouse must elect to take under will or independently of it and, after acceptance of any benefit under will, spouse must renounce every right inconsistent therewith [*In re Estate of Patton*, 494 P2d 238 (1972)]. Separate property of decedent which would have been community property if acquired in WA is quasicommunity property (RCW 26.16.220, *et seq.*) Decedent may dispose of only 1/2 of quasicommunity property (other 1/2 belongs to spouse).
- (c) Not applicable.
- (d) Not applicable.

- (a) Not applicable.
- (b) Not provided for under WA law.
- (c) Not provided for under WA law.

- (a) None.
- (b) None.
- (c) Discretionary award is available to spouse and children (RCW Chapter 11.54). Basic award is \$30,000 which may be increased or decreased in discretion of court.
- (d) Included in award set forth in (c) above.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

Question 5

How does the surviving spouse exercise his or her elective right to take against the will [as described in question 1(b)]?

Question 6

If the surviving spouse elects against the will, such elective share is satisfied —

- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

WASHINGTON

- (a) Award may be waived if there is clear and explicit voluntary relinquishment of award as known right [*Funderburk Estate*, 521 P.2d 60 (1974)].
- (b) Award may be made from probate and nonprobate assets. Absolute *inter vivos* gifts (if not set aside) would not be available for award but may be taken into account in court's granting of award.
- (c) Spouse may be estopped to claim award as a result of actions inconsistent with such claim prior to death of decedent.

Not applicable.

- (a) Not applicable.
- (b) Not applicable.

- (a) Not applicable.
- (b) Not applicable.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
- (b) Out of state real estate?
- (c) Local real estate owned by a nonresident decedent?

Question 3

What benefits are provided under each of the following and to what extent is the surviving spouse's intestate or elective share (as described in questions 1 and 2) directly reduced dollar for dollar by these benefits (rather than simply reducing the net estate) out of which either of such shares would be satisfied?

- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

WEST VIRGINIA

Thomas G. Freeman, II
Charleston, WV
October 15, 1998

All statutory citations
are to W Va Code.

- (a) (1) Entire estate if all issue of decedent and spouse are same; otherwise, (i) 3/5 of estate if decedent and spouse have same issue but spouse also has other issue or (ii) 1/2 of estate if any of decedent's issue are not spouse's issue [42-1-3].
 - (2) Entire estate.
- (b) Varying percentage of augmented estate [i.e., probate estate plus other property described in answers 2(a) and 4(b)], depending on length of marriage (i.e., 3% up to 50% if married 1 to 15 years, or more), or supplemental amount of \$25,000 if greater than percentage amount [42-3-1(b)].
- (c) No as to spouse's intestate share [42-1-3]. No as to spouse's elective share [42-3-6].
- (d) No priorities are subtracted for purposes of determining intestate share [42-1-3].

- (a) Augmented estate includes most of decedent's nonprobate assets, spouse's assets, and those transfers by spouse that would be included in spouse's augmented estate if spouse had been decedent [see answer 4(b) also] except life and accident insurance and retirement benefits payable to persons other than spouse or decedent's estate [42-3-2].
- (b) Included in augmented estate [42-3-2(b)].
- (c) Determined by decedent's domicile at death [42-3-1(c)].

- (a) None [43-1-1].
- (b) None [43-1-1].
- (c) \$5,000 homestead exemption for any resident of state [38-9-1]. Exemption has no effect in calculating augmented estate.
- (d) None.

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

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- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

-
- WEST VIRGINIA**
- (a) After full disclosure, any right may be waived in writing before or after marriage [42-3-3a].
 - (b) Augmented estate includes all property transferred during most recent marriage of decedent and spouse (other than those to bona fide purchaser or those made with spouse's consent or joinder) to extent decedent (i) retained at death right of possession, enjoyment, or income, (ii) retained at death power to revoke, consume, invade, or dispose of such property, (iii) held such property at death with another with right of survivorship, or (iv) transferred property within 2 years of death where total of such property transferred to any donee in any year exceeded \$10,000 [42-3-2(b)].
 - (c) Spouse precluded from exercising rights if (i) transfer, exercise, or release was irrevocable and made with written consent or joinder of spouse [42-3-2(c)] or (ii) spouse is convicted of feloniously killing decedent [42-4-2].

Petition filed with court and mailed or delivered to personal representative within later of 9 months after death or 6 months after probate of will [42-3-4(a)].

- (a) After payment of funeral expenses, administration expenses, homestead exemption, property exemption, and enforceable claims [42-3-2(b)(1)], first out of (i) amounts which pass or have passed to spouse by testate or intestate succession, (ii) property to which spouse succeeds by reason of decedent's death, (iii) amounts includable in augmented estate which spouse disclaimed, and then (iv) value of property owned by spouse at decedent's death. If elective share is still unsatisfied, out of amounts included in decedent's probate estate and that portion of decedent's reclaimable estate other than amounts irrevocably transferred within 2 years before decedent's death. This amount is equitably apportioned among recipients of decedent's probate and reclaimable estate in proportion to value of their interest [42-3-6].
- (b) Not provided for under WV law.

- (a) Terminates [42-3-3(a)].
- (b) Spouse's conservator, guardian, or agent under authority of power of attorney may make election [42-3-3(a)].

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 1

What are the rights (other than the benefits described in question 3) of a surviving spouse to share in the real and personal probate estate of his or her deceased spouse dying a resident of the state —

- (a) Intestate (i.e., intestate share)
 - (1) With issue (i.e., children or their lineal descendants) surviving?
 - (2) Without issue (i.e., children or their lineal descendants) surviving?
- (b) Testate (i.e., elective right to take against will)?
- (c) If the surviving spouse is entitled to a fractional share of the estate in (a) or (b), does the fraction apply to the gross probate estate reduced by all of the priority items (other than death taxes) described in the response to question 6(a)?
- (d) If the answer to (c) is no, to what extent (if any) are such priority items subtracted from the gross probate estate to which such fraction is applied?

Question 2

What are the rights of election [as described in question 1(b)] of the surviving spouse against —

- (a) Nonprobate assets (such as joint bank accounts, jointly owned real property with rights of survivorship, Totten trusts, life insurance, revocable trusts, and the like)?
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- (c) Local real estate owned by a nonresident decedent?

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- (a) Widow's dower rights
- (b) Widower's curtesy rights
- (c) Homestead rights or allowance
- (d) Spouse's, family, etc. allowances

WISCONSIN

William F. Mundt
Madison, WI
April 15, 2004

All statutory citations
are to Wis Stat.

- (a) (1) Entire estate if no surviving issue from previous marriage; otherwise, 1/2 of estate other than marital property [852.01(1)(a)].
(2) Entire estate [852.01(1)(a)].
- (b) Elective right to 50% of augmented deferred marital property estate [861.02]. Deferred marital property is property acquired during marriage and would have been marital property had both been WI residents at time of acquisition [851.055, Chap. 766]. Augmented deferred marital property estate includes probate and nonprobate transfers of deferred marital property, decedent's gifts of deferred marital property within 2 years of death, and spouse's deferred marital property less transfers of same to spouse or with spouse's consent [861.02 and 861.05]. Spouse is treated as owner of 1/2 of marital property and can challenge improper classification [858.09].
- (c) Yes.
- (d) Not applicable.

- (a) Nonprobate assets are included in augmented marital property estate if they are deferred marital property and are thus subject to election [861.02(2)].
- (b) Not provided for under WI law.
- (c) None (but law of domicile might be recognized).

- (a) None.
- (b) None.
- (c) In intestate estate, home is assigned to spouse if spouse files election to receive it within 6 months of death [861.21(3)]. If value exceeds spouse's share of estate, assignment is contingent on spouse paying difference [861.21(4)]. Same rules apply in testate estate if spouse has marital property interest in home [861.21(2)].
- (d) Family allowance is permitted for support of spouse or minor children for renewable 1 year periods [861.31]. Spouse may select certain tangible personal property if all claims are paid in full; otherwise, election can be limited to \$3,000 in value [861.33]. Allowance for education and support of dependent child can be established [861.35]. Spouse may elect up to \$10,000 in assets ahead of general creditors in insolvent estate [861.41]. Allowances to spouse under 861.33 reduce net estate; other allowances also reduce net estate unless court charges them to intestate share of recipient [861.17].

WYOMING

Joseph F. Maier
Cheyenne, WY
March 1, 1993

All statutory citations
are to Wyo Stat.

- (a) (1) 1/2 of estate [2-4-101].
(2) Entire estate [2-4-101].
- (b) 1/2 of estate if all of decedent's issue are issue of spouse or if no surviving issue; otherwise, 1/4 of estate [2-5-101].
- (c) Yes.
- (d) Not applicable.

- (a) None [2-5-101].
- (b) Not provided for under WY law.
- (c) Determined by law of decedent's domicile [2-5-101(b)].

- (a) None.
- (b) None.
- (c) Allowance of \$30,000 (only indirectly affects share by reducing divisible estate) [2-7-508].
- (d) Court may allow reasonable amount for support and maintenance of widow and minor children during estate settlement [2-7-502] and shall also set over to spouse (or if none to minor children) all of decedent's property which is exempt from execution under Wyoming exemption laws [2-7-504] (only indirectly affects share by reducing divisible estate).

SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE

Question 4

To what extent may a surviving spouse be precluded from exercising rights by —

- (a) Prenuptial and postnuptial agreements?
- (b) *Inter vivos* transfers (outright and in trust)?
- (c) Predeath actions of the surviving spouse (other than above)?

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- (a) With what priority?
- (b) Out of what property (in cash or in kind)?

Question 7

What are the effects on the right to elect against the will if, before making election, the surviving spouse —

- (a) Dies?
- (b) Becomes incapacitated?

WISCONSIN

- (a) Marital property agreements can bar spouse's elective rights [766.58].
- (b) With some exceptions, gifts in excess of \$5,000 per annum to spouse are used to satisfy election [861.06(2)(b)4].
- (c) Elections are barred if spouse unlawfully and intentionally killed decedent [854.14].

Filing election with court within 6 months of death (election period can be extended) [861.08].

- (a) Before election is satisfied, value of deferred marital property in augmented marital property estate is reduced by equitable proportion of decedent's funeral and burial expenses, administrative expenses, other expenses, and enforceable claims [861.05(3)].
- (b) Election is satisfied first from spouse's property included in augmented marital property estate, then from all property transferred to spouse as result of decedent's death, including certain gifts during lifetime [861.06(2)]. Unsatisfied balance is satisfied proportionately from property against which it attaches with certain gifted property being last property to be charged with paying balance [861.06(3 and 4)].

- (a) Rights terminate if election not made before death [861.09].
- (b) Guardian, guardian ad litem or agent acting under a power of attorney can file elections [861.09].

WYOMING

- (a) Any right of spouse to homestead allowance, exempt property, and family allowance may be waived totally or partially before or after marriage by written contract, agreement, or waiver signed by party waiving after fair disclosure [2-5-102].
- (b) Rights apply only to assets subject to disposition under will [2-5-101].
- (c) Not provided for under WY law [except that one who feloniously takes life of another shall not inherit from deceased person (2-14-101)].

Filing petition with court and mailed or delivered to personal representative, if any, within 3 months after admission of will or 30 days after notice of right to elect, whichever is later [2-5-105].

- (a) After payment of funeral and administration expenses, homestead allowances, family allowances, exemptions, and enforceable claims [2-5-101].
- (b) In cash or in kind out of property which is subject to disposition under will [2-5-101].

- (a) None (election exercised by personal representative of spouse's estate) [2-5-101(c)].
- (b) None (election exercised by spouse's guardian or conservator) [2-5-101(c)].