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March 14, 2012

Dear Chairman Kinzer and Members of the House Judiciary Committee:

I am writing to express my opposition to SB 395, which would repeal K.S.A. 59-505. I have reviewed and considered the arguments in favor of the repeal of 59-505 presented by the KBA. I disagree with their analysis and am very much opposed to the repeal of 59-505. My comments follow:

1. *Practical Effect of 59-505.* The practical effect of K.S.A. 59-505 since its enactment in 1939 has been to prevent the conveyance of real property by one spouse without the consent of the other. The aberrational "palimony" case referenced by the KBA came about by virtue of an after-the-fact common law marriage. K.S.A. 59-505 protects real estate for both spouses in a marriage.

2. *Conflict with Elective Share.* The main thrust of the KBA's argument seems to be that K.S.A. 59-505 is inconsistent with the elective share legislation. A few observations from an old country lawyer:

   i. The elective share legislation is, for most people, prohibitively expensive to put into effect. It essentially requires the probate of both the estate of the decedent and the estate of the surviving spouse, with the attendant disagreements and hearings to determine the value of assets and efforts to locate assets hidden by the surviving spouse.

   ii. Unlike the elective share legislation that requires the hiring of a lawyer and the appraisal of all of the property of both the deceased spouse and the surviving spouse, 59-505 is self-effectuating: one spouse cannot deed real

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property without the consent of the other, all without the need for expensive lawyers and appraisals and hearings.

iii. The elective share legislation is complicated. I question that there are 10 lawyers in the state who understand it, and based solely upon my own observations, there is not a judge in Kansas who has a clue how it works. It is one thing to say that the elective share legislation allows for the tracing of assets, and it is quite another thing actually to try to trace assets in the real world. The complexity and expense of implementing an elective share election greatly limit its application.

iv. The elective share legislation is an attempt to prohibit the transfer of assets by one spouse without the consent of the other. That is precisely what 59-505 does for real property, but it does it in an elegantly simple manner that does not require 8 pages in the statute book to implement.

v. K.S.A. 59-6a205(c), as a practical matter, requires both spouses always to join in any deed, so in that respect there essentially is no change in existing law, but the protection is limited only to 2 years. What, exactly, is the magic about limiting spousal protection to only 2 years? Why not for the life of the marriage, as is the situation under present 59-505? What is it that has changed since 1939 that makes it desirable to protect the surviving spouse for only 2 years as opposed to the duration of the marriage? Why is the surviving spouse in 2012 entitled to less protection than the surviving spouse in 1939?

vi. Finally, and arguably most importantly, in actual real world situations, there can never be any conflict between 59-505 and elective share provisions because, with 59-505 in place, one spouse cannot transfer real property because no title company, no examining lawyer, and no bona fide purchaser will ever approve the deed without the consent of both spouses, just exactly as is the result under 59-6a205(c). On the other hand, with repeal of 59-505 it will be easy for a spouse to hide real estate assets and transfer them to personal assets to hide them from an elective share

accounting. The elective share provisions are impractical, illusionary and too expensive a solution for all but a few marriages. The requirement for a spousal signature on a deed puts teeth in the elective share.

3. *Lack of Comparable Protection for Personal Property.* The KBA raised the argument that there is no comparable protection for personal property, and one spouse can transfer a stock portfolio without the consent of the other, so why should we protect real property but not personal property.

   i. The fact that the Kansas Legislature has chosen not to protect one spouse from the predations of the other spouse as to personal property is not a reason for not protecting real property. In fact, the sound argument would be to protect what can be protected.

   ii. Actually, I think federal law does protect personal property; my understanding is that under ERISA the participant must name his spouse as beneficiary unless the spouse otherwise consents.

   iii. The KBA argues that Kansas has changed over the last several decades since the enactment of 59-505 in 1939. They argue that Kansas is no longer a primarily agrarian state and that most of the value of assets is in personal property and that the majority of the value of the assets of the citizens in the state is no longer in real property. I think that argument might very well be correct for Johnson County and Wichita and some other metropolitan areas of the state. However, that argument is incorrect for many residents and lands of the State of Kansas located west of Highway 81. The overwhelming value of Kansas outside of metropolitan areas of the state is in minerals and real property.

   Again, 59-505 is protection for the assets of some marriages even if it does not protect all of them.

4. *Effect on Estate Planning.* In my opinion, the repeal of 59-505 will have a catastrophic effect on agricultural estate planning. Let me give you only a few examples:

   i. In order to take advantage of the annual gift tax exclusion, for many years many of our clients have chosen to give an undivided interest in a quarter section of land each year to children and their spouses. For example, we might give an undivided one-sixteenth interest in a quarter section of land each year for sixteen years to a son and to a daughter as well as to their respective spouses. We knew that the spouse of the respective son or daughter could not sell or mortgage the land without the consent of the client's son or daughter.

   ii. We have clients who have followed the practice of giving divided interests of perhaps five or ten acres per year in a quarter of ground; again, we included the in-laws because we knew they could not mortgage or sell the property without the consent of the other.

   iii. Over the years many clients have given or devised real property to their children and their respective spouses as undivided interests as tenants in common: husband and wife to daughter and son-in-law and to son and daughter-in-law with the knowledge that neither the son-in-law nor the daughter-in-law could sell to a third party without the consent of the respective spouse. If 59-505 is repealed, then either the son-in-law or the daughter-in-law will be free to sell to a third party who can then immediately force the sale of the entire tract at partition sales.

5. *Effect on Disabled Spouses.* The KBA argues that by virtue of 59-505, a hardship is placed on the non-disabled spouse because real property cannot be sold since the disabled spouse cannot join in the conveyance. In that situation, existing law would require the filing for a

conservatorship followed by a petition for the sale of real property to be sold pursuant to court order. Arguments in favor of the repeal of 59-505 assume that the interests of the disabled spouse will always and without exception be best served by vesting authority in the non-disabled spouse to dispose of the real property of the disabled spouse. The current requirement does not rely on the good intentions of every spouse. It has real protection.

The unintended consequences of the repeal of 59-505 will, in my opinion, be staggering. Either spouse will be free to sell or mortgage real property without the knowledge or consent of the other.

The reason for protection of the real estate assets of the marriage is to help protect the naive and the disabled. Both of those are worthy goals. I urge the Committee to reject SB 395.

Very truly yours,

Philip Ridenour

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