

## Spouse's Elective Share Bill (H.B. 439)

JANUARY 25, 2006

Current Ohio law permits a surviving spouse (male or female) to reject gifts receivable by the surviving spouse in the Will of a deceased spouse and elect to receive part of the probate estate of the deceased spouse. This action is taken when the spouse that survives is dissatisfied with provisions in the Will. The election by the surviving spouse results in the surviving spouse receiving one-half of the net probate assets unless the decedent had two or more children in which case it is one-third of the net probate assets. This right is limited to only probate assets, that is assets which are not in trust, or payable on death accounts, or transfer on death securities, or paid to a named beneficiary for assets like insurance, annuities, or IRA's, or joint ownership with rights of survivorship.

The trend today is to avoid the probate process. The current Ohio law is a "horse and buggy" relic. When the assets are titled in a manner that permits the assets to avoid the probate process, the spouse that survives has no opportunity to elect to receive such assets. Avoiding the probate process also permits disinheritance of the spouse that survives. The current state of the Ohio law has been criticized by Probate Judges, the Ohio State Bar Association, and others. The Ohio General Assembly has been urged to adopt a statute that provides greater assurance that a surviving spouse will not be disinherited by the deceased spouse.

H.B. 439 modifies the current Ohio law in two significant respects. First, rather than merely probate assets, the spouse that survives may elect to receive a portion of the non-probate assets, such as assets in a revocable trust, joint and survivor assets, payable on death assets, transfer on death assets, and death benefits from retirement plans and life insurance, as well as probate assets of the deceased spouse. This has been referred to as an "augmented estate". Second, the portion of the decedent's assets that may be received by the spouse that survives is designed to be like what a spouse would receive if there were a divorce at the time of death of one of the spouses. Specifically, the spouse that survives is entitled to be the owner of one-half of the couple's marital assets.

Another important provision is that spouses may enter into post-nuptial agreements during their lifetime related to disposition of property upon their death. This permits the married couple to modify how the provisions of H.B. 439 will apply to them if they mutually agree that the provisions of H.B. 439 are not appropriate for them. Under present Ohio law, such an agreement, that is a post-nuptial agreement, is considered to be against public policy and not enforceable. Ohio appears to be the only state that does not now permit this kind of agreement.

H.B. 439 is pending in the Ohio House Judiciary Committee as of January 25, 2006. For more information on this legislation, please contact Jeffrey L. Weiler, Esq., OH St Bar Assoc. Certified Specialist in Estate Planning, Trust and Probate Law; Fla. Bar Board Certified Tax Specialist; Benesch, Friedlander, Coplan & Aronoff LLP, 2300 BP Tower, 200 Public Square Cleveland, Ohio 44114; Phone: (216) 363-4551 Fax: (216) 363-4588; [Jweiler@bfca.com](mailto:Jweiler@bfca.com)