

# The New Kansas Estate Tax

by Martin Dickinson and  
Nancy Schmidt Roush



## Introduction

Kansas has a new estate tax. Senate Bill 365,<sup>1</sup> signed by Gov. Kathleen Sebelius on May 22, 2006, replaces the current estate tax as to decedents dying on or after Jan. 1, 2007. The new law will continue in effect throughout 2007, 2008, and 2009, but is repealed as to decedents dying on and after Jan. 1, 2010. At that point Kansas will no longer have a death tax.

The exemption for Kansas purposes will stay at the current level of \$1 million. For taxable estates that exceed \$1 million, the tax rates for 2007 are sharply below those applicable in 2006, and the tax rates decline further in 2008 and again in 2009. Very soon the Kansas Estate Tax will be "small potatoes" for even prosperous decedents. The incentive to move to a state without a death tax, such as Colorado or Missouri, should decline sharply.

The new law is "free-standing" in the sense that, except for a few cross references<sup>2</sup> and certain definitions,<sup>3</sup> it is not dependent on federal law. Unlike the prior law, it makes no mention of the state death tax credit formerly allowed under the federal estate tax. Therefore, the Kansas tax will not be affected by changes in federal law, including possible repeal of the federal estate tax. Achieving this "free-standing" status was the principal purpose of enactment of the new law.<sup>4</sup>

The new law is intended to be "user friendly." It adopts the long established and well-understood principles of the federal estate tax to build the Kansas gross estate and then subtract deductions to produce the taxable estate,<sup>5</sup> to which the tax rates (including the exemption amount) are applied, producing the amount of tax due.<sup>6</sup> There are a few respects in which these rules vary for Kansas purposes, primarily in a manner helpful to the taxpayer and the preparer. Because the new law closely follows federal law, the determination of Kansas estate tax liability should be relatively simple for an estate that is required to file a federal return. The new law is explained in greater detail below.

## FOOTNOTES

1. 2006 Kan. Sess. Laws ch. 199. All references to "Sec." here-in are to sections of 2006 Kan. Sess. Laws ch. 199.

2. For example, Sec. 9(b)(1) refers to the gift tax return requirements of I.R.C. § 6019.

3. Sec. 2(a).

4. SB 365 was created by a drafting group organized in 2002 by Nancy Schmidt Roush. The original members of the group were Martin Dickinson, Terry Fry, Timothy O'Sullivan, and James Weisgerber. The final version adopted in 2006 was drafted by Roush, Dickinson, and Weisgerber. The problems afflicting the prior estate tax law are described in Martin Dickinson, *The Kansas Estate Tax Problem*, 74 J. KAN. BAR ASSN. 36 (Nov./Dec. 2005).

5. Sec. 21; I.R.C. § 2051. References to "IRC §" are to sections of the Internal Revenue Code.

6. Sec. 3; I.R.C. § 2001.

## What's the Same as the Federal Estate Tax

The Kansas estate tax provisions mandating inclusion in the gross estate are generally identical to the corresponding federal provisions. The generally identical provisions are (1) property directly owned,<sup>7</sup> (2) property subject to a retained life estate,<sup>8</sup> (3) property subject to a retained power,<sup>9</sup> (4) annuities,<sup>10</sup> (5) joint tenancies,<sup>11</sup> (6) powers of appointment,<sup>12</sup> and (7) life insurance.<sup>13</sup>

The following provisions granting deductions are generally identical to the corresponding federal provisions: (1) funeral and administration expenses, claims, and mortgages;<sup>14</sup> (2) casualty losses;<sup>15</sup> (3) the marital deduction for outright gifts and trusts for which the qualified terminable interest property (QTIP) election is made;<sup>16</sup> and (4) the charitable deduction.<sup>17</sup>

The process for determining the Kansas tax is essentially identical to the federal process if the decedent owned only Kansas property. If the decedent owned some property with a situs in Kansas and other property with a situs outside Kansas, the tax is prorated, as explained below.

The existing procedural sections<sup>18</sup> were re-enacted without significant change.<sup>19</sup>

## What's Different from the Federal Estate Tax

### Gross estate

There are two variances from federal law in determining the gross estate-inclusion of transfers within one year of death and clarification of when QTIP property is included.

First, there is a general rule that all transfers within one year of the decedent's death are included in the gross estate.<sup>20</sup> This provision is necessary because Kansas does not have a gift tax. Without this provision, the Kansas tax could readily be avoided through "deathbed" gifts.

The inclusion rule applies only if the property transferred "would have been included in the decedent's gross estate if such transferred interest ... had been retained by the decedent on the date of death."<sup>21</sup> Such property is included in the gross estate at its value on the date of death, not the date of the gift.<sup>22</sup> The one-year inclusion rule applies to relinquishment of a power, as well as an outright transfer.<sup>23</sup> The one-year inclusion rule does not apply if the decedent made the transfer for "adequate and full consideration in money or money's worth."<sup>24</sup>

The inclusion rule is subject to important exceptions that are patterned on similar exceptions in IRC § 2035(c)(3). The inclusion rule always applies to transfers involving life insurance. Transfers not involving life insurance, however, are not subject to inclusion if IRC § 6019 did not require the decedent to file a federal gift tax return reporting the transfer.<sup>25</sup> IRC § 6019 exempts from the filing requirement four categories of gifts: (1) annual per donee exclusion gifts (currently up to \$12,000 per donee),<sup>26</sup> (2) tuition and medical expense transfers,<sup>27</sup> (3) transfers qualifying for the marital deduction,<sup>28</sup> and (4) most charitable transfers.<sup>29</sup>

The Kansas one-year inclusion rule is broader in scope but shorter in time than IRC § 2035. The Kansas rule applies to all nonexempt transfers, not just the limited transfers described in IRC § 2035(a)(2), but the Kansas rule ap-

plies only to transfers within one year of death, not the three years covered by IRC § 2035(a). This is especially significant for life insurance on the life of the decedent. Under federal law, if the decedent owned the policy within three years of death, the policy proceeds are included in the decedent's gross estate despite the decedent's later transfer of the policy.<sup>30</sup> Under the new Kansas law, the policy proceeds are included only if the decedent owned the policy within one year of death.

Second, qualified terminable interest property for which a Kansas QTIP election was made is included in the Kansas gross estate<sup>31</sup> similar to the inclusion rule under federal law.<sup>32</sup> The Kansas rule applies to any property for which a deduction for Kansas estate tax purposes was allowed upon the prior death of the decedent's spouse, under the QTIP provision of the new Kansas law<sup>33</sup> or any prior Kansas law. Under current law, the Department of Revenue permits differential elections; for example, a QTIP election for Kansas purposes but not for federal purposes.<sup>34</sup> Therefore, QTIP inclusion under the new law will apply to any property for which the QTIP election was made for Kansas estate tax purposes even though the QTIP election was not made for federal purposes. Because the Kansas "pretend federal exemption" has been less than the real federal exemption over the last several years, it is likely that more property has been QTIPed for Kansas purposes than for federal purposes. In those cases, the Kansas gross estate of the surviving spouse may actually be greater than the federal gross estate. If no Kansas QTIP election was made, however, there is no basis for inclusion.

7. Secs. 7 and 8; I.R.C. §§ 2031(a) and 2033.

8. Sec. 10; I.R.C. § 2036.

9. Sec. 11; I.R.C. § 2038.

10. Sec. 12; I.R.C. § 2039.

11. Sec. 13; I.R.C. § 2040.

12. Sec. 14; I.R.C. § 2041.

13. Sec. 15; I.R.C. § 2042.

14. Sec. 19; I.R.C. § 2053.

15. Sec. 20; I.R.C. § 2054.

16. Sec. 23; I.R.C. § 2056.

17. Sec. 22 (but the limitations of IRC § 2055(e) are not included in the Kansas law).

18. K.S.A. 79-15,103 through 15,118.

19. Secs. 25 through 50.

20. Sec. 9.

21. Sec. 9(a).

22. Sec. 5.

23. Sec. 9(a).

24. Sec. 9(b)(2).

25. Sec. 9(b)(1).

26. I.R.C. §§ 2503(b), 6019(1).

27. I.R.C. §§ 2503(e), 6019(1).

28. I.R.C. §§ 2523 and 6019(2). The phrase "other than by reason of Section 6019(a)(2) of the Internal Revenue Code" in Sec. 9(b)(1) appears to be an erroneous borrowing from the IRC. The authors believe it has no substantive effect but should be removed if a technical corrections bill is enacted.

29. I.R.C. §§ 2522 and 6019(3).

30. I.R.C. §§ 2035(a) and 2042(2).

31. Sec. 17.

32. I.R.C. § 2044.

33. Sec. 17.

34. Kansas Department of Revenue, "Kansas Estate Tax Booklet for Deaths Occurring On or After May 22, 2003," p. 4.

**Special use valuation**

The general rule is that the decedent's property is included in the gross estate at its "fair market value" on the date of death.<sup>35</sup> There is a very important exception for farmland under the new Kansas law. If the decedent was a Kansas resident, land that is located in Kansas and valued as agricultural property for property tax purposes<sup>36</sup> is assigned the same value for estate tax purposes.<sup>37</sup> This provision will dramatically reduce the value of many farm estates.

Federal special use valuation<sup>38</sup> is not a part of the new Kansas law, in part because of its complexity. Given the low Kansas tax rates, it is unlikely that anyone would go to the trouble of qualifying and claiming special use valuation just for Kansas purposes anyway. If the estate owns farmland, the special valuation provision described above will be more beneficial and certainly easier. If federal special use valuation is used for other kinds of property, however, the Kansas gross estate will include that property at the greater fair market value.

**Marital deductions**

The new law provides for the same type of marital deduction as federal law, with one important expansion. The new law grants a deduction for "any interest in property, which passes or has passed from the decedent to a surviving spouse."<sup>39</sup> This is exactly the same as the federal language,<sup>40</sup> but the Kansas law does not include the terminable interest

rule set forth in IRC § 2056(b)(1). As a result, a marital deduction is available under Kansas law for any spousal interest in a trust, regardless of whether the QTIP requirements<sup>41</sup> are met. Alternatively, the new law provides a deduction for the entire value of a trust for which a QTIP election can be and is made.<sup>42</sup> The inclusion of both these rules in the new law means that the executor will have two alternatives available if QTIP property is involved.

When property is going into a "QTIPable" trust for the surviving spouse, the executor will need to decide whether to make the QTIP election or just deduct the value of the spouse's interest in the trust.

For example, assume that wife dies, bequeathing \$1 million to a trust that provides income for life to husband, with remainder to the children. Assume that the actuarial value of the husband's life interest is 40 percent, or \$400,000. The executor has a choice between two options. First, the executor can take a marital deduction of \$400,000, with the result that estate tax will be imposed on the children's \$600,000 remainder interest (assuming the total taxable estate is in excess of \$1 million). In this event, no estate tax will be imposed on the trust property when the husband dies. Second, the executor can make a QTIP election, with the result that the entire trust will qualify for the marital deduction and no taxes will be imposed at the wife's death. At the husband's

death, however, the entire trust will be included in his gross estate.<sup>43</sup>

If a deduction for the full amount of the trust is needed to reduce the Kansas estate tax on the first death, and it is likely that the surviving spouse will live until 2010 or later (or the surviving spouse will not have a taxable estate even with inclusion of the trust property), then the Kansas QTIP election will be preferable. If a deduction of only the value of the spouse's interest in the trust is sufficient to avoid Kansas estate tax, then there would seem to be no reason to risk later inclusion of the full amount of the trust by making a QTIP election.

There is no guidance in the statute regarding how to determine the "value" of the spouse's deductible interest if QTIP treatment is not elected. If the spouse has the right to all income during life, using the federal tables<sup>44</sup> for valuing a life estate would seem an unassailable approach. If the principal can be used for the benefit of the spouse, that should increase the value of the spouse's interest. If the spouse's interest may be terminated sooner, such as on remarriage, that should decrease the value of the spouse's interest. There is precedent in the similar concept that existed under the old Kansas Inheritance Tax.<sup>45</sup> The same issue of valuing a spouse's interest in a trust arises when determining the amount of the spouse's elective share.<sup>46</sup>

**Other federal provisions**

As explained above, SB 365 is generally designed to replicate the process for determining federal estate tax liability. In the interest of simplicity, however, a number of federal provisions are not included in SB 365. The primary omitted provisions include: (1) special use valuation,<sup>47</sup> (2) deferred payment,<sup>48</sup> (3) alternate valuation date,<sup>49</sup> (4) credit for tax on prior transfers,<sup>50</sup> (5) credit for foreign death taxes,<sup>51</sup> (6) qualified conservation easement exclusion,<sup>52</sup> (7) transfers taking

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35. Sec. 5.

36. K.S.A. 79-1476.

37. Sec. 6.

38. I.R.C. § 2032A.

39. Sec. 23(a).

40. I.R.C. § 2056(a).

41. Sec. 23(b).

42. Sec. 23(b). The QTIP requirements stated in Sec. 23(b) are essentially identical to those stated in IRC § 2056(b)(7).

43. Sec. 17.

44. Treas. Reg. § 20.2031-7.

45. K.S.A. 79-1537b(a).

46. See K.S.A. 59-6a209(b); see also discussion at Section 2.12 of the *Kansas Estate Administration Handbook*, 6th ed.

47. I.R.C. § 2032A.

48. I.R.C. § 6166.

49. I.R.C. § 2032.

50. I.R.C. § 2013.

51. I.R.C. § 2014.

52. I.R.C. § 2031(c).

effect at death,<sup>53</sup> (8) Chapter 14 special valuation rules,<sup>54</sup> and (9) disallowance of the marital deduction where the surviving spouse is not a U.S. citizen and qualified domestic trusts.<sup>55</sup>

### Filing Threshold, Exemption, and Rates

A return is required if the Kansas gross estate exceeds \$1 million.<sup>56</sup> This requirement refers to the entire gross estate, including property outside Kansas. A return is required even if the Kansas property does not exceed \$1 million and even if the taxable estate is less than \$1 million.

Under the old law the filing threshold was to be \$2 million in 2007 and 2008 and \$3.5 million in 2009,<sup>57</sup> and if that filing threshold was not met then no tax was due. Therefore, under the new law, some estates will be subject to Kansas estate tax that would not have been subject to tax under the old law. The new law, however, provides a number of advantages, including lower rates, much more straightforward calculation of the tax, and elimination of certain inequities. Also, for some estates the new law will provide a higher filing threshold because the old law took adjusted taxable gifts into account in determining the filing obligation.<sup>58</sup>

The Kansas exemption remains at \$1 million throughout 2007, 2008, and 2009.<sup>59</sup> This is the same as the exemption amount under current law for 2006. Thus, you could have a gross estate of more than \$1 million and be required to file a Kansas return, but no tax would be due because of the exemption and other deductions such as the marital deduction.

Because the Kansas exemption will remain at \$1 million during 2007 through 2009, while the federal exemption is \$2 million during 2007 and 2008 and \$3.5 million during 2009, many estates that do not have to file a federal return or do not have a federal tax liability will have to file a Kansas tax return and may have a Kansas tax liability during these three years.

The tax rates range from 3 percent to 10 percent for 2007, 1 percent to 7 percent for 2008, and 0.5 percent to 3 percent for 2009.<sup>60</sup> The 2007 rates represent a sharp drop from the rates in effect for 2006 under current law, and further substantial drops will occur in both 2008 and 2009.

IRC § 2058 must be taken into account in determining the true impact of the tax rate reductions. IRC § 2058(a) allows a deduction for federal estate tax purposes for any death taxes paid to a state. For estates that have significant federal estate tax liability, IRC § 2058 has the effect of reducing the cost of the Kansas tax by the marginal federal estate tax rate, which after 2006 will be 45 percent for all taxable estates over the exemption amount. For example, if the Kansas tax is \$100,000 and the estate will be subject to federal tax liability of at least \$45,000, the IRC § 2058 deduction reduces the federal tax by 45 percent of \$100,000, or \$45,000. Therefore, the net cost of the Kansas tax is only \$55,000.

The table below sets forth the net cost of the Kansas tax, after taking into account the value of the § 2058 deduction, at various taxable estate levels for the years 2006 through 2009.

Taxable Estate	2006	2007	2008	2009
\$1 million	\$0	\$0	\$0	\$0
\$2 million	\$99,600	\$30,000	\$10,000	\$5,000
\$3 million	\$98,280	\$49,500	\$16,500	\$15,000
\$5 million	\$211,464	\$115,500	\$38,500	\$19,250
\$10 million	\$576,504	\$335,500	\$176,000	\$74,250

You cannot deduct the federal tax in determining the Kansas tax. As a result, there is no need for a circular computation. The executor first determines the Kansas tax, and the Kansas tax is then deducted under IRC § 2058 in determining the federal taxable estate. (Most federal estate tax computer programs actually calculate the Kansas tax and thus, the deduction, so you can do the federal return first and then the Kansas return.)

### Property in Multiple States

The situs of property for tax purposes is determined in the same way as under current law.<sup>61</sup> Importantly, the situs of intangible property is the state in which the decedent was "resident" at the time of death.<sup>62</sup> A decedent is presumed to be a Kansas resident if he or she "spent in the aggregate more than six months of the calendar year immediately preceding their death" in Kansas.<sup>63</sup>

If some of the decedent's property has a situs outside Kansas, the tax is reduced by the following method.<sup>64</sup> The tax is first determined by including all property, wherever located, in the decedent's gross estate. All deductions are then applied to produce the taxable estate, and the exemption and tax rates are applied to produce a tentative tax on the entire estate. Finally, the tax is reduced to reflect the portion of the gross estate outside Kansas. The Kansas tax consists of the tentative tax multiplied by the ratio of the value of the Kansas property to the value of the entire gross estate.

For example, assume that the value of the decedent's gross estate is \$5 million, consisting of \$3 million in Missouri and \$2 million in Kansas. All deductions are subtracted from the \$5 million gross estate to produce the taxable estate, and the exemption and tax rates are then applied. Assume that the result is a tax of \$100,000. Because the Kansas property is 40 percent of the gross estate, the Kansas tax is 40 percent of \$100,000, or \$40,000. There is no provision for a credit or deduction for taxes paid to other states.

53. I.R.C. § 2037.

54. I.R.C. §§ 2701-2704.

55. I.R.C. §§ 2056(d) and 2056A.

56. Sec. 25(a).

57. K.S.A. 79-15,102; I.R.C. §§ 2010(c) and 6018(a)(1).

58. K.S.A. 79-15,102; I.R.C. § 6018(a)(3)(A).

59. Sec. 3(b).

60. Sec. 3(b).

61. Secs. 2(e), (k), and (m) are identical to K.S.A. 79-15,101(f), (k), and (n) of current law.

62. Sec. 2(n).

63. Sec. 2(k).

64. Sec. 4.

It is important to note that the actual disposition of the Kansas property is irrelevant. In the above example, assume that the entirety of the \$2 million of Kansas property will pass to the surviving spouse and qualify for the marital deduction. The estate nevertheless has a Kansas tax liability of \$40,000.

The residence of the decedent determines the situs of intangible property but otherwise has no effect on the filing obligation. In the above example involving property in both Kansas and Missouri, there is a Kansas filing obligation because the gross estate (including both Kansas and Missouri property) exceeds \$1 million and there is at least some property in Kansas. The residence of the decedent is irrelevant. The filing obligation exists even if the value of Kansas property is below \$1 million and the decedent is not a Kansas resident.

### Planning and Implementation Suggestions

#### Estates subject to federal tax

As with the current Kansas estate tax, the new law will have an impact on

marital deduction formulas in existing documents. For estates that are large enough to be subject to federal estate tax through 2009, the following analysis should be considered regarding how the formula will work under the new Kansas law and what changes (if any) you want to make in your formulas or approach.

1. With a "reduce to zero" formula that solves for zero federal estate tax, the amount in the shelter trust will be \$2 million (or \$3.5 million in 2009) and the marital trust will be funded with the rest of the estate. If the shelter trust does not qualify as a QTIP, then for Kansas purposes you can still take a marital deduction for the value of the spouse's interest in the shelter trust. In 2007 and 2008, if the value of the spouse's interest is \$1 million or more, no Kansas estate tax will be owed, since the \$1 million exemption will cover the rest of the shelter trust. Because the value of the spouse's interest will depend on various factors, such as the terms of the trust and the age of the spouse at the time of the first death, it will not be possible to "reduce to zero" the Kansas tax with total certainty, but a good guess can be made. Even if this results in some Kansas tax,

the relatively small amount of Kansas tax may be worth a fully funded shelter trust for federal purposes. However, you will no longer have the option you have under the current Kansas estate tax (at least by practice) to take a QTIP deduction for what actually goes into a non-QTIPable shelter trust.

2. A "reduce to zero" formula that solves for zero federal and no increase in state tax raises an interesting question. If the new Kansas law didn't allow for the option of deducting the value of the spouse's interest but only allowed a QTIP deduction, this formula would fund a non-QTIPable shelter trust with \$1 million. But the deduction for the spouse's interest in the shelter trust will allow you to additionally fund the shelter trust under this formula. Let's assume that the spouse's age and the terms of the trust would allow a Kansas marital deduction for the spouse's interest in a \$2 million shelter trust of \$1 million. In 2007 and 2008 you could put \$2 million in the non-QTIPable shelter trust and still result in zero Kansas tax. If you have an older spouse, however, there is still the possibility that this kind of formula will underfund the shelter trust. It



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is probably not worthwhile to change these formulas for the three-year window. To the extent this formula allows the spouse to add to the shelter trust by a disclaimer, you will have the flexibility to decide whether you want to incur Kansas tax or underfund the shelter trust for federal purposes at the time of the first death.

3. With a "one-lung" QTIP, which can be divided into multiple QTIPs on death and differing elections made, you will have a great deal of flexibility. (The one-lung QTIP doesn't work in those situations where you want the shelter trust to go to the children, or don't want to have to pay the spouse all the income

The one-lung QTIP can be used to make the most advantageous elections at the state and federal level as follows:

a. For a death in 2007 or 2008, you can have a \$1 million QTIP for which no QTIP election is made at the state or federal level, a second QTIP of \$1 million for which the Kansas QTIP election is made but not the federal, and a third QTIP of the rest for which QTIP elections are made at both levels. If the spouse is likely to live three years, there won't be much downside to making the Kansas QTIP election on the second QTIP.

b. In the alternative, the first QTIP can be the highest amount (not to exceed the federal exemption) that results in \$1 million taxable estate for Kansas purposes after taking a deduction for the spouse's interest. You would make no QTIP election on the first QTIP at the state or federal level, but would take a deduction for the spouse's interest at the Kansas level. This will be advantageous if the spouse is likely to die soon or has a large estate because there is no risk of including all of the first QTIP in the spouse's estate on the spouse's death.

#### Estates not subject to federal tax

If there is no concern about the federal estate tax, it may not be worth revising client's documents for only a three-year window, particularly when you consider that only married couples with net assets more than \$1 million but under \$2 million (or \$3.5 million for one year) would be affected. If you do want to revise documents for these individuals (such as in the case of couples unlikely to live until 2010), here are some options: (i) a formula that funds the shelter trust with the Kansas exemption amount, (ii) an even more complicated formula that funds the shelter trust with the amount that results in \$1 million after a deduction for the spouse's interest, (iii) a one-lung QTIP, or (iv) all outright to the spouse with a disclaimer to the shelter trust.

For an estate that is somewhere between \$1 million and \$2 million and a relatively young surviving spouse, you can probably ignore the QTIP rules and, for example, leave everything to the spouse in a trust that (i) distributes income only as needed, (ii) terminates on remarriage, and/or (iii) provides benefits to other family members (all standard features of a traditional shelter trust). Each of these features will reduce the value of the deduction, of course, but you will still be likely to get at least a deduction for the amount exceeding \$1 million.

For those clients who are not expected to live until 2010, and have a \$2 million total estate, \$1 million could be given away as long as there is a chance of surviving at least one year. Because of the \$1 million federal gift tax exemption there will be no federal

gift tax due, and the \$1 million remaining at death will be under the filing threshold and/or covered by the Kansas \$1 million exemption. The main drawback is the loss of step-up in basis on the \$1 million gifted for income tax purposes. ■

#### About the Authors

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Roush received her J.D. from the University of Kansas School of Law in 1979. She was a member of the Order of the Coif and articles editor of the Kansas Law Review.

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