

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

SESSION LAW 2009-368  
HOUSE BILL 765

AN ACT TO REVISE THE EXISTING ELECTIVE SHARE STATUTES.

The General Assembly of North Carolina enacts:

**SECTION 1.** Article 1A of Chapter 30 of the General Statutes reads as rewritten:

"Article 1A.

"Elective Share.

**"§ 30-3.1. Right of elective share.**

(a) Elective Share. – The surviving spouse of a decedent who dies domiciled in this State has a right to claim an "elective share", which means an amount equal to (i) the applicable share of the Total Net Assets, as defined in G.S. 30-3.2(4), less (ii) the value of Net Property Passing to Surviving Spouse, as defined in ~~G.S. 30-3.3(a)~~. G.S. 30-3.2(2c). The applicable share of the Total Net Assets is as follows:

- (1) If the decedent is not survived by any lineal descendants, one-half of the Total Net Assets.
- (2) If the decedent is survived by one child, or lineal descendants of one deceased child, one-half of the Total Net Assets.
- (3) If the decedent is survived by two or more children, or by one or more children and the lineal descendants of one or more deceased children, or by the lineal descendants of two or more deceased children, one-third of the Total Net Assets.

(b) Reduction of Applicable Share. – In those cases in which the surviving spouse is a second or successive spouse, and the decedent has one or more lineal descendants ~~surviving by a prior marriage surviving who are not lineal descendants of the decedent's marriage to the surviving spouse~~ but there are no lineal descendants surviving by the surviving spouse, the applicable share as determined in subsection (a) of this section shall be reduced by one-half.

~~(c) Death Taxes. — Death taxes shall be taken into account as a claim against the estate in determining Total Net Assets only to the extent that the assets received by the surviving spouse do not qualify for the federal estate tax marital deduction pursuant to section 2056 of the Code or similar provisions under the laws of any other applicable taxing jurisdiction. The amount of such claims shall equal the difference between the amount of such death taxes as finally determined and the amount such death taxes would have been if all assets received by the surviving spouse had qualified for the federal estate tax marital deduction pursuant to section 2056 of the Code and similar provisions under the laws of any other applicable taxing jurisdictions.~~

**"§ 30-3.2. Definitions.**

The following definitions apply in this Article:

- (1) ~~"Code" means the Code.~~ – The Internal Revenue Code in effect at the time of the decedent's death.
- (1a) Claims. – Includes liabilities of the decedent, whether arising in contract, in tort, or otherwise, and liabilities of the decedent's estate that arise at or after



the death of the decedent, including funeral and administrative expenses, except for:

- a. A claim for equitable distribution of property pursuant to G.S. 50-20 awarded subsequent to the death of the decedent.
  - b. Death taxes, except for those death taxes attributable to Property Passing to the Surviving Spouse. "Death taxes attributable to Property Passing to the Surviving Spouse" equals the amount of decedent's death taxes as finally determined, less the amount such death taxes would have been if all Property Passing to the Surviving Spouse had qualified for the federal estate tax marital deduction pursuant to section 2056 of the Code or had qualified for a similar provision under the laws of another applicable taxing jurisdiction.
  - c. A claim founded on a promise or agreement of the decedent, to the extent such claim is not arm's length or is not supported by full or adequate consideration in money or money's worth.
  - d. Expenses apportioned by the clerk of court under G.S. 30-3.4(h).
- (2) ~~"Death taxes" means any~~ Death taxes. – Any estate, inheritance, succession, and similar taxes imposed by any taxing authority, reduced by any applicable credits against those taxes.
- (2a) General power of appointment. – Any power of appointment, including a power to designate the beneficiary of a beneficiary designation, exercisable by the decedent, regardless of the decedent's capacity to exercise such power, in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate, except for (i) powers limited by an "ascertainable standard" as defined in G.S. 36C-1-103 and (ii) powers which are not exercisable by the decedent except in conjunction with a person who created the power or has a substantial interest in the property subject to the power and whose interest is adverse to the exercise of the power in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. In no event shall a power held by the decedent as attorney-in-fact under a power of attorney be considered a general power of appointment.
- (2b) Lineal descendant. – Defined in G.S. 29-2.
- (2c) Net Property Passing to Surviving Spouse. – The Property Passing to Surviving Spouse reduced by (i) death taxes attributable to property passing to surviving spouse, and (ii) claims payable out of, charged against or otherwise properly allocated to Property Passing to Surviving Spouse.
- (3) ~~"Nonadverse trustee" means:~~ Nonadverse trustee. – Any of the following:
- a. Any person who does not possess a substantial beneficial interest in the trust that would be adversely affected by the exercise or nonexercise of the power that the individual trustee possesses respecting the trust;
  - b. Any person subject to a power of removal by the surviving spouse with or without cause; or
  - c. Any company authorized to engage in trust business under the laws of this State, or that otherwise meets the requirements to engage in trust business under the laws of this State.
- (3a) Nonspousal assets. – All property included in total assets other than the property included in Property Passing to Surviving Spouse.

- (3b) Presently exercisable general power of appointment. – A general power of appointment which is exercisable at the time in question. A testamentary general power of appointment is not presently exercisable.
- (3c) Property Passing to Surviving Spouse. – The sum of the values, as valued pursuant to G.S. 30-3.3A, of the following:
- a. Property (i) devised, outright or in trust, by the decedent to the surviving spouse or (ii) that passes, outright or in trust, to the surviving spouse by intestacy, beneficiary designation, the exercise or failure to exercise the decedent's testamentary general power of appointment or the decedent's testamentary limited power of appointment, operation of law, or otherwise by reason of the decedent's death, excluding any benefits under the federal social security system.
  - b. Any year's allowance awarded to the surviving spouse.
  - c. Property renounced by the surviving spouse.
  - d. The surviving spouse's interest in any life insurance proceeds on the life of the decedent.
  - e. Any interest in property, outright or in trust, transferred from the decedent to the surviving spouse during the lifetime of the decedent for which the surviving spouse signs a statement acknowledging such a gift. For purposes of this sub-subdivision, any gift to the surviving spouse by the decedent of the decedent's interest in any property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with right of survivorship shall be deemed to be a gift of one-half of the entire interest in property so held by the decedent and the surviving spouse.
  - f. Property awarded to the surviving spouse, subsequent to the death of the decedent, pursuant to an equitable distribution claim under G.S. 50-20.
  - g. Property held in a spousal trust described in G.S. 30-3.3A(e)(1).
- If property falls under more than one sub-subdivision of this subdivision, then the property shall be included only once, but under the sub-subdivision yielding the greatest value of the property.
- (3d) Responsible person. – A person or entity other than the surviving spouse that received, held, or controlled property constituting nonspousal assets on the date used to determine the value of the property. The personal representative is the responsible person for nonspousal assets that pass under the decedent's will or by intestate succession.
- (3e) Responsible person's nonspousal assets. – The nonspousal assets received, held, or controlled by a responsible person.
- (3f) Total assets. – The sum of the values, as determined pursuant to G.S. 30-3.3A, of the following:
- a. The decedent's property that would pass by intestate succession if the decedent died without a will, other than wrongful death proceeds;
  - b. Property over which the decedent, immediately before death, held a presently exercisable general power of appointment, except for (i) property held jointly with right of survivorship, which is includable in total assets only to the extent provided in sub-subdivision c. of this subdivision and (ii) life insurance, which is includable in Total Assets only to the extent provided in sub-subdivision d. of this subdivision. Includes, without limitation:

1. Property held in a trust that the decedent could revoke.
  2. Property held in a trust to the extent that the decedent had an unrestricted power to withdraw the property.
  3. Property held in a depository account owned by the decedent in a financial institution payable or transferable at decedent's death to a beneficiary designated by the decedent.
  4. Securities owned by the decedent in an account or in certificated form that are payable or transferable at decedent's death to a beneficiary designated by the decedent.
- c. Property held as tenants by the entirety or jointly with right of survivorship as follows:
1. One-half of any property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with right of survivorship is included, without regard to who contributed the property.
  2. Property held by the decedent and one or more other persons other than the surviving spouse as joint tenants with right of survivorship is included to the following extent:
    - I. All property attributable to the decedent's contribution.
    - II. The decedent's pro rata share of property not attributable to the decedent's contribution, except to the extent of property attributable to contributions by a surviving joint tenant.

The decedent is presumed to have contributed the jointly owned property unless contribution by another is proven by clear and convincing evidence.
- d. Benefits payable by reason of the decedent's death under any policy, plan, contract, or other arrangement, either owned by the decedent or over which the decedent had a general power of appointment or had the power to designate the surviving spouse as beneficiary, including, without limitation:
1. Insurance on the life of the decedent.
  2. Accidental death benefits.
  3. Annuities.
  4. Employee benefits or similar arrangements.
  5. Individual retirement accounts.
  6. Pension or profit sharing plans.
  7. Deferred compensation.
  8. Any private or governmental retirement plan.
- e. Property irrevocably transferred by the decedent to the extent the decedent retained the possession or enjoyment of, or the right to income from, the property for life or for any period not ascertainable without reference to the decedent's death or for any period that does not in fact end before the decedent's death, except:
1. Property transferred for full and adequate consideration.
  2. Transfers to that the surviving spouse consented in writing by signing a deed, an income or gift tax return that reports the gift, or other writing.
  3. Transfers that became irrevocable before the decedent's marriage to the surviving spouse.

The property included in total assets is that fraction of the transferred property to which the decedent retained the right.

f. Property transferred by the decedent to the extent the decedent created a power over the property or the income from the property, which, immediately prior to death, could be exercised by the decedent in conjunction with any other person, or which could be exercised by a person who does not have a substantial interest that would be adversely affected by the exercise or nonexercise of the power, for the benefit of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate, except:

1. Property transferred for full and adequate consideration.
2. Transfers to which the surviving spouse consented in writing by signing a deed, an income or gift tax return that reports the gift, or other writing.
3. Transfers which became irrevocable before the decedent's marriage to the surviving spouse.

The property included in total assets with respect to a power over property is that fraction of the property to which the power related.

g. Property transferred by the decedent to persons other than the surviving spouse if such transfer was made both during the one-year period immediately preceding the decedent's death and during the decedent's marriage to the surviving spouse, except:

1. Property transferred for full and adequate consideration.
2. Transfers to which the surviving spouse consented in writing by signing a deed, an income or gift tax return that reports such gift, or other writing.
3. That part of any property transferred to any one transferee that qualified for exclusion from gift tax under section 2503 of the Code.

For purposes of this sub-subdivision, the termination of a right or interest in, or power over, property that would have been included in the total assets under sub-subdivisions b., e., or f. of this subdivision if the right, interest, or power had not terminated until the decedent's death shall be deemed to be a transfer of such property. Termination occurs when, with respect to a right or interest in property, the decedent transfers or relinquishes the right or interest; with respect to a power over property, the power terminates by exercise or release, but not by lapse or default.

If property falls under more than one sub-subdivision of this subdivision, then the property shall be included only once, but under the sub-subdivision yielding the greatest value of the property.

(4) ~~"Total Net Assets" means, after the payment or provision for payment of the decedent's funeral expenses, year's allowances to persons other than to the surviving spouse, debts, claims other than an equitable distribution of property awarded to the surviving spouse pursuant to G.S. 50-20 subsequent to the death of the decedent, and administration expenses, the sum of the following:~~

- a. ~~All property to which the decedent had legal and equitable title immediately prior to death;~~
- b. ~~All property received by the decedent's personal representative by reason of the decedent's death, other than wrongful death proceeds;~~

- e. ~~One half of the value of any property held by the decedent and the surviving spouse as tenants by the entirety, or as joint tenants with rights of survivorship;~~
- d. ~~The entire value of any interest in property held by the decedent and another person, other than the surviving spouse, as joint tenants with right of survivorship, except to the extent that contribution can be proven by clear and convincing evidence;~~
- e. ~~The value of any property which would be included in the taxable estate of the decedent pursuant to sections 2033, 2035, 2036, 2037, 2038, 2039, or 2040 of the Code.~~
- f. ~~Any gifts of property made by the decedent to donees other than the surviving spouse within six months of the decedent's death, excluding:
 
  - 1. ~~Any gifts within the annual exclusion provisions of section 2503 of the Code;~~
  - 2. ~~Any gifts to which the surviving spouse consented. A signing of a deed, or income or gift tax return reporting such gift shall be considered consent; and~~
  - 3. ~~Any gifts made prior to marriage;~~~~
- g. ~~Any proceeds of any individual retirement account, pension or profit-sharing plan, or any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary, excluding any benefits under the federal social security system;~~
- h. ~~Any other Property Passing to Surviving Spouse under G.S. 30-3.3; and~~
- i. ~~In case of overlapping application of the same property under more than one provision, the property shall be included only once under the provision yielding the greatest value."~~

Total Net Assets. – The total assets reduced by year's allowances to persons other than the surviving spouse and claims.

**"§ 30-3.3. Property passing to surviving spouse.**

(a) ~~Property Passing to Surviving Spouse.~~— For purposes of this Article, "Property Passing to Surviving Spouse" means the sum of the following:

- (1) ~~One half of the value of any interest in property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with rights of survivorship;~~
- (2) ~~The value of any interest in property (outright or in trust, including any interest subject to a general power of appointment held by the surviving spouse, as defined in section 2041 of the Code) devised by the decedent to the surviving spouse, or which passes to the surviving spouse by intestacy, or by beneficiary designation, or by exercise of or in default of the exercise of the decedent's testamentary general or limited power of appointment, or by operation of law or otherwise by reason of the decedent's death, excluding any benefits under the federal social security system;~~
- (3) ~~Any year's allowance awarded to the surviving spouse;~~
- (4) ~~The value of any property renounced by the surviving spouse;~~
- (5) ~~The value of the surviving spouse's interest, outright or in trust, in any life insurance proceeds on the life of the decedent;~~
- (6) ~~The value of any interest in property, outright or in trust, transferred from the decedent to the surviving spouse during the lifetime of decedent for~~

~~which (i) a gift tax return is timely filed reporting such gift, or (ii) the surviving spouse signs a statement acknowledging such a gift. For purposes of this subdivision, any gift to the surviving spouse by the decedent of the decedent's interest in any property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with right of survivorship shall be valued at one-half of the entire value of that interest in property at the time the gift is made;~~

~~(7) Notwithstanding any other provision of law related to valuing a partial interest in property, the entire fair market value of any property held in trust for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, if the terms of the trust meet the following requirements:~~

~~a. During the lifetime of the surviving spouse, the trust is controlled by one or more Nonadverse Trustees;~~

~~b. The trustee is required to distribute to or for the benefit of the surviving spouse either (i) the entire net income of the trust at least annually; or (ii) the income of the trust in such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse;~~

~~e. The trustee is required to distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse; and~~

~~In exercising discretion, the trustee may be authorized or required to take into consideration all other income, assets, and other means of support as are available to the surviving spouse; and~~

~~(8) The net value of the marital estate awarded to the surviving spouse pursuant to G.S. 50-20 subsequent to the death of the decedent.~~

~~(b) Death Taxes.—The value of Property Passing to Surviving Spouse shall be reduced by any death taxes that are a charge against or apportioned against the surviving spouse on property interests included in Property Passing to Surviving Spouse.~~

~~(c) No Duplication.—In case of overlapping application of the same property under more than one provision, the property shall be included only once, under the provision yielding the greatest value.~~

### **"§ 30-3.3A. Valuation of property.**

(a) Basic Principles. – Unless otherwise expressly stated to the contrary in this section, the value of property shall be that property's fair market value, taking into consideration any applicable discounts. The value shall be determined as of the date of death, except for (i) property transferred to persons other than the surviving spouse described in G.S. 30-3.2(3f)g. and (ii) property transferred to the surviving spouse described in G.S. 30-3.2(3c)e. that is not held in trust, that is not life insurance, and that is not held as tenants by the entirety or some other form of ownership that passes to the surviving spouse by reason of survivorship. The value of gift property described in clauses (i) and (ii) shall be determined as the value on the date of transfer; but if the donee proves to the satisfaction of the clerk that the value on the date of disposal of the asset prior to the decedent's death is less than on the original date of transfer or that the value on the date of death is less than on the original date of transfer, then the lesser value shall be used.

(b) Certain Joint Property. – In valuing a partial interest in jointly owned property with right of survivorship, there shall be no discount taken to reflect the decedent's partial interest including, but not limited to, discounts for lack of control, ownership of a fractional interest, or lack of marketability.

(c) Certain Powers of Appointment. – In valuing property over which the decedent held a presently exercisable general power of appointment, the value includes only the property subject to the power that passes at the decedent's death, whether by exercise, release, lapse, default, or otherwise.

(d) Certain Transfers With Retained Interests. – In valuing property transferred by the decedent with a retained right of possession or enjoyment or the right to income described in G.S. 30-3.2(3f)e., only the fraction of the property to which the decedent retained a right shall be included. In valuing property in which the decedent created a power as described in G.S. 30-3.2(3f)f., the value includes, with respect to a power, the value of the property subject to the power, and the amount included in the valuation with respect to a power over the income is the value of the property that produces or produced the income; provided, however, if the power is a power over both income and property and the foregoing produces different amounts, the amount included in the valuation is the greater amount.

(e) Partial or Contingent Interest Property. – The valuation of partial and contingent property interests, outright or in trust, which are limited to commence or terminate upon the death of one or more persons, upon the expiration of a period of time, or upon the occurrence of one or more contingencies, shall be determined by computations based upon the mortality and annuity tables set forth in G.S. 8-46 and G.S. 8-47, and by using a presumed rate of return of six percent (6%) of the value of the underlying property in which those interests are limited. However, in valuing partial and contingent interests passing to the surviving spouse, the following special rules apply:

- (1) The value of the beneficial interest of a spouse shall be the entire fair market value of any property held in trust if the decedent was the settlor of the trust, if the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, and if the terms of the trust meet the following requirements:
  - a. During the lifetime of the surviving spouse, the trust is controlled by one or more nonadverse trustees.
  - b. The trustee shall distribute to or for the benefit of the surviving spouse either (i) the entire net income of the trust at least annually or (ii) the income of the trust in such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
  - c. The trustee shall distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
  - d. In exercising discretion, the trustee may be authorized or required to take into consideration all other income assets and other means of support available to the surviving spouse.
- (2) To the extent that the partial or contingent interest is dependent upon the occurrence of any contingency that is not subject to the control of the surviving spouse and that is not subject to valuation by reference to the mortality and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the contingency will be conclusively presumed to result in the lowest possible value passing to the surviving spouse. However, a life estate or income interest that will terminate upon the surviving spouse's death or remarriage will be valued without regard to the possibility of termination upon remarriage.
- (3) To the extent that the valuation of a partial or contingent interest is dependent upon the life expectancy of the surviving spouse, that life

expectancy shall be conclusively presumed to be no less than 10 years, regardless of the actual attained age of the surviving spouse at the decedent's death.

(f) Method for Determining Value. – Unless otherwise stated in this Article, the value of property shall be determined as follows:

- (1) The value of property passing by intestacy described in G.S. 30-3.2(3f)a. and Property Passing to Surviving Spouse, other than property held in a trust, shall be established by the good-faith agreement of the surviving spouse and the personal representative, unless either (i) the surviving spouse is the personal representative or (ii) the clerk determines that the personal representative may not be able to represent the estate adversely to the surviving spouse, in which cases the value of such property shall be determined pursuant to subdivision (4) of this subsection.
- (2) The value of property constituting an interest in a trust shall be established by good-faith agreement of the surviving spouse, the personal representative, and the trustee, unless either (i) the surviving spouse is both the personal representative and the trustee or (ii) the clerk determines that the trustee or the personal representative may not be able to represent the trust or the estate, respectively, adversely to the surviving spouse, in which cases the value of such property shall be determined pursuant to subdivision (4) of this subsection.
- (3) The value of all other property shall be established by the good-faith agreement of the surviving spouse, the personal representative, and the responsible person that received, held, or controlled such property on the date used to determine the value of such property for purposes of determining total assets, unless the clerk determines that valuation under subdivision (4) of this subsection is more appropriate.
- (4) If the value of any property is not established by agreement as provided above, the parties may present evidence regarding value, which may include expert testimony, and the clerk may appoint one or more qualified and disinterested persons to help determine the value of such property. After hearing, the clerk shall make a finding of fact of the value of each asset.

**"§ 30-3.4. Procedure for determining the elective share.**

(a) Exercisable Only During Lifetime. – The right of the surviving spouse to file a claim for an elective share must be exercised during the lifetime of the surviving spouse, by the surviving spouse, by the surviving spouse's agent under a attorney-in-fact if the surviving spouse's power of attorney, attorney expressly authorizes the attorney-in-fact to do so or to generally engage in estate transactions, or or, with approval of court, by the guardian of the surviving spouse's estate. estate or general guardian. If a surviving spouse dies before the claim for an elective share has been settled, the surviving spouse's personal representative shall succeed to the surviving spouse's rights to an elective share.

(b) Time Limitations. – A claim for an elective share must be made within six months after the issuance of letters testamentary or letters of administration in connection with the will or intestate proceeding with respect to which the surviving spouse claims the elective share by (i) filing a petition with the clerk of superior court of the county in which the primary administration of the decedent's estate lies, and (ii) mailing or delivering a copy of that petition to the personal representative of the decedent's estate. A surviving spouse's incapacity shall not toll the six-month period of limitations.

(c) Time for Hearing. – Unless waived by the personal representative and the surviving spouse, the clerk shall set the matter for hearing no earlier than two months and no later than six months after the filing of the petition. However, the clerk may extend the time of hearing as

the clerk sees fit. The surviving spouse shall give notice of the hearing to the personal representative, and to any person described in G.S. 30-3.5 who may be required to contribute toward the satisfaction of the elective share.

~~(d) Preparation of Tax Form.— In every case in which a petition to determine an elective share has been filed, and within two months of the filing of the petition, the personal representative shall prepare and submit to the clerk a proposed Form 706, federal estate tax return, for the estate, regardless of whether that form is required to be filed with the Internal Revenue Service. The clerk may extend the time for submission of the proposed Form 706 as the clerk sees fit.~~

~~(e) Valuation.— The valuation of interests in property for purposes of G.S. 30-3.2 and G.S. 30-3.3 shall be determined as follows:~~

- ~~(1) Basic principles.— Each interest shall be valued at its fair market value, reduced by all liens, claims, or encumbrances against the interest. For interests passing at the decedent's death, valuation shall be as of the date of death, and for interests transferred during the decedent's lifetime, valuation shall be as of the date of transfer.~~
- ~~(2) Valuation of partial and contingent interests in property.— The valuation of interests in property, outright or in trust, which are limited to commence or terminate upon the death of one or more persons, upon the expiration of a period of time, or upon the occurrence of one or more contingencies, shall be determined by computations based upon the mortuary and annuity tables set forth in G.S. 8-46 and G.S. 8-47, and upon the basis of six percent (6%) of the gross value of the underlying property in which those interests are limited. However, in valuing interests passing to the surviving spouse, the following special rules apply:
  - ~~a. An interest described in G.S. 30-3.3(a)(7) that shall be valued as if the underlying property or interest passed outright to the surviving spouse unencumbered by any trust;~~
  - ~~b. To the extent that the interest is dependent upon the occurrence of any contingency that is not subject to the control of the surviving spouse and that is not subject to valuation by reference to the mortuary and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the contingency will be conclusively presumed to result in the lowest possible value passing to the surviving spouse. However, a life estate or income interest that will terminate only upon the earlier of the surviving spouse's death or remarriage will be valued without regard to the possibility of termination upon remarriage; and~~
  - ~~e. To the extent that the valuation of an interest is dependent upon the life expectancy of the surviving spouse, that life expectancy shall be conclusively presumed to be no less than 10 years, regardless of the actual attained age of the surviving spouse at the decedent's death.~~~~
- ~~(3) Determination of fair market value.— The fair market value of each asset comprising Total Net Assets shall be determined as follows:
  - ~~a. Probate assets and assets passing to spouse.— The value of each probate asset and Property Passing to Surviving Spouse, other than assets held in trust, shall be established by the good faith agreement of the surviving spouse and the personal representative, unless either (i) the surviving spouse is the personal representative, or (ii) the clerk determines that the personal representative may not be able to represent the estate adversely to the surviving spouse.~~~~

- b. ~~Trust assets. — The value of each trust asset shall be established by good faith agreement of the surviving spouse and the trustee, unless either (i) the surviving spouse is the trustee, or (ii) the clerk determines that the trustee may not be able to represent the trust adversely to the surviving spouse.~~
- e. ~~Other assets. — The value of any other asset shall be established by the good faith agreement of the surviving spouse and each person described in G.S. 30-3.5 who may be required to contribute toward the satisfaction of the elective share because of that person's interest in the asset, unless the clerk determines that valuation under sub-subdivision d. of this subdivision is more appropriate.~~
- d. ~~Use of disinterested persons. — If the value of any asset is not established by agreement, the clerk shall appoint one or more qualified and disinterested persons to determine a value of each asset. That determination of the value of an asset shall be final for the exclusive purposes of this Article.~~

(d1) Mediation. — The clerk may order mediation as described in G.S. 7A-38.3B of any disputes in connection with an elective share proceeding.

(e1) Procedure. — An elective share proceeding shall be an estate matter and may be appealed pursuant to G.S. 1-301.3.

(e2) Information About Total Net Assets. — In order to assist the clerk in determining whether a surviving spouse is entitled to an elective share, and, if so, the amount thereof, the following provisions apply:

(1) Submission within two months. — In every case in which a petition to determine an elective share has been filed, within two months of the filing of the petition, the personal representative shall submit sufficient information about the total assets for the clerk to determine the elective share. To fulfill its obligation to provide information, the personal representative may prepare and submit to the clerk a proposed Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, for the estate, regardless of whether that form is required to be filed with the Internal Revenue Service. The clerk may extend the time for submission of the proposed Form 706 or other information as the clerk sees fit.

(2) Examination regarding assets. — If the personal representative, the surviving spouse, or a responsible person has reasonable grounds to believe that any person has a claim or has in its possession assets included in Total Net Assets, then the personal representative, surviving spouse, or responsible person may use the procedures set out in G.S. 28A-15-12 to cause the clerk to examine the person believed to have a claim or to possess assets included in Total Net Assets.

(f) Findings and Conclusions. — After notice and hearing, the clerk shall determine whether or not the surviving spouse is entitled to an elective share, and if so, the clerk shall then determine the elective share and shall order the personal representative to transfer that amount to the surviving spouse. The clerk's order shall recite specific findings of fact and conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving Spouse, and the elective share.

~~(g) Appeals. — Any party in interest may appeal from the decision of the clerk to the superior court. If an appeal is taken from the decision of the clerk, that appeal shall have the effect of staying the judgment and order of the clerk until the cause is heard and determined by the superior court upon the appeal taken. Upon an appeal taken from the clerk to the superior court, the judge may review the findings of fact by the clerk and may find the facts or take~~

other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the Appellate Division.

(h) Expenses. – The expenses (including attorneys' fees) reasonably incurred by the personal representative, other responsible persons, and the surviving spouse in connection with elective share proceedings shall be equitably apportioned by the clerk of court in the clerk's discretion among the personal representative, other responsible persons, and the surviving spouse.

**"§ 30-3.5. Recovery of assets by personal representative. Satisfaction of elective share.**

~~(a) Recovery of Assets.~~—The personal representative is entitled to recover proportionately from all persons, other than the surviving spouse, receiving or in possession of any of the decedent's Total Net Assets a sufficient amount to enable the personal representative to pay the elective share. The apportionment shall be made in the proportion that the value of the interest of each person receiving or in possession of any of Total Net Assets bears to Total Net Assets, excluding any Property Passing to Surviving Spouse. The only persons subject to contribution to make up the elective share are (i) original recipients of property comprising the decedent's Total Net Assets, and subsequent gratuitous inter vivos donees or persons claiming by testate or intestate succession to the extent those persons have the property or its proceeds on or after the date of decedent's death, and (ii) a fiduciary, as to the property under the fiduciary's control at or after the time a fiduciary receives notice that a surviving spouse has claimed an elective share. A fiduciary shall not be considered to have notice until it receives notice at its address as shown in the decedent's estate papers in the clerk's office or, if there are no such papers or no such address is shown in those papers, at the fiduciary's residence or the office of its registered agent.

The personal representative may withhold from any property of the decedent in his possession, distributable to any person subject to apportionment, the amount of the elective share apportioned to such person. If the property in possession of the personal representative and distributable to any person subject to apportionment is insufficient to satisfy the proportionate amount of the elective share determined to be due from that person, the personal representative may recover the deficiency from that person. If the property is not in possession of the personal representative, the personal representative may recover from the person the amount of the elective share apportioned to that person in accordance with this Article. If the personal representative cannot reasonably collect from any person subject to apportionment the amount of the elective share apportioned to that person, the amount not reasonably recoverable shall, with the approval of the clerk, be apportioned among the other persons who are subject to apportionment. The apportionment shall be made in the proportion that the value of the interest of each remaining person bears to the total value of the interests of all remaining persons.

(a1) Apportionment. – The personal representative shall apportion the liability to the surviving spouse for the amount of the elective share among all responsible persons as follows:

- (1) The net value of each nonspousal asset shall be determined by calculating the value of the nonspousal asset under G.S. 30-3.3A and reducing such value by that portion of the claims (including year's allowances to persons other than the surviving spouse) payable out of, charged against, or otherwise properly allocable to the nonspousal asset.
- (2) Using the net value of each nonspousal asset as determined under subdivision (1) of this subsection, the personal representative shall determine each responsible person's liability to the surviving spouse by multiplying the amount of the elective share by a fraction, the numerator of which is the net value of the responsible person's nonspousal assets and the denominator of which is the net value of all of the nonspousal assets.

(a2) Recovery From Responsible Persons. – In recovering assets from responsible persons, the following rules apply:

- (1) To the extent the personal representative is a responsible person, the personal representative shall satisfy its liability to the surviving spouse out of its nonspousal assets according to the following order of priority:
  - a. The personal representative shall satisfy its liability out of the net value of the nonspousal assets passing by intestate succession by allocating the liability proportionately among each intestate heir based on the fraction of the net value of the nonspousal assets passing by intestate succession that each intestate heir is entitled to receive.
  - b. If the net value of the nonspousal assets passing by intestate succession is not sufficient to satisfy the personal representative's liability in full, the personal representative shall satisfy its remaining liability out of the net value of the nonspousal assets passing as part of the decedent's residuary estate by allocating the liability proportionately among each beneficiary of the decedent's residuary estate based on the fraction of the net value of the nonspousal assets passing as part of the decedent's residuary estate that each residuary beneficiary is entitled to receive.
  - c. If the net value of the nonspousal assets in the residuary estate is not sufficient to satisfy the personal representative's liability in full, the personal representative shall satisfy its remaining liability by allocating the remaining liability proportionately among each other beneficiary of the decedent's will based on the fraction of the net value of the remaining nonspousal assets each other beneficiary is entitled to receive.
- (2) The personal representative shall recover from each other responsible person the responsible person's liability to the surviving spouse.
- (3) Each responsible person, including the personal representative in its capacity as a responsible person, may elect to satisfy its liability in full by any of the following methods:
  - a. Conveyance of that portion of the responsible person's nonspousal assets (or identical substitute assets), valued on the date of conveyance, sufficient to satisfy the responsible person's liability; or, if the value of the responsible person's nonspousal assets on the date of conveyance is less than the responsible person's liability, conveyance of all of the responsible person's nonspousal assets (or identical substitute assets).
  - b. Payment of the liability in cash.
  - c. Payment of the liability in other property upon written agreement of the surviving spouse at values agreed by the surviving spouse for purposes of determining the extent of the liability satisfied.
  - d. Any combination of the payment methods set forth under sub-subdivision a. through d. of this subdivision, provided that the total value of assets conveyed by the responsible person equals such responsible person's liability.

(a3) Inability or Refusal to Pay. – The personal representative shall be entitled to petition the clerk of court for an order requiring any responsible person to satisfy its liability. Upon refusal of a responsible person to obey such an order, the personal representative shall be entitled to a judgment against such responsible person in the amount of the liability and to any other remedies the clerk deems appropriate. Although the responsible person shall remain

primarily liable for such responsible person's liability for the elective share, the following rules apply:

- (1) If the responsible person makes a gratuitous transfer, whether inter vivos or by testate or intestate succession, of all or any part of the responsible person's nonspousal assets or the proceeds thereof after the decedent's death, then the gratuitous transferee shall be liable for the amount transferred, and the personal representative shall be entitled to recover that amount from the transferee as if the transferee were the responsible person.
- (2) If the responsible person is a fiduciary and makes a distribution of all or any part of the responsible person's nonspousal assets or the proceeds thereof after the decedent's death, then the distributee shall be liable for the amount transferred, and the personal representative shall be entitled to recover that amount from the distributee as if the distributee were the responsible person.

If, after exhausting all other remedies in this section, the personal representative cannot reasonably recover a responsible person's liability, then, with the approval of the clerk, the defaulting responsible person's liability shall be apportioned on a pro rata basis among the responsible persons who have not defaulted. Each nondefaulting other responsible person shall be liable for the amount of the liability apportioned to it in the same manner and to the same extent as its original liability for the elective share; provided, that each responsible person's liability shall not exceed the responsible person's proportionate share of the value of the nonspousal assets based on the values used in determining Total Net Assets. Each nondefaulting other responsible person shall be entitled to a proportionate share of any judgment against or subsequent recovery of the liability from the defaulting responsible person.

(b) Standstill Order. – After the filing of the petition demanding an elective share, either the personal representative or surviving spouse the personal representative, surviving spouse, or any responsible person may request the clerk to issue an order that any recipients responsible person not dispose of any all or a portion of the decedent's Total Net Assets or the proceeds thereof pending the hearing payment of the elective share. The decision to issue such an order shall be in the discretion of the clerk. A person who violates the standstill order may be held in civil contempt of court pursuant to Article 5A of Chapter 2 of the General Statutes. The clerk shall enter an order terminating the standstill order upon the clerk's determination that the standstill order is no longer necessary or desirable.

(c) Satisfaction of Liability. — A person receiving or in possession of any of the decedent's Total Net Assets may pay his proportionate elective share liability with respect to that property by any of the following methods:

- (1) Conveyance of the property included in the decedent's Total Net Assets;
- (2) Payment of the value of his liability in cash or, upon agreement of the surviving spouse, other property; or
- (3) Partial conveyance and partial payment under subdivisions (1) and (2) of this subsection, provided the value conveyed and paid is equal to his liability.

(d) Expenses. — The expenses reasonably incurred by the personal representative in connection with the appraisal or recovery of assets shall be apportioned as provided for the elective share under this Article. If the personal representative finds that it is inequitable to apportion the expenses because those expenses were incurred because of the fault of one or more persons subject to apportionment, the personal representative may direct other more equitable apportionment, with the approval of the clerk.

(e) Bond. – If property held by the personal representative is distributed If a responsible person distributes or disposes of nonspousal assets prior to final apportionment of the elective share, share and expenses, the personal representative may require the distributee responsible person or the transferee to provide a bond or other security for the apportionment responsible

person's liability for payment of the elective share and apportioned expenses in the form and amount prescribed by the personal representative, with the approval of the clerk.

**"§ 30-3.6. Waiver of rights.**

(a) The right of a surviving spouse to claim an elective share may be waived, wholly or partially, before or after marriage, with or without consideration, by a written waiver signed by the surviving ~~spouse-spouse~~, by the surviving spouse's attorney-in-fact if the surviving spouse's power of attorney expressly authorizes the attorney-in-fact to do so or to generally engage in estate transactions, or, with approval of court, by the guardian of the surviving spouse's estate or general guardian.

(b) A waiver is not enforceable if the surviving spouse proves that:

- (1) The waiver was not executed voluntarily; or
- (2) The surviving spouse or the surviving spouse's representative making the waiver was not provided a fair and reasonable disclosure of the property and financial obligations of the decedent, unless the surviving spouse waived, in writing, the right to that disclosure.

(c) A written waiver that would have been effective to waive a spouse's right to dissent in estates of decedents dying on or before December 31, 2000, under Article 1 of Chapter 30 of the General Statutes is effective to waive that spouse's right of elective share under this Article for estates of decedents dying on or after January 1, 2001."

**SECTION 2.** This act is effective when it becomes law and applies to decedents dying on or after October 1, 2009.

In the General Assembly read three times and ratified this the 16<sup>th</sup> day of July, 2009.

s/ Walter H. Dalton  
President of the Senate

s/ Joe Hackney  
Speaker of the House of Representatives

s/ Beverly E. Perdue  
Governor

Approved 9:39 a.m. this 27<sup>th</sup> day of July, 2009