

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

H

2

HOUSE BILL 765
Committee Substitute Favorable 4/8/09

Short Title: Revise Elective Share Statutes.

(Public)

Sponsors:

Referred to:

March 25, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO REVISE THE EXISTING ELECTIVE SHARE STATUTES.
3 The General Assembly of North Carolina enacts:

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

5 "Article 1A.

6 "Elective Share.

7 **"§ 30-3.1. Right of elective share.**

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

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

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

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

35 **"§ 30-3.2. Definitions.**

36 The following definitions apply in this Article:



- 1 (1) ~~"Code" means the Code.~~ – The Internal Revenue Code in effect at the time
2 of the decedent's death.
- 3 (1a) Claims. – Includes liabilities of the decedent whether arising in contract, in
4 tort, or otherwise, and liabilities of the decedent's estate which arise at or
5 after the death of the decedent, including funeral and administrative
6 expenses, except for:
- 7 a. A claim for equitable distribution of property pursuant to G.S. 50-20
8 awarded subsequent to the death of the decedent.
- 9 b. Death taxes, except for those death taxes attributable to Property
10 Passing to the Surviving Spouse. "Death taxes attributable to
11 Property Passing to the Surviving Spouse" equals the amount of
12 decedent's death taxes as finally determined, less the amount such
13 death taxes would have been if all Property Passing to the Surviving
14 Spouse had qualified for the federal estate tax marital deduction
15 pursuant to section 2056 of the Code or had qualified for a similar
16 provision under the laws of another applicable taxing jurisdiction.
- 17 c. A claim founded on a promise or agreement of the decedent, to the
18 extent such claim is not arm's length or is not supported by full or
19 adequate consideration in money or money's worth.
- 20 (2) ~~"Death taxes" means any Death taxes.~~ – Any estate, inheritance, succession,
21 and similar taxes imposed by any taxing authority, reduced by any
22 applicable credits against those taxes.
- 23 (2a) General power of appointment. – Any power of appointment, including a
24 power to designate the beneficiary of a beneficiary designation, exercisable
25 by the decedent, regardless of the decedent's capacity to exercise such
26 power, in favor of the decedent, the decedent's estate, the decedent's
27 creditors, or the creditors of the decedent's estate, except for (i) powers
28 limited by an "ascertainable standard" as defined in G.S. 36C-1-103 and (ii)
29 powers which are not exercisable by the decedent except in conjunction with
30 a person who created the power or has a substantial interest in the property
31 subject to the power and whose interest is adverse to the exercise of the
32 power in favor of the decedent, the decedent's estate, the decedent's
33 creditors, or the creditors of the decedent's estate. In no event shall a power
34 held by the decedent as attorney-in-fact under a power of attorney be
35 considered a general power of appointment.
- 36 (2b) Net Property Passing to Surviving Spouse. – The Property Passing to
37 Surviving Spouse reduced by (i) death taxes attributable to Property Passing
38 to the Surviving Spouse, (ii) any expenses described in G.S. 30-3.4(h) that
39 are a charge against or are apportioned to the surviving spouse with respect
40 to property included in Property Passing to Surviving Spouse, and (iii)
41 claims satisfied out of property included in Property Passing to the Surviving
42 Spouse.
- 43 (2c) Lineal descendant. – Defined in G.S. 29-2.
- 44 (3) ~~"Nonadverse trustee" means:~~ Nonadverse trustee. – Any of the following:
- 45 a. Any person who does not possess a substantial beneficial interest in
46 the trust that would be adversely affected by the exercise or
47 nonexercise of the power that the individual trustee possesses
48 respecting the trust;
- 49 b. Any person subject to a power of removal by the surviving spouse
50 with or without cause; or

1 c. Any company authorized to engage in trust business under the laws
2 of this State, or that otherwise meets the requirements to engage in
3 trust business under the laws of this State.

4 (3a) Nonspousal assets. – All property included in total assets other than the
5 property included in Property Passing to Surviving Spouse. The value of
6 nonspousal assets shall be their net values used in determining Total Net
7 Assets.

8 (3b) Presently exercisable general power of appointment. – A general power of
9 appointment which is exercisable at the time in question. A testamentary
10 general power of appointment is not presently exercisable.

11 (3c) Property Passing to Surviving Spouse. – The sum of the values, as valued
12 pursuant to G.S. 30-3.3A, of the following:

13 a. Property (i) devised, outright or in trust, by the decedent to the
14 surviving spouse or (ii) that passes, outright or in trust, to the
15 surviving spouse by intestacy, beneficiary designation, the exercise
16 or failure to exercise the decedent's testamentary general power of
17 appointment or the decedent's testamentary limited power of
18 appointment, operation of law, or otherwise by reason of the
19 decedent's death, excluding any benefits under the federal social
20 security system.

21 b. Any year's allowance awarded to the surviving spouse.

22 c. Property renounced by the surviving spouse.

23 d. The surviving spouse's interest in any life insurance proceeds on the
24 life of the decedent.

25 e. Any interest in property, outright or in trust, transferred from the
26 decedent to the surviving spouse during the lifetime of the decedent
27 for which the surviving spouse signs a statement acknowledging such
28 a gift. For purposes of this sub-subdivision, any gift to the surviving
29 spouse by the decedent of the decedent's interest in any property held
30 by the decedent and the surviving spouse as tenants by the entirety or
31 as joint tenants with right of survivorship shall be deemed to be a gift
32 of one-half of the entire interest in property so held by the decedent
33 and the surviving spouse.

34 f. Property awarded to the surviving spouse, subsequent to the death of
35 the decedent, pursuant to an equitable distribution claim under
36 G.S. 50-20.

37 g. Property held in a spousal trust described in G.S. 30-3.3A(e)(1).

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

41 (3d) Responsible person. – A person or entity other than the surviving spouse that
42 received, held, or controlled property constituting nonspousal assets on the
43 date used to determine the value of the property.

44 (3e) Responsible person's nonspousal assets. – The nonspousal assets received,
45 held, or controlled by a responsible person.

46 (3f) Total assets. – The sum of the values, as determined pursuant to
47 G.S. 30-3.3A, of the following:

48 a. The decedent's property that would pass by intestate succession if the
49 decedent died without a will, other than wrongful death proceeds;

50 b. Property over which the decedent, immediately before death, held a
51 presently exercisable general power of appointment, except for (i)

1 property held jointly with right of survivorship, which is includable
2 in total assets only to the extent provided in sub-subdivision c. of this
3 subdivision and (ii) life insurance, which is includable in Total
4 Assets only to the extent provided in sub-subdivision d. of this
5 subdivision. Includes, without limitation:

- 6 1. Property held in a trust that the decedent could revoke.
- 7 2. Property held in a trust to the extent that the decedent had an
8 unrestricted power to withdraw the property.
- 9 3. Property held in a depository account owned by the decedent
10 in a financial institution payable or transferable at decedent's
11 death to a beneficiary designated by the decedent.
- 12 4. Securities owned by the decedent in an account or in
13 certificated form that are payable or transferable at decedent's
14 death to a beneficiary designated by the decedent.

15 c. Property held as tenants by the entirety or jointly with rights of
16 survivorship as follows:

- 17 1. One-half of any property held by the decedent and the
18 surviving spouse as tenants by the entirety or as joint tenants
19 with rights of survivorship is included, without regard to who
20 contributed the property.
- 21 2. Property held by the decedent and one or more other persons
22 other than the surviving spouse as joint tenants with rights of
23 survivorship is included to the following extent:
 - 24 I. All property attributable to the decedent's
25 contribution.
 - 26 II. The decedent's pro rata share of property not
27 attributable to the decedent's contribution, except to
28 the extent of property attributable to contributions by
29 a surviving joint tenant.

30 The decedent is presumed to have contributed the jointly
31 owned property unless contribution by another is proven by
32 clear and convincing evidence.

33 d. Benefits payable by reason of the decedent's death under any policy,
34 plan, contract, or other arrangement, either owned by the decedent or
35 over which the decedent had a general power of appointment or had
36 the power to designate the surviving spouse as beneficiary, including,
37 without limitation:

- 38 1. Insurance on the life of the decedent.
- 39 2. Accidental death benefits.
- 40 3. Annuities.
- 41 4. Employee benefits or similar arrangements.
- 42 5. Individual retirement accounts.
- 43 6. Pension or profit-sharing plans.
- 44 7. Deferred compensation.
- 45 8. Any private or governmental retirement plan.

46 e. Property irrevocably transferred by the decedent to the extent the
47 decedent retained the possession or enjoyment of, or the right to
48 income from, the property for life or for any period not ascertainable
49 without reference to the decedent's death or for any period which
50 does not in fact end before the decedent's death, except:

- 51 1. Property transferred for full and adequate consideration.

- 1 2. Transfers to which the surviving spouse consented in writing
 2 by signing a deed, an income or gift tax return that reports the
 3 gift, or other writing.
 4 3. Transfers which became irrevocable before the decedent's
 5 marriage to the surviving spouse.
 6 The property included in total assets is that fraction of the transferred
 7 property to which the decedent retained the right.
 8 f. Property transferred by the decedent to the extent the decedent
 9 created a power over the property or the income from the property,
 10 which, immediately prior to death, could be exercised by the
 11 decedent in conjunction with any other person, or which could be
 12 exercised by a person who does not have a substantial interest that
 13 would be adversely affected by the exercise or nonexercise of the
 14 power, for the benefit of the decedent, the decedent's estate, the
 15 decedent's creditors, or the creditors of the decedent's estate, except:
 16 1. Property transferred for full and adequate consideration.
 17 2. Transfers to which the surviving spouse consented in writing
 18 by signing a deed, an income or gift tax return that reports the
 19 gift, or other writing.
 20 3. Transfers which became irrevocable before the decedent's
 21 marriage to the surviving spouse.
 22 The property included in total assets with respect to a power over
 23 property is that fraction of the property to which the power related.
 24 g. Property transferred by the decedent to persons other than the
 25 surviving spouse if such transfer was made both during the one-year
 26 period immediately preceding the decedent's death and during the
 27 decedent's marriage to the surviving spouse, except:
 28 1. Property transferred for full and adequate consideration.
 29 2. Transfers to which the surviving spouse consented in writing
 30 by signing a deed, an income or gift tax return that reports
 31 such gift, or other writing.
 32 3. That part of any property transferred to any one transferee
 33 that qualified for exclusion from gift tax under section 2503
 34 of the Code.
 35 For purposes of this sub-subdivision, the termination of a right or
 36 interest in, or power over, property that would have been included in
 37 the total assets under sub-subdivisions b., e., or f. if the right, interest,
 38 or power had not terminated until the decedent's death shall be
 39 deemed to be a transfer of such property. Termination occurs when,
 40 with respect to a right or interest in property, the decedent transfers
 41 or relinquishes the right or interest; with respect to a power over
 42 property, the power terminates by exercise or release, but not by
 43 lapse or default.
 44 If property falls under more than one sub-subdivision of this subdivision,
 45 then the property shall be included only once, but under the sub-subdivision
 46 yielding the greatest value of the property.
 47 (4) ~~"Total Net Assets" means, after the payment or provision for payment of the~~
 48 ~~decedent's funeral expenses, year's allowances to persons other than to the~~
 49 ~~surviving spouse, debts, claims other than an equitable distribution of~~
 50 ~~property awarded to the surviving spouse pursuant to G.S. 50-20 subsequent~~

1 to the death of the decedent, and administration expenses, the sum of the
2 following:

- 3 a. ~~All property to which the decedent had legal and equitable title~~
4 ~~immediately prior to death;~~
- 5 b. ~~All property received by the decedent's personal representative by~~
6 ~~reason of the decedent's death, other than wrongful death proceeds;~~
- 7 c. ~~One half of the value of any property held by the decedent and the~~
8 ~~surviving spouse as tenants by the entirety, or as joint tenants with~~
9 ~~rights of survivorship;~~
- 10 d. ~~The entire value of any interest in property held by the decedent and~~
11 ~~another person, other than the surviving spouse, as joint tenants with~~
12 ~~right of survivorship, except to the extent that contribution can be~~
13 ~~proven by clear and convincing evidence;~~
- 14 e. ~~The value of any property which would be included in the taxable~~
15 ~~estate of the decedent pursuant to sections 2033, 2035, 2036, 2037,~~
16 ~~2038, 2039, or 2040 of the Code.~~
- 17 f. ~~Any gifts of property made by the decedent to donees other than the~~
18 ~~surviving spouse within six months of the decedent's death,~~
19 ~~excluding:~~
- 20 1. ~~Any gifts within the annual exclusion provisions of section~~
21 ~~2503 of the Code;~~
- 22 2. ~~Any gifts to which the surviving spouse consented. A signing~~
23 ~~of a deed, or income or gift tax return reporting such gift shall~~
24 ~~be considered consent; and~~
- 25 3. ~~Any gifts made prior to marriage;~~
- 26 g. ~~Any proceeds of any individual retirement account, pension or~~
27 ~~profit sharing plan, or any private or governmental retirement plan or~~
28 ~~annuity of which the decedent controlled the designation of~~
29 ~~beneficiary, excluding any benefits under the federal social security~~
30 ~~system;~~
- 31 h. ~~Any other Property Passing to Surviving Spouse under G.S. 30-3.3;~~
32 ~~and~~
- 33 i. ~~In case of overlapping application of the same property under more~~
34 ~~than one provision, the property shall be included only once under~~
35 ~~the provision yielding the greatest value."~~

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

38 **"§ 30-3.3. Property passing to surviving spouse.**

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

- 41 (1) ~~One half of the value of any interest in property held by the decedent and the~~
42 ~~surviving spouse as tenants by the entirety or as joint tenants with rights of~~
43 ~~survivorship;~~
- 44 (2) ~~The value of any interest in property (outright or in trust, including any~~
45 ~~interest subject to a general power of appointment held by the surviving~~
46 ~~spouse, as defined in section 2041 of the Code) devised by the decedent to~~
47 ~~the surviving spouse, or which passes to the surviving spouse by intestacy,~~
48 ~~or by beneficiary designation, or by exercise of or in default of the exercise~~
49 ~~of the decedent's testamentary general or limited power of appointment, or~~
50 ~~by operation of law or otherwise by reason of the decedent's death,~~
51 ~~excluding any benefits under the federal social security system;~~

- 1 (3) Any year's allowance awarded to the surviving spouse;
2 (4) The value of any property renounced by the surviving spouse;
3 (5) The value of the surviving spouse's interest, outright or in trust, in any life
4 insurance proceeds on the life of the decedent;
5 (6) The value of any interest in property, outright or in trust, transferred from
6 the decedent to the surviving spouse during the lifetime of decedent for
7 which (i) a gift tax return is timely filed reporting such gift, or (ii) the
8 surviving spouse signs a statement acknowledging such a gift. For purposes
9 of this subdivision, any gift to the surviving spouse by the decedent of the
10 decedent's interest in any property held by the decedent and the surviving
11 spouse as tenants by the entirety or as joint tenants with right of survivorship
12 shall be valued at one half of the entire value of that interest in property at
13 the time the gift is made;
14 (7) Notwithstanding any other provision of law related to valuing a partial
15 interest in property, the entire fair market value of any property held in trust
16 for the exclusive benefit of the surviving spouse during the surviving
17 spouse's lifetime, if the terms of the trust meet the following requirements:
18 a. During the lifetime of the surviving spouse, the trust is controlled by
19 one or more Nonadverse Trustees;
20 b. The trustee is required to distribute to or for the benefit of the
21 surviving spouse either (i) the entire net income of the trust at least
22 annually; or (ii) the income of the trust in such amounts and at such
23 times as the trustee, in its discretion, determines necessary for the
24 health, maintenance, and support of the surviving spouse;
25 c. The trustee is required to distribute to or for the benefit of the
26 surviving spouse out of the principal of the trust such amounts and at
27 such times as the trustee, in its discretion, determines necessary for
28 the health, maintenance, and support of the surviving spouse; and
29 In exercising discretion, the trustee may be authorized or required to take
30 into consideration all other income, assets, and other means of support as are
31 available to the surviving spouse; and
32 (8) The net value of the marital estate awarded to the surviving spouse pursuant
33 to G.S. 50-20 subsequent to the death of the decedent.

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

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

40 **§ 30-3.3A. Valuation of property.**

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

1 or that the value on the date of death is less than on the original date of transfer, then the lesser
2 value shall be used.

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

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

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

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

28 (1) The value of the beneficial interest of a spouse shall be the entire fair market
29 value of any property held in trust if the decedent was the settlor of the trust,
30 if the trust is held for the exclusive benefit of the surviving spouse during the
31 surviving spouse's lifetime, and if the terms of the trust meet the following
32 requirements:

33 a. During the lifetime of the surviving spouse, the trust is controlled by
34 one or more nonadverse trustees.

35 b. The trustee shall distribute to or for the benefit of the surviving
36 spouse either (i) the entire net income of the trust at least annually or
37 (ii) the income of the trust in such amounts and at such times as the
38 trustee, in its discretion, determines necessary for the health,
39 maintenance, and support of the surviving spouse.

40 c. The trustee shall distribute to or for the benefit of the surviving
41 spouse out of the principal of the trust such amounts and at such
42 times as the trustee, in its discretion, determines necessary for the
43 health, maintenance, and support of the surviving spouse.

44 d. In exercising discretion, the trustee may be authorized or required to
45 take into consideration all other income assets and other means of
46 support available to the surviving spouse.

47 (2) To the extent that the partial or contingent interest is dependent upon the
48 occurrence of any contingency that is not subject to the control of the
49 surviving spouse and that is not subject to valuation by reference to the
50 mortality and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the
51 contingency will be conclusively presumed to result in the lowest possible

1 value passing to the surviving spouse. However, a life estate or income
2 interest that will terminate upon the surviving spouse's death or remarriage
3 will be valued without regard to the possibility of termination upon
4 remarriage.

5 (3) To the extent that the valuation of a partial or contingent interest is
6 dependent upon the life expectancy of the surviving spouse, that life
7 expectancy shall be conclusively presumed to be no less than 10 years,
8 regardless of the actual attained age of the surviving spouse at the decedent's
9 death.

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

12 (1) The value of property passing by intestacy described in G.S. 30-3.2(3f)a. and
13 Property Passing to Surviving Spouse, other than property held in a trust,
14 shall be established by the good faith agreement of the surviving spouse and
15 the personal representative, unless either (i) the surviving spouse is the
16 personal representative or (ii) the clerk determines that the personal
17 representative may not be able to represent the estate adversely to the
18 surviving spouse, in which cases the value of such property shall be
19 determined pursuant to subdivision (4) of this subsection.

20 (2) The value of property constituting an interest in a trust shall be established
21 by good faith agreement of the surviving spouse, the personal representative,
22 and the trustee, unless either (i) the surviving spouse is both the personal
23 representative and the trustee or (ii) the clerk determines that the trustee or
24 the personal representative may not be able to represent the trust or the
25 estate, respectively, adversely to the surviving spouse, in which cases the
26 value of such property shall be determined pursuant to subdivision (4) of this
27 subsection.

28 (3) The value of all other property shall be established by the good faith
29 agreement of the surviving spouse, the personal representative, and the
30 responsible person that received, held, or controlled such property on the
31 date used to determine the value of such property for purposes of
32 determining total assets, unless the clerk determines that valuation under
33 subdivision (4) of this subsection is more appropriate.

34 (4) If the value of any property is not established by agreement as provided
35 above, the parties may present evidence regarding value, which may include
36 expert testimony, and the clerk may appoint one or more qualified and
37 disinterested persons to help determine the value of such property. After
38 hearing, the clerk shall make a finding of fact of the value of each asset.

39 **"§ 30-3.4. Procedure for determining the elective share.**

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

48 (b) Time Limitations. – A claim for an elective share must be made within six months
49 after the issuance of letters testamentary or letters of administration in connection with the will
50 or intestate proceeding with respect to which the surviving spouse claims the elective share by
51 (i) filing a petition with the clerk of superior court of the county in which the primary

1 administration of the decedent's estate lies, and (ii) mailing or delivering a copy of that petition
2 to the personal representative of the decedent's estate. A surviving spouse's incapacity shall not
3 toll the six-month period of limitations.

4 (c) Time for Hearing. – Unless waived by the personal representative and the surviving
5 spouse, the clerk shall set the matter for hearing no earlier than two months and no later than
6 six months after the filing of the petition. However, the clerk may extend the time of hearing as
7 the clerk sees fit. The surviving spouse shall give notice of the hearing to the personal
8 representative, and to any person described in G.S. 30-3.5 who may be required to contribute
9 toward the satisfaction of the elective share.

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

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

18 ~~(1) Basic principles. — Each interest shall be valued at its fair market value,~~
19 ~~reduced by all liens, claims, or encumbrances against the interest. For~~
20 ~~interests passing at the decedent's death, valuation shall be as of the date of~~
21 ~~death, and for interests transferred during the decedent's lifetime, valuation~~
22 ~~shall be as of the date of transfer.~~

23 ~~(2) Valuation of partial and contingent interests in property. — The valuation of~~
24 ~~interests in property, outright or in trust, which are limited to commence or~~
25 ~~terminate upon the death of one or more persons, upon the expiration of a~~
26 ~~period of time, or upon the occurrence of one or more contingencies, shall be~~
27 ~~determined by computations based upon the mortuary and annuity tables set~~
28 ~~forth in G.S. 8-46 and G.S. 8-47, and upon the basis of six percent (6%) of~~
29 ~~the gross value of the underlying property in which those interests are~~
30 ~~limited. However, in valuing interests passing to the surviving spouse, the~~
31 ~~following special rules apply:~~

32 ~~a. An interest described in G.S. 30-3.3(a)(7) that shall be valued as if~~
33 ~~the underlying property or interest passed outright to the surviving~~
34 ~~spouse unencumbered by any trust;~~

35 ~~b. To the extent that the interest is dependent upon the occurrence of~~
36 ~~any contingency that is not subject to the control of the surviving~~
37 ~~spouse and that is not subject to valuation by reference to the~~
38 ~~mortuary and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the~~
39 ~~contingency will be conclusively presumed to result in the lowest~~
40 ~~possible value passing to the surviving spouse. However, a life estate~~
41 ~~or income interest that will terminate only upon the earlier of the~~
42 ~~surviving spouse's death or remarriage will be valued without regard~~
43 ~~to the possibility of termination upon remarriage; and~~

44 ~~e. To the extent that the valuation of an interest is dependent upon the~~
45 ~~life expectancy of the surviving spouse, that life expectancy shall be~~
46 ~~conclusively presumed to be no less than 10 years, regardless of the~~
47 ~~actual attained age of the surviving spouse at the decedent's death.~~

48 ~~(3) Determination of fair market value. — The fair market value of each asset~~
49 ~~comprising Total Net Assets shall be determined as follows:~~

50 ~~a. Probate assets and assets passing to spouse. — The value of each~~
51 ~~probate asset and Property Passing to Surviving Spouse, other than~~

1 assets held in trust, shall be established by the good faith agreement
2 of the surviving spouse and the personal representative, unless either
3 (i) the surviving spouse is the personal representative, or (ii) the clerk
4 determines that the personal representative may not be able to
5 represent the estate adversely to the surviving spouse.

6 b. ~~Trust assets.~~—The value of each trust asset shall be established by
7 good faith agreement of the surviving spouse and the trustee, unless
8 either (i) the surviving spouse is the trustee, or (ii) the clerk
9 determines that the trustee may not be able to represent the trust
10 adversely to the surviving spouse.

11 e. ~~Other assets.~~—The value of any other asset shall be established by
12 the good faith agreement of the surviving spouse and each person
13 described in G.S. 30-3.5 who may be required to contribute toward
14 the satisfaction of the elective share because of that person's interest
15 in the asset, unless the clerk determines that valuation under
16 sub-subdivision d. of this subdivision is more appropriate.

17 d. ~~Use of disinterested persons.~~—If the value of any asset is not
18 established by agreement, the clerk shall appoint one or more
19 qualified and disinterested persons to determine a value of each asset.
20 That determination of the value of an asset shall be final for the
21 exclusive purposes of this Article.

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

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

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

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

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

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

1 (g) Appeals. — Any party in interest may appeal from the decision of the clerk to the
2 superior court. If an appeal is taken from the decision of the clerk, that appeal shall have the
3 effect of staying the judgment and order of the clerk until the cause is heard and determined by
4 the superior court upon the appeal taken. Upon an appeal taken from the clerk to the superior
5 court, the judge may review the findings of fact by the clerk and may find the facts or take
6 other evidence, but the facts found by the judge shall be final and conclusive upon any appeal
7 to the Appellate Division.

8 (h) Expenses. — The expenses (including attorneys' fees) reasonably incurred by the
9 personal representative, other responsible persons, and the surviving spouse in connection with
10 elective share proceedings shall be equitably apportioned by the clerk of court in the clerk's
11 discretion among the personal representative, other responsible persons, and the surviving
12 spouse. Each responsible person shall pay its apportioned expenses to the personal
13 representative in cash.

14 **"§ 30-3.5. Recovery of assets by personal representative. Satisfaction of elective share.**

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

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

43 (a1) Apportionment. — The personal representative shall determine each responsible
44 person's liability to the surviving spouse by multiplying the value of the elective share by a
45 fraction, the numerator of which is the value of the responsible person's nonspousal assets and
46 the denominator of which is the total value of all of the nonspousal assets included in Total Net
47 Assets.

48 (a2) Recovery From Responsible Persons. — As a responsible person, the personal
49 representative shall satisfy its liability for payment of the elective share out of the decedent's
50 estate's nonspousal assets using first the nonspousal assets in the decedent's residuary estate. If
51 the nonspousal assets in the residuary estate are not sufficient, the personal representative shall

1 reduce each other responsible person's share of the nonspousal assets proportionately based on
2 the values used in determining the Total Net Assets. The personal representative shall recover
3 from each other responsible person the responsible person's liability for the payment of the
4 elective share. Each responsible person, including the decedent's personal representative, may
5 elect to satisfy its liability in full by any of the following methods:

6 (1) Conveyance of that portion of the responsible person's nonspousal assets (or
7 identical substitute assets), valued on the date of conveyance, sufficient to
8 satisfy the responsible person's liability; or, if the value of the responsible
9 person's nonspousal assets on the date of conveyance is less than the
10 responsible person's liability, conveyance of all of the responsible person's
11 nonspousal assets (or identical substitute assets).

12 (2) Payment of the liability in cash.

13 (3) Payment of the liability in other property upon written agreement of the
14 surviving spouse at values agreed by the surviving spouse for purposes of
15 determining the extent of the liability satisfied.

16 (4) Any combination of the payment methods set forth under subdivisions (2)
17 through (4) of this subsection, provided that the total value of assets
18 conveyed by the responsible person equals such responsible person's
19 liability.

20 (a3) Inability or Refusal to Pay. – The personal representative shall be entitled to petition
21 the clerk of court for an order requiring any responsible person to satisfy its liability. Upon
22 refusal of a responsible person to obey such an order, the personal representative shall be
23 entitled to a judgment against such responsible person in the amount of the liability and to any
24 other remedies the clerk deems appropriate. Although the responsible person shall remain
25 primarily liable for such responsible person's liability for the elective share, the following rules
26 apply:

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

33 (2) If the responsible person is a fiduciary and makes a distribution of all or any
34 part of the responsible person's nonspousal assets or the proceeds thereof
35 after the decedent's death, then the distributee shall be liable for the amount
36 transferred, and the personal representative shall be entitled to recover that
37 amount from the distributee as if the distributee were the responsible person.

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

48 (b) Standstill Order. – After the filing of the petition demanding an elective share, ~~either~~
49 ~~the personal representative or surviving spouse~~ the personal representative, surviving spouse, or
50 ~~any responsible person~~ may request the clerk to issue an order that any ~~recipients~~ responsible
51 person not dispose of ~~any~~ all or a portion of the decedent's Total Net Assets or the proceeds

1 ~~thereof pending the hearing, payment of the elective share. The decision to issue such an order~~
2 ~~shall be in the discretion of the clerk. A person who violates the standstill order may be held in~~
3 ~~civil contempt of court pursuant to Article 5A of Chapter 2 of the General Statutes. The clerk~~
4 ~~shall enter an order terminating the standstill order upon the clerk's determination that the~~
5 ~~standstill order is no longer necessary or desirable.~~

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

9 ~~(1) Conveyance of the property included in the decedent's Total Net Assets;~~

10 ~~(2) Payment of the value of his liability in cash or, upon agreement of the~~
11 ~~surviving spouse, other property; or~~

12 ~~(3) Partial conveyance and partial payment under subdivisions (1) and (2) of this~~
13 ~~subsection, provided the value conveyed and paid is equal to his liability.~~

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

20 ~~(e) Bond. — If property held by the personal representative is distributed~~
21 ~~share, share and expenses, the personal representative may require the distributee~~
22 ~~person or the transferee to provide a bond or other security for the apportionment~~
23 ~~person's liability for payment of the elective share and apportioned expenses in the form and~~
24 ~~amount prescribed by the personal representative, with the approval of the clerk.~~

25 **"§ 30-3.6. Waiver of rights.**

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

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

33 ~~(1) The waiver was not executed voluntarily; or~~

34 ~~(2) The surviving spouse or the surviving spouse's representative making the~~
35 ~~waiver was not provided a fair and reasonable disclosure of the property and~~
36 ~~financial obligations of the decedent, unless the surviving spouse waived, in~~
37 ~~writing, the right to that disclosure.~~

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

42 **SECTION 2.** This act is effective when it becomes law and applies to decedents
43 dying on or after October 1, 2009.
44