

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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HOUSE BILL 765

Short Title: Revise Elective Share Statutes.

(Public)

Sponsors: Representative Stam.

Referred to: Judiciary I.

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)~~, G.S. 30-3.2(13), less (ii) the value of
11 Net Property Passing to Surviving Spouse, as defined in ~~G.S. 30-3.3(a)~~, G.S. 30-3.2(5). The
12 applicable share 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) Claims. – Includes liabilities of the decedent whether arising in contract, in
2 tort, or otherwise, and liabilities of the decedent's estate which arise at or
3 after the death of the decedent, except for:
- 4 a. A claim for equitable distribution of property pursuant to G.S. 50-20
5 awarded subsequent to the death of the decedent.
- 6 b. Death Taxes, except for those Death Taxes attributable to Property
7 Passing to the Surviving Spouse. "Death Taxes attributable to
8 Property Passing to the Surviving Spouse" equals the amount of
9 decedent's Death Taxes as finally determined, less the amount such
10 Death Taxes would have been if all Property Passing to the Surviving
11 Spouse had qualified for the federal estate tax marital deduction
12 pursuant to section 2056 of the Code or had qualified for a similar
13 provision under the laws of another applicable taxing jurisdiction.
- 14 c. A claim founded on a promise or agreement of the decedent, to the
15 extent such claim is not arm's length or is not supported by full or
16 adequate consideration in money or money's worth.
- 17 (2) "Code" means the Code. – The Internal Revenue Code in effect at the time
18 of the decedent's death.
- 19 ~~(2)~~(3) "Death taxes" means any Death Taxes. – Any estate, inheritance, succession,
20 and similar taxes imposed by any taxing authority, reduced by any
21 applicable credits against those taxes.
- 22 (4) General Power of Appointment. – Any power of appointment, including a
23 power to designate the beneficiary of a beneficiary designation, exercisable
24 by the decedent, regardless of the decedent's capacity to exercise such
25 power, in favor of the decedent, the decedent's estate, the decedent's
26 creditors or the creditors of the decedent's estate, except for (i) powers
27 limited by an "ascertainable standard" as defined in G.S. 36C-1-103 and (ii)
28 powers which are not exercisable by the decedent except in conjunction with
29 a person who created the power or has a substantial interest in the property
30 subject to the power and whose interest is adverse to the exercise of the
31 power in favor of the decedent, the decedent's estate, the decedent's
32 creditors, or the creditors of the decedent's estate. In no event shall a power
33 held by the decedent as attorney-in-fact under a power of attorney be
34 considered a General Power of Appointment.
- 35 (5) Net Property Passing to Surviving Spouse. – The Property Passing to
36 Surviving Spouse reduced by (i) Death Taxes and any of the decedent's
37 funeral and administration expenses or any expenses described in
38 G.S. 30-3.4(h) that are a charge against or are apportioned to the surviving
39 spouse with respect to property included in Property Passing to Surviving
40 Spouse and (ii) Claims satisfied out of property included in Property Passing
41 to the Surviving Spouse.
- 42 (6) Lineal Descendant. – Defined in G.S. 29-2.
- 43 ~~(3)~~(7) "Nonadverse trustee" means: Nonadverse Trustee. – Any of the following:
- 44 a. Any person who does not possess a substantial beneficial interest in
45 the trust that would be adversely affected by the exercise or
46 nonexercise of the power that the individual trustee possesses
47 respecting the trust;
- 48 b. Any person subject to a power of removal by the surviving spouse
49 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 (8) Non-spousal Assets. – All property included in Total Net Assets other than
5 the property included in Net Property Passing to Surviving Spouse. The
6 value of Non-spousal Assets shall be their net values used in determining
7 Total Net Assets.

8 (9) 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 (10) Property Passing to Surviving Spouse. – The sum of the values, as valued
12 pursuant to G.S. 30-3.3, of the following:

13 a. Property described in the definition of Total Assets in
14 G.S. 30-3.2(13) (i) devised, outright or in trust, by the decedent to the
15 surviving spouse or (ii) that passes, outright or in trust, to the
16 surviving spouse by intestacy, beneficiary designation, the exercise
17 or failure to exercise the decedent's general or limited testamentary
18 power of appointment, operation of law, or otherwise by reason of
19 the 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. 30-3.3(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 (11) Responsible Person. – A person or entity other than the surviving spouse that
42 received, held, or controlled property constituting Non-spousal Assets on the
43 date used to determine the value of the property.

44 (12) Responsible Person's Non-spousal Assets. – The Non-spousal Assets
45 received, held, or controlled by a Responsible Person.

46 (13) Total Assets. – The sum of the values, as determined pursuant to
47 G.S. 30-3.3, 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
3 this 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 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 (14) Total Net Assets. – The Total Assets reduced by the decedent's funeral and
37 administration expenses, year's allowances to persons other than the
38 surviving spouse, and Claims.

39 **"§ 30-3.3. Property passing to surviving spouse. Valuation of property.**

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

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

1 by operation of law or otherwise by reason of the decedent's death,
2 excluding any benefits under the federal social security system;

3 (3) Any year's allowance awarded to the surviving spouse;

4 (4) The value of any property renounced by the surviving spouse;

5 (5) The value of the surviving spouse's interest, outright or in trust, in any life
6 insurance proceeds on the life of the decedent;

7 (6) The value of any interest in property, outright or in trust, transferred from
8 the decedent to the surviving spouse during the lifetime of decedent for
9 which (i) a gift tax return is timely filed reporting such gift, or (ii) the
10 surviving spouse signs a statement acknowledging such a gift. For purposes
11 of this subdivision, any gift to the surviving spouse by the decedent of the
12 decedent's interest in any property held by the decedent and the surviving
13 spouse as tenants by the entirety or as joint tenants with right of survivorship
14 shall be valued at one half of the entire value of that interest in property at
15 the time the gift is made;

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

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

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

27 c. The trustee is required to distribute to or for the benefit of the
28 surviving spouse out of the principal of the trust such amounts and at
29 such times as the trustee, in its discretion, determines necessary for
30 the health, maintenance, and support of the surviving spouse; and
31 In exercising discretion, the trustee may be authorized or required to take
32 into consideration all other income, assets, and other means of support as are
33 available to the surviving spouse; and

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

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

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

42 (a) Basic Principles.— Unless otherwise expressly stated to the contrary in this section,
43 the value of property shall be that property's fair market value, taking into consideration any
44 applicable discounts. The value shall be determined as of the date of death, except for (i)
45 property transferred to persons other than the surviving spouse described in G.S. 30-3.2(13)g,
46 and (ii) property transferred to the surviving spouse described in G.S. 30-3.2(10)e. that is not
47 held in trust, that is not life insurance, and that is not held as tenants by the entirety or some
48 other form of ownership that passes to the surviving spouse by reason of survivorship. The
49 value of gift property described in clauses (i) and (ii) shall be determined as the value on the
50 date of transfer; but if the donee proves to the satisfaction of the clerk that the value on the date
51 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 (c) Certain Powers of Appointment. – In valuing property over which the decedent held
6 a Presently Exercisable General Power of Appointment, the value includes only the property
7 subject to the power that passes at the decedent's death, whether by exercise, release, lapse,
8 default, or otherwise.

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

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

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

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

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

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

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

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

1 will be valued without regard to the possibility of termination upon
2 remarriage.

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

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

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

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

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

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

37 **"§ 30-3.4. Procedure for determining the elective share.**

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

46 (b) Time Limitations. – A claim for an elective share must be made within six months
47 after the issuance of letters testamentary or letters of administration in connection with the will
48 or intestate proceeding with respect to which the surviving spouse claims the elective share by
49 (i) filing a petition with the clerk of superior court of the county in which the primary
50 administration of the decedent's estate lies, and (ii) mailing or delivering a copy of that petition

1 to the personal representative of the decedent's estate. A surviving spouse's incapacity shall not
2 toll the six-month period of limitations.

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

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

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

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

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

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

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

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

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

49 a. ~~Probate assets and assets passing to spouse. — The value of each~~
50 ~~probate asset and Property Passing to Surviving Spouse, other than~~
51 ~~assets held in trust, shall be established by the good faith agreement~~

1 of the surviving spouse and the personal representative, unless either
2 (i) the surviving spouse is the personal representative, or (ii) the clerk
3 determines that the personal representative may not be able to
4 represent the estate adversely to the surviving spouse.

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

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

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

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

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

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

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

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

45 ~~(f)(g)~~ Findings and Conclusions. – After notice and hearing, the clerk shall determine
46 whether or not the surviving spouse is entitled to an elective share, and if so, the clerk shall
47 then determine the elective share and shall order the personal representative to transfer that
48 amount to the surviving spouse. The clerk's order shall recite specific findings of fact and
49 conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving
50 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
10 with elective share proceedings shall be equitably apportioned by the clerk of court in the
11 clerk's discretion among the personal representative, other Responsible Persons, and the
12 surviving 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 (a) 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 Non-spousal Assets
46 and the denominator of which is the total value of all of the Non-spousal Assets included in
47 Total Net Assets.

48 (b) 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 Non-spousal Assets using first the Non-spousal Assets in the decedent's residuary
51 estate. If the Non-spousal Assets in the residuary estate are not sufficient, the personal

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

- 7 (1) Conveyance of all of the Responsible Person's Non-spousal Assets (or
8 identical substitute assets), regardless of the value of such Non-spousal
9 Assets on the date of conveyance.
- 10 (2) Conveyance of a portion of the Responsible Person's Non-spousal Assets,
11 valuing such Non-spousal Assets for purposes of determining the extent of
12 the liability satisfied at the value on the date of conveyance.
- 13 (3) Payment of the liability in cash.
- 14 (4) Payment of the liability in other property upon written agreement of the
15 surviving spouse at values agreed by the surviving spouse for purposes of
16 determining the extent of the liability satisfied.
- 17 (5) Any combination of the payment methods set forth under subdivisions (2)
18 through (4) of this subsection, provided that the total value of assets
19 conveyed by the Responsible Person equals such Responsible Person's
20 liability.

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

- 28 (1) If the Responsible Person makes a gratuitous transfer, whether inter vivos or
29 by testate or intestate succession, of all or any part of the Responsible
30 Person's Non-spousal Assets or the proceeds thereof after the decedent's
31 death, then the gratuitous transferee shall be liable for the amount
32 transferred, and the personal representative shall be entitled to recover that
33 amount from the transferee as if the transferee were the Responsible Person.
- 34 (2) If the Responsible Person is a fiduciary and makes a distribution of all or any
35 part of the Responsible Person's Non-spousal Assets or the proceeds thereof
36 after the decedent's death, then the distributee shall be liable for the amount
37 transferred, and the personal representative shall be entitled to recover that
38 amount from the distributee as if the distributee were the Responsible
39 Person.

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

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

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

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

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

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

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

24 ~~(e)~~ Bond. – If property held by the personal representative is distributed ~~If a~~
25 Responsible Person distributes or disposes of Non-spousal Assets prior to final apportionment
26 of the elective share, ~~share and expenses~~, the personal representative may require the
27 distributee ~~Responsible Person or the transferee~~ to provide a bond or other security for the
28 apportionment ~~Responsible Person's liability for payment of the elective share and apportioned~~
29 expenses in the form and amount prescribed by the personal representative, with the approval
30 of the clerk.

31 "§ 30-3.6. Waiver of rights.

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

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

39 (1) The waiver was not executed voluntarily; or

40 (2) The surviving spouse or the surviving spouse's representative making the
41 waiver was not provided a fair and reasonable disclosure of the property and
42 financial obligations of the decedent, unless the surviving spouse waived, in
43 writing, the right to that disclosure.

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

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