

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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HOUSE BILL 807
Committee Substitute Favorable 4/23/03

Short Title: Elective Share Amendments.

(Public)

Sponsors:

Referred to:

March 31, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY CERTAIN PROVISIONS OF THE LAW ESTABLISHING
THE ELECTIVE SHARE OF A DECEDENT'S SURVIVING SPOUSE AND TO
REPEAL THE RIGHT OF A SURVIVING SPOUSE TO ELECT A LIFE
INTEREST IN LIEU OF AN INTESTATE SHARE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 30-3.1 reads as rewritten:

"§ 30-3.1. Right of elective share.

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

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

(b) Reduction of Applicable Share. – In those cases in which the surviving spouse is a second or successive spouse, and the decedent has one or more lineal descendants surviving by a prior marriage but there are no lineal descendants surviving by the surviving spouse, the applicable share as determined in subsection (a) of this section shall be reduced by one-half.

(c) Death Taxes. – Death taxes shall be taken into account as a claim against the estate in determining Total Net Assets only to the extent that ~~such taxes are increased because~~ the assets received by the surviving spouse do not qualify for the federal estate

1 tax marital deduction pursuant to section 2056 of the Code or similar provisions under
2 the laws of any other applicable taxing jurisdiction. The amount of such claims shall
3 equal the difference between the amount of such death taxes as finally determined and
4 the amount such death taxes would have been if all assets received by the surviving
5 spouse had qualified for the federal estate tax marital deduction pursuant to section
6 2056 of the Code and similar provisions under the laws of any other applicable taxing
7 jurisdictions."

8 **SECTION 2.** G.S. 30-3.2 reads as rewritten:

9 **"§ 30-3.2. Definitions.**

10 The following definitions apply in this Article:

- 11 (1) "Code" means the Internal Revenue Code in effect at the time of the
12 decedent's death.
- 13 (2) "Death taxes" means any estate, inheritance, succession, and similar
14 taxes imposed by any taxing authority, reduced by any applicable
15 credits against those taxes.
- 16 (3) ~~"Nonadverse trustee" means a trustee who would be deemed~~
17 ~~nonadverse under section 672 of the Code.~~ means:
- 18 a. Any person who does not possess a substantial beneficial
19 interest in the trust that would be adversely affected by the
20 exercise or nonexercise of the power that the individual trustee
21 possesses respecting the trust;
- 22 b. Any person subject to a power of removal by the surviving
23 spouse with or without cause; or
- 24 c. Any company authorized to engage in trust business under the
25 laws of this State, or that otherwise meets the requirements to
26 engage in trust business under the laws of this State.
- 27 (4) "Total Net Assets" means, after the payment or provision for payment
28 of the decedent's funeral expenses, year's allowances to persons other
29 than to the surviving spouse, debts, claims other than an equitable
30 distribution of property awarded to the surviving spouse pursuant to
31 G.S. 50-20 subsequent to the death of the decedent, and administration
32 expenses, the sum of the following:
- 33 a. All property to which the decedent had legal and equitable title
34 immediately prior to death;
- 35 b. All property received by the decedent's personal representative
36 by reason of the decedent's death, other than wrongful death
37 proceeds;
- 38 c. One-half of the value of any property held by the decedent and
39 the surviving spouse as tenants by the entirety, or as joint
40 tenants with rights of survivorship;
- 41 d. The entire value of any interest in property held by the decedent
42 and another person, other than the surviving spouse, as joint
43 tenants with right of survivorship, except to the extent that
44 contribution can be proven by clear and convincing evidence;

- 1 e. The value of any property which would be included in the
2 taxable estate of the decedent pursuant to sections 2033, 2035,
3 2036, 2037, 2038, 2039, or 2040 of the Code.
- 4 f. Any ~~donative transfers~~ gifts of property made by the decedent to
5 donees other than the surviving spouse within six months of the
6 decedent's death, excluding:
- 7 1. Any gifts within the annual exclusion provisions of
8 section 2503 of the Code;
- 9 2. Any gifts to which the surviving spouse consented. A
10 signing of a deed, or income or gift tax return reporting
11 such gift shall be considered consent; and
- 12 3. Any gifts made prior to marriage;
- 13 g. Any proceeds of any individual retirement account, pension or
14 profit-sharing plan, or any private or governmental retirement
15 plan or annuity of which the decedent controlled the designation
16 of beneficiary, excluding any benefits under the federal social
17 security system;
- 18 h. Any other Property Passing to Surviving Spouse under G.S.
19 30-3.3; and
- 20 i. In case of overlapping application of the same property under
21 more than one provision, the property shall be included only
22 once under the provision yielding the greatest value."

23 **SECTION 3.** G.S. 30-3.3(a) reads as rewritten:

24 **"§ 30-3.3. Property Passing to Surviving Spouse.**

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

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

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

8 (7) The Notwithstanding any other provision of law related to valuing a
9 partial interest in property, the entire fair market value of any property
10 held in trust for the exclusive benefit of the surviving spouse during
11 the surviving spouse's lifetime, where the trust requires a Nonadverse
12 Trustee to utilize the principal and income of the trust for the support
13 and maintenance of the surviving spouse; and if the terms of the trust
14 meet the following requirements:

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

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

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

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

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

33 **SECTION 4.** G.S. 30-3.4 reads as rewritten:

34 **"§ 30-3.4. Procedure for determining the elective share.**

35 (a) **Exercisable Only During Lifetime.** – The right of the surviving spouse to file
36 a claim for an elective share must be exercised during the lifetime of the surviving
37 spouse, by the surviving spouse, the surviving spouse's agent under a power of attorney,
38 or the guardian of the surviving spouse's estate. If a surviving spouse dies before the
39 claim for an elective share has been settled, the surviving spouse's personal
40 representative shall succeed to the surviving spouse's rights to an elective share.

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

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

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

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

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

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

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

34 a. ~~To the extent that the interest is dependent upon the exercise of~~
35 ~~discretion by a fiduciary, the interest shall have no value unless~~
36 ~~the spouse is serving as that fiduciary and the power to~~
37 ~~distribute the trust property constitutes a general power of~~
38 ~~appointment held by the spouse, as defined in section 2041 of~~
39 ~~the Code or the fiduciary is a Nonadverse Trustee required to~~
40 ~~utilize the income and principal for the exclusive benefit of the~~
41 ~~surviving spouse during the surviving spouse's lifetime;~~An
42 interest described in G.S. 30-3.3(a)(7) that shall be valued as if
43 the underlying property or interest passed outright to the
44 surviving spouse unencumbered by any trust;

- 1 b. To the extent that the interest is dependent upon the occurrence
2 of any contingency that is not subject to the control of the
3 surviving spouse and that is not subject to valuation by
4 reference to the mortuary and annuity tables set forth in G.S.
5 8-46 and G.S. 8-47, the contingency will be conclusively
6 presumed to result in the lowest possible value passing to the
7 surviving spouse. However, a life estate or income interest that
8 will terminate only upon the earlier of the surviving spouse's
9 death or remarriage will be valued without regard to the
10 possibility of termination upon remarriage; and
- 11 c. To the extent that the valuation of an interest is dependent upon
12 the life expectancy of the surviving spouse, that life expectancy
13 shall be conclusively presumed to be no less than 10 years,
14 regardless of the actual attained age of the surviving spouse at
15 the decedent's death.
- 16 (3) Determination of fair market value. – The fair market value of each
17 asset comprising Total Net Assets shall be determined as follows:
- 18 a. Probate assets and assets passing to spouse. – The value of each
19 probate asset and Property Passing to Surviving Spouse, other
20 than assets held in trust, shall be established by the good faith
21 agreement of the surviving spouse and the personal
22 representative, unless either (i) the surviving spouse is the
23 personal representative, or (ii) the clerk determines that the
24 personal representative may not be able to represent the estate
25 adversely to the surviving spouse.
- 26 b. Trust assets. – The value of each trust asset shall be established
27 by good faith agreement of the surviving spouse and the trustee,
28 unless either (i) the surviving spouse is the trustee, or (ii) the
29 clerk determines that the trustee may not be able to represent
30 the trust adversely to the surviving spouse.
- 31 c. Other assets. – The value of any other asset shall be established
32 by the good faith agreement of the surviving spouse and each
33 person described in G.S. 30-3.5 who may be required to
34 contribute toward the satisfaction of the elective share because
35 of that person's interest in the asset, unless the clerk determines
36 that valuation under sub-subdivision d. of this subdivision is
37 more appropriate.
- 38 d. Use of disinterested persons. – If the value of any asset is not
39 established by agreement, the clerk shall appoint one or more
40 qualified and disinterested persons to determine a value of each
41 asset. That determination of the value of an asset shall be final
42 for the exclusive purposes of this Article.
- 43 (f) Findings and Conclusions. – After notice and hearing, the clerk shall
44 determine whether or not the surviving spouse is entitled to an elective share, and if so,

1 the clerk shall then determine the elective share and shall order the personal
2 representative to transfer that amount to the surviving spouse. The clerk's order shall
3 recite specific findings of fact and conclusions of law in arriving at the decedent's Total
4 Net Assets, Property Passing to Surviving Spouse, and the elective share.

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

12 **SECTION 5.** G.S. 30-3.6 is amended by adding a new subsection to read:

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

18 **SECTION 6.** Section 5 of this act is effective when it becomes law. The
19 remainder of this act becomes effective January 1, 2004, and applies to estates of
20 decedents dying on or after that date.