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THE UNMERRY WIDOW: SPOUSAL DISINHERITANCE AND LIFE INSURANCE IN NORTH CAROLINA*

JEFFREY S. KINSLER**

In spite of our nation's long-held public policy of protecting surviving spouses, some people purposely disinherit their spouses. For centuries, North Carolina more or less tolerated intentional spousal disinheritance. In 1959, in an effort to protect surviving spouses from deliberate disinheritance, North Carolina adopted a "right of dissent" statute that authorized a surviving spouse to renounce the decedent spouse's will and receive a statutorily prescribed share (ranging from one-sixth to one-half) of the decedent spouse's probate estate. Because the dissent statute was limited to the decedent spouse's probate estate, it was easily circumvented through the use of non-probate transfers. In 1969, the Uniform Probate Code ("UPC") proposed legislation designed to close the non-probate loophole by expanding the scope of the elective share to an "augmented estate" comprised of the decedent spouse's probate estate and most non-probate transfers made by the decedent spouse during life. In 1990, the UPC added life insurance proceeds payable to persons other than the surviving spouse to the augmented estate. In 2001, the North Carolina General Assembly adopted a version of the UPC's augmented estate. Prior to the effective date, however, the General Assembly made an ostensibly technical revision to its new elective share law. Although minor in appearance, the goal of the revision was major: the removal of life insurance proceeds payable to non-spousal beneficiaries from the scope of the elective share. The revision was likely completed due to lobbying by insurance companies, which have traditionally resisted elective share laws in other states. Despite the General Assembly's efforts to protect insurance companies, most life insurance proceeds payable to non-spousal beneficiaries are still included in the surviving spouse's elective share. While this inclusion promotes North Carolina's interest in protecting surviving spouses from

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total disinheritance, the State does not need to choose between protecting insurance companies and protecting surviving spouses. This Article proposes legislation that would allow the State to further its policy of protecting surviving spouses while simultaneously protecting insurance companies from additional liability.

INTRODUCTION	1871
I. SPOUSAL PROTECTION IN NORTH CAROLINA.....	1875
A. <i>Prior to 1784: Common Law Dower and Curtesy</i>	1877
B. <i>1784–1869: Statutory Dower</i>	1879
C. <i>1869–1959: Common Law Dower Reinstated</i>	1879
D. <i>1959–2000: Right of Dissent</i>	1880
1. <i>Circumvention of the Right of Dissent: Three</i> <i>Judicial Tests</i>	1881
2. <i>Uniform Probate Code</i>	1885
a. <i>1969 Version of the UPC</i>	1885
b. <i>Revised 1990 Version of the UPC</i>	1887
E. <i>2001–July 27, 2009: Elective Share</i>	1889
F. <i>July 27, 2009–Present</i>	1892
II. ARGUMENTS TO REBUT THE EXCLUSION OF INSURANCE FROM THE ELECTIVE SHARE.....	1892
A. <i>The Argument that Life Insurance Is Not Used to</i> <i>Disinherit</i>	1893
B. <i>The Argument that Insurance Companies Would Suffer</i> <i>Double Exposure</i>	1895
C. <i>The Argument that Deletion of Section 2042 Promotes</i> <i>the Purchase of Insurance</i>	1896
III. LIFE INSURANCE LOOPHOLE	1897
A. <i>Life Insurance Is Not Included in the Decedent’s Total</i> <i>Net Assets Under Sections 30-3.2(4)(a)–(d) or (f)–(i)</i>	1897
B. <i>Life Insurance is Included in the Decedent’s Taxable</i> <i>Estate Under Internal Revenue Code Sections 2035 and</i> <i>2038</i>	1899
IV. PROPOSED LEGISLATION.....	1906
A. <i>Proposed New Section 30-3.7 of the North Carolina</i> <i>General Statutes</i>	1906
CONCLUSION	1908

INTRODUCTION

This nation has a long-held policy of protecting the financial security of surviving spouses.¹ The traditional justification for this policy was to provide adequate support for the surviving spouse who might otherwise become a ward of the state.² In recent years, a second justification has emerged: marriage is an economic partnership in which each spouse contributes to the marital assets, and each deserves a portion thereof.³

In spite of such policy, some people purposely disinherit their spouses,⁴ and those inclined to do so will exploit any loophole to realize their objective.⁵ For this reason, nearly all separate property states have adopted elective share laws designed to prevent intentional spousal disinheritance,⁶ but the efficacy of such laws is

1. See, e.g., *In re Estate of McGee*, 988 So. 2d 1, 5–6 (Fla. Dist. Ct. App. 2007) (noting the “strong public policy” of protecting the surviving spouse (citing *Via v. Putnam*, 656 So. 2d 460, 461 (Fla. 1995))); *Shimp v. Huff*, 556 A.2d 252, 263 (Md. 1989) (highlighting the “strong public policy” of protecting surviving spouses); *Wasserman v. Schwartz*, 836 A.2d 828, 832 (N.J. Super. Ct. Law Div. 2001) (explaining that “public policy” underlies protection of surviving spouses).

2. See Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 549 (2008) (discussing two policies of the elective share statutes as the partnership theory of marriage and supporting the surviving spouse); Colby T. Roe, Comment, *Arkansas Marriage: A Partnership Between a Husband and Wife, or a Safety Net for Support?*, 61 ARK. L. REV. 735, 736 (2009) (“These are the two contrasting views of elective share: the support theory versus the economic-partnership theory.”).

3. See, e.g., Newman, *supra* note 2, at 549; Roe, *supra* note 2, at 736.

4. See, e.g., *Traub v. Zlatkiss*, 559 So. 2d 443, 444 (Fla. Dist. Ct. App. 1990) (finding that a transfer of assets to reduce the widow’s inheritance could not be set aside); *Newman v. Dore*, 9 N.E.2d 966, 967 (N.Y. 1937) (finding that the trust agreements served the function of “evading and circumventing the laws”); *In re Estate of Francis*, 327 N.C. 101, 104, 394 S.E.2d 150, 152 (1990) (finding that deposits in joint bank accounts should not be included in the net estate of the decedent); *Moore v. James*, 44 N.C. App. 578, 580, 261 S.E.2d 289, 290 (1980) (holding that trust assets were to be included in the estate’s net assets); *Barrett v. Barrett*, 894 A.2d 891, 893 (R.I. 2006) (concluding that a conveyance of real estate prior to death extinguishes a surviving spouse’s right to a life estate).

5. See *infra* Part I. Indeed, there are estate planners who cater to clients who desire to disinherit their spouses. See generally Ronald Z. Domsky, *‘Til Death do Us Part . . . After that My Dear, You’re on Your Own: A Practitioner’s Guide to Disinheriting a Spouse in Illinois*, 29 S. ILL. U. L.J. 207 (2005) (offering practical advice to estate practitioners in Illinois on how to help a client intentionally disinherit a spouse or family member).

6. See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, & ESTATES 425 n.1 (7th ed. 2005). All separate property states except Georgia have elective share laws. See *id.* Elective share statutes are unnecessary in community property states because marital assets are equalized during life. See John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse’s Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 306 (1987) (explaining that elective share statutes exist only in separate property states as a replacement for the spousal protection acquired during marriage in community property states).

contingent on the closure of all loopholes.⁷ An elective share statute with a single loophole is the equivalent of no statute at all, for in both instances a person predisposed to disinherit his or her spouse may do so with impunity.

For centuries, North Carolina—like most separate property states—more or less tolerated intentional spousal disinheritance. In 1959, North Carolina, in an effort to protect surviving spouses from deliberate disinheritance, adopted a “right of dissent” statute that authorized a surviving spouse to renounce the decedent spouse’s will and in lieu thereof elect to receive a statutorily prescribed share (ranging from one-sixth to one-half) of the decedent spouse’s “probate” estate.⁸ Because the dissent statute was limited to the decedent spouse’s probate estate, it was easily circumvented through the use of non-probate transfers, such as *inter vivos* trusts, joint tenancies, payable-on-death contracts, and life insurance.⁹ As a result, the right of dissent statute did very little to prevent intentional spousal disinheritance.

In 1969, the Uniform Probate Code (“UPC”) proposed legislation designed to close the non-probate loophole by expanding the scope of the elective share to an “augmented estate” comprised of the decedent spouse’s probate estate and most non-probate transfers made by the decedent spouse during life.¹⁰ In 1990, the UPC added life insurance proceeds payable to persons other than the surviving spouse to the augmented estate.¹¹ The objective of the augmented

7. See generally G. Michael Bridge, Note, *Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets within the Augmented Estate*, 74 CORNELL L. REV. 511 (1989) (arguing for closure of the life insurance loophole in the 1969 Uniform Probate Code). This Article proceeds on the assumption that all purposeful disinheritance should be opposed. Though this assumption is the subject of debate, that debate is the subject for another article.

8. An Act to Rewrite the Statutes on Dissent from Wills, ch. 880, 1959 N.C. Sess. Laws 896 (codified at N.C. GEN. STAT. § 30-1 (1999) (repealed 2000)); *Phillips v. Phillips*, 296 N.C. 590, 605, 252 S.E.2d 761, 770 (1979) (noting that that the purpose of the dissent statute was to protect surviving spouses).

9. See, e.g., *Phillips*, 296 N.C. at 605–06, 252 S.E.2d at 771 (“[T]he statute fails to foreclose the possibility of intentional disinheritance. A surviving spouse’s elective share under G.S. 30-3 [was] based on a percentage of the decedent’s ‘net estate.’ Because the net estate includes only probate assets, [a testator could effectively disinherit] his spouse by leaving his property to others through the use of will substitutes.”).

10. UNIF. PROBATE CODE § 2-202 (1969).

11. UNIF. PROBATE CODE § 2-205 (1990). Life insurance payable to the surviving spouse was included in the augmented estate under the 1969 version of the UPC. UNIF. PROBATE CODE § 2-202 (1969); see also Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 497 n.41 (2000) (calling on states to adopt a “deferred community property” system as an

estate is to prevent deliberate spousal disinheritance,¹² and it has functioned quite well in those jurisdictions implementing the UPC's approach.¹³

Effective January 1, 2001, the North Carolina General Assembly adopted a version of the UPC's augmented estate.¹⁴ Prior to the effective date, however, the General Assembly made an ostensibly technical revision to its new elective share law.¹⁵ Although minor in appearance, the goal of the revision was major: the removal of life insurance proceeds payable to non-spousal beneficiaries from the scope of the elective share.¹⁶ The revision was likely completed due to lobbying by insurance companies, which have traditionally resisted elective share laws in other states.¹⁷ Until now, legal commentators have assumed that the General Assembly successfully removed life insurance proceeds from North Carolina's elective share statute.¹⁸ This Article will demonstrate, however, that the General Assembly probably failed to achieve its goal as the statute includes life

alternative to traditional elective share laws); Daniel E. Martin, Comment, *Comparative Analysis Between the Uniform Probate Code and Michigan Elective Share Systems: The Time Is Ripe to Adopt the Augmented Estate Concept in Michigan*, 69 U. DET. MERCY L. REV. 381, 394 (1992) (comparing the UPC and Michigan law with regard to protection of surviving spouses and encouraging Michigan to adopt the UPC).

12. See, e.g., *In re Estate of Zimmerman*, 2001 N.D. 155, ¶ 12, 633 N.W.2d 594, 598 ("The purpose of the concept of augmenting the probate estate in computing the elective share is . . . to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share." (quoting N.D. CENT. CODE § 30.1-05-02 cmt. (2000))).

13. See *In re Ridgeway*, 877 S.W.2d 167, 170 (Mo. Ct. App. 1994) (explaining that life insurance premiums paid to a spouse are included in the augmented estate); *Felix-Aranibar v. Felix*, No. W26889, 2002 WL 1941025, at *1 (Va. Cir. Ct. Aug. 12, 2002) (holding that life insurance benefits are included in Virginia's augmented estate for the purpose of the surviving spouse's elective share); see also Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 61 n.99 (1994) (noting that UPC § 2-205 includes life insurance premiums in the elective share).

14. Act to Modify the Rights of a Decedent's Spouse, ch. 30, 2000 N.C. Sess. Laws 1174 (codified at N.C. GEN. STAT. § 30-3.1 (2007)), amended by An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.1)); see also Tracy Dawn Cobb, Comment, *North Carolina's New Elective Share Statute: Much Ado About Nothing?*, 36 WAKE FOREST L. REV. 795, 810 (2001) (noting that North Carolina adopted a variation of the UPC's augmented estate concept).

15. Act to Modify the Rights of a Decedent's Spouse, at 1174 (indicating that the General Assembly deleted section 2042 of the Internal Revenue Code from the definition of the decedent spouse's total net assets).

16. See Cobb, *supra* note 14, at 817-18 (explaining that the General Assembly deleted section 2042 of the Internal Revenue Code from the total net assets with the intent to remove life insurance proceeds from inclusion).

17. See *infra* Part II.

18. Cobb, *supra* note 14, at 818-19.

insurance policies in the elective share. Despite the General Assembly's efforts to protect insurance companies, most life insurance proceeds payable to non-spousal beneficiaries are still included in the surviving spouse's elective share.¹⁹ While this inclusion promotes North Carolina's interest in protecting surviving spouses from total disinheritance, the State does not need to choose between protecting insurance companies and protecting surviving spouses. This Article proposes legislation that would allow the State to further its policy of protecting surviving spouses while simultaneously protecting insurance companies from additional liability.

History proves that a person predisposed to disinherit his or her spouse will exploit even the smallest of loopholes.²⁰ Although the General Assembly failed in its effort to create a major life insurance loophole in North Carolina's elective share statute, a minor life insurance loophole still exists, as illustrated by the following hypothetical.

Mr. Testator is a North Carolina resident with \$1 million of liquid assets. At death, Mr. Testator wants his property distributed as follows: 100% to his sister, Sally, and 0% to his surviving spouse, Wilma. If Mr. Testator attempts such distribution by will, inter vivos trust, joint tenancy, joint bank account, or payable-on-death account, Wilma will be entitled to a portion (probably one-half) of such assets under North Carolina's elective share law.²¹ There is, however, one type of transfer—life insurance—that will allow Mr. Testator to leave his entire estate to Sally and nothing to Wilma. Mr. Testator could transfer \$1 million to the trustee of an irrevocable life insurance trust ("ILIT") with Sally as the beneficiary. The trustee of the ILIT could then use the \$1 million to purchase a single-premium insurance policy on Testator's life, designating the ILIT as the beneficiary. When Mr. Testator dies, the life insurance proceeds will be paid to the ILIT for the benefit of Sally, and under existing North Carolina law, these assets would be exempt from Wilma's elective share rights.²² For all

19. See *infra* Part III.B.

20. See, e.g., *Traub v. Zlatkiss*, 559 So. 2d 443, 447 (Fla. Dist. Ct. App. 1990); *Newman v. Dore*, 9 N.E.2d 966, 967 (N.Y. 1937); *Barrett v. Barrett*, 894 A.2d 891, 898 (R.I. 2006).

21. N.C. GEN. STAT. § 30-3.1 (2007), amended by An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.1).

22. See *infra* Part III.B.

practical purposes, therefore, spouses may still intentionally disinherit each other in North Carolina.²³

Part I of this Article examines the history of dower, curtesy, dissent, and elective share in North Carolina and under the UPC, which has greatly influenced recent legislation in North Carolina.²⁴ Part II refutes the purported justifications for treating life insurance differently than other non-probate transfers. Part III analyzes the General Assembly's unsuccessful attempt to create a major life insurance loophole in North Carolina's elective share law. In addition, this Part identifies and dissects the minor life insurance loophole that still exists in the elective share statute. Finally, Part IV proposes legislation designed to remedy the existing life insurance loophole in a manner that protects both surviving spouses and life insurance companies.

I. SPOUSAL PROTECTION IN NORTH CAROLINA

If all spousal disinheritance were the result of inadvertence, statutory protection would be unnecessary or, at least, simplistic.²⁵ The case law, though, is replete with examples of people who attempt—often successfully—to deliberately disinherit their spouses.²⁶ While the case law in North Carolina includes no examples

23. In addition to an elective share, a surviving spouse is entitled “to an allowance of the value of twenty thousand dollars (\$20,000) for the surviving spouse’s support for one year after the death of the deceased spouse.” An Act to Increase the Amount of the Year’s Allowance for a Surviving Spouse and to Make Conforming Changes to Related Provisions, ch. 30, 2009 N.C. Sess. Laws 183, available at NC LEGIS 2009-183 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-15). The “year’s allowance” is to be paid out of personal property in the decedent spouse’s probate estate. *Id.* It may not be paid out of life insurance proceeds. See *In re Brown’s Estate*, 40 N.C. App. 61, 63, 251 S.E.2d 905, 906 (1979) (finding that proceeds from an insurance policy are not included in personal property). North Carolina also has a \$1,000 homestead exemption. N.C. CONST. art. X, § 2.

24. For example, in 2007, North Carolina adopted UPC sections 2-510 (Incorporation by Reference), 2-511 (Testamentary Additions to Trusts), and 2-512 (Events of Independent Significance). See N.C. GEN. STAT. §§ 31-47, 31-51, 31-52 (2007).

25. Spouses who are disinherited by premarital wills are known as omitted or pretermitted spouses. See, e.g., UNIF. PROBATE CODE § 2-301 cmt. (1990). Under the UPC, such inadvertently omitted spouses are generally entitled to an intestate share. *Id.* North Carolina treats pretermitted spouses the same as spouses who were purposely disinherited. See N.C. GEN. STAT. § 31-5.3 (2007) (“A will is not revoked by a subsequent marriage of the maker; and the surviving spouse may petition for an elective share when there is a will made prior to the marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may petition for an elective share when there is a will made subsequent to marriage.”).

26. See, e.g., *Traub v. Zlatkiss*, 559 So. 2d 443, 447 (Fla. Dist. Ct. App. 1990); *Newman v. Dore*, 9 N.E.2d 966, 967 (N.Y. 1937); *Estate of Francis*, 327 N.C. 101, 104, 394 S.E.2d

of deliberate disinheritance of spouses, statutes that allow such behavior will inevitably result in such cases. Other states, for example, have experienced such disinheritance. An egregious example is *Newman v. Dore*,²⁷ in which Ferdinand Straus, an eccentric octogenarian, died on June 28, 1934, survived by his thirty-year-old estranged wife.²⁸ The applicable New York elective share statute encompassed only probate assets;²⁹ it did not include non-probate transfers made by the decedent spouse before death.³⁰ Fully cognizant of the law, Mr. Straus, three days before his death, transferred all of his real and personal property into inter vivos trusts, thereby completely depleting his probate estate.³¹ Mr. Straus's surviving spouse was not a beneficiary of the trusts.³² As a result, her elective share was limited to one-third of Mr. Straus's probate estate—that is, one third of nothing.³³ The New York Court of Appeals ultimately invalidated Mr. Straus's inter vivos trusts,³⁴ but a clearer example of (attempted) malicious disinheritance is hard to imagine.³⁵

Malicious disinheritance is not limited to early twentieth century case law. A modern example of deliberate disinheritance is *Traub v. Zlatkiss*,³⁶ where a few days before death, Sheldon Traub, a wealthy

150, 152 (1990); *Moore v. James*, 44 N.C. App. 578, 580, 261 S.E.2d 289, 290 (1980); *Barrett v. Barrett*, 894 A.2d 891, 898 (R.I. 2006).

27. 9 N.E.2d 966 (N.Y. 1937).

28. *Id.* at 967; see also *DUKEMINIER ET AL.*, *supra* note 6, at 444 n.12 (describing the facts of *Newman v. Dore*).

29. N.Y. EST. POWERS & TRUSTS LAW §§ 18–20 (Gould 1929). The statute reads:

[A] personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section These limitations and exceptions include a case where “the testator has devised or bequeathed in trust an amount equal to or greater than the intestate share, with income thereof payable to the surviving spouse for life.” Subdivision 1(b). The Legislature has declared that its intention in enacting these sections of the revised Decedent Estate Law was “to increase the share of a surviving spouse in the estate of a deceased spouse, either in a case of intestacy or by an election against the terms of the will of the deceased spouse thus enlarging property rights of such surviving spouse.”

Id.

30. *Newman*, 9 N.E. 2d at 967.

31. *Id.*

32. *Id.*

33. *Id.* (“If the [trust] agreements effectively divested the settlor of title to his property, then the decedent left no estate and the widow takes nothing.”).

34. *Id.* at 969–70.

35. See *id.* at 967 (noting the trial court's finding that Ferdinand Straus created the trust agreements for the purpose of “evading and circumventing the laws”).

36. 559 So. 2d 443 (Fla. Dist. Ct. App. 1990).

businessman who was separated from his second wife, conveyed his real estate, securities, and bank accounts to his friends and children from a former marriage.³⁷ Like New York law, Florida's elective share statute applied only to probate assets.³⁸ Thus, Mr. Traub's lifetime transfers substantially depleted his probate estate and consequently disinherited his surviving spouse.³⁹ Mrs. Traub challenged the validity of her husband's lifetime transfers, but the Florida court—unlike the court in *Newman*—upheld them.⁴⁰

Newman and *Traub* exemplify the need for comprehensive legislation to protect surviving spouses from deliberate disinheritance.⁴¹ To better understand the need for such legislation, it is important to analyze the history of spousal protection in North Carolina and under the UPC because, as Justice Holmes famously observed, “[t]he life of the law has not been logic: it has been experience.”⁴²

A. *Prior to 1784: Common Law Dower and Curtesy*

Prior to 1784, North Carolina's sole protection for surviving spouses was common law dower,⁴³ which gave a surviving wife a one-third interest for life in most real estate owned by her husband during the marriage.⁴⁴ The wife's dower interest attached at the time the

37. *Id.* at 444.

38. *Id.* at 445 (noting that section 732.206 of the Florida Statutes provided that the surviving spouse's elective share of the decedent's estate was calculated by reference to all of the property of the decedent subject to probate administration).

39. *Id.* at 444–45.

40. *Id.* at 446 (“Completed inter vivos transfers of assets by a spouse which reduce the transferring spouse's probate estate, even if made with the specific intent to diminish or eliminate a surviving spouse's statutory elective share, do not constitute a legal ‘fraud’ on the surviving spouse and are not subject to being set aside in whole or in part at the behest of the surviving spouse in order to increase the surviving widow's elective share.”).

41. See also *In re Estate of Froman*, 803 S.W.2d 176, 181 (Mo. Ct. App. 1991) (invalidating large cash gift made by decedent spouse one year before death); *Pezza v. Pezza*, 690 A.2d 345, 350 (R.I. 1997) (upholding decedent spouse's transfers to inter vivos trust), *superseded by statute*, R.I. GEN. LAWS § 33-25-2(b) (1956), as recognized in *Barrett v. Barrett*, 894 A.2d 891, 898 (R.I. 2006) (finding that illusory transfer test was supplanted by statute).

42. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Boston, Little Brown 1881).

43. Dower is a longstanding historical right that predates the formation of our nation and has become embedded in common law. The right of dower is “so ancient, that its origin is now lost in doubt and uncertainty.” *Pfau v. Moseley*, 222 N.E.2d 639, 645 (Ohio 1966) (quoting *Dunseth v. Bank of the U.S.*, 6 Ohio 77, 78 (1833)).

44. See, e.g., *Corp. Comm'n v. Dunn*, 174 N.C. 679, 693, 94 S.E. 481, 482 (1917) (“[O]ne-third part of all the lands and tenants in which her husband had an estate of inheritance, and of which he was seized at any time during the coverture, to hold for the time of her natural life.”). See generally George L. Haskins, *The Development of Common*

husband acquired legal title to real property or upon marriage, whichever occurred later.⁴⁵ The reason for dower was “a very plain and sensible one: for the sustenance of the wife and the rearing and education of the younger children.”⁴⁶

At common law, a wife had an inchoate interest in her husband’s property during his lifetime.⁴⁷ This interest could not be extinguished by her husband’s inter vivos conveyances.⁴⁸ Although the inchoate right of dower was not considered an estate or a property interest,⁴⁹ it hindered the alienability of real estate by clouding title.⁵⁰ An act of the husband alone could not defeat the wife’s right of dower.⁵¹ If the husband conveyed land without his wife’s consent even to a bona fide purchaser, it passed subject to the wife’s dower rights, so vendees were reluctant to purchase land from married men.⁵² Because it impeded alienability,⁵³ common law dower was abolished in England in 1925,⁵⁴ and it has also been abolished in nearly every state.⁵⁵

Similarly, husbands had a right to curtesy under common law.⁵⁶ Upon marriage, a husband acquired a “tenancy by the marital right”

Law Dower, 62 HARV. L. REV. 42, 42 (1948) (describing that the effect of dower was to give the wife rights in her husband’s property if she survived him).

45. DUKEMINIER ET AL., *supra* note 6, at 423.

46. *Griffin v. Griffin*, 191 N.C. 227, 228–29, 131 S.E. 585, 586 (1926) (quoting *Pridgen v. Pridgen*, 190 N.C. 102, 107, 129 S.E. 419, 422 (1925)).

47. *Corp. Comm’n*, 174 N.C. at 681, 94 S.E. at 482; *see also* 28 C.J.S. *Dower & Curtesy* § 54 (2008) (“The inchoate right of dower is the wife’s interest in her husband’s land during his life; while it is not an estate, or title, or interest in land, but is a contingent right or expectancy, it is nevertheless a valuable, subsisting, and distinct interest.”).

48. *See* William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade*, 77 YALE L.J. 605, 615 (1968).

49. *Corp. Comm’n*, 174 N.C. at 681, 94 S.E. at 482.

50. Andrew E. Tanick & Pamela L. Johnson, Note, *Probate Reform: The New Minnesota Elective Share Statutes*, 70 MINN. L. REV. 241, 248 n.38 (1985).

51. *In re Estate of Shroh*, 392 N.W.2d 192, 194 (Mich. Ct. App. 1986) (“No contract of sale or conveyance by a husband without his wife’s signature will operate to divest her of her dower.”).

52. *See, e.g.,* *Wilson v. Wilson*, 356 S.E.2d 422, 427 (S.C. 1987) (“The dower right attaches to all lands of which the husband was seized during coverture, and his alienation of this property without his wife’s release or bar of her dower right does not affect her dower interest.”); DUKEMINIER ET AL., *supra* note 6, at 423.

53. *See* G. Bryan Ulmer, Case Note, *Trusts & Estates—Spousal Disinheritance—Inter Vivos Trusts and Wyoming’s Spousal Elective Share*, *Briggs v. Wyoming National Bank*, 29 LAND & WATER L. REV. 323, 326 (1994) (“Over time many states began to recognize that dower placed burdensome restrictions on the alienability of land, and legislatures began to abolish the common law doctrines of dower and curtesy.”).

54. HERBERT T. TIFFANY & BASIL JONES, 2 TIFFANY REAL PROPERTY § 551 (1939).

55. *See* JAMES B. MCLAUGHLIN, JR. & RICHARD T. BOWSER, 1 WIGGINS WILLS & ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 17.2, at 536 (4th ed. 2008).

56. *See* George L. Haskins, *Curtsey in the United States*, 100 U. PA. L. REV. 196, 196 (1951) (“In England at common law a husband acquired upon marriage a right to the rents

in all of the freehold estates of his wife.⁵⁷ At the birth of inheritable issue, the husband's interest vested, thereby entitling him to a life estate in all of his wife's freehold estates.⁵⁸

Although dower and curtesy provided some protection for surviving spouses, both doctrines were easy to circumvent through non-probate transfers.⁵⁹ In 1784, North Carolina, instead of closing the loopholes in common law dower, removed virtually all protection for surviving spouses.

B. 1784–1869: Statutory Dower

In 1784, North Carolina abolished common law dower.⁶⁰ Thereafter, a husband could defeat his wife's right to dower by *inter vivos* conveyance.⁶¹ A widow was entitled to dower only in lands in which her husband died seized and possessed.⁶² Between 1784 and 1867, a wife's dower rights were easy to circumvent because she was not required to join in conveyances by the husband of his realty.⁶³ During this time, inter vivos conveyances could be used to deplete the decedent spouse's probate estate and thereby defeat the surviving spouse's dower rights. In order to provide more protection for surviving spouses, North Carolina restored common law dower in 1869.⁶⁴

C. 1869–1959: Common Law Dower Reinstated

From 1869 until 1959, dower was “the legal right of a widow whose husband dies intestate, or when she dissents from his will, to

and profits, together with the use and enjoyment, of all the realty of which his wife was then seized and of which she thereafter became seized during coverture If issue of the marriage, capable of inheriting her property, were born alive, he then acquired in her inheritable estates of which she had actual seisin an interest known as ‘curtesy initiate,’ If he survived her, that interest became ‘consummate,’ and he was then said to be ‘tenant by the curtesy’ during his lifetime.”)

57. MCLAUGHLIN & BOWSER, *supra* note 55, § 17.4, at 536.

58. *Id.*

59. *See, e.g.,* Traub v. Zlatkiss, 559 So.2d 443, 444 (Fla. Dist. Ct. App. 1990).

60. Bryan v. Bryan, 16 N.C. (1 Dev. Eq.) 47, 51 (1827) (“Our act of 1784 (Rev. c., 204, s. 8) gives the wife dower only in the lands of which the husband died seized—whereas the common law gave her much more extensive rights.”). Unlike common law dower and curtesy, rights under modern elective share statutes are not gender-specific since these rights are almost certainly unconstitutional. *See, e.g.,* Boan v. Watson, 316 S.E.2d 401, 403 (S.C. 1984) (holding that the common right of dower is unconstitutional in South Carolina).

61. *See* Baird v. Winstead, 123 N.C. 181, 182, 31 S.E. 390, 390–91 (1898).

62. *Id.*

63. Everett v. Ballard, 174 N.C. 16, 17, 93 S.E. 385, 386 (1917).

64. O’Kelly v. Williams, 84 N.C. 281, 283 (1881).

have allotted to her upon the death of her husband one-third in value of all the lands, tenements, and hereditaments . . . whereof her husband was beneficially seized during the coverture.”⁶⁵ During this period, dower included both legal and equitable title to real estate.⁶⁶ A husband could not convey his real estate without joinder of his wife,⁶⁷ but non-probate transfers, such as joint bank accounts and life insurance, could be used to circumvent the right to dower.⁶⁸ Mandatory dower and curtesy were replaced by the right-of-dissent statute,⁶⁹ but a surviving spouse may opt for dower rights (i.e., a life estate in one-third of the decedent’s property) in lieu of modern elective share rights.⁷⁰

D. 1959–2000: Right of Dissent

North Carolina adopted a version of an elective share statute in 1959.⁷¹ Under North Carolina’s “right of dissent,” a surviving spouse was entitled to renounce the decedent spouse’s will when “the total value of property received under and outside the will” (i.e., non-probate transfers) was “less than what he or she would have received had the deceased spouse died intestate.”⁷² By exercising the right of dissent, the surviving spouse was entitled to receive an intestate share ranging from one-third to one-half of the decedent spouse’s probate estate.⁷³ In some cases, the share of a second or successive spouse was reduced by fifty percent.⁷⁴

65. *Pridgen v. Pridgen*, 190 N.C. 102, 105, 129 S.E. 419, 421 (1925).

66. MCLAUGHLIN & BOWSER, *supra* note 55, § 17.2, at 534.

67. *Thomas v. Sandlin*, 173 N.C. 329, 335, 91 S.E. 1028, 1031 (1917); *see also Artis v. Artis*, 228 N.C. 754, 763, 47 S.E.2d 228, 234 (1948) (finding that title to land acquired by son from father passed subject to dower right of father’s widow).

68. *See, e.g., Phillips v. Phillips*, 296 N.C. 590, 605–06, 252 S.E.2d 761, 771 (1979). Non-probate assets payable to the surviving spouse, such as life insurance, were taken into consideration when determining the surviving spouse’s intestate share. N.C. GEN. STAT. § 30-1(b) (1999) (repealed 2000).

69. N.C. GEN. STAT. § 29-4 (2007) (abolishing the common law rights of dower and curtesy); *see also* N.C. GEN. STAT. § 30-3.1 (2007) (noting the statutory right of dissent for the surviving spouse), *amended by* An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, *available at* NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.1).

70. *See* N.C. GEN. STAT. § 29-30 (allowing the surviving spouse to elect to take a life estate in one third of value of the decedent spouse’s real estate).

71. N.C. GEN. STAT. § 30-1(a) (1999) (repealed 2000).

72. *In re Kirkman’s Estate*, 302 N.C. 164, 166, 273 S.E.2d 712, 714 (1981); N.C. GEN. STAT. § 30-1(a) (1999) (repealed 2000).

73. N.C. GEN. STAT. § 30-1(a) (1999) (repealed 2000).

74. *Vinson v. Chappell*, 275 N.C. 234, 238, 166 S.E.2d 686, 689–90 (1969). The share of a second or successive spouse was reduced when the following conditions existed:

To exercise the right of dissent, the surviving spouse had to renounce all property he or she would have received under the decedent spouse's will,⁷⁵ including any property (inter vivos and testamentary) the surviving spouse would have received in a pour-over trust,⁷⁶ but the surviving spouse was not required to renounce non-probate assets.⁷⁷ Because there was no requirement to renounce non-probate assets, it was possible for surviving spouses to receive more than an intestate share.⁷⁸ For example, if a surviving spouse received a non-probate gift that was only slightly less than his or her intestate share, he or she would be entitled to keep both the non-probate gift and the elective share.⁷⁹ This would result in a windfall for the surviving spouse at the expense of the will's beneficiaries.⁸⁰ A decedent spouse, of course, could preclude the right of dissent by devising to the surviving spouse the minimum amount required by the intestate statute.⁸¹

1. Circumvention of the Right of Dissent: Three Judicial Tests

Like most traditional elective share statutes, North Carolina's right of dissent failed "to foreclose the possibility of intentional disinheritance. A surviving spouse's elective share . . . [was] based on a percentage of the decedent's 'net estate.' Because the net estate includes only probate assets, a testator [could] effectively disinherit his spouse by leaving his property to others through the use of will

-
- (1) A married person, husband or wife, dies testate, survived by his (her) spouse.
 - (2) The surviving spouse, being entitled under G.S. § 30-1 to do so, dissents.
 - (3) The surviving spouse is a "second or successive spouse."
 - (4) No lineal descendants "by the second or successive marriage" survive the testator (testatrix).
 - (5) The testator (testatrix) is survived by lineal descendants by his (her) former marriage.

Id.

75. *Phillips v. Phillips*, 296 N.C. 590, 605, 252 S.E.2d 761, 770-71 (1979).

76. N.C. GEN. STAT. § 30-3(c) (1999) (repealed 2000).

77. *Phillips*, 296 N.C. at 605, 252 S.E.2d at 770-71.

78. *Id.*

79. *Id.* (citing Jerry W. Leonard, Note, *Does North Carolina Law Adequately Protect Surviving Spouses?*, 48 N.C. L. REV. 361, 365 (1970)).

80. *Id.*

81. *In re Estate of Finch*, 97 N.C. App. 489, 492, 389 S.E.2d 126, 127 (1990). A spouse may also disclaim elective share rights. See N.C. GEN. STAT. § 30-3.6 (2007) (providing the rules for a surviving spouse to waive the elective share), amended by An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.6); see also *In re Estate of Archibald*, 183 N.C. App. 274, 281, 644 S.E.2d 264, 268 (2007) (holding that husband's waiver of elective share rights in separation agreement was not enforceable where husband and wife reconciled prior to wife's death).

substitutes.”⁸² Will substitutes and other non-probate transfers could be used by a spouse to deplete the probate estate and render the elective share meaningless for the surviving spouse.

Between 1959 and 2000, North Carolina courts twice addressed the use of will substitutes as a means of circumventing the right of dissent.⁸³ The exclusion of non-probate transfers from elective share statutes, however, is not limited to North Carolina.⁸⁴ Until recently, most states had similar statutes.⁸⁵ As a result, the common law developed three tests—the illusory transfer test, the intent to defraud test, and the reality test—that a surviving spouse could use to defeat non-probate transfers and return such assets to the probate estate.⁸⁶ As illustrated in *Estate of Francis*,⁸⁷ however, these judicial tests still did not offer much protection to surviving spouses in North Carolina, so the public pressured the General Assembly to adopt the UPC concept of the augmented estate.⁸⁸

Illusory Transfer Test. This test asks whether the decedent spouse has in good faith divested himself or herself of ownership of the property or has made an illusory transfer.⁸⁹ The “good faith” requirement does not refer to the decedent’s motive to affect the surviving spouse but rather the intent to divest himself or herself of the ownership of the property.⁹⁰

The illusory transfer test has been adopted in many jurisdictions, including South Carolina,⁹¹ and arguably by the North Carolina Court of Appeals in *Moore v. Jones*.⁹² In *Moore*, a widow dissented to her husband’s will and sought to obtain an intestate share of an *inter vivos* trust created by her husband.⁹³ The husband retained the following rights in the trust during his lifetime: the right to all income from the trust assets, the right to withdraw assets from the trust, and the right

82. *Phillips*, 296 N.C. at 605–06, 252 S.E.2d at 771.

83. See *Estate of Francis*, 327 N.C. 101, 394 S.E.2d 150 (1990); *Moore v. Jones*, 44 N.C. App. 578, 261 S.E.2d 289 (1980).

84. See *Bridge*, *supra* note 7, at 519–21 (citing cases from several jurisdictions in which spouses used non-probate transfers to evade elective share laws).

85. *Id.*

86. *Id.* at 519.

87. 327 N.C. 101, 394 S.E.2d 150 (1990).

88. See, e.g., *Cobb*, *supra* note 14, at 804.

89. *Newman v. Dore*, 9 N.E.2d, 966, 969 (N.Y. 1937).

90. *Id.*

91. *Dreher v. Dreher*, 634 S.E.2d 646, 650 (S.C. 2002) (finding that the illusory transfer test is invalid for elective share purposes).

92. 44 N.C. App. 578, 261 S.E.2d 289 (1980); see *Dreher*, 634 S.E.2d at 650 (noting that the illusory transfer test was used in *Moore*).

93. *Moore*, 44 N.C. App. at 579–80, 261 S.E.2d at 290.

to amend, modify, or revoke the trust.⁹⁴ The widow argued that the trust assets should be included in the husband's net estate for purposes of the right of dissent because the trust was the functional equivalent of a will. The court of appeals agreed, holding;

[W]here, as here, the settlor retains up to the instant of his death powers over the trust assets so extensive that in a real sense he had the same rights therein after creating the trust as he had before its creation, such assets should be considered part of his estate insofar as the statutory rights granted the settlor's surviving spouse . . . are concerned.⁹⁵

Intent to Defraud Test. This test asks whether the decedent, when making the transfer which reduced or defeated the surviving spouse's elective share, intended to defraud the surviving spouse of his or her marital right in the estate.⁹⁶ Although evidence of actual intent is generally required,⁹⁷ some courts will infer fraudulent intent from "a number of equitable factors . . . including the proximity in time between the transfer and the decedent's death, the proportion of the settlor's property transferred to the trust, the absence of consideration, and the fairness to the surviving spouse if the trust is operative."⁹⁸ The intent to defraud test has been criticized as both overinclusive and underinclusive:

Motive or intent is an unsatisfactory test of the validity of a transfer of property. In most jurisdictions it has been rejected, sometimes for the reason that it would cast doubt upon the validity of all transfers made by a married man, outside of the regular course of business; sometimes because it is difficult to find a satisfactory logical foundation for it. Intent may, at times, be relevant in determining whether an act is fraudulent, but there can be no fraud where no right of any person is invaded.⁹⁹

94. *Id.*

95. *Id.* at 583, 261 S.E.2d at 292.

96. *See In re Estate of Froman*, 803 S.W.2d 176, 179 (Mo. Ct. App. 1991) (noting that the intent of the decedent spouse is a factor in considering whether the surviving spouse was defrauded of her right to a portion of the estate).

97. *See Johnson v. Farmers & Merch. Bank*, 379 S.E.2d 752, 758 (W. Va. 1989).

98. *Rose v. St. Louis Union Trust Co.*, 253 N.E.2d 417, 419 (Ill. 1969).

99. *Newman v. Dore*, 9 N.E.2d 966, 968 (N.Y. 1937).

Because of these criticisms, the intent to defraud test has been adopted by few jurisdictions¹⁰⁰ and has never been used by North Carolina courts.

Reality Test. This test asks whether the non-probate transfer was a valid inter vivos conveyance.¹⁰¹ In other words, the surviving spouse may invalidate the non-probate transfer only if it was “purely fictional or testamentary.”¹⁰² Under the reality test, legitimate inter vivos trusts, joint bank accounts, payable-on-death contracts, joint tenancies, and life insurance policies are exempt from the elective share.¹⁰³

Without expressly adopting a particular test, the Supreme Court of North Carolina appears to have utilized the reality test in *Estate of Francis*.¹⁰⁴ In that case, the decedent spouse opened several bank accounts with her sister as joint tenants with right of survivorship.¹⁰⁵ Her probate estate was valued at slightly more than \$2,000 while the bank accounts were valued at more than \$90,000.¹⁰⁶ Not surprisingly, the husband dissented to the will and sought to obtain an intestate share of the bank accounts.¹⁰⁷ The supreme court held that he was not entitled to a portion of the joint bank accounts because funds held in the joint accounts with right of survivorship passed to the surviving joint tenant as a matter of law.¹⁰⁸

In *Estate of Francis*, the surviving spouse argued that the joint accounts should be included “in the net estate for purposes of the dissent statute because the accounts here are similar to the funds in the trust account held includable in the net estate in determining the right to dissent” in *Moore*.¹⁰⁹ The supreme court, however, declined to extend *Moore* to joint bank accounts, reasoning that there is “no legislative intent, express or implied, to make . . . bank accounts a part

100. See *Johnson*, 379 S.E.2d at 758 (observing that the intent to defraud test is “a minority approach”).

101. *Bridge*, *supra* note 7, at 521; see also *Kerwin v. Donaghy*, 59 N.E.2d 299, 307 (Mass. 1945) (denying the surviving spouse the right to reach assets decedent spouse had transferred to a valid *inter vivos* trust), *abrogated by Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984).

102. *Bridge*, *supra* note 7, at 521.

103. *Id.* at 521–522.

104. 327 N.C. 101, 394 S.E.2d 150 (1990).

105. *Id.* at 103–04, 394 S.E.2d at 152.

106. *Id.* at 104–05, 394 S.E.2d at 152.

107. *Id.* at 104, 394 S.E.2d at 152.

108. *Id.* at 109, 394 S.E.2d at 155.

109. *Id.* at 111, 394 S.E.2d at 156.

of the decedent's net estate for purposes of determining the surviving spouse's right to dissent."¹¹⁰

Estate of Francis made clear that will substitutes—like joint bank accounts with right of survivorship, payable-on-death accounts, and life insurance policies—may be used to disinherit a surviving spouse. Not long thereafter, the public pressured the General Assembly to provide more protection for surviving spouses. In particular, judges¹¹¹ and other critics of the North Carolina right of dissent¹¹² called on the General Assembly to adopt the augmented estate concept from the Uniform Probate Code.

2. Uniform Probate Code

Although only twenty states have adopted the Uniform Probate Code,¹¹³ it has influenced the legislation and case law in nearly every state, including North Carolina.¹¹⁴ This is particularly true with regard to elective share laws, as the UPC has been the guiding light in this area of the law.¹¹⁵

a. 1969 Version of the UPC

Under the original version of the UPC, the surviving spouse's elective share percentage was quite traditional: one-third of the

110. *Id.* at 112, 394 S.E.2d at 157 (“By express language in the statute, upon the death of any party to the account, the survivor or survivors become the sole owners of the entire unwithdrawn deposit subject only to the claims specifically enumerated in N.C.G.S. § 41-2.1(b)(3) (1984).”).

111. *See, e.g.,* Phillips v. Phillips, 296 N.C. 590, 605, 252 S.E.2d 761, 771 (1979) (noting that the right of dissent statute could easily be circumvented by non-probate transfers); Jerry W. Leonard, Note, *Does North Carolina Law Adequately Protect Surviving Spouses?*, 48 N.C. L. REV. 361, 365–67 (1970) (calling on the North Carolina General Assembly to protect spouses from disinheritance by including in the net estate all property contributed by the decedent prior to death).

112. *See, e.g.,* Charles H. Munn, Jr., Note, *The Uniform Probate Code's Augmented Estate Concept: A Remedy for the North Carolina Dissent Statute*, 12 CAMPBELL L. REV. 425, 444–46 (1990) (calling on North Carolina to adopt UPC's augmented estate concept).

113. JOYCE PALOMAR, 3 PATTON & PALOMAR ON LAND TITLES § 512 (3d ed. 2008). States that have adopted the UPC include: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin. *Id.*

114. *See* Taylor v. Nationsbank Corp., 125 N.C. App. 515, 518, 481 S.E.2d 358, 360 (1997) (“Although North Carolina has not adopted the Uniform Probate Code as such, it has relied on it as persuasive authority.”).

115. *See* Ronald R. Volkmer, *Elective Share Issues Considered*, 27 EST. PLAN. 334, 334 (2000) (“The elective share scheme of the Uniform Probate Code (UPC) has been used as the model for many legislatures in those states; about an equal number of states have adopted the 1969 version of the UPC and the 1990 version.”).

probate estate.¹¹⁶ But, unlike traditional elective share laws, the surviving spouse did not receive one-third of the decedent spouse's probate estate but rather one-third of a revolutionary new concept: the augmented estate.¹¹⁷ The primary purpose of the augmented estate was "to prevent the owner of wealth from making arrangements which transmit his [or her] property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share."¹¹⁸ This purpose was accomplished by adding the value of most non-probate transfers made by the decedent before death to the decedent's probate estate.¹¹⁹ As a result, traditional will

116. UNIF. PROBATE CODE § 2-201(a) (1969) ("If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated."). Section 2-201(b) provided: "If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death." UNIF. PROBATE CODE § 2-201(b) (1969). See generally 755 ILL. COMP. STAT. 5/2-8 (2008) (entitling the surviving spouse in a state with the traditional elective share to one-third of the estate for testators with descendants or one-half of the estate for testators without descendants).

117. UNIF. PROBATE CODE § 2-202 (1969).

118. *Id.* § 2-202 cmt. (1969). Another purpose of the augmented estate was "to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements." *Id.*

119. *Id.* § 2-202 (1969). In particular, the following non-probate transfers to persons other than the surviving spouse were included in the augmented estate:

- (i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;
- (ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;
- (iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;
- (iv) any transfer made within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

Id.

The augmented estate also included:

The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent to the extent the owned or transferred property is derived from the decedent, by any means other than testate or intestate succession without a full consideration in money or money's worth.

substitutes, such as revocable trusts, joint tenancies with right of survivorship, payable-on-death contracts, and joint bank accounts, were included in the augmented estate and could no longer be used to circumvent the elective share.¹²⁰

The 1969 version of the UPC, however, did not treat all non-probate transfers alike. A few non-probate transfers were deliberately excluded from the augmented estate.¹²¹ In particular, the UPC provided that “[n]othing herein shall cause to be included in the augmented estate any life insurance . . . payable to a person other than the surviving spouse.”¹²² Life insurance payable to third parties was excluded from the augmented estate because the UPC drafters thought that life insurance was “not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse.”¹²³

Thus, while the 1969 version of the UPC closed most of the non-probate loopholes, it left one, life insurance, open on the assumption that people would not use life insurance to disinherit their spouses. Twenty-one years later, the UPC changed course and included life insurance in the augmented estate.¹²⁴

b. Revised 1990 Version of the UPC

Life insurance is one of the largest assets owned by the average person,¹²⁵ but it was historically exempt from dower and elective share laws.¹²⁶ This changed in 1990 when the Commissioners on Uniform

Id. § 2-202(3) (1969).

120. *Id.* § 2-202 (1969).

121. *Id.* The following non-probate transfers were excluded from the augmented estate: “life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.” *Id.*

122. *Id.* By contrast, life insurance payable to the surviving spouse was included in the augmented estate because it would be “unfair to allow a surviving spouse to disturb the decedent’s estate plan if the spouse has received ample provision from life insurance.” *Id.*

123. *Id.* § 2-202 cmt. (1969).

124. UNIF. PROBATE CODE § 2-205(1)(iv) cmt. (1990).

125. See Patrick J. Lannon, *What Every Attorney Needs to Know About Estate Planning*, FLA. B. J., Nov. 2007, at 37, 37. According to the United States Census Bureau, the average amount of life insurance per household in 1990 was \$124,500. See Press Release, U.S. Dep’t of Commerce News, New Statistical Abstract Highlights Household Lifestyles (Dec. 4, 1997), <http://www.census.gov/Press-Release/cb97-199.html> (last visited Aug. 26, 2009).

126. See, e.g., *Nelson v. Metropolitan Tower Life Ins. Co.*, 4 F. Supp. 2d 683, 688 n.11 (E.D. Ky. 1998) (holding that a wife has no statutory dower interest in her husband’s life insurance policy).

State Laws included life insurance in the scope of the UPC's augmented estate.¹²⁷ By this time, perceptions had changed.

By excluding life insurance assets from the surviving spouse's forced share, states leave open a significant loophole for anyone wishing to disinherit his or her spouse. Because life insurance allows the insured to revoke the policy at any time prior to his death, it is an attractive disinheriting device. Life insurance is even more attractive under the U.P.C. augmented estate concept because the augmented estate excludes life insurance while including all other lifetime transfers where the transferor retains power to revoke the transfer or to control the assets during his lifetime. To provide uniformity of law and to protect the well-settled public policy of preventing decedents from disinheriting surviving spouses, states should permit surviving spouses to reach life insurance assets with their forced share.¹²⁸

Accordingly, UPC section 2-205 added life insurance payable to third parties to the augmented estate, acknowledging that life insurance may be "used to deplete the estate and reduce the spouse's elective-share entitlement."¹²⁹ Thus, if the decedent spouse had a life insurance policy on his or her own life with the proceeds payable to someone other than the surviving spouse,¹³⁰ the full value of the proceeds would be included in the augmented estate.¹³¹

The 1990 version of the UPC has been successful in preventing the use of life insurance to disinherit surviving spouses. For example, in *Felix-Aranibar v. Felix*,¹³² the decedent's surviving spouse brought an action to include the decedent's group life insurance policy in the

127. UNIF. PROBATE CODE § 2-205(1)(iv) cmt. (1990).

128. Bridge, *supra* note 7, at 527.

129. UNIF. PROBATE CODE § 2-205(1)(iv) cmt. (1990); see Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 253 (1991) ("In the redesign of the elective share, the revised UPC strengthens the augmented-estate concept. Students of the pre-1990 UPC . . . will know that several loopholes were left ajar in the augmented estate—a notable one being life insurance the decedent buys, naming someone other than his or her surviving spouse as the beneficiary. With appropriate protection for the insurance company that pays off the beneficiary before receiving notice of an elective share claim, the redesigned elective share closes that loophole, as well as the others.").

130. Life insurance payable to the surviving spouse is also included in the augmented estate. UNIF. PROBATE CODE § 2-207(a)(1)(iii) (1990).

131. *Id.* § 2-205 cmt. 8. (1990) ("G, as owner of a life-insurance policy insuring her life, designated X and Y as the beneficiaries of that policy. G died owning the policy, survived by S [G's surviving spouse], X, and Y. The full value of the proceeds of that policy is included in the augmented estate under paragraph (1)(iv).").

132. No. W26889, 2002 WL 1941025 (Va. Cir. Ct. Aug. 12, 2002).

augmented estate.¹³³ The beneficiary of the policy was the decedent's first wife.¹³⁴ The court determined that "the policy must be included within the statute for the purpose of calculating the surviving spouse's one-third statutory share of the decedent's estate,"¹³⁵ as the inclusion of life "insurance policies within the augmented estate statute . . . provides greater protection for the wife against disinheritance."¹³⁶ Thus, the UPC closed the life insurance loophole in 1990.

E. 2001–July 27, 2009: Elective Share

Effective January 1, 2001, North Carolina revised its elective share law.¹³⁷ Under the new statute, the surviving spouse's elective share percentage was the same: an intestate share ranging from one-sixth to one-half depending on whether the decedent was survived by descendants and whether the surviving spouse was a first spouse or a successive spouse.¹³⁸ Unlike North Carolina's former right-of-dissent law, however, the surviving spouse's share under the new elective share law comes from the decedent's "total net assets" and not the decedent's probate estate.¹³⁹ To prevent decedents from using non-probate transfers to circumvent the elective share, the term "total net assets," as originally defined, included:

- (1) All property to which the decedent had legal and equitable title immediately prior to death;
- (2) All property received by the decedent's personal representative by reason of the decedent's death, other than wrongful death proceeds;

133. *Id.* at *1.

134. *Id.*

135. *Id.* at *7. Under Virginia law, the following assets are included in the augmented estate: "insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime." VA. CODE ANN. § 64.1-16.1(D) (2007).

136. *Felix-Aranibar*, 2002 WL 1941025, at *3.

137. Act to Modify the Rights of a Decedent's Spouse, ch. 30, 2000 N.C. Sess. Laws 1174 (codified at N.C. GEN. STAT. § 30-3.1 (2007)), amended by An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.1)). For purposes of Part I.E. and Part I.F., the citations to sections 30-3.1 to 3.6 of the General Statutes of North Carolina will refer to the 2007 version, prior to the recent 2009 amendments.

138. N.C. GEN. STAT. § 30-3.1(a) (2007).

139. *Id.* § 30-3.2(4).

(3) One-half of the value of any property held by the decedent and the surviving spouse as tenants by the entirety, or as joint tenants with rights of survivorship;

(4) The entire value of any interest in property held by the decedent and another person, other than the surviving spouse, as joint tenants with right of survivorship, except to the extent that contribution can be proven by clear and convincing evidence;

(5) The value of any property which would be included in the taxable estate of the decedent pursuant to sections 2033, 2035, 2036, 2037, 2038, 2039, 2040, or 2042 of the [Internal Revenue] Code.

(6) Any donative transfers made by the decedent to donees other than the surviving spouse within six months of the decedent's death, excluding:

a. Any gifts within the annual exclusion provisions of section 2503 of the Code;

b. Any gifts to which the surviving spouse consented. A signing of a deed, or income or gift tax return reporting such gift shall be considered consent; and

c. Any gifts made prior to marriage;

(7) Any proceeds of any individual retirement account, pension or profit-sharing plan, or any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary, excluding any benefits under the federal social security system;

(8) Any other Property Passing to Surviving Spouse under G.S. 30-3.3¹⁴⁰

For purposes of non-probate assets, the most important part of the new elective share statute is section 30-3.2(4)(e), which incorporates by reference most of the provisions used by the Internal Revenue Code to define the term "taxable estate"¹⁴¹ for federal tax

140. An Act to Modify the Rights of a Decedent's Spouse, at 1175-76.

141. It is worth noting that the statute uses the term "taxable estate" rather than "gross estate." N.C. GEN. STAT. § 30-3.2(4). Taxable estate is defined as the decedent's gross estate reduced by allowable deductions, such as the charitable deduction. *In re Estate of*

purposes.¹⁴² Under section 30-3.2(4)(e), the following non-probate transfers—the ones most often used to evade the elective share—are now included (fully or partially) in the decedent’s total net assets: revocable trusts, joint tenancies with right of survivorship, joint bank accounts, and payable-on-death contracts.¹⁴³ In addition, as originally enacted, section 30-3.2(4)(e) incorporated by reference section 2042 of the Internal Revenue Code, which includes in the taxable estate insurance on the life of the decedent for which the decedent held “incidents of ownership” at death.¹⁴⁴ “Incidents of ownership” include “the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy.”¹⁴⁵

Accordingly, if the decedent spouse held a life insurance policy on his or her own life with a named beneficiary, the proceeds of such policy would be included in the decedent’s taxable estate for federal tax purposes.¹⁴⁶ For this reason, the proceeds would likewise be included in the decedent’s total net assets, as originally defined, for

Pope, __ N.C. App. __, __, 666 S.E.2d 140, 151 (2008) (holding that an inter vivos trust created by decedent with remainder paid to charitable foundation is not included in decedent’s taxable estate for estate tax purposes and thus not included in the decedent’s total net assets). As a consequence, a decedent spouse who desires to leave his or her property to charity could easily disinherit the surviving spouse.

142. N.C. GEN. STAT. § 30-3.2(4).

143. David C. Johnson, *Federal Estate, Gift, and Generation-Skipping Transfer Taxation: A Review of the Arguments for Repeal and a Proposal for Simplification*, 25 S. ILL. U. L.J. 135, 135–36 (2000) (noting that the gross estate for purposes of the federal estate tax includes non-probate assets such as revocable trusts, joint tenancies, and pension benefits).

144. I.R.C. § 2042(2) (2008) (“[T]he amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person [is included in the taxable estate].”).

145. Treas. Reg. § 20.2042-1(c)(2) (as amended in 1979). Incidents of ownership also include:

a reversionary interest in the policy or its proceeds, whether arising by the express terms of the policy or other instrument or by operation of law, but only if the value of the reversionary interest immediately before the death of the decedent exceeded 5 percent of the value of the policy.

Id. § 20.2042-1(c)(3).

146. See generally GEORGE G. BOGERT ET AL., *BOGERT’S TRUSTS & TRUSTEES* § 273.40 (2008) (noting that I.R.C. § 2042 requires that the value of the gross estate include the proceeds of life insurance policies to which decedent possessed any incidents of ownership at time of death, regardless of who the beneficiary was).

purposes of North Carolina's elective share.¹⁴⁷ Thus, as originally promulgated, North Carolina's elective share statute protected surviving spouses from intentional disinheritance, for there were no major loopholes in the definition of "total net assets."

F. July 27, 2009–Present

Incredibly, a few weeks before this Article was published, the General Assembly passed a session law that includes insurance on the life of the decedent in the total net assets.¹⁴⁸ The General Assembly deleted section 4 from North Carolina General Statutes section 30-3.2 and the references to the Internal Revenue Code.¹⁴⁹ The General Assembly added new section 3f to section 30-3.2, which includes insurance on the life of the decedent in the total net assets.¹⁵⁰ The effect of this legislation is unknown; it will most likely protect surviving spouses by including insurance in the total net assets, but it includes no provision that specifically addresses its effect on insurance companies. While the General Assembly is moving in the right direction by protecting the surviving spouse, the new legislation fails to address the question of insurance company liability, a question addressed in Part IV of this Article. The new legislation also fails to prevent a person from using an ILIT as a conduit to purchase a life insurance policy that disinherits his or her surviving spouse.

II. ARGUMENTS TO REBUT THE EXCLUSION OF INSURANCE FROM THE ELECTIVE SHARE

As originally written, North Carolina's elective share statute included insurance proceeds in the elective share. As will be discussed in Part III, before it was enacted, the General Assembly deleted the reference to section 2042 of the Internal Revenue Code.¹⁵¹ North Carolina does not maintain detailed legislative history, so the reason for the deletion of section 2042 of the Internal Revenue Code may never be known. An educated guess, though, can be made, because the insurance industry has a long history of opposing the

147. Act to Modify the Rights of a Decedent's Spouse, ch. 30, 2000 N.C. Sess. Laws 1174, 1175 (codified at N.C. GEN. STAT. § 30-3.1 (2007), amended by An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.1)).

148. An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. §§ 30-3.1 to 3.6).

149. *Id.*

150. *Id.*

151. See *infra* Part III.

inclusion of life insurance proceeds in elective share laws.¹⁵² The insurance industry opposed the inclusion of life insurance in the augmented estate in the 1990 version of the UPC,¹⁵³ and it has successfully prevented the inclusion of life insurance proceeds in the elective share laws of other states.¹⁵⁴ Thus, it is likely that the deletion of section 2042 in North Carolina's elective share law was the result of insurance industry lobbying.

Why would the insurance industry oppose the inclusion of life insurance proceeds in the elective share? Over the years, three reasons have been suggested, each of which is addressed below.

A. *The Argument that Life Insurance Is Not Used to Disinherit*

Argument. Although life insurance is one of the most significant modes of generational wealth transmission,¹⁵⁵ there is a belief that “it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share.”¹⁵⁶ Because of this belief, life insurance proceeds payable to third parties were excluded from the original version of the UPC's augmented estate.¹⁵⁷

Rebuttal. The belief that life insurance is not used to disinherit fails to recognize that life insurance possesses the same qualities as wills: most life insurance policies are revocable until death and the beneficiaries may be changed at any time.¹⁵⁸ Hence, life insurance is the functional equivalent of other will substitutes, such as inter vivos trusts, payable-on-death contracts, and joint bank accounts, which are frequently used to evade elective share laws.¹⁵⁹ It is naïve to assume

152. See Nathaniel W. Schwickerath, Note, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 *DRAKE L. REV.* 769, 801–02 (2000).

153. Susan N. Gary, *The Oregon Elective Share Statute: Is Reform an Impossible Dream?*, 44 *WILLAMETTE L. REV.* 337, 343 n.48 (2007).

154. *Id.* at 343 n.48, 362 n.159.

155. Lannon, *supra* note 125, at 37 (“Life insurance often represents the single largest asset passing on death.”).

156. UNIF. PROBATE CODE § 2-202 cmt. (1969) (explaining why life insurance was excluded from the augmented estate in the 1969 version of the UPC).

157. See *supra* notes 121–23 and accompanying text.

158. See, e.g., *Pierson v. Buyer*, 330 N.C. 182, 185, 409 S.E.2d 903, 905 (1991) (demonstrating the similar characteristics and effects of life insurance policies and wills).

159. See *Livesay v. Carolina First Bank*, __ N.C. App. __, __, 665 S.E.2d 158, 162 (2008) (“One other will substitute is a life insurance policy.”); Steve G. Nilsson, *Can Living Trusts Defeat Elective Share?*, *FLA. B. J.*, Oct. 1996, at 34, 34 (discussing instances when living trusts were used to evade the elective share); Stephanie J. Willbanks, *Parting is Such Sweet Sorrow, But Does It Have to Be So Complicated? Transmission of Property at Death in Vermont*, 29 *VT. L. REV.* 895, 922 (2005) (noting that will substitutes—such as life insurance, annuities, joint tenancy, and revocable trusts—are beyond the reach of Vermont's elective share statute).

that a person inclined to disinherit his or her spouse would not use life insurance to accomplish such a goal, particularly if life insurance is the only mode of wealth transmission that is exempt from the elective share statute.¹⁶⁰

Case law also disproves the belief that life insurance is not used to evade elective share laws. For example, in *Mitchell v. Mitchell*,¹⁶¹ the decedent changed the beneficiary of his life insurance policy after separating from his wife, thus removing the insurance proceeds from both his probate estate and the scope of the elective share laws.¹⁶² Finding the change of beneficiary to be illusory, the trial court subjected the insurance proceeds to the surviving spouse's elective share.¹⁶³ The appellate court reversed, pointing out that "[i]n making the various changes in beneficiaries, the deceased exercised his absolute right to do so. There was nothing illusory about any of the changes. His contracts of insurance gave him that right."¹⁶⁴

Additionally, in *In re Estate of Herron*,¹⁶⁵ the deceased spouse transferred various life insurance policies to a revocable inter vivos trust four years before death.¹⁶⁶ Such transfers substantially depleted the deceased spouse's probate estate, prompting the surviving spouse to challenge the validity of the transfers.¹⁶⁷ The court concluded that the insurance trust was a bona fide inter vivos transaction and, as such, was exempt from the surviving spouse's elective share.¹⁶⁸

Although the North Carolina General Assembly may have justified the deletion of section 2042 in part on the belief that life

160. See Gary, *supra* note 153, at 361 ("In addition to the fact that life insurance may be a significant asset of an estate, if the augmented estate does not include life insurance, a spouse will be able to use life insurance to avoid the elective share. If a spouse decided to use insurance to transfer assets to someone other than the surviving spouse, the spouse might enter into a contract that involved a significant premium. Insurance might become the vehicle of choice for avoiding the elective share."); Bruce L. Stout & Audy M. Perry, Jr., *West Virginia Takes a Step Backward in Elective Share Law*, 99 W. VA. L. REV. 679, 683 (1997) ("If life insurance is exempted, then life insurance will be the 'estate-depleting transfer of choice' for people wanting to disinherit their surviving spouse.").

161. 37 N.Y.S.2d 612 (N.Y. App. Div. 1942), *aff'd*, 50 N.E.2d 106 (N.Y. 1943).

162. *Id.* at 614.

163. *Id.*

164. *Id.* at 615.

165. 237 So. 2d 563 (Fla. Dist. Ct. App. 1970).

166. *Id.* at 564.

167. *Id.*

168. *Id.* at 568; see also *Bullen v. Safe Deposit & Trust Co.*, 9 A.2d 581, 584-85 (Md. 1939) (holding that assets in a revocable life insurance trust are not subject to the surviving spouse's elective share). But see *In re Estate of Brown*, 119 A.2d 513, 516 (Pa. 1956) (holding that because the decedent retained lifetime control over the insurance trust, the insurance proceeds were subject to the surviving spouse's elective share).

insurance is not generally used to evade elective share laws, both common sense and case law demonstrate that the belief is not well founded.¹⁶⁹

B. The Argument that Insurance Companies Would Suffer Double Exposure

Argument. The best reason suggested for excluding life insurance proceeds from the elective share is to protect life insurance companies from double-payment exposure.¹⁷⁰ The probate process can take months, if not years.¹⁷¹ After all, a surviving spouse has at least six months to renounce the decedent spouse's will and demand an elective share.¹⁷²

One of the purposes of life insurance is to ensure that beneficiaries have access to resources during the probate process.¹⁷³ Accordingly, life insurance proceeds are typically paid to the named beneficiaries within days of the decedent's death.¹⁷⁴ The insurance industry has resisted efforts to include life insurance proceeds in the elective share because it claims that it would be forced to choose between two undesirable options:¹⁷⁵ refuse to disburse life insurance proceeds of married decedents to non-spousal beneficiaries for at least six months, or pay the proceeds to the non-spousal beneficiaries

169. Cf. *Succession of Lane*, 95-0558 (La. App. 4 Cir. 09/28/95); 662 So. 2d 82, 82 (involving a father who used life insurance policies to circumvent children's forced share rights under Louisiana law).

170. See MCLAUGHLIN & BOWSER, *supra* note 55, § 14:6, at 32.

171. Robert A. Esperti & Renno L. Peterson, *Proper Drafting and Planning for the Use of Revocable Trusts*, 21 COLO. LAW. 2565, 2566 (1992) (indicating it took twelve to eighteen months to close a probate estate).

172. N.C. GEN. STAT. § 30-3.4(b) (2007) ("A claim for an elective share must be made within six months after the issuance of letters testamentary or letters of administration in connection with the will or intestate proceeding with respect to which the surviving spouse claims the elective share by (i) filing a petition with the clerk of superior court of the county in which the primary administration of the decedent's estate lies, and (ii) mailing or delivering a copy of that petition to the personal representative of the decedent's estate. A surviving spouse's incapacity shall not toll the six-month period of limitations."), *amended by An Act to Revise the Existing Elective Share Statutes*, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.4).

173. See, e.g., Richard S. Kinyon & K. Bruce Friedman, *Tax Planning for Estate & Trust Distributions*, 163 PRACTISING LAW INST. 137, 172, Feb. 1, 1986, available at WESTLAW, 163 PLI/Est 137.

174. See MCLAUGHLIN & BOWSER, *supra* note 55, § 14.6, at 32.

175. See Terry S. Kogan & Michael F. Thomson, *Piercing the Façade of Utah's "Improved" Elective Share Statute*, 1999 UTAH L. REV. 677, 699 (1999) (reporting that the Utah legislature excluded life insurance proceeds from the augmented estate because of "pressure from the insurance industry").

and risk subsequent litigation by the surviving spouse for wrongful payment.¹⁷⁶

Rebuttal. While the insurance industry's concern is legitimate, it presents a false dilemma. There is a third option: a statute that includes life insurance proceeds in the elective share with a provision to protect insurance companies for payments made in good faith prior to notice of the surviving spouse's demand for an elective share.¹⁷⁷ Part IV of this Article proposes legislation that protects both surviving spouses and insurance companies.

C. The Argument that Deletion of Section 2042 Promotes the Purchase of Insurance

Argument. Another reason has been suggested for the exclusion of life insurance proceeds from the elective share law in North Carolina. By removing life insurance proceeds from the elective share, the life insurance industry is likely to see an increase in its business because life insurance would become the estate-depleting asset of choice.¹⁷⁸

Rebuttal. Although life insurance is now the option of choice for persons inclined to disinherit their spouses, it seems unlikely that the General Assembly attempted to create a life insurance loophole to give the insurance industry an unfair advantage over other modes of generational wealth transfer. It is more likely that the General Assembly based its decision on the belief that life insurance is not

176. See *id.*; see also Domenico Zaino, Jr., Commentary, *The Practical Effect of Extending Revocation by Divorce Statutes to Life Insurance*, 2 CONN. INS. L.J. 213, 234 n.120 (1996) (noting that the 1990 UPC added a good faith payment provision to placate insurance companies).

177. Tanick & Johnson, *supra* note 50, at 258–59.

A more plausible explanation for the UPC's exclusion of life insurance and pension benefits from the augmented estate rests on the fear that insurance companies or pension funds will be liable to both the electing spouse and to the third party beneficiary if the benefits are included in the augmented estate. This fear, however, is unfounded. An earlier intestate succession bill introduced in the Minnesota Senate demonstrates how the legislature may avoid this problem of double liability. The bill would have relieved a "payer" of benefits from liability to a surviving spouse once the named beneficiary had been paid, unless the payer had notice of the spouse's intention to file for an elective share. Absent notice, the insurer or pension plan would not be liable for merely paying the named beneficiary. Such a provision would thus protect payers from double liability, and at the same time protect surviving spouses' rights to an elective share.

Id. (footnotes omitted).

178. See Cobb, *supra* note 14, at 818–19.

used to evade the elective share or to protect life insurance companies from double exposure.

III. LIFE INSURANCE LOOPHOLE¹⁷⁹

On July 21, 2000, after the adoption of section 30-3.2(4) but nearly six months prior to its effective date, the General Assembly made a seemingly minor, technical revision to section 30-3.2(4)(e) by deleting “2042” from the list of Internal Revenue Code provisions set forth therein.¹⁸⁰ In doing so, the General Assembly attempted to exclude life insurance from the decedent’s total net assets. Until now, legal commentators have assumed the General Assembly accomplished its goal.¹⁸¹ A question remains, however, as to whether life insurance may be included in the decedent’s total net assets under one of the *other* provisions of section 30-3.2(4). This question will be addressed below.

A. *Life Insurance Is Not Included in the Decedent’s Total Net Assets Under Sections 30-3.2(4)(a)–(d) or (f)–(i)*

As detailed below, life insurance policies with non-spousal beneficiaries are not included in “total net assets” under North Carolina General Statutes sections 30-3.2(4)(a)–(d) or (f)–(i). These sections encompass most property owned by the average person, but not traditional life insurance policies.

Under section 30-3.2(4)(a), “[a]ll property to which the decedent had legal and equitable title immediately prior to death” is included in the decedent’s total net assets.¹⁸² This subsection requires that the decedent have *both* legal and equitable title immediately prior to

179. For purposes of Part III., citations to sections 30-3.1 to 3.6 of the General Statutes of North Carolina will refer to the 2007 version, prior to the recent 2009 amendments found in An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. §§ 30-3.1 to 3.6).

180. An Act to Modify the Rights of a Decedent’s Spouse, ch. 30, § 92, 2000 N.C. Sess. Laws 737, 806 (codified at N.C. GEN. STAT. § 30-3.4(b) (2007), amended by An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.4). Section 30-3.2(4)(e) then read: “The value of any property which would be included in the Taxable Estate of the decedent pursuant to sections 2033, 2035, 2036, 2037, 2038, 2039, or 2040 of the [Internal Revenue] Code.” N.C. GEN. STAT. § 30-3.2(4)(e) (2007).

181. See *Cobb*, *supra* note 14, at 818–19.

182. N.C. GEN. STAT. § 30-3.2(4)(a); see also *In re Estate of Pope*, __ N.C. App. __, __, 666 S.E.2d 140, 150–51 (2008) (noting that the total net assets include all property to which the decedent had “legal and equitable title” before death).

death. For life insurance policies with named beneficiaries, the decedent may have legal title but does not have equitable title.¹⁸³

Under section 30-3.2(4)(b), “[a]ll property received by the decedent’s personal representative by reason of the decedent’s death, other than wrongful death proceeds” are included in the decedent’s total net assets.¹⁸⁴ Because life insurance proceeds are paid directly to the named beneficiary and are not part of the decedent’s probate estate, this provision would not apply to life insurance proceeds (except those payable to the decedent’s estate or executor).¹⁸⁵ In addition, life insurance proceeds would not be covered by sections 30-3.2(4)(c) and 4(d) because those subsections are limited to property held by the decedent and others as joint tenants with right of survivorship or tenants by the entirety.¹⁸⁶ Life insurance policies usually have only one owner.¹⁸⁷

Section 30-3.2(4)(f) applies to gifts made by the decedent within six months of death.¹⁸⁸ For this subsection to apply, the gift must be completed during the decedent spouse’s lifetime.¹⁸⁹ A gift is not complete unless the gifted property is delivered during the decedent spouse’s lifetime.¹⁹⁰ For example, if the decedent spouse creates an inter vivos trust with the remainder paid to a third party at the decedent spouse’s death, delivery of the remainder does not occur until after the decedent spouse’s death, and thus section 30-3.2(4)(f) is inapplicable.¹⁹¹ For the same reason, section 30-3.2(4)(f) would not apply to a beneficial interest in a life insurance policy. The typical life insurance policy involves two transfers. The first transfer occurs when the decedent purchases the policy from the insurance company. This transfer would not trigger section 30-3.2(4)(f) because life

183. *In re Pope*, __ N.C. App. at __, 666 S.E.2d at 151. Moreover, if the policy is held by an ILIT, the decedent would own neither legal nor equitable title. *Id.* (noting that in trusts, the trustee owns legal title and the beneficiary owns equitable title).

184. N.C. GEN. STAT. § 30-3.2(4)(b).

185. *See In re Estate of Perry*, 2008-Ohio-351, ¶¶ 16–26, No. 2007-03-061, 2008 WL 282067, at *3–5 (Ohio Ct. App. Feb. 4, 2008) (omitting life insurance proceeds from the probate assets).

186. N.C. GEN. STAT. § 30-3.2(4)(c), (d) (2007). Section 30-3.2(4)(e) will be addressed in Part III.B., *infra*.

187. *See, e.g.*, *Estate of Street v. Comm’r*, 73 T.C.M. (CCH) 1787, 1787 (1997) (noting that decedent was the sole owner of four insurance policies on his life); Charles W. Bauer, *Protecting an Elderly Client’s Assets*, 26767 NAT’L. BUS. INST. 72, 126, Mar. 17, 2005, available at WESTLAW, 26767 NBI-CLE 72 (“The owner of a life insurance policy is the insured unless otherwise noted on the policy . . .”).

188. N.C. GEN. STAT. § 30-3.2(4)(f).

189. *In re Estate of Pope*, 666 __N.C. App. __, __, S.E.2d 140, 152–53 (2008).

190. *Id.*

191. *Id.*

insurance policies are contracts, not gifts.¹⁹² The second transfer occurs when the insurance company disburses the proceeds to the named beneficiary. This transfer could not trigger section 30-3.2(4)(f) because it occurs after the decedent's death.¹⁹³

By its terms, section 30-3.2(4)(g) is limited to individual retirement accounts, pensions, profit-sharing plans, and private or governmental retirement plans and annuities; it does not cover life insurance.¹⁹⁴ Finally, section 30-3.2(4)(h) is limited to property passing to the surviving spouse.¹⁹⁵ Although this provision would cause inclusion of life insurance proceeds payable to the surviving spouse in the decedent's total net assets, it would not cause inclusion of life insurance proceeds payable to third parties in such assets.¹⁹⁶

As a consequence, if life insurance proceeds payable to third parties are included in the decedent's total net assets, the inclusion must result from section 30-3.2(4)(e), which, in turn, incorporates sections 2033 and 2035–2040 of the Internal Revenue Code.

B. Life Insurance is Included in the Decedent's Taxable Estate Under Internal Revenue Code Sections 2035 and 2038

As originally written, section 30-3.2(4)(e) included in the decedent's "total net assets" all assets included in the "taxable estate" under section 2042 of the Internal Revenue Code for federal estate tax purposes.¹⁹⁷ Under this provision, life insurance proceeds payable to third parties would be included in the decedent's total net assets.¹⁹⁸ However, as explained above, section 2042 of the Internal Revenue Code was deleted from section 30-3.2(4)(e) in 2000 in an attempt to remove life insurance proceeds from the decedent's total net assets.¹⁹⁹

192. See, e.g., *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 574, 589 S.E.2d 423, 428 (2003) ("A life insurance policy is a contract.").

193. See *In re Pope*, __, N.C. App. at __, 666 S.E.2d at 150–51.

194. N.C. GEN. STAT. § 30-3.2(4)(g) (2007).

195. *Id.* § 30-3.2(4)(h).

196. See *id.* §§ 30-3.2(4)(h), 30-3.3(a)(5) (stating that the property that passes to the surviving spouse includes his interest, "outright or in trust," in any insurance proceeds from policies on his life).

197. See *supra* Part I.E.

198. An Act to Modify the Rights of a Decedent's Spouse, ch. 30, 2000 N.C. Sess. Laws 1174 (codified at N.C. GEN. STAT. § 30-3.1 (2007)), amended by An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.1).

199. See *Cobb*, *supra* note 14, at 817–18 (arguing that the North Carolina General Assembly deleted I.R.C. section 2042 from the decedent spouse's total net assets with the intent to remove life insurance proceeds from inclusion in such assets).

Under federal law, however, life insurance policies may be included in the taxable estate for federal estate tax purposes under provisions other than section 2042 of the Internal Revenue Code,²⁰⁰ as there is substantial overlap between section 2042 and other provisions of the Internal Revenue Code.²⁰¹ Indeed, legal experts agree that in addition to Internal Revenue Code section 2042, “[o]ther sections of the [Internal Revenue] Code may . . . include insurance proceeds in the gross estate,” specifically sections 2036 through 2038.²⁰² Accordingly, as shown below, it seems likely that life insurance proceeds payable to third parties are still included in the decedent’s total net assets despite the deletion of section 2042.

As revised, section 30-3.2(4)(e) includes in the decedent’s total net assets “[t]he value of any property which would be included in the taxable estate of the decedent pursuant to sections 2033, 2035, 2036, 2037, 2038, 2039, or 2040 of the [Internal Revenue] Code.”²⁰³ To the extent relevant to North Carolina’s elective share law, each of these provisions is examined below.

I.R.C. Section 2033. According to section 2033 of the Internal Revenue Code, “[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.”²⁰⁴ Section 2033 is roughly synonymous with the decedent’s probate estate,²⁰⁵ and the law is clear that life insurance proceeds payable to named beneficiaries are not included in the decedent’s probate estate.²⁰⁶ In addition, the predecessor to section 2033 of the Internal Revenue Code was enacted two years before the predecessor to section 2042;²⁰⁷ during this two-year period, life insurance proceeds payable to the decedent’s estate were

200. BOGERT, *supra* note 146, § 273.40.

201. *See, e.g.*, John T. Gaubatz, *A Generation Shifting Transfer Tax*, 12 VA. TAX REV. 1, 13 (1992) (noting overlap between I.R.C. sections 2038 and 2042); MAUNSEL W. HICKEY ET AL., LOUISIANA PRACTICE § 5:66 (2009) (observing interplay between I.R.C. sections 2035 and 2042).

202. J. MARTIN BURKE ET AL., 1 MODERN ESTATE PLANNING § 9.04 (2008).

203. N.C. GEN. STAT. § 30-3.2(4)(e) (2007).

204. I.R.C. § 2033 (2008).

205. INTERNAL REVENUE MANUAL, PROBATE ASSETS 5.5.7.5 (2005), *available at* http://www.irs.gov/irm/part5/irm_05-005-007.html#d0e80.

206. *See, e.g.*, *In re Estate of Perry*, 2008-Ohio-351, ¶¶ 16, No. 2007-03-061, 2008 WL 282067, at *3 (Ohio Ct. App. Feb. 4, 2008) (omitting life insurance proceeds from probate assets).

207. Revenue Act of 1916, ch. 463, 39 Stat. 756, 777–78 (1916) (codified as I.R.C. § 202 (1916), predecessor of I.R.C. § 2033 (2008)); Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1098 (1919) (codified as I.R.C. § 402(f) (1919), predecessor of I.R.C. § 2042 (2008)).

included in the taxable estate, but life insurance proceeds payable to named beneficiaries were not.²⁰⁸

I.R.C. Section 2035. Under some circumstances, a life insurance policy with a non-spousal beneficiary will be included in the decedent's taxable estate under section 2035(a) of the Internal Revenue Code and thus in the decedent's total net assets under section 30-3.2(4)(e). According to section 2035(a), if the decedent transfers an interest in property within three years of death, and the value of such property would have been included in the decedent's gross estate under section 2042 of the Internal Revenue Code if the transferred interest had been retained by the decedent on the date of his death, the value of the gross estate shall include the value of any property which would have been so included.²⁰⁹ In other words:

Section 2035(a) will apply if the decedent possessed an incident of ownership [e.g., the right to change beneficiaries] in the life insurance policy at some time during the three-year period prior to death and transferred such incident of ownership during the same period. Thus, the relevant frame of reference for purposes of § 2035 is not merely the time of death, but the three-year period preceding death. If during the three-year period preceding death, the decedent possessed incidents of ownership . . . and the decedent subsequently relinquished the incidents of ownership by assignment of the policy . . . the application of § 2035(a) will be triggered.²¹⁰

As a consequence, a person inclined to disinherit his or her spouse in North Carolina would have to be careful doing so with existing life insurance policies. If the decedent spouse transferred such policies to an ILIT (or third party) within three years of death, the proceeds of such policies would be included in the decedent's total net assets under section 2035(a) of the Internal Revenue Code and section 30-3.2(4)(e) of the North Carolina General Statutes.²¹¹

It is important to note, however, that section 2035(a) of the Internal Revenue Code does not apply to new life insurance policies.²¹² If the decedent spouse wishes to purchase a new life

208. BORIS I. BITTKER, ET AL., *FEDERAL ESTATE & GIFT TAXATION* 364-65 (9th ed. 2005).

209. I.R.C. § 2035(a) (2008).

210. I.R.S. Priv. Ltr. Rul. 199905010 (Oct. 30, 1998).

211. See, e.g., Michael A. Kirtland, *What Every Divorce Attorney Should Know About Taxes*, 61 ALA. LAW., Mar. 2000, at 116, 120 ("If an existing policy is transferred to the ILIT, the non-inclusion of the policy benefits in the estate of the insured will only occur after three years from the date of transfer to the ILIT.").

212. I.R.C. § 2035(a) (2008).

insurance policy with assurance that the proceeds of such policy will not be included in his or her total net assets,

he or she should create a new ILIT, make a cash gift to the new ILIT and have the ILIT purchase the new life insurance policy. This avoids the 3-year rule under I.R.C. section 2035 which would result if the grantor purchased the policy and then transferred it to the ILIT.²¹³

In addition, section 2035(a) does not apply to life insurance policies purchased by the decedent within three years of death if, at the time of purchase, the beneficiaries or anyone other than the decedent are designated as the owners of such policies.²¹⁴ This is true regardless of the fact that the decedent paid all premiums on the life insurance policy.²¹⁵

It is possible, therefore, that some life insurance policies will be included in a decedent spouse's total net assets under section 2035(a) of the Internal Revenue Code and section 30-3.2(4)(e) of the General Statutes of North Carolina. This result is unlikely to occur, however, if the decedent spouse is predisposed to disinherit the surviving spouse and is searching for a legal loophole, since section 2035(a) is relatively easy to circumvent.

I.R.C. Section 2036. Under section 2036 of the Internal Revenue Code, the value of property is included in a decedent's taxable estate if the decedent retained for life "(1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."²¹⁶ Section 2036 is most often used to include in the decedent's taxable estate the value of the remainder interest in a trust if the decedent retained the income interest for life.²¹⁷ For instance, if a person establishes an inter vivos trust that holds a life insurance policy on his or her life and he or she retains an income interest in the trust, the full

213. Domingo P. Such, *Fix-ups of Estate Plans after They have Become Irrevocable*, SK093 ALI-ABA 137, 148, June 19-24, 2005, available at WESTLAW, SK093 A.L.I.-A.B.A. 137.

214. *In re Estate of Perry v. Comm'r*, 927 F.2d 209, 212 (5th Cir. 1991).

215. *In re Estate of Tracy v. U.S.*, No. C-C-81-56-P, 1982 WL 1716, at *5 (W.D.N.C. Sep. 3, 1982).

216. I.R.C. § 2036 (2008).

217. ALINE F. ANDERSON & DIANE KENNEDY, *ANDERSON'S WILLS, TRUSTS & ESTATE PLANNING* § 10:11 (2009).

value of the insurance proceeds will be included in the person's taxable estate under section 2036 of the Internal Revenue Code.²¹⁸

Because life insurance policies do not have traditional income interests, there is no authority known to the author supporting inclusion of life insurance policies held by the decedent outright (and not in trust) in the taxable estate under section 2036.²¹⁹ If the policy has an income or income-like interest, the proceeds would probably be included in the decedent's taxable estate under section 2036 of the Internal Revenue Code and total net assets under section 30-3.2(4)(e) of the General Statutes of North Carolina. Such inclusion could be avoided though, if at the time the decedent purchases the policy, he or she designates someone else (e.g., the beneficiary or an ILIT) as the owner of the policy.²²⁰

I.R.C. Section 2037. Under section 2037 of the Internal Revenue Code, the value of property transferred by the decedent will be included in the decedent's taxable estate if the decedent retained more than a de minimis reversionary interest.²²¹ People who purchase life insurance policies with named beneficiaries typically do not retain reversionary interests.²²² Thus, section 2037 would rarely cause inclusion of the proceeds of a life insurance policy in the decedent's taxable estate. If a decedent spouse wishes to ensure that life insurance proceeds are excluded from the scope of section 2037, he or she could designate someone else (e.g., the beneficiary or an ILIT) as the owner of the policy.²²³

I.R.C. Section 2038. The greatest hurdle for a person intending to disinherit his or her spouse with life insurance in North Carolina is section 2038 of the Internal Revenue Code. Under section 2038,

218. I.R.S. Tech. Adv. Mem. 98-26-002 (June 26, 1998).

219. Section 2036 includes in the decedent's taxable estate "the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer . . . by trust or otherwise, under which he has retained for his life . . . the possession or enjoyment of, or the right to the income from, the property . . ." I.R.C. § 2036(a)(1) (2008). An insured does not have an income interest in his or her own life insurance policy.

220. See *supra* Introduction (explaining the use of an ILIT).

221. I.R.C. § 2037 (2008).

222. See, e.g., *Bennett v. United States*, 185 F. Supp. 577, 584 (N.D. Ill. 1960) (excluding life insurance proceeds from the decedent's estate under I.R.C. § 2037 because decedent retained no reversionary interests). A reversionary interest generally follows a life estate or lease. For life insurance policies on the decedent's life, the decedent's interest in the policy ends at his or her death; thus, the decedent has no reversionary interest in the policy. *Id.*

223. See *Bennett*, 185 F. Supp. at 586-87 (excluding from the gross estate life insurance policies transferred to an irrevocable trust not included under the predecessor to section 2037 of the Internal Revenue Code).

property the decedent transferred during life in which he or she retained the power to “alter, amend, revoke, or terminate” is included in the decedent’s taxable estate.²²⁴ For instance, if the decedent creates a revocable trust that holds insurance policies on the decedent’s life, the proceeds of such policies are included in the decedent’s taxable estate under section 2038 of the Internal Revenue Code and hence would be included in the decedent’s total net assets under section 30-3.2(4)(e) of the North Carolina General Statutes.²²⁵

It is safe to assume, therefore, that an insurance policy on the decedent’s life that he or she owns outright (i.e., not in trust) would likewise be included in the decedent’s taxable estate under section 2038 because the decedent would have the power to alter, amend, revoke, or terminate the policy by, for example, changing beneficiaries or canceling the policy.²²⁶ Thus, despite the deletion of section 2042 from section 30-3.2(4)(e) of the North Carolina General Statutes, most life insurance proceeds would still be subject to the surviving spouse’s elective share rights under section 2038 of the Internal Revenue Code. This would include any policy on the life of the decedent spouse for which the decedent possessed the right to change beneficiaries or to surrender or cancel the policy; most policyholders retain such rights until death.²²⁷ Inclusion of a life insurance policy under section 2038 of the Internal Revenue Code is avoidable, however, if at the time the decedent purchases the policy, he or she designates someone else (e.g., the beneficiary or an ILIT) as the owner of the policy and retains no powers or interests whatsoever in the policy.²²⁸

I.R.C. Section 2039. Under section 2039 of the Internal Revenue Code, annuities with survivorship benefits are included in the taxable estate of the original annuitant.²²⁹ By its very terms, section 2039 does not apply to life insurance policies on the life of the decedent.²³⁰

224. I.R.C. § 2038 (2008).

225. See, e.g., HICKEY ET AL., *supra* note 201, at 111.

226. See Gaubatz, *supra* note 201, at 12–13.

227. 5 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 67:28, at 67-38 (3d. ed. 2005) (“Life insurance policies ordinarily reserve to the insured the right to change beneficiaries thereunder, and to surrender the policy for cash, borrow from the insurer up to its reserve value, or permit it to lapse for nonpayment of premiums.”).

228. Joshua S. Rubenstein, *Understanding Estate, Gift and Generation-Skipping Transfer Taxes* 317 PRACTISING LAW INST. 7, 49, July 9, 2002, available at WESTLAW, 317 PLI/Est 7; 2 EDWARD F. KOREN & ROBERT H. WALTUCH, ESTATE AND PERSONAL FINANCIAL PLANNING § 22.09 (2008).

229. I.R.C. § 2039 (2008) (“The gross estate shall include the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under

I.R.C. Section 2040. Section 2040 of the Internal Revenue Code applies to property held by the decedent as a joint tenant with right of survivorship or tenant by the entirety.²³¹ It would not apply to life insurance policies because such policies rarely have more than one owner.²³²

In summary, the General Assembly failed in its goal to create an insurance loophole because, even in the absence of section 2042 of the Internal Revenue Code, the proceeds of a typical insurance policy on the life of the decedent will be included in the decedent's taxable estate under section 2038 (or section 2035) of the Internal Revenue Code and hence will be included in the decedent's total net assets under section 30-3.2(4)(e) of the General Statutes of North Carolina.²³³ Such inclusion is avoidable if, at the time the decedent purchases the policy, he or she designates someone else (e.g., the beneficiary or an ILIT) as the owner of the policy and retains no powers or interests whatsoever in it. Thus, with a little planning, life insurance can be used in North Carolina to disinherit one's spouse.²³⁴ In Part IV, this Article proposes legislation that will allow the

any form of contract or agreement . . . (other than as insurance under policies on the life of the decedent).”).

230. *Id.*

231. *Id.* § 2040 (“The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person, or as tenants by the entirety by the decedent and spouse . . .”).

232. *See supra* note 187 and accompanying text.

233. *See* N.C. GEN. STAT. § 30-3.2(4)(e) (2007).

234. Notwithstanding the fact that most life insurance policies fit easily within the scope of section 2038 of the Internal Revenue Code and thus within the scope of section 30-3.2(4)(e) of the General Statutes of North Carolina, a case could be made for the exclusion of all insurance proceeds payable to non-spousal beneficiaries from the elective share statute. Such a case would be based on the following rule of statutory construction: “It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law.” *People v. Dillon*, 668 P.2d 697, 712 (Cal. 1983) (quoting *People v. Valentine*, 169 P.2d 1, 14 (Cal. 1946)); *see also* *Landers v. Pickering*, 427 N.E.2d 716, 718 (Ind. Ct. App. 1981) (“A fundamental rule of statutory construction is where a prior statute contains certain language, and a latter statute deletes the language, it is presumed that the legislature was cognizant of the prior language and intended to change the law by the deletion.”). As applied to section 30-3.2(4)(e) of the General Statutes of North Carolina, the argument would proceed as follows: by deleting section 2042 of the Internal Revenue Code, the General Assembly intended to effect a substantial change to the law, specifically, the removal of life insurance proceeds from the elective share statute. Any other interpretation of the deletion of section 2042 would render the General Assembly's action superfluous. Thus, life insurance proceeds payable to non-spousal beneficiaries should be excluded from the elective share statute despite the fact that they are technically covered by other provisions of section 30-3.2(4)(e).

General Assembly to protect both insurance companies from excessive liability and surviving spouses.

IV. PROPOSED LEGISLATION

Based on the recent action of the General Assembly, insurance proceeds from an insurance policy on the life of the decedent are now included in the elective share.²³⁵ New legislation is needed, however, to protect insurance companies from excessive liability. New legislation also is needed to prevent a person from using an ILIT as a conduit to purchase a life insurance policy that disinherits his or her surviving spouse.

A. Proposed New Section 30-3.7 of the North Carolina General Statutes

To protect insurance companies that make good faith payments to named beneficiaries before being notified of the surviving spouse's demand for an elective share, the following provision should be enacted as a new section 30-3.7 of the North Carolina General Statutes:

Insurance Company Liability. An insurance company is not liable for having made a payment to a person designated in a life insurance policy who, under this Article, is not entitled to the payment, or for having taken any other action in good faith reliance on the person's apparent entitlement under the terms of the insurance policy, before the insurance company received written notice of a claimed lack of entitlement under this Article. An insurance company is liable for a payment made or other action taken after the insurance company received written notice of a claimed lack of entitlement under this Article. Written notice of a claimed lack of entitlement under this Article must be mailed to the insurance company's main office by registered or certified mail, return receipt requested, or served upon the insurance company in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this Article, an insurance company may pay any amount owed to the clerk of the superior court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the clerk of the superior court having

235. An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, available at NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. §§ 30-3.1 to 3.6).

jurisdiction of probate proceedings relating to decedent's estate located in the county of the decedent's residence. The clerk shall hold the funds and, upon the clerk's determination under this Article, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the clerk discharge the insurance company from all claims for the value of amounts paid to or deposited with the clerk.²³⁶

The proposed statute protects insurance companies from wrongful payment lawsuits by surviving spouses.

As a consequence, life insurance proceeds payable to third parties would be subject to the surviving spouse's elective share under one of two scenarios: first, the surviving spouse could notify the insurance company of his or her elective share rights prior to disbursement of the proceeds, at which point the insurance company could protect itself by depositing the proceeds with the clerk of the probate court; or second, if disbursement of the proceeds to the beneficiaries has already occurred, the decedent's personal representative could attempt to retrieve the life insurance proceeds (or at least the appropriate portion thereof) from the beneficiaries.²³⁷

236. This proposed provision is an adaptation of section 28A-24-8 of the North Carolina General Statutes and Uniform Probate Code section 2-214. *See* N.C. GEN. STAT. § 28A-24-8 (2007); UNIF. PROBATE CODE § 2-214 (1990).

237. The personal representative is authorized to pursue such payments under section 30-3.5(a) of the General Statutes of North Carolina, which provides:

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

N.C. GEN. STAT. § 30-3.5(a) (2007), *amended by* An Act to Revise the Existing Elective Share Statutes, ch. 30, 2009 N.C. Sess. Laws 368, *available at* NC LEGIS 2009-368 (2009) (Westlaw) (to be codified at N.C. GEN. STAT. § 30-3.5).

CONCLUSION

For centuries, North Carolina more or less tolerated spousal disinheritance. In 1959, North Carolina adopted a “right of dissent” statute that authorized a surviving spouse to renounce the decedent spouse’s will and in lieu thereof elect to receive a statutorily prescribed share of the decedent spouse’s probate estate. Because the elective share statute was limited to the decedent spouse’s probate estate, it was easily circumvented through the use of non-probate transfers, such as inter vivos trusts, joint tenancies, payable-on-death contracts, and life insurance. In 1969, the UPC sought to close the non-probate loophole by expanding the reach of the elective share to an “augmented estate” comprised of the decedent spouse’s probate estate *and* all non-probate transfers made by the decedent spouse during life. The purpose of the augmented estate was to prevent spouses from deliberately disinheriting each other.

In 2001, the General Assembly of North Carolina adopted a version of the augmented estate. Shortly before the effective date, the General Assembly made what appeared to be a technical revision to the law. The goal of this ostensibly technical revision was to remove life insurance proceeds from the scope of the elective share. Until now, legal commentators have assumed that the General Assembly successfully removed life insurance proceeds from North Carolina’s elective share statute. This Article demonstrates, however, that despite the legislature’s action, most life insurance proceeds payable to non-spousal beneficiaries are probably still included in the surviving spouse’s elective share.²³⁸

Although the General Assembly failed in its effort to create a major life insurance loophole in North Carolina’s elective share statute, a minor life insurance loophole—using an ILIT as a conduit for the insurance policy—still exists. This Article refutes the purported justifications for treating life insurance differently than other non-probate transfers and proposes legislation designed to close the existing life insurance loophole in North Carolina’s elective share law in a manner that does not expose insurance companies to needless litigation.²³⁹ At least one jurisdiction—Virginia—has enacted such a law²⁴⁰ and has successfully prevented the evasion of

238. See *supra* Part III.B.

239. See *supra* Part IV.; see also Zaino, *supra* note 176, at 234 n.120 (noting that the 1990 UPC added a good faith payment provision to placate insurance companies).

240. See VA. CODE ANN. § 64.1-16.1 (“[T]he terms ‘estate’ and ‘property’ shall include insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit

the surviving spouse's elective share with life insurance.²⁴¹ This Article calls on North Carolina to join its northern neighbor and enact comprehensive legislation designed to protect surviving spouses from intentional disinheritance.

plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime").

241. See *Felix-Aranibar v. Felix*, No. W26889, 2002 WL 1941025, at *7 (Va. Cir. Ct. Aug. 12, 2002) (holding that life insurance benefits are included in Virginia's augmented estate for the purpose of the surviving spouse's elective share).