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## The North Carolina Dissent Statutes: The Seeds of Inequities Germinate

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# COMMENTS

## THE NORTH CAROLINA DISSENT STATUTES: THE SEEDS OF INEQUITIES GERMINATE . . .

I.	INTRODUCTION . . . . .	449
II.	HISTORY . . . . .	453
III.	ANALYSIS . . . . .	455
	A. <i>The Three Inequities</i> . . . . .	455
	1. <i>The Second or Successive Spouse Provision</i> . . . . .	455
	a. <i>Vinson v. Chappell</i> . . . . .	456
	b. <i>Phillips v. Phillips</i> . . . . .	458
	c. <i>In re Estate of Edwards</i> . . . . .	458
	2. <i>The Possibility of a Windfall</i> . . . . .	460
	3. <i>The Possibility of a Disinheritance</i> . . . . .	462
	B. <i>Ameliorating the Inequities</i> . . . . .	466
	1. <i>The Second or Successive Spouse Provision</i> . . . . .	466
	2. <i>The Possibility of a Windfall</i> . . . . .	467
	3. <i>The Possibility of Disinheritance</i> . . . . .	469
IV.	CONCLUSION . . . . .	470

### I. INTRODUCTION

When a spouse wishes to bequeath or devise his or her property to someone other than the surviving spouse,<sup>1</sup> the stage is set for a potential conflict between the state's interest in protecting the surviving spouse against disinheritance and the testator's inter-

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1. The North Carolina right to dissent statute accords both husband and wife coextensive rights in the other's estate at probate. The use of "surviving spouse" throughout this commentary applies by law to both spouses; however, "surviving spouse" will usually refer to the wife here for illustrative purposes. Cf. Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970) (stating that although the statutes read that neither spouse may disinherit the other, the primary object of the law's concern has traditionally been the widow).

est in freedom of testation. Through the enactment of North Carolina General Statutes sections 30-1 and 30-3,<sup>2</sup> the North Carolina General Assembly has recognized the need to restrict the testator's freedom of testation whenever its exercise threatens the state's interest in protecting the surviving spouse from disinheritance. The purpose of this commentary is not to quarrel with the public poli-

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2. For purposes of this comment, discussion is limited to N.C. GEN. STAT. §§ 30-1 and 30-3 (1984). N.C. GEN. STAT. §§ 30-1 and 30-3 provide in pertinent part:

*30-1. Right of Dissent.*

(a) A spouse may dissent from his deceased spouse's will in those cases where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of property or interests in property passing in any matter outside the will to the surviving spouse as a result of the death of the testator:

- (1) Is less than the intestate share of such spouse, or . . .
- (3) Is less than the one half of the amount provided by the Intestate Succession Act in those cases where the surviving spouse is a second or successive spouse and the testator has surviving him lineal descendants by a former marriage and there are no lineal descendants surviving him by the second or successive marriage.

(b) For the purpose of subsection (a) of this section and by way of illustration and not of limitation, the following shall, subject to the exception hereinafter set forth, be included in the computation of the value of the property or interest in property passing to the surviving spouse as a result of the death of the testator:

- (1) The value of a legal or equitable life estate for the life of the surviving spouse;
- (2) The value of the proceeds of an annuity for the life of the surviving spouse;
- (3) The value of proceeds of insurance policies on the life of the decedent received by the spouse;
- (4) The value of any property passing by survivorship . . . ;
- (5) The value of the principal of a trust under the terms of which the surviving spouse holds a general power of appointment over the principal of the trust estate . . . .

*30-3 Effect of Dissent.*

(a) Upon dissent as provided for in G.S. 30-2, the surviving spouse except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate;

(b) Whenever the surviving spouse is a second or successive spouse, he or she shall take only one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage.

cies underlying North Carolina's decision to protect the surviving spouse; rather, the question explored is whether the state has employed the most effective means to implement this decision.

The decision by North Carolina lawmakers in 1959 to accord the surviving spouse a fixed statutory share in the estate of the deceased spouse, regardless of the wishes of the decedent as expressed in his will, was prompted by various policy concerns which focus on the protection of the family unit. Among the specific justifications for protection of the surviving spouse are a recognition that: (1) a surviving spouse may be left financially destitute and may become a financial burden on society while others who have no better claim to the decedent's wealth benefit from the decedent's lifetime accumulations,<sup>3</sup> (2) a surviving spouse may have contributed to the accumulation of the deceased spouse's wealth,<sup>4</sup> and (3) a surviving spouse may have a continued need for support after the deceased spouse's death, especially if the surviving spouse stood in a dependency relationship to the decedent.<sup>5</sup>

To further justify an infringement on the freedom of testation, proponents of the protective forced share statutes point to the prevalence of such protective devices throughout the United States.<sup>6</sup> In addition, they argue that the legislature has the inherent power to limit testamentary freedom. Most courts, including the North Carolina Supreme Court, regard the question of testamentary freedom as a statutory right,<sup>7</sup> and "not one of those natural . . . rights which are supposed to precede all government, and which no government can rightfully impair . . . ." <sup>8</sup>

Opponents of forced share statutes argue that forced share statutes such as section 30-1 are anachronistic and rest on tenuous

3. Kurtz, *The Augmented Estate Concept Under The Uniform Probate Code: In Search Of An Equitable Elective Share*, 62 IOWA L. REV. 981, 1061 (1977).

4. *Id.* Recognition of one spouse's contribution to the other spouse's accumulation of wealth for succession purposes parallels theoretically the equitable distribution of marital property upon divorce. It would be anomalous to compensate a spouse for those "marital efforts" at divorce under equitable distribution and deny a similar claim at death.

5. *Id.*

6. Almost every state offers some form of protection from disinheritance to the surviving spouse whether it be in the form of dower, a fixed statutory share, or community property.

7. 1 N. WIGGINS, *Wills and Administration of Estates in North Carolina* 6 (1964).

8. Pullen v. Commissioners, 66 N.C. 361, 363 (1872).

policy grounds. Furthermore, the infringement of testamentary freedom is unjustified. Critics also contend that the traditional concerns of the law in protecting the spouse were formulated centuries ago and are no longer warranted in light of present changed attitudes, social patterns and realities.<sup>9</sup> To further buttress their position, commentators point to the paucity of case law and empirical evidence<sup>10</sup> which suggest that interspousal disinheritance is infrequent.

Lack of empirical evidence and paucity of appellate case law do not, however, diminish the legislative concern for protection of the surviving spouse. One could logically argue that the present scheme deters estate planning which would disinherit the surviving spouse.<sup>11</sup> Hence, this protective concept, rooted in the historical foundations of probate law, remains with us in North Carolina and in most other United States jurisdictions, notwithstanding modern proposals that it be eliminated completely.

Has North Carolina used the best legislative formula to implement the state's policy of protecting the surviving spouse against disinheritance? Faced with the competing policies of protecting the spouse from disinheritance and allowing freedom of testation, the North Carolina General Assembly enacted a statutory right to dissent scheme which evinces traditional American sentiment favoring preservation of the home. However, this statutory restraint does not always secure the purpose for which it was enacted.

North Carolina appellate decisions indicate that "seeds of inequity" which require legislative attention have begun to germinate from North Carolina's dissent statutes.<sup>12</sup> This commentary focuses on three of the inequities which result from the present scheme: (1) the discriminatory treatment of a second or successive spouse, (2) the possibility that a surviving spouse may receive a windfall beyond the designated statutory share, and (3) the "loop-hole" which readily allows disinheritance of the surviving spouse.

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9. Chaffin, *Protection of the Surviving Spouse*, COMPARATIVE PROBATE LAW STUDIES 187, 202 (1977).

10. See Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem* 33 U. CHI. L. REV. 681 (1966).

11. UNIF. PROB. CODE, art. II, pt. 2, general comment (1977) (stating that this provision will operate to decrease substantially the number of elections because the statute will provide a legal base for the counseling of testators against schemes to disinherit a spouse).

12. See, e.g., *Vinson v. Chappell* 275 N.C. 234, 166 S.E.2d 686 (1969).

## II. HISTORY

A historical sketch of common law dower illustrates the age-old concern over spousal disinheritance and represents the forerunner to North Carolina's forced share statute. Dower was an institution of a period in history when land was the basis of wealth.<sup>13</sup> Dower represented a wife's inchoate interest in the real property of her husband which he could not defeat by will or inter vivos transfer.<sup>14</sup> The fact that the wife did not hold a similar inchoate interest in her husband's personal property was not significant since an individual's wealth in this early agrarian society existed primarily in the form of realty, not personalty.<sup>15</sup>

With the passage of time, the American system of wealth moved away from a basis in land and towards such personal property holdings as stocks, bonds, and cash.<sup>16</sup> As land became more an article of commerce and less the foundation of a person's wealth, the impediments to free transferability of the land resulting from dower became more burdensome.<sup>17</sup> Dower rights in real property decreased its marketability by remaining as a cloud on title. The danger of unknown dower rights and the necessity for extensive title searches to determine these rights in a given parcel of land depressed real estate prices.<sup>18</sup>

Not only did dower rights fetter commerce in land but also with the shift of individual wealth from realty to personalty, dower ceased to sufficiently serve the purpose for which it was created: to provide some measure of social and economic security to the surviving spouse through an interest in her deceased husband's real estate.<sup>19</sup> The protective purpose of dower was defeated when the principal assets of the average estate were personal property rather than real estate.

The increased importance of personal property led to legislative concern over the wife's possible disinheritance and the limited protection provided by dower. Most states<sup>20</sup> responded with the

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13. See generally 25 AM. JUR. 2D *Dower and Curtesy* § 3 (1966).

14. *Id.*

15. Kurtz, *supra* note 3, at 985.

16. Kossow, *Probate Law and the Uniform Code: "One For the Money . . ."*, 61 GEO. L.J. 1357, 1382 (1973).

17. Kurtz, *supra* note 3, at 987.

18. M. RHEINSTEIN, *CASES ON DECEDENT'S ESTATES* 67 (1955).

19. CHAFFIN, *supra* note 9, at 189.

20. The states without forced share statutes are generally the community property states. Interestingly, similar public policies form the basis for both

development of statutory concepts which augmented or substituted for dower and curtesy an absolute interest in a specified fraction of all real and personal property owned by the decedent at his or her death.<sup>21</sup> The "forced share" gave the surviving spouse the right to dissent from the will and receive instead a statutory share<sup>22</sup> of the probate estate notwithstanding the provisions in the will.

Realizing the need to augment dower in a manner compatible with North Carolina's long-standing policies of protecting the home and freedom of testation,<sup>23</sup> the North Carolina General Assembly enacted the North Carolina forced share statute.<sup>24</sup> This enactment has produced several positive changes in favor of both the courts and the surviving spouse. The courts benefit by a forced share statute which is relatively simple to administer; the probate court need only determine the total value of the estate to which the share applies and the applicable statutory share to which the surviving spouse is entitled.<sup>25</sup> When a decedent's estate is comprised primarily of personal property, the surviving spouse benefits from greater protection from disinheritance provided by a forced share statute than that which dower provides.<sup>26</sup>

On its face, the North Carolina forced share statute appears to be an adequate means of protecting the surviving spouse from disinheritance as well as providing a scheme which is simple to administer.<sup>27</sup> However, simplicity is available only at a cost. Simplicity, in fact, may be the typical forced share statute's downfall.

forced share statutes and community property laws. In community property states, the surviving spouse is guaranteed one-half of the marital property which provides some protection against disinheritance.

21. Bolich, *Election, Dissent, and Renunciation*, 39 N.C.L. REV. 17, 21 (1960).

22. The statutory share is often an intestate share, and in North Carolina, the amount of the share depends on the circumstances. See, e.g., N.C. GEN. STAT. § 30-3.

23. Bolich, *supra* note 21, at 28.

24. Although this commentary is limited to the forced share statutes, a surviving spouse in North Carolina may dissent and alternatively elect to take a life interest in the deceased spouse's real estate. See N.C. GEN. STAT. § 29-30 (1984) for the election by a surviving spouse to take a life interest in lieu of an intestate share. N.C. GEN. STAT. § 29-30 has the practical effect of providing the benefits of dower to the surviving spouse.

25. Plager, *supra* note 10, at 682.

26. Kossow, *supra* note 16, at 1383. Forced share statutes differ from dower by operating on all personal and real property that make up a decedent's estate. Further, the surviving spouse will take a fee simple interest rather than a life estate which improves the marketability of the interest. *Id.*

27. See, e.g., Kossow, *supra* note 16, at 1383.

### III. ANALYSIS

#### A. *The Three Inequities*

##### 1. *The Second or Successive Spouse Provision*

Spouses who are displeased with their spouse's will have reciprocal rights to dissent from the other's will, this right being qualified by section 30-1.<sup>28</sup> Assuming the right to dissent is established and section 30-3(b) is inapplicable, section 30-3(a)<sup>29</sup> provides that the dissenting spouse takes the same share of the net probate estate as he would have taken if the deceased spouse had died intestate. This provision is similar to the forced share statutes presently effective in other jurisdictions.

A surviving second or successive spouse's right to dissent<sup>30</sup> and the share received upon dissent<sup>31</sup> is accorded different treatment in North Carolina and represents a unique departure from the general rule prevailing in the majority of jurisdictions which treats first and second or successive spouses similarly for dissent purposes. The North Carolina statute provides:

Whenever the surviving spouse is a second or successive spouse, he or she shall take only one-half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage.<sup>32</sup>

Wyoming<sup>33</sup> and Indiana<sup>34</sup> are the only other states which incorpo-

28. See *supra* note 2.

29. *Id.*

30. *Supra* note 2. (See N.C. GEN. STAT. § 30-1(a)(3)).

31. *Supra* note 2. (See N.C. GEN. STAT. § 30-3(b)).

32. N.C. GEN. STAT. § 30-3(b).

33. WYO. STAT. § 2-5-101 (1977).

[T]he surviving spouse has a right of election to take an elective share of the net probate estate as follows: (1) One-half, if there are no surviving issue of the decedent, or if the surviving spouse is also a parent of any of the surviving issue of the decedent; or (ii) *One-fourth*, if the surviving spouse is not the parent of any surviving issue of the decedent.

*Id.* (emphasis supplied).

34. IND. CODE ANN. § 29-1-3-1 (Burns Supp. 1986). The surviving spouse shall be entitled to one-third of the net personal and real estate of the testator whereas a second or subsequent spouse who had no children by the decedent and the decedent left surviving him a child or descendant of a child by a previous spouse takes one-third of the net personal estate and only a life estate in one-third of the testator's land. *Id.*



rate similar provisions into their dissent statutes. The successive spouse provision is subject to questions and criticism and has prompted courts to apply strained interpretations of the statute in order to reach a fair result.

a. *Vinson v. Chappell*

The North Carolina Supreme Court analyzed section 30-3(b) in *Vinson v. Chappell*.<sup>35</sup> The plaintiff, surviving widow of the decedent, filed a declaratory judgment action contesting the constitutionality of section 30-3(b) successive spouse provision on substantive due process grounds.<sup>36</sup> The statute reduced her dissenter's entitlement by one-half since she was the decedent's second wife and met the other criteria stated in the statute.<sup>37</sup> Although the constitutionality of section 30-3(b) was upheld,<sup>38</sup> the court proposed a five-part test,<sup>39</sup> each element to be met, before section 30-3(b) would be applicable to a dissenting spouse.

The *Vinson* opinion clearly evidenced judicial questioning of and concern over the wisdom and fairness underlying a successive spouse provision which relegates a successive spouse to an inferior status for dissent purposes. Inequities apparent on the face of the statute were enumerated by the court, indicating its concern over the statute: (1) If a successive spouse is the decedent and is not survived by children or lineal descendants of a former marriage, the surviving spouse dissenter will receive a full intestate share.<sup>40</sup> Equal treatment of the husband and wife in a second marriage situation necessitates a change in section 30-3(b) to ensure that parties receive the same share in the other's estate upon dissent. Otherwise, a testator who has a child or lineal descendant by a former

35. 275 N.C. 234, 166 S.E.2d 686 (1969).

36. *Id.* at 236, 166 S.E.2d at 688.

37. *See infra* note 39.

38. *Vinson*, 275 N.C. at 242, 166 S.E.2d at 692.

39. *Id.* at 238, 166 S.E.2d at 689-90.

G.S. 30-3(b) applies only when these facts concur: (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.* (emphasis in original).

40. *Id.* at 238, 166 S.E.2d at 690.

marriage has greater freedom of testation as against a childless successive spouse.<sup>41</sup> (2) The surviving successive spouse's inferior rights are not dependent upon whether a child was born of the marriage with the decedent; rather the rights depend upon whether such child survives the decedent<sup>42</sup> in which case the dissenter's status would be elevated from the half-share provision to the full intestate share provision. (3) The successive spouse statute applies when the decedent is survived by a child of a former marriage even if the decedent's will leaves nothing to such child.<sup>43</sup> (4) The application of section 30-3(b) does not rest upon any equitable considerations such as the comparative durations of the first and second marriages or the ages and financial status of the decedent's children at the time of the decedent's death.<sup>44</sup> Thus, the application of section 30-3(b) to the above fact situations fails to produce fair, justifiable results.

Are these seemingly unfair applications of section 30-3(b) overridden by a strong public policy which provides a reasonable basis for the disparate treatment of a first and second or successive spouse? The *Vinson* court wavered in its commitment to finding a distinct policy ground upon which to base the statute, stating, "[T]he reasons that impelled the inclusion of this unusual provision in the 1959 Act are unclear."<sup>45</sup> The court addressed the possibility that the objective of this legislation was to discourage multiple marriages by making it financially less desirable to marry a widow or widower with issue by a prior marriage.<sup>46</sup> Refusing to sanction this feeble policy argument, the court deferred to the legislature for any statements of public policy.<sup>47</sup> The *Vinson* court instead read the "legislative intent" behind the enactment of section 30-3(b) as a provision which would enable a person who had a child by a former marriage to make greater testamentary provisions for that child.<sup>48</sup> Despite this brief statement that the statutory provision may be supported by some valid legislative purpose, the court's opinion focused on the "seeds of inequities"<sup>49</sup> arising

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41. *Id.* at 240, 166 S.E.2d at 691.

42. *Id.* at 238-39, 166 S.E.2d at 690.

43. *Id.* at 239, 166 S.E.2d at 690.

44. *Id.*

45. *Id.*

46. *Id.* at 239, 166 S.E.2d at 691.

47. *Id.* at 239-40, 166 S.E.2d at 691.

48. *Id.* at 240, 166 S.E.2d at 691.

49. *Id.* at 241, 166 S.E.2d at 692.

out of section 30-3(b) and implied that a more meritorious objection to the provision's substance could be brought on grounds attacking the wisdom and fairness of the statute rather than its constitutionality.<sup>50</sup>

b. *Phillips v. Phillips*

At issue in *Phillips v. Phillips*<sup>51</sup> were computational questions arising from the interdependence of federal estate tax and net estate amounts which were computed to determine the surviving spouse's right to dissent under section 30-1.<sup>52</sup> The *Phillips* court expressed what it considered to be the rationale underlying the North Carolina statute which modifies the successive spouse's share in the decedent spouse's estate upon dissent. The court stated that the statute's purpose was to protect the testator's children by a former marriage against a "fortune hunting" second or successive spouse.<sup>53</sup> Restating the potentially unfair and unequal applications of section 30-3(b) originally enumerated in *Vinson*, the *Phillips* court concluded, "Solutions to the problems created by our present dissent statutes must, of course, await legislative action."<sup>54</sup>

c. *In re Estate of Edwards*

Discontent with the unfairness inherent in section 30-3(b) surfaced once again in *In re Estate of Edwards*<sup>55</sup> when a dispute arose over the applicable share of the decedent's estate to which a successive spouse dissenter was entitled. After a fifteen year marriage during which the husband adopted two of his wife's five children from a previous marriage, the wife died leaving her entire estate to her five children from the previous marriage.<sup>56</sup> The husband-petitioner dissented from the will. At issue was a question of first impression: Are two natural children of a testatrix, born during a pre-

50. *Id.* at 241-42, 166 S.E.2d at 692.

51. 296 N.C. 590, 252 S.E.2d 761 (1979).

52. For discussion concerning the mathematical computation of a second or successive spouse's right to dissent, see Note, *The Interrelated Computations Involved in Determining a Surviving Spouse's Right to Dissent*, 16 WAKE FOREST L. REV. 251 (1980).

53. *Phillips*, 296 N.C. at 606, 252 S.E.2d at 771.

54. *Id.* at 607, 252 S.E.2d at 772.

55. 316 N.C. 698, 343 S.E.2d 913 (1986).

56. *Id.* at 699, 343 S.E.2d at 914-15.

vious marriage and later adopted with her consent by her second spouse, considered lineal descendants by the second marriage for purposes of section 30-3(b)?<sup>57</sup>

After examining the legislative policy concerning the effect of adoptions and the rights and obligations of surviving spouses, the court in a 6-3 decision determined that the children were born of the second marriage and were "lineal descendants by the second marriage" within the meaning of section 30-3(b).<sup>58</sup> The court held that an adoption order created a new bloodline by law as would have been created by nature had the testatrix given birth to natural children of her union with her second spouse.<sup>59</sup> For purposes of section 30-3(b), the *Edwards* court determined there were lineal descendants by the testatrix's second marriage because the testatrix's consent to her husband's adoption of her two minor children was tantamount to the couple's producing their own offspring.<sup>60</sup>

In a dissenting opinion in which two justices concurred, Justice Exum disagreed with the majority's conclusion that the adoption of the two children changed the children's previous relationship to their mother, making them lineal descendants of their mother by her second marriage.<sup>61</sup> The dissenting opinion argued that the majority circumvented the plain language of section 30-3(b),<sup>62</sup> and failed to perceive the effect of adoption by a stepparent with the consent of his spouse, the biological parent.<sup>63</sup>

Although the precise language of section 30-3(b) does not easily produce an equitable outcome in an adoption situation, the majority of the North Carolina Supreme Court reached its result by considering the legislative purpose behind the adoption and dissent statutes. The 6-3 decision, however, indicates that the court members were sharply split in their opinion of the proper outcome. The plain language of North Carolina's peculiar successive spouse provision again surfaced, proving itself difficult to integrate with another area of the law: adoptions.

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57. *Id.* at 699, 343 S.E.2d at 914.

58. *Id.* at 710, 343 S.E.2d at 920-21.

59. *Id.* at 706, 343 S.E.2d at 918.

60. *Id.* at 708, 343 S.E.2d at 920.

61. *Id.* at 710, 343 S.E.2d at 921 (Exum, J., dissenting).

62. *Id.*

63. *Id.* at 711-14, 343 S.E.2d at 921-23 (Exum, J., dissenting).

## 2. *The Possibility of a Windfall*

North Carolina's dissent statutes represent the legislative meshing of diametrically opposed public policies. Through the promulgation of these statutes, the General Assembly declares that the testator's privilege to give his property to such objects of his bounty as he chooses will be recognized so long as the testator first makes certain provisions required by statute for his surviving spouse.

Dissension from a spouse's will is a two-part process in North Carolina whereby the dissenter must first meet the requirements of section 30-1(a) which offers the surviving spouse a qualified right to dissent. Under section 30-1(a), the surviving spouse establishes the right to dissent if

the aggregate value of the provisions under the will for the benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the testator: (1) is less than the intestate share of such spouse . . . .<sup>64</sup>

In theory, this legislation is designed to protect both the surviving spouse and the testator. The surviving spouse is protected from disinheritance by a statute which establishes the right to dissent. The testator's freedom of testation is likewise protected because the statute denies the surviving spouse a share of the testator's net estate when he or she is adequately provided for by property passing outside the probate estate.

The first part of the right to dissent process operates well to keep the dissenting spouse from getting a "lion's share"<sup>65</sup> of the decedent's estate, primarily because of the consideration given to property passing outside the will. Section 30-1(b) lists "by way of illustration and not limitation," certain outside property or interests which are to be included in the computation of the surviving spouse's right to dissent:

- (1) The value of a legal or equitable life estate for the life of the surviving spouse;
- (2) The value of the proceeds of an annuity for the surviving spouse;

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64. N.C. GEN. STAT. § 30-1(a) (1984). Discussion of the possibility of a windfall is limited in this commentary to surviving spouses who are entitled to a full intestate share and to second or successive spouses.

65. See Bolich, *supra* note 21, at 30.

- (3) The value of proceeds of insurance policies on the life of the decedent received by the spouse;
- (4) The value of any property passing by survivorship . . . ;
- (5) The value of the principal of a trust under the terms of which the surviving spouse holds a general power of appointment over the principal of the trust estate . . . .<sup>66</sup>

Property or interests in property passing outside the probate estate to the surviving spouse have a significant effect on the equation used to determine the surviving spouse's dissent rights. For example, Don, the decedent, died testate leaving a net estate of \$50,000 of which \$10,000 was bequeathed to Susan, the surviving spouse and the remainder to his parents. At Don's death, Susan also collected \$20,000 in life insurance proceeds as the beneficiary of Don's life insurance policy. Assuming Susan's statutory intestate share is one-half of Don's net estate, does she have the right to dissent? Since Susan's total benefits derived from property passing under the will and outside the will total \$30,000, she does not have the right to dissent under section 30-1(a)(1). In a jurisdiction where the forced share operates only on the probate estate assets, Susan would be credited with receiving \$10,000 in property and could dissent against the will to take an additional \$15,000 from the shares of the testator's intended takers under the will.

The policies underlying the dissent statute are ultimately defeated, however, after the right to dissent is established and the second step in the dissent process is applied. North Carolina section 30-3 governs the effect of dissent and provides the spouse with a full intestate share without requiring non-probate assets passing to the spouse be renounced. The potential problem of double compensation becomes apparent. When a surviving spouse receives property outside the probate estate which is slightly less in value than her intestate share and receives little or no property under the will, she qualifies to dissent under the first step of the process governed by section 30-1(a). Under the second step in the process governed by section 30-3, the surviving spouse is entitled to receive a full intestate share<sup>67</sup> in addition to retaining the nonprobate assets. The result is a "windfall" to the surviving spouse at the expense of the beneficiaries under the will.<sup>68</sup> For example, a surviving

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66. See *supra* note 2 and accompanying text.

67. See N.C. GEN. STAT. § 29-14 (1984).

68. N.C. GEN. STAT. § 30-3(c) (1984) provides:

If the surviving spouse dissents from his or her deceased spouse's will

spouse who receives \$40,000 in life insurance benefits at her spouse's death and another \$10,000 under the will can establish a right to dissent where the probate estate is \$62,000 and the dissenter's intestate share is one-half the net estate. Upon dissent, the dissenting spouse "renounces" the \$10,000 received under the will and receives instead one-half of the probate estate, \$31,000. In addition, the surviving spouse retains the \$40,000 insurance proceeds. The total received by the dissenting spouse is \$71,000 out of a net estate of \$102,000. Hence, the testator who provides for his spouse by such section 30-1(b) "outside properties"<sup>69</sup> as life insurance or co-ownership of property with survivorship rights is subject to have his estate plans upset by a dissenting spouse who elects to take a forced share.

By applying one set of criteria for determining whether the right to dissent exists and another for determining the effect of the dissent, the legislature has effectively upset the compromise between the competing policies of protection of the spouse and freedom of testation. What initially appears to be an effective solution to the competing policy concerns under section 30-1 is quickly broken down upon the application of section 30-3. The dissent statutes' "seeds of inequities" once again manifest themselves in a windfall situation where the surviving spouse becomes "overprotected" from disinheritance while the decedent's freedom of testation sustains a major blow through disruption of his estate plan.

### 3. *The Possibility of Disinheritance*

By the enactment of North Carolina's forced share statutes, the state declares as public policy the protection of the surviving spouse against disinheritance, but because the statutes are silent as to a decedent's inter vivos transfers of property, an ominous loophole exists which readily allows spousal disinheritance by a testator. As a rule, forced share statutes restrict only the testamentary disposal of property.<sup>70</sup> In North Carolina, to the extent that a sur-

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and takes an intestate share as provided herein, the residue of the testator's net estate, as defined in G.S. 29-2, shall be distributed to the other devisees and legatees as provided in the testator's last will diminished pro rata unless the will otherwise provides.

*Id.* The effect of reducing the shares devised to beneficiaries under the will is to upset the testator's estate plan, thereby undercutting his freedom of testation.

69. See *supra* note 2 for a complete listing.

70. BLACK'S LAW DICTIONARY 1322 (5th ed. 1979) defines testamentary disposition as "[a] disposition of property by way of gift, will, or deed which is not to

living spouse's forced share is carved out of the decedent's net estate, lifetime transfers by the decedent potentially deplete the size of the net estate and, ultimately, the spouse's forced share.<sup>71</sup>

The application of the forced share to a decedent's estate property exemplifies the insensitivity of the statute to modern trends in property transferral. Probate is no longer the exclusive means of wealth transmittal; the modern trend favors property arrangements that avoid probate.<sup>72</sup> These arrangements include inter vivos trusts, joint tenancies and other so-called "will substitutes" which have the effect of defeating the spouse's forced share by completely depleting the probate estate. Thus, the determined spouse-hater can disinherit his spouse by eliminating most of the property in his probate estate against which the dissenting spouse's forced share may be exercised.<sup>73</sup> Accomplished through one of the many inter vivos transfer schemes, the decedent need only rid himself of technical title while retaining the use and control of the property for his life.<sup>74</sup> "He is inconvenienced but not pauperized, and his wife is left holding an empty bag."<sup>75</sup>

The silence of the North Carolina legislature on the problems of inter vivos "evasions" imposes a heavy responsibility on the courts to formulate tests to deal with deliberate attempts to defeat a spouse's forced share by such transfers.<sup>76</sup> From a study of judicial responses in many jurisdictions<sup>77</sup> to the problem of inter vivos transfers, three distinct tests emerge, designed to determine whether a lifetime transfer is effective to defeat the surviving spouse's dissent share. These judicial solutions or tests appear to depend on the competing equities and the type of transfer involved.<sup>78</sup>

The illusory transfer test<sup>79</sup> is used by courts to set aside inter vivos transfers where the decedent retains an excessive amount of

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take effect unless the grantor dies or until that event."

71. See Annot., 39 A.L.R.3d 14 (1971).

72. Chaffin, *supra* note 9, at 192.

73. See Clark, *supra* note 1, at 514.

74. For extensive analysis of the various will substitutes and evasion techniques, see W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960).

75. Clark, *supra* note 1, at 514.

76. W. MACDONALD, *supra* note 74, at 4.

77. See generally W. MACDONALD, *supra* note 74.

78. Kurtz, *supra* note 3, at 1006.

79. See generally W. MACDONALD, *supra* note 74, at 67-97 (discusses the use of the illusory transfer test in various jurisdictions).



control over, or beneficial interest in, the property transferred. The leading case upholding the right of a surviving spouse to void an inter vivos transfer in trust on the ground that it was illusory is *Newman v. Dore*.<sup>80</sup> The court enunciated a test of "illusoriness", focusing on whether the transferor in good faith<sup>81</sup> divested himself of property ownership.

The fraudulent intent test is used to void inter vivos transfers which reflect a decedent's intent to defraud the surviving spouse of her statutory share. Because the court must ascertain the fraudulent intent of a transferor who is deceased, the elusiveness of the intent test has required that jurisdictions using this test modify the doctrine to include consideration of the equities involved.<sup>82</sup>

The "reality test,"<sup>83</sup> however, sustains an inter vivos transfer against attack by a surviving spouse if the transfer has validity independent of any questions concerning the rights of a dissenting spouse.<sup>84</sup> Sham transfers or testamentary transfers appear to be the only transfers subject to a spouse's attack under the reality test.<sup>85</sup>

Despite the test a jurisdiction purports to apply in these cases, the decisions rely essentially on competing equities presented by the parties in light of the facts and circumstances of each case. Among the competing equities considered by the courts are the size of the inter vivos transfer, the proximity of the transfer to the transferor's death, the relationship between transferor and transferee, and the financial conditions of the rival claimants.<sup>86</sup>

The North Carolina Court of Appeals had occasion to rule on the validity of an inter vivos trust which impaired the distributive

80. 275 N.Y. 371, 9 N.E.2d 966 (1937). In an attempt to defeat his widow's statutory rights, the testator created an inter vivos trust of all his property three days before his death and retained the income for life and the power to revoke the trust. The *Newman* Court sustained the widow's attack on the grounds that the trust was "illusory."

81. *Id.* at 379, 9 N.E.2d at 969.

82. See W. MACDONALD, *supra* note 74, at 98.

83. *Id.* at 120-44. See, e.g., *In re Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

84. This judicial doctrine is based on the theory that a transfer is immune from a spouse's attack if the transfer is operative between the parties or is complete or is one in which the transferee obtained a present interest in the subject matter of the transfer as soon as it was made. W. MACDONALD, *supra* note 74, at 120.

85. *Id.*

86. See W. MACDONALD, *supra* note 74, at 145-74.

share of a surviving spouse in a case of first impression, *Moore v. Jones*.<sup>87</sup> The settlor of the trust in *Moore* retained the right to withdraw assets from the trust, change the beneficiaries, and to modify, amend, add to, or revoke the trust.<sup>88</sup> The court held that an admittedly valid inter vivos trust, revocable by the grantor, is ineffective only as it impairs the spouse's statutory rights.<sup>89</sup> Except to the extent of the spouse's forced share interest in the trust, the court held the trust was valid and could be carried out in accordance with its terms.<sup>90</sup> Couching its rationale in public policy terms, the court favored protection of the surviving spouse from disinheritance over the policy promoting free alienability of property by the decedent.<sup>91</sup> In addition, the court noted the excessive powers retained by the settlor over the trust assets, powers "so extensive that in a real sense he has the same rights therein after creating the trust as he had before its creation . . ."<sup>92</sup> Concluding that the trust assets should be considered part of the settlor's estate insofar as his surviving spouse's forced share rights were concerned, the *Moore* court reached an equitable result by applying the "excessive control/illusory transfer" test and weighing the conflicting public policy concerns at issue.

These judicially-devised tests for evaluating inter vivos transfers are not without substantial criticism.<sup>93</sup> While the decisions do achieve rough equity through ad hoc balancing of individual circumstances and facts, the weakness of this approach lies in the to-

87. 44 N.C. App. 578, 261 S.E.2d 289 (1980).

88. *Id.* at 579, 261 S.E.2d at 290.

89. *Id.* at 583, 261 S.E.2d at 292. The *Moore* Court stated the issue as: [W]hether the assets held in trust over which the settlor retained such extensive powers at the time of his death should be properly considered as part of his estate for purposes of (1) determining plaintiff's right to dissent under G.S. § 30-1 and (2) computing the share of his estate to which the plaintiff is entitled under G.S. § 30-3(a) should her right to dissent be established.

*Id.*

90. *Id.*

91. *Id.* The *Moore* Court stated: "Recognizing the conflicting public policy considerations which decision of this appeal involves . . . we hold that the public policy favoring protection of a surviving spouse against disinheritance, which has been adopted and expressed by our legislature by enactment of Article 1 of G.S. Ch. 30, should prevail." *Id.*

92. *Id.*

93. See, e.g., Kurtz, *supra* note 3, at 994; Bolich, *supra* note 21, at 23; W. MACDONALD, *supra* note 74, at 5.

tal lack of predictable results.<sup>94</sup> Courts have found it difficult to formulate a general rule which is at once broad enough to include all types of will substitutes and yet personalized enough to achieve a fair result on the individual level.<sup>95</sup>

The difficulty of reaching a consensus of judicial opinion on the treatment of will substitutes is likely attributable to the cross-currents of conflicting public policy underlying the issue. The *Moore* court made a policy statement that North Carolina recognizes the spousal protection policy over the commercially desirable interest in the inter vivos alienability of property.<sup>96</sup>

Commentators indicate that the final definitive answer to the inter vivos problem lies with the legislature.<sup>97</sup> Confronted with questions concerning the North Carolina dissent statutes, various courts explicitly state that public policy determinations are a matter for the legislature, and that changes in the manner of distribution to a surviving spouse of an interest in the decedent spouse's estate is a matter for the General Assembly.<sup>98</sup>

## B. *Ameliorating the Inequities*

### 1. *The Second or Successive Spouse Provision*

Both the North Carolina Supreme Court and Court of Appeals have had the occasion to apply North Carolina section 30-3(b) and both courts have made the plea that legislative action be taken regarding the statute. The courts have had difficulty finding a proper rationale for applying the statute, especially when equitable considerations in a given case militate against the statute's harsh, unjustifiable results. Sound public policy arguments supporting section 30-3(b) are noticeably lacking.

Statistics on marriages, divorces, remarriages, and the median age at remarriage<sup>99</sup> suggest that a statute according second spouses unequal treatment upon dissent is anachronistic—assuming the statute had some purpose at a past point in time. For example, the median duration of marriage for the past twenty years has been approximately 6.8 years.<sup>100</sup> When this average is compared to the

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94. Kurtz, *supra* note 3, at 1006.

95. Clark, *supra* note 1, at 523.

96. *Moore*, 44 N.C.App. at 583, 261 S.E.2d at 292.

97. *See, e.g.*, 1 N. WIGGINS § 158 (1964).

98. *See, e.g.*, *Phillips*, 296 N.C. at 607, 252 S.E.2d at 772.

99. STATISTICAL ABSTRACT OF THE UNITED STATES 80 (105th Ed. 1985).

100. *Id.*

fifteen years duration of the second marriages in *Edwards* and *Vinson*, any reasons for applying section 30-3(b) become increasingly perplexing. Furthermore, from the sizeable increase in the divorce rate from 1960 to 1980, a reasonable inference can be made that a comparable increase in the number of remarriages is occurring and will continue to occur in the future. With the status of "second spouse" becoming more commonplace, the disparate treatment of first and second spouses appears unjustifiable.

The most effective legislative action to mitigate the unjust consequences of section 30-3(b) is to abolish the provision. No apparent public policy bases are so sound or strong in support of the provision that they offset the inconsistencies and inequities arising from section 30-3(b). In the event that abolition of section 30-3(b) is unpalatable to legislators, an alternate proposal is to incorporate *Vinson's* equitable consideration(s)<sup>101</sup> into the statute which would eliminate some of the harsh effects of section 30-3(b).

## 2. *The Possibility of a Windfall*

Inadequate legislative attention to property passing from the decedent outside the net probate estate to the surviving spouse accounts for the possibility that a surviving spouse may receive a windfall upon dissent.<sup>102</sup> The difference in criteria used to determine the spouse's right to dissent<sup>103</sup> and the distributive share upon dissent<sup>104</sup> is the culprit which upsets the successful implementation of conflicting public policies underlying North Carolina's dissent statutes.

The simplest legislative change to eliminate the inconsistent outcomes arising from section 30-3 is to credit the amount of outside property interests passing to the dissenter, such as insurance proceeds and survivorship rights in joint accounts, against the dissenter's intestate share. In other words, apply the criteria used to determine the right to dissent to determine the distributive share as well. Suppose, for example, that the decedent died testate with a net probate estate of \$50,000, none of which is left to the surviving spouse, and \$20,000 passing outside the will to the surviving spouse as survivorship rights in a joint bank account. Under

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101. See *supra* note 44 and accompanying text.

102. Note, *Decedents' Estates—Does North Carolina Law Adequately Protect Surviving Spouses?*, 48 N.C.L. REV. 361, 366 (1970).

103. See *supra* note 2.

104. *Id.*

the present section 30-3, assuming the spouse's intestate share in one-half of the net estate, the spouse is entitled to dissent and take \$25,000 of the net probate estate in addition to keeping the \$20,000 passing to her outside the will. On the other hand, if the suggested change in section 30-3 was made, the \$20,000 passing to the spouse outside the will would be credited against her elective share and the spouse would receive only \$5,000 from the probate estate. The second result represents the restoration of an equilibrium between the policies of protection for the spouse and the freedom of testation. The testator's estate plan is upset only as to \$5,000 which requires a pro rata contribution from the beneficiaries under his will as opposed to a \$25,000 contribution under the present law.

A more comprehensive approach to eliminating the windfall situation would be accomplished by the adoption of the Uniform Probate Code's "augmented estate" provision.<sup>105</sup> One of the purposes of the augmented estate concept is to prevent the surviving spouse who has already received a fair share of the decedent's wealth during his life, or at his death from outside properties, from electing a share of the probate estate.<sup>106</sup> By including all the property owned by the surviving spouse at the decedent's death which was derived from the decedent other than by will or intestate succession, the surviving spouse's share upon dissent is reduced.<sup>107</sup> The comprehensive approach of the augmented estate concept necessitates complexity, but however complicated the provision may be, it is certainly more effective than the North Carolina statute in balancing the goals of protecting the surviving spouse from disinheritance against the decedent's freedom of testation and interests of other donees.<sup>108</sup> Additionally, the augmented estate concept re-

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105. UNIF. PROB. CODE, art. II, § 2-202 (1977) [hereinafter cited as U.P.C.]. U.P.C. § 2-201 provides the surviving spouse take one-third of what is known as the "augmented estate." The augmented estate includes probate property, gratuitous lifetime transfers to persons other than the surviving spouse, and the property of the spouse derived from the decedent.

106. By way of illustration, outside properties would include such property interests as the interest of the spouse in any trust created by the decedent during his lifetime, proceeds of life insurance, and outright gifts by decedent to the spouse. See U.P.C. § 2-202 comment.

107. While this property increases the augmented estate, it also counts as part of the one-third share of the spouse.

108. See Curry, *Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio*, 34 Ohio St. L.J. 114, 138 (1973).

lies on a mathematical computation of the spouse's share which corresponds with North Carolina's long-standing mathematical approach taken towards dower and its forced share statute.

To the extent that a surviving spouse's actual economic needs are ignored by forced share statutes, the statute may provide unnecessary protection for the spouse.<sup>109</sup> One commentator has proposed a "Model Decedent's Family Maintenance Act" which eliminates the forced share concept and authorizes courts to award maintenance payments out of the decedent's estate to a surviving spouse on the basis of need.<sup>110</sup> The advantage of this approach is the flexibility to shape the remedy in each individual's case, rather than to apply an arithmetic system of justice; however, the courts must be given a broad measure of discretion to assess the spouse's need.<sup>111</sup> Serious objections exist to allowing courts to dispose of a decedent's assets in whatever way a particular judge regards as just.<sup>112</sup> In addition, the potential undue burden on the courts must be assessed before the luxury of individuation can be afforded.

### 3. *The Possibility of Disinheritance*

Legislative inattention to property interests passing outside the net probate estate is again the culprit which provides the testator with the opportunity to deplete his probate estate through inter vivos transfers which have the deleterious effect of disinheriting a surviving spouse. Once again, the Uniform Probate Code's augmented estate concept suggests a solution.<sup>113</sup> The augmented estate extends not only to probate assets, but to a limited number of inter vivos transfers as well, especially those commonly used as will substitutes. This system assures the surviving spouse of a share in both the probate estate and certain assets passed outside the probate process.

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109. Kurtz, *supra* note 3, at 1009.

110. W. MACDONALD, *supra* note 74, at 299-327. The proposal consists of family maintenance legislation buttressed with anti-evasion provisions.

111. *Id.* at 300.

112. Chaffin, *supra* note 9, at 195.

113. Included in the augmented estate under U.P.C. § 2-202 are transfers made by the decedent during marriage other than to surviving spouse without receipt of consideration in money or money's worth providing the transfer is (1) one with retained benefits or controls, or (2) one held at time of death with another with right of survivorship, or (3) transfers made within two years of death of the decedent that exceed \$3,000. Thus, most will substitutes mentioned earlier will be caught in the augmented estate.

The Uniform Probate Code's approach has basically the same underpinnings as the "gross estate" solution.<sup>114</sup> Under the gross estate approach, the property and interests on which the decedent would be taxed according to federal estate regulations, are considered part of his net estate for dissent purposes.<sup>115</sup> Basically, the spouse's claim would "affect" any property in which the decedent had a beneficial interest at his death, or which the decedent transferred in contemplation of death.<sup>116</sup> Either the augmented estate concept or the gross estate approach represents an improvement over North Carolina's present statute. These two approaches would provide predictability for the estate planner and would not be too difficult to administer since the tax regulations are definitive and the legal profession is familiar with them.<sup>117</sup> The answer to the problem must provide protection for the surviving spouse from disinheritance, security of title for the transferee, and some degree of predictability in estate planning for the decedent.<sup>118</sup>

#### IV. CONCLUSION

Over the course of North Carolina's history, measures to provide for the surviving spouse against disinheritance have emanated from the courts and legislature. The legislature has attempted to balance the public's interest in protecting the spouse from disinheritance against the interest in freedom of testation and the commercial necessity of unfettered transfer of property. The legislature purported to establish an equilibrium between these two competing concerns through the enactment of North Carolina's forced share statutes. The statutes, sections 30-1 and 30-3, however, fall short of the legislative goals.

Beginning with *Vinson*, the courts have enumerated the inconsistencies and unfairness arising from the dissent provisions and have explicitly stated that legislative reform should be the solution. The lack of sound policy bases for the second or successive spouse provision support the abolition of a provision which serves only to produce unequal and unjustifiable results. Other legislative

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114. See generally W. MACDONALD, *supra* note 74, at 276.

115. But see, I R. WELLMAN, UNIFORM PROBATE CODE PRACTICE MANUAL (1977) (U.P.C. § 2-202 comment notes subtle differences between federal estate tax law and U.P.C. § 2-202).

116. W. MACDONALD, *supra* note 74, at 276.

117. *Id.*

118. *Id.* at ix.

action encouraged is the enactment of a provision which would require property already received by the surviving spouse to be credited against his or her elective share in order that a dissenting spouse does not receive a "windfall" at the expense of the decedent's other beneficiaries. Additionally, the disinheritance of a surviving spouse could be curtailed by the enactment of a provision which would treat certain inter vivos transfers in a similar manner for both dissent and federal estate tax purposes.

If the legislature intends to achieve a balance between the policies of protecting the spouse from disinheritance and the freedom of testation, the protection should not be spurious. It is senseless to have a protective policy and then provide means whereby the policy is easily defeated. The flaws in the dissent statutes can be remedied, but the solutions require legislative action. "In the meantime, bench and bar, executors and surviving spouses must cope with the existing statutes as best they can"<sup>119</sup> as the seeds of inequities continue to germinate and grow from the statutory dissent provisions.

*Anne Mayo Evans*

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119. *Phillips*, 296 N.C. at 607, 252 S.E.2d at 772.