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The Elective Share, Part Three – What's It Worth?

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Welcome to part three of my series on North Carolina's elective share. In **part one** of this series, we discussed what the elective share is and how it works to prevent a surviving spouse from being disinherited. In **part two**, we explored the process of filing a claim for elective share, including recent statutory changes that became effective on January 1, 2026. In this third and final part, we are going to discuss how the decedent's assets are valued in order to calculate the elective share amount. This discussion will highlight the changes that went into effect on January 1, 2026, regarding the value of a trust created for the benefit of a surviving spouse.

Providing Information about the Decedent's Total Net Assets

After an elective share petition has been filed by the surviving spouse (or by the spouse's representative as permitted by **G.S. 30-3.4**(a)), the petition must be served on the personal representative (PR) of the decedent's estate and any responsible persons as required by **G.S. 30-3.4**(e1). Once service has been completed, the elective share proceeding moves into an information-gathering stage. Specifically, **G.S. 30-3.4**(e2)(1) requires the PR to submit **sufficient information** about the decedent's total assets for the clerk to determine the elective share. The information must be submitted to the clerk within two months of the filing of the petition. The clerk may extend the time for submitting this information as the clerk sees fit. **G.S. 30-3.4**(e2)(1). While the statute does not require a specific process for extending the time to submit information, this request often comes before the clerk in a motion filed by the PR requesting the extension and suggesting an extended deadline that the clerk may or may not approve. A PR may need more than two months to gather sufficient information, especially if the decedent's assets are complex or some of the assets are not under the PR's direct control (such as proceeds from a life insurance policy or the funds in a retirement account).

To fulfill the PR's obligation to provide information, **G.S. 30-3.4**(e2)(1) allows the PR to prepare and submit to the clerk a proposed **Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return**. This tax return, commonly referred to as an "estate tax return," a "Form 706," or just plain "706," is a detailed tax return designed to calculate federal estate tax. Because the current lifetime estate tax exclusion amount is $15 million per person, estate tax returns are only required to be filed with the Internal Revenue Service (IRS) in a small number of estates; however, **G.S. 30-3.4**(e2)(1) gives the PR the option to file a Form 706 with the clerk regardless if one is actually required to be filed with the IRS.

While the PR is not required to file a Form 706 to submit the sufficient information about the decedent's Total Net Assets, the Form 706 can be a helpful way for the PR to organize and submit this information because of the way the 706 is structured. The Form 706 contains twenty-two schedules that categorize the decedent's assets in detail, much like the definition of Total Assets in **G.S. 30-3.2**(3f), which divides the decedent's assets into specific subcategories. These schedules include information about assets that would not normally be included on the required inventory the PR would file with the clerk, such as a **schedule** listing funeral and other expenses (including attorney's fees), a **schedule** listing insurance policies on the decedent's life, and a **schedule** listing annuities and retirement accounts, such as IRAs, that pass by beneficiary designation.

Regardless of how the PR chooses to submit the Total Net Asset information to the clerk, the PR will need to include information about the value of each asset. The PR's determination, however, is not the final word on value. The complete process for determining the value of the decedent's assets is set out in **G.S. 30-3.3A**.

How are the Decedent's Assets Valued?

G.S. 30-3.3A establishes the framework for determining the value of the decedent's assets. First, with limited exception, the value of each asset should be the fair market value as of the date of the decedent's death. One exception is a gift made during the decedent's lifetime, which is instead valued as of the date of the transfer. **G.S. 30-3.3A**(a). Second, the value should be agreed upon by the surviving spouse, the PR, and any other responsible person currently or formerly in possession of the asset as of the decedent's date of death. **G.S. 30-3.3A**(f).

A different method of valuation is used if (i) the PR, the surviving spouse, and the responsible person (if applicable) cannot agree on the value of the asset, (ii) the surviving spouse is also the PR or a trustee of the decedent's assets, or (iii) the clerk determines that the personal representative or trustee may not be able to represent the estate adversely to the surviving spouse (in other words, if there is a conflict of interest between the surviving spouse and the PR or a trustee). Under those circumstances, the parties may present evidence regarding value, which may include expert testimony. **G.S. 30-3.3A**(f)(4). The clerk may appoint one or more qualified and disinterested persons, such as an appraiser, to help determine the value of such property. *Id.* The clerk is required to make a finding of the value of each asset after the hearing. *Id.* Typically, this is done at the hearing on the petition for the elective share, wherein the clerk determines if the surviving spouse is entitled to the elective share and, if so the amount of elective share they are to receive. *See* **G.S. 30-3.4**(f).

G.S. 30-3.3A also provides that certain kinds of assets have specific valuation rules. This includes (i) certain types of jointly owned property, (ii) powers of appointment, and (iii) transfers where the decedent has retained some kind of interest, such as possession or enjoyment of the property. **G.S. 30-3.3A**(b), (c), and (d). There are also special rules for valuing a trust created for the benefit of a surviving spouse (referred to in this post as a "spousal trust"). **G.S. 30-3.3A**(e). This type of trust often comes under heavy scrutiny when determining what the trust is worth for purposes of the elective share, as the value of the trust can have major implications on how much a surviving spouse is entitled to receive.

What is an interest in a trust worth?

Assets of the decedent that pass into a spousal trust are considered "Property Passing to the Surviving Spouse" (PPSS). **G.S. 30-3.2**(3c). This means that the property in the spousal trust will be subtracted from the "Applicable Share of Total Net Assets" that the spouse would otherwise be entitled to receive. Recall, from part one, the elective share formula: ***Elective Share Amount = (Total Net Assets x Applicable Share) – Net PPSS***.

This is where valuation matters. As a general rule, the lifetime interest in a trust would be valued as less than 100% of the value of the assets in the trust. **G.S. 30-3.3A**(e). This rule is based on a formula in **G.S. 30-3.3A**(e) that requires the parties to assume that the lifetime beneficiary of the trust will not use all the assets in the trust and, therefore, some assets will be left over at the lifetime beneficiary's death to pass to the remainder beneficiaries of the trust. The formula assumes that the trust will earn six percent (6%) each year. It then uses G.S. 8-46 to determine the beneficiary's life expectancy and, using G.S. 8-47, applies that life expectancy as the number of years the trust is expected to run to determine the present value of what the beneficiary's interest in the trust is worth. In this post, I have referred to this formula as the "6% formula." Calculating the 6% formula involves multiple steps, and Section II.C.4 of *Decedents' Estates, Trusts, and Powers of Attorney*, ch. 16, "**Right to Elective Share**" contains a detailed example of one way to perform the calculation. In every instance, the value of a beneficiary's interest in a trust will always be less than the total value of the assets in the trust.

An Exception for Spousal Trusts

Given the 6% formula, is it ever possible for a beneficiary's interest in a trust to be worth more? The answer is yes, and **G.S. 30-3.3A**(e)(1) provides this critical exception to the 6% formula. If a trust created for the benefit of the surviving spouse, and ***if the trust is drafted to include specific, statutorily mandated provisions***, then one hundred percent (100%) of the property in the trust can be counted as "Property Passing to the Surviving Spouse" (PPSS) for purposes of the elective share. This type of trust is sometimes referred to as a "100% spousal trust."

The 100% spousal trust can have a dramatic effect on the elective share, because it can reduce or even eliminate a spouse's elective share amount.

Changes to the 100% Spousal Trust Criteria

S.L. 2025-33 makes key changes to the requirements a spousal trust must meet to be considered a 100% spousal trust for elective share purposes. The chart below illustrates these changes. The new requirements are in ***bold***.

Requirements Prior to January 1, 2026	Beginning January 1, 2026
The trust must be controlled by a nonadverse (i.e., neutral) trustee during the lifetime of the surviving spouse.	The trust must be controlled by a nonadverse (i.e., neutral) trustee during the lifetime of the surviving spouse.***The trust must require that the nonadverse trustee must be in place for the duration of the trust, including successor trustees.If the spouse serves as their own trustee, the nonadverse trustee requirement will be met.*** G.S. 30-3.3A(1)a.
The trustee shall distribute to or for the benefit of the surviving spouse either: the entire net income of the trust at least annually, or the income of the trust in such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.	The trust must contain language that the trustee shall distribute to or for the benefit of the surviving spouse either: the entire net income of the trust at least annually, or the income of the trust in such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse. ***A trust will fail to meet the income distribution requirements described above if the terms of the trust do not state the requirement that the trustee shall distribute the income using the terms "shall," "is required to," or other equivalent term or terms.*** G.S. 30-3.3A(e)(1)b. and (1b).
The trustee shall distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.	The trustee shall distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse. ***A trust will fail to meet the principal distribution requirements described above if the terms of the trust do not state the requirement that the trustee shall distribute the principal using the terms "shall," "is required to," or other equivalent term or terms.*** G.S. 30-3.3A(e)(1)c. and (1b).

The updates to the 100% spousal trust criteria ***apply to all petitions for elective share filed on or after January 1, 2026, regardless of the deceased spouse's date of death***.

The burden of ensuring that a trust is updated will fall on the person who created the trust (known as the settlor). If the settlor does not act to update the terms of a spousal trust after January 1, 2026 to ensure that it complies with the changes in S.L. 2025-33, or if a PR does not take action to attempt to modify the trust after the settlor dies, this can have a significant impact on the elective share amount. In cases where the surviving spouse, the PR, and the trustee do not agree on the value of a spousal trust—or if there is a conflict of interest between the surviving spouse, the PR, and the trustee—the clerk would hear the evidence and arguments of the parties as contemplated by **G.S. 30-3.3A**(f)(4). In doing this, the clerk should carefully evaluate the evidence and arguments of the parties to determine if the criteria in **G.S. 30-3.3A**(1)(1a), (1b), and (2) has been met. If it has, the trust qualifies as a 100% spousal trust. If the criteria has not been met, the value of the trust must be determined by applying the 6% formula.

Putting It All Together

Why do valuation rules matter so much? Because the value of decedent's assets directly affects the amount of the elective share to which the surviving spouse may be entitled. And why is the value of a spousal trust so important? Because if the trust satisfies the requirements for a 100% spousal trust under G.S. 30-3.3A(e), the value of the trust may significantly reduce, or even eliminate, the surviving spouse's elective share amount.

Consider our fictional married couple from parts one and two, Bobby and Darla. Recall that Bobby and Darla were married for more than fifteen years, giving Darla a maximum Applicable Share of 50%. In the previous example, Bobby had Total Net Assets worth $800,000. Instead of dying intestate, let's assume that Bobby created a will before his death and, in his will, he leaves all of his assets to a trust. The trust is for Darla's benefit during her lifetime, and at Darla's death, the trust distributes everything to Bobby's two sons, BJ and TJ. The trust contains the required provisions discussed above to make it a 100% spousal trust, including the requirements added by S.L. 2025-33.

If Darla files a claim for elective share after Bobby's death, the amount of the elective share she would be entitled to will be $0. This is because everything in the trust ($800,000) will be considered Net Property Passing to the Surviving Spouse (NPPSS), and this amount is more than Darla's Applicable Share of Bobby's Total Net Assets (50% x $800,000, or $400,000). Because the $800,000 of NPPSS is greater than the Applicable Share of Total assets, Darla would not be entitled to receive any elective share amount.

If Bobby's trust did not meet the requirements to be considered a 100% spousal trust, the 6% formula would apply. If Darla was 77 years old at the time of Bobby's death, her life expectancy under G.S. 8-46 would be 10.0 years. Six percent of the total value of the trust would be $48,000. The present value of each dollar would be worth 7.360. G.S. 8-47. Multiplying the 6% amount by the present value (7.360) means that Darla's interest in the trust would be worth $353,280. This means that while Darla's elective share amount would not be eliminated by the trust, it would be reduced to $46,720 (Appliable Share of 50% = $400,000, minus $353,280 of NPPSS, for an elective share amount payable to Darla of $46,720).

If you compare both of these scenarios to Bobby dying without a will (and not creating a trust) and assume there is no property passing to Darla at Bobby's death (no NPPSS), Darla would be entitled to the full amount of her elective share, or $400,000. These drastically different results depend upon the type of assets Bobby leaves at his death and how they are valued for elective share purposes.

Conclusion

In determining the elective share amount, the clerk will need to carefully review the asset type and the applicable valuation rules under **G.S. 30-3.3A**. And in the event the decedent has created a spousal trust and there is no agreement as to value or if a conflict of interest exists, the clerk should carefully consider the evidence and arguments of the parties to determine if the criteria in **G.S. 30-3.3A**(1)(1a), (1b), and (2) has been met. If the criteria has been met, the clerk would make findings in the clerk's order that the trust is a 100% spousal trust and value the trust accordingly. If the criteria has not been met, the clerk would make findings that trust does not qualify as a 100% spousal trust and find instead that the trust be valued by applying the 6% formula.