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The Uniform Probate Code's "Augmented Estate" Concept: A Remedy for the North Carolina Dissent Statute

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COMMENTS

THE UNIFORM PROBATE CODE'S "AUGMENTED ESTATE" CONCEPT: A REMEDY FOR THE NORTH CAROLINA DISSENT STATUTE

INTRODUCTION

As our society developed, personal property gained recognition as a major component in the American system of wealth. Our society began as a predominantly agrarian economy where the primary source of wealth was land. The American society moved from this agrarian economy to an economy where intangible property became a major source of wealth. This intangible wealth consisted mainly of cash, stocks, bonds, and other various types of personal property. As personal property became more important in our society, decedents' estates began to contain an ever increasing percentage of personal property. This growing importance of personal property resulted in state statutes recognizing the need to protect surviving spouses against disinheriance as to that property. These statutes afforded the surviving spouse the opportunity to take an elective statutory share over the share she was to receive under the decedent's will.

A problem has surfaced which deals with conflicts between two compelling state interests. These state interests include protecting the decedent's immediate family from disinheriance and

3. Id.
5. Id.
6. Id.
protecting the decedent's interest in freedom of testation.\(^8\) Although there is a strong public policy behind freedom of testation, states have felt obligated to intrude when the surviving spouse has been short changed.\(^9\) All states have probate laws which deal with this policy of protecting the decedent's immediate family, especially the surviving spouse.\(^10\) Generally, these probate laws are intended to provide protection from intentional and unintentional disinherance by the decedent.\(^11\) This Comment will show that state statutes are not always effective. This Comment (1) discusses North Carolina's dissent statute,\(^12\) (2) shows the possible unfairness the North Carolina dissent statute may cause, and (3) argues why the Uniform Probate Code's "augmented estate" concept\(^13\) should be incorporated in North Carolina's dissent statute.

**North Carolina's Dissent Statute\(^14\)**

The North Carolina legislature began to recognize the significance of personal property in our society's system of wealth. The legislature also realized the need to equilibrate the growing importance of personal wealth with the strong policy toward protecting the surviving spouse against disinherance.\(^15\) This balancing process resulted in the abolition of dower and curtesy\(^16\) and the enact-

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8. *Id.* at 449-50.
11. *Id.*
ment of Chapter 30, Article 1 of the North Carolina General Statutes. The statutory enactment of Sections 30-1 and 30-3, together with the North Carolina Intestate Succession Act, provide protection for the surviving spouse in two ways. The surviv-

17. Comment, supra note 7, at 453-54.


§ 30-1. Right to 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 the property or interests in property passing in any manner 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
(2) Is less than one half of the deceased spouse's net estate in those cases where the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, 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.

§ 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; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate as defined in G.S. 29-2(5). . . . N.C. Gen. Stat. § 30-1(a), -3(a) (1984).


20. Note, supra note 9, at 362.
ing spouse has a qualified right to dissent from the decedent's will and has a right to an intestate share. The surviving spouse is given the opportunity to dissent from his or her deceased spouse's will. This opportunity exists when the value of property the surviving spouse receives under the will plus the value of property passing to the surviving spouse outside the will is less than his or her intestate share. A surviving spouse then has the right to dissent from his or her deceased spouse's will:

\[\text{where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator: Is less than the intestate share of such spouse. }\]

A part of the section 30-1(a) calculation consists of determining the value of "property or interests in property" passing to the surviving spouse outside the decedent's will. The general rule is that all property passing to the surviving spouse outside the decedent's will is included in the section 30-1(a) calculation. Section 30-1(b) provides examples of property interests that are to be considered in this calculation. These property interests include, but are not limited to: (1) the value of legal or equitable life estates.

21. Id.; See also Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 680 (1969) (stating that the right of a surviving spouse to dissent from a will is conferred by statute).

22. M. EDWARDS, NORTH CAROLINA PROBATE HANDBOOK, § 32-1, at 155 (3rd ed. 1982); N.C. GEN. STAT. § 30-1(a) (1984). For purposes of this Comment, discussion is limited to N.C. GEN. STAT. § 30-1(a)(1). Please note that § 30-1(a)(2) & -1(a)(3) provide other situations where a surviving spouse has a right to dissent. N.C. GEN. STAT. § 30-1(a)(2) deals with the situation where the surviving spouse is not survived by any children, lineal descendants of deceased children, or by any parents. N.C. GEN. STAT. § 30-1(a)(3) deals with the situation where the surviving spouse is a second or successive spouse and the deceased spouse is survived by lineal descendants only from a former marriage.

23. The right to dissent is vested in both husband and wife. See Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967) (when considering the changes made by Chapter 1209 of the 1963 Session Laws, the effect of amending N.C. CONST., art. X, § 6 (now § 4) was to restore the right of the husband to dissent from his wife's will).


25. Id. § 30-1(a).

26. Id.

27. Id.

28. Id. § 30-1(b).

29. Id. § 30-1(b)(1).
(2) the value of annuity proceeds,\textsuperscript{30} (3) the value of life insurance proceeds,\textsuperscript{31} (4) property owned by the decedent and surviving spouse as tenants by the entirety,\textsuperscript{32} and (5) the value of the principal of a trust where the surviving spouse has general power of appointment over the principal.\textsuperscript{33} Section 30-1(b) also provides an exception to the aforementioned general rule. This exception declares that property is excluded from the section 30-1(a) calculation to the extent the surviving spouse paid or contributed to its purchase price.\textsuperscript{34} These computations are used to determine the surviving spouse's qualified right to dissent.\textsuperscript{35}

30. \textit{Id.} § 30-1(b)(2).
31. \textit{Id.} § 30-1(b)(3).
32. \textit{Id.} § 30-1(b)(4).
33. \textit{Id.} § 30-1(b)(5).

(b) For the purposes 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 interests in property passing to the surviving spouse as a result of the death of the testator:

\begin{enumerate}
\item The value of a legal or equitable life estate for the life of the surviving spouse;
\item The value of the proceeds of an annuity for the life of the surviving spouse;
\item The value of proceeds of insurance policies on the life of the decedent received by the spouse;
\item The value of any property passing by survivorship, including real property owned by the decedent and surviving spouse as tenants by the entirety;
\item 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;
\end{enumerate}

except that no property or interest in property shall be so included to the extent that the surviving spouse or another in his behalf either gave or donated it or paid or contributed to its purchase price.


35. \textit{See In re} Estate of Conner, 5 N.C. App. 228, 168 S.E.2d 245 (1969). \textit{See also} Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980) (A proper determination of a right to dissent cannot be established until the property passing to the surviving spouse under and outside the will has been determined and properly valued. Under this statute, the right to dissent is established by a mathematical calculation).
Once a valid dissent has been established, section 30-3 prescribes the effect of that dissent. Under section 30-3, the decedent is deemed to have died intestate and the surviving spouse receives his or her intestate share. Once a surviving spouse dissents from her spouse's will, she "is entitled to exactly the same share she would have received if he had died intestate." The decedent's will becomes a nullity as to the surviving spouse's property interests under the will. The application of section 30-3 produces results which come into direct conflict with the policies underlying the dissent statute. Conflicts are created because the surviving spouse is not required to renounce the non-probate assets received outside the will. Therefore, the final result of section 30-3 is to give the surviving spouse a full intestate share plus all non-probate property received outside the will. This result causes various problems and injustices.

UNFAIRNESS AND INJUSTICE CAUSED BY THE NORTH CAROLINA DISSENT STATUTE

Section 30-1 of the North Carolina General Statutes was adopted to legislatively express the public policy favoring the protection of a surviving spouse against disinheritance. The dissent

38. N.C. GEN. STAT. § 30-3(a) (1984). This Comment only considers the situation where the surviving spouse is entitled to an intestate share. Please note that subsections 30-3(a) & -3(b) contain situations where the surviving spouse receives something different than his or her intestate share. N.C. GEN. STAT. § 30-3(a) and (b) provide in part:

(a) Upon dissent . . . 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.

N.C. GEN. STAT. § 30-3(a), -3(b) (1984).
40. Id.
41. Comment, supra note 7, at 461.
The surviving spouse is protected from possible disinheri-
tance through a statutory right to dissent from the deceased
spouse's will. The decedent's freedom to distribute property at
death is protected by making the surviving spouse's right to dis-
sent a qualified right. The right to dissent is denied when the
surviving spouse has been adequately provided for outside the
will. Even though the North Carolina dissent statute seems to
provide adequate protection, the effectiveness of this protection is
questionable. Inconsistencies and defects in the North Carolina
dissent statute create troublesome and problematic loopholes in
the statute which can cause the following problems. First, a dece-
dent may intentionally or unintentionally disinherit a surviving
spouse. Secondly, a dissenting spouse may be permitted to re-
ceive a financial windfall at the expense of the other beneficiaries
under the will.

North Carolina's dissent statute does not take into considera-
tion lifetime transfers made by the decedent. This defect pro-
vides a loophole which the decedent can use to intentionally or un-
intentionally disinherit a surviving spouse or family. A decedent
can make lifetime transfers to individuals other than the surviving
spouse. The effect of these lifetime transfers is to deplete the dece-
dent's net estate to a nominal amount. Because the surviving
spouse's elective share is based on the value of the decedent's net
estate, these lifetime transfers also effectively reduce that elective

44. Note, supra note 9, at 362-63. See also Phillips, 296 N.C. at 605, 252
S.E.2d at 770 (1979).
45. N.C. GEN. STAT. § 30-1(a) (1984); See also Comment, supra note 7, at 460.
46. Phillips, 296 N.C. at 605, 252 S.E.2d at 770 (1979). North Carolina is one
of a few jurisdictions which make the right to dissent a qualified right. Bolich,
47. N.C. GEN. STAT. § 30-1 (1984); Phillips, 296 N.C. at 605, 252 S.E.2d at 770
(1979).
48. Comment, supra note 7, at 462.
49. Id. at 462; Note, supra note 9, at 365.
261 S.E.2d 289 (1980). (The decedent created a valid trust and made lifetime,
inter vivos transfers to that trust. The decedent retained extensive powers and
control over the trust property. The court held that the decedent never really
relinquished ownership of the property. Therefore, the trust should be considered
a part of his estate for determining the surviving spouse's right to dissent).
51. Comment, supra note 7, at 462.
52. Id. at 462-63.
Therefore, lifetime transfers can have the effect of disinheriting the surviving spouse and destroying the policies underlying the dissent statute.

Other problems occur after a valid dissent has been established. Section 30-3 entitles the surviving spouse to a full intestate share plus all the non-probate property received outside the will. The North Carolina dissent statute only considers non-probate property received when determining the qualification of a right to dissent. This non-probate property is not considered when determining the surviving spouse's elective share. Because property received outside the will is not considered in the elective share valuation, the surviving spouse may be permitted to receive a financial windfall. An example illustrates this windfall.

Buzzy, the deceased spouse, died testate leaving a net estate of $200,000. The surviving spouse, Mary, received nothing under the decedent's will. However, Mary received $80,000 of life insurance proceeds that passed to her outside the will. Under section 30-1 of the North Carolina dissent statute, one must compare two different numbers. First, one must determine the aggregate amount of property passing to the surviving spouse under and outside the will. In this example, the total amount of property passing to Mary equals $80,000. Second, one must determine the surviving spouse's intestate share. In this example Mary's intestate share equals $100,000. Because the aggregate amount of property Mary received was less than her intestate share, she has a qualified right to dissent from her deceased husband's will. Once Mary has established a valid right to dissent, section 30-3 prescribes the effect of this dissent. Mary will receive a full intestate share valued at $100,000 in addition to the $80,000 of non-probate property she received outside the will.

This case shows a situation where a surviving spouse is per-
mitted to dissent from her deceased husband's will. The surviving spouse can dissent even though she is adequately provided for through non-probate transfers. The surviving spouse is permitted to dissent at the expense of the decedent's estate plan and the other beneficiaries under the will. Applying sections 30-1 and 30-3 in determining the right to dissent and the surviving spouse's elective share defeats the policies underlying the dissent statute. These competing policies include the protection of the surviving spouse from disinheritance and the protection of the decedent's right to distribute property at death. Applying standards to establish the right to dissent that differ from the standards applied to show the dissent's effect destroys all policies underlying the statute. The application of these different standards destroys the process of balancing these competing public policies. The injustice and unfairness caused by the North Carolina dissent statute can be easily shown. The difference of even one dollar between non-probate property received and the surviving spouse's intestate share will cause a financial windfall for the surviving spouse.

To magnify the ineffectiveness of the North Carolina dissent statute, consider the same example that was given above except increase the values involved. Assume the decedent's net estate is valued at $4,000,000. Also, assume the surviving spouse receives $1,999,999 in non-probate property that passed to her outside the will. The surviving spouse's intestate share is valued at $2,000,000. Because the amount of property the surviving spouse received under and outside the will is less than her intestate share, she can dissent. Applying section 30-3 results in the surviving spouse receiving both her intestate share and the non-probate property. In this hypothetical, the surviving spouse receives a financial windfall. The surviving spouse is permitted to dissent from the will when she has been more than adequately provided for outside the will.

The North Carolina dissent statute's overprotection of the surviving spouse results in the destruction of the decedent's testamentary intent and the destruction of the other beneficiaries' in-

63. Id.
64. Id. at 462.
65. Id.
66. Note, supra note 9, at 365.
67. Id.
The North Carolina dissent statute's inconsistencies are caused by the insufficient legislative attention given to the property interests that vest in the surviving spouse. These property interests include both inter vivos and testamentary transfers the surviving spouse received before and at the decedent's death. The next part of this Comment will discuss a concept which appears to be a reasonable way to correct these inconsistencies.

**AUGMENTED ESTATE CONCEPT OF THE UNIFORM PROBATE CODE**

The Uniform Probate Code (UPC) is an act containing various rules, regulations and general provisions "relating to the affairs of decedents. . . ." These general provisions pertain to the administration of decedents' estates along with the distribution of the estate property. The underlying purposes of the UPC are:

1. To simplify and clarify the law concerning the affairs of decedents.
2. To discover and make effective the intent of a decedent in distribution of his property;
3. To promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;
4. To facilitate use and enforcement of certain trusts;
5. To make uniform the law among the various jurisdictions.

The UPC provision which has caused the most controversy is the "augmented estate" concept adopted in the UPC's elective share statute.

Under the UPC's elective share statute, the surviving spouse has a right to elect a one-third share of the decedent's "augmented estate." One of the major goals of the UPC's elective share statute is to protect the surviving spouse from disinheritance. While providing this protection, this statute also tries to balance the

70. Note, *supra* note 9, at 366.
72. *Id.*
competing interests of the other beneficiaries and the decedent's freedom to distribute property at death. The North Carolina dissent statute also tries to achieve these same goals. However, when computing the decedent's gross estate and elective share amounts, the UPC considers certain transfers of property the North Carolina statute ignores. These transfers include certain property the decedent transferred inter vivos and certain property the surviving spouse received from the decedent.

The Commissioners of the UPC recognized that a substantial amount of wealth was being transmitted outside the will. The Commissioners determined, therefore, that the surviving spouse's elective share should be based on an estate value that included more than general probate assets. This estate value should also include certain transfers that were seen as testamentary substitutes as well as property the surviving spouse received from the decedent.

The comment to section 2-202 of the UPC states the purpose of this augmented estate concept and the goals the Commissioners hoped to achieve. These goals are twofold:

(1) 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, and (2) 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.

The combination of a statutory elective share and an augmented estate concept serves a dual purpose. First, this combination prevents the surviving spouse from being deprived of a "fair share" of

78. Id.
79. See Comment, supra note 7, at 460.
81. Id.
82. Kurtz, supra note 1, at 1015.
83. Id.
84. Id.
86. Id.
the decedent's estate. This deprivation is prevented by providing the surviving spouse protection against lifetime transfers used to deplete the decedent's estate. Secondly, this combination prevents the receipt of a financial windfall by the surviving spouse. The surviving spouse is precluded from receiving transfers outside the decedent's will while also having the ability to elect against the will.

Section 2-202 of the UPC defines how the augmented estate is computed for elective share purposes. Section 2-202 consists of a two part calculation. First, the decedent's net estate is reduced by (1) funeral and administration expenses, (2) homestead allowances, (3) family allowances and exemptions, and (4) enforceable claims. This value represents the traditional net probate estate. Second, certain amounts must be added back to the net probate estate. The first of these amounts to be added back represents the value of lifetime transfers the decedent made to other persons besides the surviving spouse. These transfers include (a) transfers where the decedent retains a life estate, (b) transfers where the decedent retains the power of revocation, (c) transfers that create joint tenancies with the right of survivorship, and (d) transfers made to a beneficiary within two years of the decedent's death where the aggregate transfers are in excess of $3,000. The second of these amounts to be added back represents the value of certain property associated with the surviving spouse and certain transfers of this property.

By adding back certain inter vivos transfers, the UPC defeats the decedent's intentional attempt to use a will substitute to avoid the elective share statute. Also, the surviving spouse is prevented from electing a share of the probate estate when the spouse has

88. Id.
89. Id.
90. Id.
91. Id.
93. Id.
94. Id.
95. Id.
101. Kossow, supra note 2, at 1390.
received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death..." As a result, certain property owned or transferred by the surviving spouse which was derived from the decedent is treated as a credit against the elective share.

A. Certain Lifetime Transfers

Section 2-202(1) establishes four inter vivos transfers to donees other than the surviving spouse that must be added back to the augmented estate. The UPC refused to allow certain transfers made by the decedent to adversely affect the surviving spouse's rights. These transfers specifically include those where the decedent retains some control or beneficial interest over the transferred property. These types of transfers are included in the decedent's augmented estate when the transfer is made to any person other than the surviving spouse. These transfers must be made by the decedent during his marriage to the surviving spouse. Also, the augmented estate includes these transfers only to the extent the decedent did not receive adequate and full consideration for the property transferred.

102. Id. at 1391.

103. As will be discussed later in this Comment, "certain" property represents that property which the surviving spouse owned at the decedent's death plus that property transferred by the surviving spouse to persons other than the decedent. This property must be derived from the decedent and is includible in the augmented estate to the extent the surviving spouse did not pay adequate and full consideration. U.P.C. § 2-202(2), 8 U.L.A. 76-77 (1982).

104. Kossow, supra note 2, at 1390-91.

105. Kurtz, supra note 1, at 1018; see also U.P.C. § 2-201(1), 8 U.L.A. 75-76 (1982).

106. Kurtz, supra note 1, at 1018.

107. Id.


109. Id.

110. The specific language of U.P.C. § 2-202(1) provides in part:

The augmented estate means the estate reduced by funeral and administrative expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following
1. Retained Beneficial Interest

The augmented estate includes any transfer made by the decedent where the decedent retains at his death (1) possession or enjoyment of the property, or (2) the right to income from the property. Again, these transfers must be made by the decedent during marriage and to persons other than the surviving spouse. These transfers are included only to the extent the decedent did not receive adequate and full consideration. Such transfers are nothing more than will substitutes used to avoid the surviving spouse's elective share. The UPC prevents the decedent from using a retained life estate as a means of avoiding the property's inclusion in his augmented estate.

2. Retained Power of Revocation

The augmented estate also includes any transfers made by the decedent in which the decedent "[r]etained 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." Because of the decedent's retained power of revocation, the donee's interest is nothing but speculative in nature:

(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 to a donee 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 $3,000.00.


113. Id.
114. As stated before, these transfers must be made to persons other than the surviving spouse and during the period of marriage to the surviving spouse. The transfers are included only to the extent the decedent did not receive adequate and full consideration. U.P.C. § 2-202(1), 8 U.L.A. 75-76 (1982).
Therefore, the decedent has not relinquished control over the property necessary to avoid inclusion in his augmented estate.

Section 2-202(1)(ii) applies whether the power to revoke is retained solely in the decedent or whether the power is retained in conjunction with another person. For example, X transfers property to T in trust. The income from the trust is paid to Y for life and upon Y's death, the trust principal is distributed to Z. X retains the power to revoke or amend the terms of the trust, but any revocation or amendment is effective only with the consent of Z. Even though X's power of revocation requires the consent of Z, X's augmented estate still includes the trust property.

3. Joint Tenancy Property

Section 2-202(1)(iii) states that the augmented estate shall include any transfer made by the decedent "whereby property is held at the time of decedent's death by decedent and another with right of survivorship." Section 1-202(33) defines "property" as including both real and personal property or any type of equivalent property interest. This section is not limited to the more common joint property interests dealing with real property. This section also includes joint tenancies in personal property such as bank accounts and other investment properties. Also, this section only applies to transfers made by the decedent. No transfer, therefore, is included in the decedent's augmented estate to the extent the decedent did not contribute to the joint tenancy. For example, X and Y both contribute $5,000 each to a joint bank account. If Y predeceases X, only Y's contribution of $5,000 is included in Y's augmented estate. Likewise, if X had transferred

116. Kurtz, supra note 1, at 1027.
118. Example adopted from Kurtz, supra note 1, at 1028. See also Helvering v. City Bank Farmers Trust, 296 U.S. 85 (1935).
119. These transfers must be made to persons other than the surviving spouse and during the period of marriage to the surviving spouse. The transfers are included only to the extent the decedent did not receive adequate and full consideration for the property transferred. U.P.C. § 2-202(1), 8 U.L.A. 75-76 (1982).
122. Kurtz, supra note 1, at 1030.
123. Id.
124. Id.
the full $10,000 to the bank account, no portion of that money would be included in Y's augmented estate.\textsuperscript{126}

\textbf{4. Transfers in Contemplation of Death}

The augmented estate includes any transfer made by the decedent to a donee other than the surviving spouse within two years of the decedent's death.\textsuperscript{127} These transfers are included in the decedent's augmented estate to the extent that the aggregate transfers to any single individual exceed $3,000.\textsuperscript{128} The augmented estate captures the value of the transferred property except where the decedent receives adequate and full consideration for that property.\textsuperscript{129}

Section 2-202(1)(iv) applies whether or not the decedent retains any beneficial interest or control over the property.\textsuperscript{130} This section captures transfers that may escape inclusion under sections 2-202(1)(i) and 2-202(1)(ii).\textsuperscript{131} The two year rule under this section is a hard and fast rule. The decedent's motives or purposes for making a particular transfer so close to his death are irrelevant and are not considered.\textsuperscript{132}

This section does contain a problem or loophole which destroys most of its effectiveness. This loophole allows the decedent to defeat the surviving spouse's elective share.\textsuperscript{133} The decedent can make several different $3,000 transfers to children or other donees during the two year period.\textsuperscript{134} These small, but numerous, transfers

\textsuperscript{126}. Treas. Reg. § 20.2040-1(c) example 3 (1989). \textit{See also} Kurtz, \textit{supra} note 1, at 1030-31. Please note that all joint tenancy property received by the decedent as a gift or inheritance should be excluded from the decedent's augmented estate. This exclusion is based on the fact that the decedent made no contribution to the property. Kurtz, \textit{supra} note 1, at 1031.

\textsuperscript{127}. As required in the past three types of transfers, these transfers also must be made during the decedent's marriage to the surviving spouse.


\begin{quote}
(iv) any transfer made to a donee within two years of death of decedent to the extent the aggregate transfers to any one donee in either of the years exceed $3,000.00.
\end{quote}


\textsuperscript{130}. Kurtz, \textit{supra} note 1, at 1032.

\textsuperscript{131}. \textit{Id}.

\textsuperscript{132}. \textit{Id}.

\textsuperscript{133}. \textit{Id}.

\textsuperscript{134}. \textit{Id}. at 1032-33.
will substantially and effectively deplete the decedent’s augmented estate. This decrease in the decedent’s augmented estate results in a decrease in the surviving spouse’s elective share.

5. Exceptions

Section 2-202(1) contains two major exceptions to the general rule of including certain decedent transfers in the augmented estate calculation. First, a transfer is excluded from the augmented estate “if made with the written consent or joinder of the surviving spouse.” The decedent effectively avoids the transferred property’s inclusion in his augmented estate by obtaining his spouse’s written consent or by having her join in the transfer. Second, the augmented estate excludes any life insurance, accident insurance, joint annuities, or pensions that are payable to a donee other than the surviving spouse. The comment of section 2-202 states that these types of transfers are not included because they are generally not used to deplete the decedent’s estate.

Commentators see the second exception as a means to effectively avoid the surviving spouse’s elective share. The decedent has the ability to purchase a single premium life insurance policy which substantially decreases his estate’s value. By naming someone other than his spouse as the beneficiary of that insurance policy, the decedent has greatly reduced the surviving spouse’s elective share. Also, the decedent can use a joint annuity as a means to transfer his property to persons other than his spouse, while retaining a current beneficial interest in the property. Because the annuity payments pass to a person other than the surviv-

136. Id.; U.P.C. § 2-202(1) provides in part:
  Any transfer is excluded if made with the written consent or joinder
  of the surviving spouse. . . .
137. Kurtz, supra note 1, at 1034.
  Nothing herein shall cause to be included in the augmented estate
  any life insurance, accident insurance, joint annuity, or pension payable
  to a person other than the surviving spouse.
140. Kurtz, supra note 1, at 1035.
141. Id.
142. Id.
ing spouse at the decedent’s death, this transfer effectively avoids the augmented estate. However, the joint annuity exception conflicts with section 2-202(1)(i)\textsuperscript{143} which states that the augmented estate includes “any transfer under which the decedent retained at the time of his death the... right to income from, the property. . .”\textsuperscript{144} The UPC’s commentary also states that whether or not the transfer was made before or during marriage to the surviving spouse is irrelevant.\textsuperscript{145}

B. Property Owned by the Surviving Spouse

Section 2-202(2) of the UPC considers the surviving spouse’s property derived from the decedent in the elective share computation.\textsuperscript{146} Inclusion of the property derived from the decedent in the decedent’s augmented estate serves two main purposes.\textsuperscript{147} First, the property the surviving spouse receives from the decedent during marriage becomes a credit against her elective share.\textsuperscript{148} Secondly, where the surviving spouse is adequately provided for outside the will, her ability to share in property passing to others under the will is impaired.\textsuperscript{149}

Under section 2-202(2), the augmented estate includes various types of property. The augmented estate includes the value of property the surviving spouse owns at the decedent’s death.\textsuperscript{150} The augmented estate also includes property the surviving spouse transferred to persons other than the decedent if the property “would have been includible in the [surviving] spouse’s augmented

\textsuperscript{143} Id.
\textsuperscript{144} U.P.C. § 2-202(1)(i), 8 U.L.A. 76 (1982). See also Kurtz, supra note 1, at 1035.
\textsuperscript{146} U.P.C. § 2-202(2), 8 U.L.A. 76-77 (1982). The statute provides in part: (2) 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. . .

\textsuperscript{147} Kurtz, supra note 1, at 1036-37.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
estate if the surviving spouse had predeceased the decedent. . . ."\textsuperscript{151}

The primary purpose behind this statutory language is to capture those transfers in which the surviving spouse has retained some beneficial enjoyment.\textsuperscript{152} Similar to section 2-202(1), this statutory language also implies that the augmented estate excludes property where the decedent consented to or joined in the transfer.\textsuperscript{153} Property the surviving spouse obtains from the decedent by will or through intestate succession is also excluded.\textsuperscript{154} The exclusion of this property is based on the fact that the property will already be a part of the decedent's augmented estate as probate property.\textsuperscript{155} Finally, this property is includible in the augmented estate only to the extent the spouse did not receive adequate and full consideration for the transfer.\textsuperscript{156}

Life insurance proceeds are not included in the augmented estate under section 2-202(1) because life insurance is generally not purchased to avoid the elective share statute.\textsuperscript{157} However, under section 2-202(2), life insurance proceeds payable to the surviving spouse are included "because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance."\textsuperscript{158} Other forms of property that are caught by this section include the following: "property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse;"\textsuperscript{159} lump sum annuity payments attributable to premiums paid by the decedent;\textsuperscript{160} amounts payable after decedent's death from pension plans;\textsuperscript{161} disability compensation;\textsuperscript{162} death benefits or retirement plans (exclusive of Federal Social Security System);\textsuperscript{163} community property when applicable;\textsuperscript{164} and

151. Id.; Please note that these transfers by the surviving spouse must have been made during marriage to the decedent, similar to § 2-202(1).
152. Kurtz, supra note 1, at 1037.
153. Id.; See Statutory exceptions under § 2-202(1).
155. Kurtz, supra note 1, at 1037.
158. Id.; See Kurtz, supra note 1, at 1040.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
C. Application

Under the UPC, the surviving spouse may elect one-third of the value of the decedent's augmented estate. Proponents argue that this system serves both competing policies by disallowing both (1) disinheritance of a spouse, and (2) a financial windfall by the surviving spouse. For this reason, North Carolina should strongly consider adopting the augmented estate provision of the UPC.

If the North Carolina legislature adopts the augmented estate concept over the current dissent legislation, the results of the examples given previously in this Comment will be different. In the first example, Mary would not have received a financial windfall at the expense of the other beneficiaries and the decedent's estate plan. The augmented estate would include not only the probate assets of $200,000, but also the life insurance proceeds of $80,000 that Mary received outside the will. The value of the augmented estate would be $280,000 and Mary's elective share would total $93,333. The life insurance proceeds would have been properly charged against the surviving spouse's elective share and she would only share in the probate assets to the extent of $13,333 rather

165. Id. § 2-202(2)(i) provides in part:
For purposes of this paragraph [2-202(2)]:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent.

than $100,000. This calculation prevents the surviving spouse from receiving a financial windfall when she has been adequately provided for outside the will.

A better example of showing how the augmented estate concept eliminates unfairness and injustice is to apply this concept to the second hypothetical that was used to magnify the ineffectiveness of the North Carolina dissent statute. Under that hypothetical, the surviving spouse received her intestate share of $2,000,000 of the $4,000,000 net estate plus the $1,999,999 of non-probate property she received outside the will. If the augmented estate provisions are applied to this situation, the augmented estate will be calculated to include both the $4,000,000 of probate property and the $1,999,999 of non-probate property. The surviving spouse’s one-third elective share will equal $1,999,999, whereby the non-probate assets she received outside the will serve as a complete credit against her elective share and the decedent’s estate plan is not disturbed.

**CONCLUSION**

The North Carolina legislature tried to establish rules that protect the surviving spouse against intentional or unintentional disinheritance. At the same time, the legislature tried to provide the testator with the freedom to distribute his or her property at death. Even though the legislature has tried to balance these two competing interests, the statutes enacted fall well short of this balancing goal and are basically ineffective. This ineffectiveness and inconsistency in the North Carolina dissent statute is caused by the less than adequate legislative attention given to the non-probate property interests that vest in the surviving spouse at the deceased spouse’s death.\(^{166}\)

The UPC’s augmented estate concept provides an effective remedy for the loopholes present in the North Carolina dissent statute. The augmented estate concept is more effective because it considers property interests that the North Carolina dissent statute fails to recognize. The augmented estate includes certain lifetime transfers made by the decedent to individuals other than the surviving spouse in the calculation of the elective share.\(^{167}\) The inclusion of this property protects the surviving spouse against possi-

\(^{166}\) Note, *supra* note 9, at 366.

ble disinherance. 168 The augmented estate calculation also includes property the surviving spouse derives from the decedent. 169 To the extent the surviving spouse has been adequately provided for outside the will, she will not be permitted to diminish other beneficiaries' shares under the will. The inclusion of this property provides protection against the surviving spouse receiving a financial windfall at the expense of the other beneficiaries. 170 This provision also maintains the decedent's freedom of testation. 171

The augmented estate concept is not free of any and all loopholes. Some loopholes appear in the exclusion of life insurance proceeds and joint annuities payable to persons other than the surviving spouse from the elective share calculation. 172 However, the loopholes that appear in the augmented estate concept are few and generally are not used for the purpose of avoiding the elective share. 173 The North Carolina legislature should strongly consider an amendment to the dissent statutes in order to statutorily encompass the Uniform Probate Code's augmented estate concept.

Charles H. Munn, Jr.

168. Kurtz, supra note 1, at 1059.
170. Kurtz, supra note 1, at 1060.
171. Id.