CHAPTER 30.1-05
ELECTIVE SHARE OF SURVIVING SPOUSE

30.1-05-01. (2-202) Elective share.

1. The surviving spouse of a decedent who dies domiciled in this state has a right of election, under the limitations and conditions stated in this chapter, to take an elective share amount equal to fifty percent of the augmented estate.
2. If the sum of the amounts described in subdivision d of subsection 2 of section 30.1-05-02, subdivision a of subsection 1 of section 30.1-05-03, and that part of the elective-share amount payable from the decedent's probate estate and nonprobate transfers to others under subsections 2 and 3 of section 30.1-05-03 is less than seventy-five thousand dollars, the surviving spouse is entitled to a supplemental elective-share amount equal to seventy-five thousand dollars minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in subsections 2 and 3 of section 30.1-05-03.
3. If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against, but are in addition to, the elective-share and supplemental elective-share amounts.
4. The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

30.1-05-02. (2-201, 2-204 through 2-208) Augmented estate.

1. a. In this section:
   (1) "Decedent's nonprobate transfers to others" means the decedent's nonprobate transfers to persons, other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors, that are included in the augmented estate under subdivision b of subsection 2.
   (2) "Fractional interest in property held in joint tenancy with the right of survivorship", whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.
   (3) "Marriage", as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.
   (4) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that the person possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.
   (5) "Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary designation.
   (6) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent, whether or not the decedent then had the capacity to exercise the power, held a power to create a present or future interest in the decedent, the decedent's creditors, the decedent's estate, or the creditors of the decedent's estate, and includes a power to revoke or invade the principle of a trust or other property arrangement.

(7) "Probate estate" means property, whether movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.
(8) "Property" includes values subject to a beneficiary designation.
(9) "Right to income" includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.
(10) "Transfer", as it relates to a transfer by or of the decedent, includes:
(a) An exercise or release of a presently exercisable general power of appointment held by the decedent;
(b) A lapse at death of a presently exercisable general power of appointment held by the decedent; and
(c) An exercise, release, or lapse of a general power of appointment that the decedent created in the decedent and of a power described in subparagraph b of paragraph 2 of subdivision b of subsection 2 that the decedent conferred on a nonadverse party.

b. In subparagraph a of paragraph 3 of subdivision b of subsection 2, "termination", with respect to a right or interest in property, means that the right or interest terminated by the terms of the governing instrument or that the decedent transferred or relinquished the right or interests; and, with respect to a power over property, means that the power terminated by exercise, release, lapse, in default, or otherwise, except that, with respect to a power described in subparagraph a of paragraph 1 of subdivision b of subsection 2, "termination" means that the power terminated by exercise or release, but not by lapse nor in default or otherwise.

2. The augmented estate consists of the sum of:
a. The value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance as defined in section 47-18-01, family allowances, exempt property, and enforceable claims.
b. The value of the decedent's nonprobate transfers to others, which are composed of all property, whether movable or immovable, wherever situated, not included in the decedent's probate estate, of any of the following types:
(1) Property of any of the following types that passed outside probate at the decedent's death:
(a) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment created by the decedent during the marriage; the amount included is the value of the property subject to the power, to the extent that the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.
(b) The decedent's fractional interest in property, held by the decedent in joint tenancy with the right of survivorship; the amount included is the value of the decedent's fractional interest contributed by the decedent during the marriage, to the extent that that fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.
(c) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship; the amount included is the value of the decedent's ownership interest, to the extent that the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.
(2) Property transferred in any of the following forms by the decedent during marriage:
(a) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or the income from, the property if and to the extent that the decedent's right terminated at or continued beyond

the decedent's death; the amount included is the value of the fraction of the property to which the decedent's right related, to the extent that that fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(b) Any transfer in which the decedent created a power over the income or principal of the transferred property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, for the benefit of the decedent, the decedent's creditors, the decedent's estate, or the creditors of the decedent's estate; the amount included is the value of the property subject to the power, to the extent that the power was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent that the property subject to the power passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(a) Any property that passed as a result of termination of a right or interest in, or power over, property that would have been included in the augmented estate under subparagraph a, b, or c of paragraph 1 of this subdivision, or under paragraph 2 of this subdivision, if the right, interest, or power had not terminated until the decedent's death; the amount included is the value of the property that would have been included under these subsections, except that the property is valued at the time that the right, interest, or power terminated, and is included only to the extent that the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse.

(b) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse, the amount included is the value of the transferred property to the extent that the aggregate transfers to any one donee in either of the two years exceeded ten thousand dollars.

c. The value of the decedent's nonprobate transfers to the decedent's surviving spouse, which are composed of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(1) The decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant;

(2) The decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner;

(3) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if, and to the extent that, the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds, the amount included is the value of the proceeds, to the extent that they were payable at the decedent's death; and

(4) All other property that would have been included in the augmented estate under paragraph 1 or 2 of subdivision b of this subsection had it passed to

or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors, but excluding property passing to the surviving spouse under the federal social security system.

d. Except to the extent included in the augmented estate under subdivision a or c, the value of property:
   (1) That was owned by the decedent's surviving spouse at the decedent's death, including:
      (a) The surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship;
      (b) The surviving spouse's ownership interest in property or accounts held in co-ownership registration with the right of survivorship; and
      (c) Property that passed to the surviving spouse by reason of the decedent's death, but not including the spouse's right to homestead allowance, family allowance, exempt property, or payments under the federal social security system.
   (2) That would have been included in the surviving spouse's nonprobate transfers to others, other than the spouse's fractional and ownership interest included under subparagraphs a and b of paragraph 1, had the spouse been the decedent. Property included under this paragraph is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, except that, for purposes of subparagraphs a and b of paragraph 1, the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. The value of property included under this paragraph is reduced in each category by enforceable claims against the included property and is reduced by enforceable claims against the surviving spouse.

3. The value of any property is excluded from the decedent's nonprobate transfers to others to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property or if the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse. Life insurance, accident insurance, pension, profit-sharing, retirement, and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate are also excluded from the decedent's nonprobate transfers.
4. The value of property includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system.
5. In case of overlapping application to the same property of the paragraphs or subparagraphs of subsection 2, the property is included in the augmented estate under the provision yielding the highest value, but under any one, but only one, of the overlapping provisions if they all yield the same value.

30.1-05-03. (2-209) Sources from which elective share payable.

1. In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:
   a. Amounts included in the augmented estate under subdivision a of subsection 2 of section 30.1-05-02 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under subdivision c of subsection 2 of section 30.1-05-02; and
   b. Amounts included in the augmented estate under subdivision d of subsection 2 of section 30.1-05-02.

2. If, after the application of subsection 1, the elective-share amount is not fully satisfied or if the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfers to others, other than amounts included under subparagraph a or b of paragraph 3 of subdivision b of subsection 2 of section 30.1-05-02, are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.
3. If, after the application of subsections 1 and 2, the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of that remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

30.1-05-04. (2-210) Personal liability of recipients.

1. Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to the person or to pay the value of the amount for which the person is liable.
2. If any section or part of any section of this chapter is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit, is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in section 30.1-05-03, to the person who would have been entitled to it were that section or part of that section not preempted.

30.1-05-05. (2-211) Proceeding for elective share - Time limit.

1. Except as provided in subsection 2, the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse shall serve a copy of the petition for the elective share on, and shall give written notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests may be adversely affected by the taking of the elective share. Except as provided in subsection 2, the decedent's nonprobate transfers to others, described in subdivision b of subsection 2 of section 30.1-05-02, is not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than nine months after the decedent's death.
2. Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's nonprobate transfers to others, described in subdivision b of subsection 2 of section 30.1-05-02, are not excluded from the

augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

3. The surviving spouse may withdraw a demand for an elective share at any time before entry of a final determination by the court.
4. After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under sections 30.1-05-03 and 30.1-05-04. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than the person would have been under sections 30.1-05-03 and 30.1-05-04, had relief been secured against all persons subject to contribution.
5. An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.
6. A copy of the order or judgment of the court shall be forwarded immediately to the tax commissioner by the court.

30.1-05-06. (2-212) Right of election personal to surviving spouse - Incapacitated surviving spouse.

1. The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under subsection 1 of section 30.1-05-05. If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by the surviving spouse's conservator, guardian, or agent under the authority of a power of attorney.
2. If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court shall set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under subsections 2 and 3 of section 30.1-05-03 and shall appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee shall administer the trust in accordance with the following terms and any additional terms as the court determines appropriate:
    a. Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse exclusive of benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.
    b. During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.
    c. Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that

predeceased spouse died immediately after the surviving spouse; or to that predeceased spouse's heirs under section 30.1-09.1-11.

30.1-05-07. (2-213) Waiver of right to elect and of other rights.

Repealed by S.L. 2013, ch. 121, § 2.

30.1-05-08. (2-214) Protection of payers and other third parties.

1. Although under section 30.1-05-02 a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payer or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payer or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payer or other third party is liable only for actions taken two or more business days after the payer or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed. The written notice must indicate the name of the decedent, the date of the decedent's death, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that the spouse intends to file a petition for the elective share or that a petition for the elective share has been filed. Any form of service of notice other than that described in subsection 2 is not sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument.
2. The written notice must be mailed to the payer's or other third party's main office or home by registered mail or served upon the payer or third party in the same manner as a summons in a civil action. Notice to a sales representative of the payer or other third party does not constitute notice to the payer or other third party. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payer or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The availability of an action under this section does not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payer or other third party for any such payment, transfer, or deposit with the court, even if no probate proceedings have been commenced before the payment, transfer, or deposit. The court shall hold the funds or items of property and, upon its determination under subsection 4 of section 30.1-05-05, shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under subsection 1 of section 30.1-05-05, or, if filed, the demand for an elective share is withdrawn under subsection 3 of section 30.1-05-05, the court shall order disbursement to the designated beneficiary. A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court. Payments, transfers, or deposits made to or with the court discharge the payer or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to or items of property transferred to or deposited with the court.
3. Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.