WEST VIRGINIA LEGISLATURE  
SECOND REGULAR SESSION, 1992  

ENROLLED  
Committee Substitute for  
HOUSE BILL No. 4112  

(By Delegate  
Mr. Speaker, Mr. Chambers and)  
Delegate Bart  

Passed March 2, 1992  
In Effect ninety days from Passage
AN ACT to repeal section one, article two, chapter thirty-seven; article two, chapter forty-two; section one, article four of said chapter; and sections three through twenty, inclusive, article one, chapter forty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section six, article one, chapter forty-one of said code; to amend and reenact sections one, two, three and four, article one, chapter forty-two; to further amend article one of said chapter by adding thereto eight new sections, designated sections three-a, three-b, three-c, three-d, three-e, three-f, three-g and ten; to amend and reenact sections one, two and three, article three, chapter forty-two; to further amend article three of said chapter by adding thereto five new sections, designated sections three-a, four, five, six and seven; to amend and reenact sections one and two, article one, chapter forty-three; and to amend and reenact section six, article seven, chapter fifty-five of the code, all relating to intestate succession and distribution of damages in wrongful death actions; spousal and surviving heirs shares; representation; the abolition of dower and curtesy; effects of premarital will on spouse's share; and requiring spousal notice if certain property is conveyed.
Be it enacted by the Legislature of West Virginia:

That section one, article two, chapter thirty-seven; article two, chapter forty-two; section one, article four, chapter forty-two; and sections three through twenty, inclusive, article one, chapter forty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section six, article one, chapter forty-one of said code be amended and reenacted; that sections one, two, three and four, article one of chapter forty-two be amended and reenacted; that article one of said chapter forty-two be further amended by adding thereto eight new sections, designated sections three-a, three-b, three-c, three-d, three-e, three-f, three-g and ten; that sections one, two and three, article three, chapter forty-two be amended and reenacted; that article three of said chapter forty-two be further amended by adding thereto five new sections, designated sections three-a, four, five, six and seven; that sections one and two, article one, chapter forty-three be amended and reenacted; and that section six, article seven, chapter fifty-five be amended and reenacted, all to read as follows:

CHAPTER 41. WILLS.

ARTICLE 1. CAPACITY TO MAKE; REQUISITES; VALIDITY.

§41-1-6. Revocation by divorce; no revocation by other changes of circumstances.

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. Notwithstanding the provisions of section three, article three, chapter forty-one of this code, the share of such spouse shall be distributed according to
the residuary clause of the decedent’s will or according
to the statute of intestate succession for the decedents
property. If provisions are revoked solely by this section,
they are revived by testator’s remarriage to the former
spouse. For purposes of this section, divorce or annul-
ment means any divorce or annulment which would
exclude the spouse as a surviving spouse. A decree of
separation which does not terminate the status of
husband and wife is not a divorce for purposes of this
section. No change of circumstances other than as
described in this section revokes a will.

CHAPTER 42. DESCENT AND DISTRIBUTION.

ARTICLE 1. DESCENT.

§42-1-1. General definitions.

Subject to additional definitions contained in the
subsequent articles that are applicable to specific
articles, parts, or sections, and unless the context
otherwise requires in this code:

(1) “Agent” includes an attorney-in-fact under a
durable or nondurable power of attorney, an individual
authorized to make decisions concerning another’s
health care, and an individual authorized to make
decisions for another under a natural death act.

(2) “Beneficiary” as it relates to a trust beneficiary,
includes a person who has any present or future interest,
vested or contingent, and also includes the owner of an
interest by assignment or other transfer; as it relates to
a charitable trust, includes any person entitled to
enforce the trust; as it relates to a “beneficiary of a
beneficiary designation,” refers to a beneficiary of an
insurance or annuity policy, of an account with POD
designation, of a security registered in beneficiary form
(TOD), or of a pension, profit-sharing, retirement, or
similar benefit plan, or other nonprobate transfer at
death; and, as it relates to a “beneficiary designated in
governing instrument,” includes a grantee of a deed,
a devisee, a trust beneficiary, a beneficiary of a
beneficiary designation, a donee, appointee, or taker in
default of a power of appointment, or a person in whose
favor a power of attorney or a power held in any
individual, fiduciary, or representative capacity is
exercised.

(3) "Court" means the county commission or branch in
this state having jurisdiction in matters relating to the
affairs of decedents.

(4) "Conservator" means a person who is appointed by
a court to manage the estate of a protected person.

(5) "Descendant" of an individual means all of his or
her descendants of all generations, with the relationship
of parent and child at each generation being determined
by the definition of child and parent contained in this
code.

(6) "Devise" when used as a noun, means a testament-
tary disposition of real or personal property and, when
used as a verb, means to dispose of real or personal
property by will.

(7) "Devisee" means a person designated in a will to
receive a devise. In the case of a devise to an existing
trust or trustee, or to a trustee on trust described by
will, the trust or trustee is the devisee and the benefi-
ciaries are not devisees.

(8) "Distributee" means any person who has received
property of a decedent from his or her personal
representative other than as a creditor or purchaser. A
testamentary trustee is a distributee only to the extent
of distributed assets or increment thereto remaining in
his or her hands. A beneficiary of a testamentary trust
to whom the trustee has distributed property received
from a personal representative is a distributee of the
personal representative. For the purposes of this
provision, "testamentary trustee" includes a trustee to
whom assets are transferred by will, to the extent of the
devised assets.

(9) "Estate" includes the property of the decedent,
trust, or other person whose affairs are subject to this
code as originally constituted and as it exists from time
to time during administration.
(10) “Exempt property” means that property of a decedent’s estate which is provided for in Section 48, Article VI of the constitution.

(11) “Fiduciary” includes a personal representative, guardian, conservator and trustee.

(12) “Foreign personal representative” means a personal representative appointed by another jurisdiction.

(13) “Formal proceedings” means proceedings conducted before a judge with notice to interested persons.

(14) “Governing instrument” means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a donative, appointive, or nominative instrument of any other type.

(15) “Guardian” means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(16) “Heirs” means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.

(17) “Informal proceedings” mean those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.

(18) “Interested person” includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in,
any proceeding.

(19) "Issue" of a person means descendant as defined in subsection (5).

(20) "Joint tenants with the right of survivorship" and "community property with the right of survivorship" includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(21) "Lease" includes an oil, gas, or other mineral lease.

(22) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(23) "Minor" means a person who is under eighteen years of age.

(24) "Mortgage" means any deed of trust, conveyance, agreement, or arrangement in which property is encumbered or used as security.

(25) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his or her death.

(26) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(27) "Payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(28) "Person" means an individual or an organization.

(29) "Personal representative" includes executor, administrator, successor personal representative, special
administrator, and persons who perform substantially
the same function under the law governing their status.
"General personal representative" excludes special
administrator.

(30) "Petition" means a written request to the court
for an order after notice.

(31) "Proceeding" includes action at law and suit in
equity.

(32) "Property" includes both real and personal
property or any interest therein and means anything
that may be the subject of ownership.

(33) "Security" includes any note, stock, treasury
stock, bond, debenture, evidence of indebtedness,
certificate of interest or participation in an oil, gas, or
mining title or lease or in payments out of production
under such a title or lease, collateral trust certificate,
transferable share, voting trust certificate or, in
general, any interest or instrument commonly known as
a security, or any certificate of interest or participation,
any temporary or interim certificate, receipt, or
certificate of deposit for, or any warrant or right to
subscribe to or purchase, any of the foregoing.

(34) "Settlement" in reference to a decedent's estate,
includes the full process of administration, distribution
and closing.

(35) "State" means a state of the United States, the
District of Columbia, the Commonwealth of Puerto Rico,
or any territory or insular possession subject to the
jurisdiction of the United States.

(36) "Successor personal representative" means a
personal representative, other than a special administra-
tor, who is appointed to succeed a previously appointed
personal representative.

(37) "Successors" means persons, other than creditors,
who are entitled to property of a decedent under his or
her will or this code.

(38) "Survive" means that an individual has neither
predeceased an event, including the death of another
individual, nor is deemed to have predeceased an event. The term includes its derivatives, such as "survives," "survived," "survivor," "surviving."

(39) "Surviving spouse" means the person to whom the decedent was married at the time of the decedent's death.

(40) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(41) "Testator" includes an individual of either sex.

(42) "Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives and custodial arrangements, including that relating to gifts or transfers to minors, dealing with special custodial situations, business trusts providing for certificates to be issued to beneficiaries.

(43) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(44) "Will" includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

§42-1-2. Intestate estate.

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this code, except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the
decedent, the share of the decedent's intestate estate to
which that individual or class would have succeeded
passes as if that individual or each member of that class
had disclaimed his or her intestate share.


The intestate share of a decedent's surviving spouse
is:

(a) The entire intestate estate if:
   (1) No descendant or parent of the decedent survives
       the decedent; or
   (2) All of the decedent's surviving descendants are
       also descendants of the surviving spouse and there is no
       other descendant of the surviving spouse who survives
       the decedent;

(b) Three fourths of the intestate estate, if no descend-
   ant of the decedent survives the decedent, but a parent
   of the decedent survives the decedent;

(c) Three fifths of the intestate estate, if all of the
    decedent's surviving descendants are also descendants of
    the surviving spouse and the surviving spouse has one
    or more surviving descendants who are not descendants
    of the decedent;

(d) One half of the intestate estate, if one or more of
    the decedent's surviving descendants are not descend-
    ants of the surviving spouse.

§42-1-3a. Share of heirs other than surviving spouse.

Any part of the intestate estate not passing to the
decedent's surviving spouse under section three of this
article, or the entire intestate estate if there is no
surviving spouse, passes in the following order to the
individuals designated below who survive the decedent:

(a) To the decedent's descendants by representation;

(b) If there is no surviving descendant, to the dece-
dent's parents equally if both survive, or to the surviving
    parent;

(c) If there is no surviving descendant or parent, to
the descendants of the decedent's parents or either of them by representation;

(d) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but, if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

§42-1-3b. Requirement that heir survive decedent for one hundred twenty hours.

An individual who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of a decedent or of an individual who would otherwise be an heir, or the times of death of both, cannot be determined, and it is not established that the individual who would otherwise be an heir survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state under section three-c of this article.

§42-1-3c. No taker.

If there is no taker under the provisions of this article, the intestate estate passes to the state.

§42-1-3d. Representation.

(a) In this section:

(1) “Deceased descendant,” “deceased parent,” or “deceased grandparent” means a descendant, parent, or
grandparent who either predeceased the decedent or is
deemed to have predeceased the decedent under section
three-b of this article.

(2) “Surviving descendant” means a descendant who
neither predeceased the decedent nor is deemed to have
predeceased the decedent under section three-b of this
article.

(b) If, under section three-a of this article, a dece-
dent’s intestate estate or a part thereof passes “by
representation” to the decedent’s descendants, the estate
or part thereof is divided into as many equal shares as
there are: (i) Surviving descendants in the generation
nearest to the decedent which contains one or more
surviving descendants; and (ii) deceased descendants in
the same generation who left surviving descendants, if
any. Each surviving descendant in the nearest genera-
tion is allocated one share. The remaining shares, if any,
are combined and then divided in the same manner
among the surviving descendants of the deceased
descendants as if the surviving descendants who were
allocated a share and their surviving descendants had
predeceased the decedent.

(c) If, under section three-a of this article, a decedent’s
intestate estate or a part thereof passes “by representa-
tion” to the descendants of the decedent’s deceased
parents or either of them or to the descendants of the
decedent’s deceased paternal or maternal grandparents
or either of them, the estate or part thereof is divided
into as many equal shares as there are: (i) Surviving
descendants in the generation nearest the deceased
parents or either of them, or the deceased grandparents
or either of them, that contains one or more surviving
descendants; and (ii) deceased descendants in the same
generation who left surviving descendants, if any. Each
surviving descendant in the nearest generation is
allocated one share. The remaining shares, if any, are
combined and then divided in the same manner among
the surviving descendants of the deceased descendants
as if the surviving descendants who were allotted a
share and their surviving descendants had predeceased
the decedent.
§42-1-3e. Kindred of half blood.
1 Relatives of the half blood inherit the same share they
2 would inherit if they were of the whole blood.

§42-1-3f. Afterborn heirs.
1 An individual in gestation at a particular time is
2 treated as living at that time if the individual lives one
3 hundred twenty hours or more after birth.

§42-1-3g. Advancements.
1 (a) If an individual dies intestate as to all or a portion
2 of his or her estate, property the decedent gave during
3 the decedent's lifetime to an individual who, at the
4 decedent's death, is an heir is treated as an advancement
5 against the heir's intestate share only if (i) the decedent
6 declared in a contemporaneous writing or the heir
7 acknowledged in writing that the gift is an advancement
8 or (ii) the decedent's contemporaneous writing or the
9 heir's written acknowledgement otherwise indicates that
10 the gift is to be taken into account in computing the
11 division and distribution of the decedent's intestate
12 estate.
13
14 (b) For purposes of subsection (a), property advanced
15 is valued as of the time the heir came into possession
16 or enjoyment of the property or as of the time of the
17 decedent's death, whichever first occurs.
18
19 (c) If the recipient of the property fails to survive the
20 decedent, the property is not taken into account in
21 computing the division and distribution of the decedent's
22 intestate estate, unless the decedent's contemporaneous
23 writing provides otherwise.

§42-1-4. Alienage.
1 No individual is disqualified to take as an heir because
2 the individual or an individual through whom he or she
3 claims is or has been an alien.

§42-1-10. Individuals related to decedent through two
1 lines.
2 An individual who is related to the decedent through
2 two lines of relationship is entitled to only a single share
based on the relationship that would entitle the individual to the larger share.

ARTICLE 3. PROVISIONS RELATING TO HUSBAND OR WIFE OF DECEDEEDNT.

§42-3-1. Right to elective share.

(a) 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 part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Years Married</th>
<th>Elective-Share Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>Supplemental Amount Only</td>
</tr>
<tr>
<td>1 year but less than 2 years</td>
<td>3% of the augmented estate.</td>
</tr>
<tr>
<td>2 years but less than 3 years</td>
<td>6% of the augmented estate.</td>
</tr>
<tr>
<td>3 years but less than 4 years</td>
<td>9% of the augmented estate.</td>
</tr>
<tr>
<td>4 years but less than 5 years</td>
<td>12% of the augmented estate.</td>
</tr>
<tr>
<td>5 years but less than 6 years</td>
<td>15% of the augmented estate.</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>18% of the augmented estate.</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>21% of the augmented estate.</td>
</tr>
<tr>
<td>8 years but less than 9 years</td>
<td>24% of the augmented estate.</td>
</tr>
<tr>
<td>9 years but less than 10 years</td>
<td>27% of the augmented estate.</td>
</tr>
<tr>
<td>10 years but less than 11 years</td>
<td>30% of the augmented estate.</td>
</tr>
<tr>
<td>11 years but less than 12 years</td>
<td>34% of the augmented estate.</td>
</tr>
<tr>
<td>12 years but less than 13 years</td>
<td>38% of the augmented estate.</td>
</tr>
<tr>
<td>13 years but less than 14 years</td>
<td>42% of the augmented estate.</td>
</tr>
<tr>
<td>14 years but less than 15 years</td>
<td>46% of the augmented estate.</td>
</tr>
<tr>
<td>15 years or more</td>
<td>50% of the augmented estate.</td>
</tr>
</tbody>
</table>

(b) If the sum of the amounts described in subdivisions (3) and (4), subsection (b) of section two, and subdivisions (1) and (3), subsection (a), section six of this article, and that part of the elective-share amount payable from the decedent’s probate and reclaimable estates under subsections (b) and (c), section six of this article, is less than twenty-five thousand dollars, the surviving spouse is entitled to a supplemental elective-share amount equal to fifty thousand dollars, minus the sum of the amounts described in those sections. The
37 supplemental elective share amount is payable from the
decedent's probate estate and from recipients of the
decedent's probate estate and from recipients of the
decedent's reclaimable estate in the order of priority set
forth in subsections (b) and (c), section six of this article.

42 (c) 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.

§42-3-2. Augmented estate.

1 (a) Definitions.

2 (1) In this section:

3 (i) “Bona fide purchaser” means a purchaser for value
in good faith and without notice of an adverse claim. The
notation of a state documentary fee on a recorded
instrument is prima facie evidence that the transfer
described therein was made to a bona fide purchaser.

8 (ii) “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
he or she possesses respecting the trust or other property
arrangement. A person having a general power of
appointment over property is deemed to have a benefi-
cial interest in the property.

16 (iii) “Presently exercisable general power of appoint-
ment” means a power of appointment under which, at
the time in question, the decedent by an exercise of the
power could have created an interest, present or future,
in himself or herself or his or her creditors.

21 (iv) “Probate estate” means property, whether real or
personal, movable or immovable, wherever situated,
that would pass by intestate succession if the decedent
died without a valid will.

25 (v) “Right to income” includes a right to payments
under an annuity or similar contractual arrangement.

27 (vi) “Value of property owned by the surviving spouse
at the decedent’s death” and “value of property to which
the surviving spouse succeeds by reason of the dece-
dent’s death” include the commuted value of any present
or future interest then held by the surviving spouse and
the commuted value of amounts payable to the surviving
spouse after the decedent’s death 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.

(2) In subsections (b) (2) (iii) and (iv), “transfer”
includes an exercise or release of a power of appoint-
ment, but does not include a lapse of a power of
appointment.

(b) The augmented estate consists of the sum of:

(1) The value of the decedent’s probate estate, reduced
by funeral and administration expenses, homestead
exemption, property exemption, and enforceable claims;

(2) The value of the decedent’s reclaimable estate. The
decedent’s reclaimable estate is composed of all prop-
erty, whether real or personal, movable or immovable,
wherever situated, not included in the decedent’s
probate estate, of any of the following types:

(i) Property to the extent the passing of the principal
thereof to or for the benefit of any person, other than
the decedent’s surviving spouse, was subject to a
presently exercisable general power of appointment
held by the decedent alone, if the decedent held that
power immediately before his or her death, or if and to
the extent the decedent, while married to his or her
surviving spouse and during the two-year period next
preceding the decedent’s death, released that power or
exercised that power in favor of any person other than
the decedent or the decedent’s estate, spouse or surviv-
ing spouse;

(ii) Property, to the extent of the decedent’s unilater-
ally severable interest therein, held by the decedent and
any other person, except the decedent’s surviving
spouse, with right of survivorship, acquired during the
marriage of the decedent and the surviving spouse, if
the decedent held that interest immediately before his
or her death or if and to the extent the decedent, while
married to his or her surviving spouse and during the
two-year period preceding the decedent's death, trans-
ferred that interest to any person other than the
decedent's surviving spouse;

(iii) Proceeds of insurance, including accidental death
benefits, on the life of the decedent payable to any
person other than the decedent's surviving spouse, if the
decedent owned the insurance policy, had the power to
change the beneficiary of the insurance policy, or the
insurance policy was subject to a presently exercisable
general power of appointment held by the decedent
alone immediately before his or her death or if and to
the extent the decedent, while married to his or her
surviving spouse and during the two-year period next
preceding the decedent's death, transferred that policy
to any person other than the decedent's surviving spouse;
and

(iv) Property transferred by the decedent to any
person other than a bona fide purchaser at any time
during the decedent's marriage to the surviving spouse,
to or for the benefit of any person, other than the
decedent's surviving spouse, if the transfer is of any of
the following types:

(A) Any transfer to the extent that the decedent
retained at the time of or during the two-year period
next preceding his or her death the possession or
enjoyment of, or right to income from the property;

(B) Any transfer to the extent that, at the time of or
during the two-year period next preceding the dece-
dent's death, the income or principal was subject to a
power, exercisable by the decedent alone or in conjunc-
tion with any other person or exercisable by a nonad-
verse party, for the benefit of the decedent or the
decedent's estate;

(C) Any transfer of property, to the extent the
decedent's contribution to it, as a percentage of the
whole, was made within two years before the decedent's
death, by which the property is held, at the time of or
during the two-year period next preceding the dece-
dent's death, by the decedent and another, other than the
decedent's surviving spouse, with right of survivorship;
or

(D) Any transfer made to a donee within two years
before the decedent's death to the extent that the
aggregate transfers to any one donee in either of the
years exceed ten thousand dollars.

(3) The value of property to which the surviving
spouse succeeds by reason of the decedent's death, other
than by homestead exemption, exempt property, testate
succession, or intestate succession, including the pro-
ceeds of insurance, including accidental death benefits,
on the life of the decedent and benefits payable under
a retirement plan in which the decedent was a partic-
ipant, exclusive of the federal social security system; and

(4) The value of property owned by the surviving
spouse at the decedent's death, reduced by enforceable
claims against that property or that spouse, plus the
value of amounts that would have been includible in the
surviving spouse's reclaimable estate had the spouse
predeceased the decedent. But amounts that would have
been includible in the surviving spouse's reclaimable
estate under subsection (b) (2) (iii) are not valued as if
he or she were deceased.

(c) Any transfer or exercise or release of a power of
appointment is excluded from the decedent's reclaima-
ble estate (i) to the extent the decedent received
adequate and full consideration in money or money's
worth for the transfer, exercise or release, or (ii) if
irrevocably made with the written consent or joinder of
the surviving spouse.

(d) Property is valued as of the decedent's death, but
property irrevocably transferred during the two-year
period next preceding the decedent's death which is
included in the decedent's reclaimable estate under
subsection (b) (2) (i), (ii) and (iv) is valued as of the time
of the transfer. If the terms of more than one of the
subparagraphs or sub-subparagraphs of subsection (b)
(2) apply, the property is included in the augmented estate under the subparagraph or sub-subparagraph that yields the highest value. For the purposes of this subsection, an “irrevocable transfer of property” includes an irrevocable exercise or release of a power of appointment.

(e) (1) Although under this section a payment, item of property, or other benefit is included in the decedent's reclaimable estate, a payor 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 good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor 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 payor or other third party is liable for payments made or other actions taken after the payor 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.

(2) The written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. 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 payor 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 court shall hold the funds or item of
property and, upon its determination under subsection (d) of section four of this article, shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under subsection (a) of section four of this article or, if filed, the demand for an elective share is withdrawn under subsection (c) of section four of this article, the court shall order disbursement to the designated beneficiary. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(3) Upon petition to the probate 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.

(f) (1) A person who purchases property from a recipient for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this part to return the payment, item of property, or benefit nor is liable under this part for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit included in the decedent's reclaimable estate is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, as provided in section six of this article.

(2) If any section or part of any section of this part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's reclaimable estate, 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 six of this article to the person who would have been entitled to it.
§42-3-3. Right of election personal to surviving spouse.

(a) 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 (a) of section (3) of this article. If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his or her conservator, guardian, or agent under the authority of a power of attorney.

(b) If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court must 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 reclaimable estate under subsections (b) and (c) of section six of this article and must 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 must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:

(1) 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 and 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;

(2) 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;

(3) Upon the surviving spouse's death, the trustee
shall transfer the unexpended trust property 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.

§42-3-3a. Waiver of right to elect; other rights.

(a) The right of election of a surviving spouse and the
rights of the surviving spouse to homestead exemption,
exempt property, or any of them, may be waived, wholly
or partially, before or after marriage, by a written
contract, agreement, or waiver signed by the surviving
spouse.

(b) A surviving spouse's waiver is not enforceable if
the surviving spouse proves that:

(1) He or she did not execute the waiver voluntarily;
or

(2) The waiver was unconscionable when it was
executed and, before execution of the waiver, he or she:

(i) Was not provided a fair and reasonable disclosure
of the property or financial obligations of the decedent;

(ii) Did not voluntarily and expressly waive, in
writing, any right to disclosure of the property or
financial obligations of the decedent beyond the disclo-
sure provided; and

(iii) Did not have, or reasonably could not have had,
an adequate knowledge of the property or financial
obligations of the decedent.

(c) An issue of unconscionability of a waiver is for
decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all
rights," or equivalent language, in the property or estate
of a present or prospective spouse or a complete
property settlement entered into after or in anticipation
of separation or divorce is a waiver of all rights of
elective share, homestead allowance, and exempt property by each spouse in the property of the other and renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

§42-3-4. Proceeding for elective share; time limit.

(a) Except as provided in subsection (b), 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 must give 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 will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's reclaimable estate, described in subdivision (2), subsection (b) of section two of this article, 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.

(b) 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 reclaimable estate, 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 reclaimable estate, described in subdivision (2), subsection (b) of section two of this article, is 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.
(c) The surviving spouse may withdraw his or her demand for an elective share at any time before entry of a final determination by the court.

(d) 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 section six of this article. 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 he or she would have been under section two had relief been secured against all persons subject to contribution.

(e) 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.

§42-3-5. Effect of election on statutory benefits.

If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead exemption and exempt property, if any, are not charged against but are in addition to the elective share and supplemental elective-share amounts.

§42-3-6. Charging spouse with owned assets and gifts received; liability of others for balance of elective share.

(a) 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 reclaimable estate:

(1) Amounts included in the augmented estate which pass or have passed to the surviving spouse by testate

(2) Amounts included in the augmented estate under subdivision (3), subsection (b), section two of this article;

(3) Amounts included in the augmented estate which would have passed to the spouse but were disclaimed; and

(4) Amounts included in the augmented estate under subdivision (4), subsection (b), section two of this article up to the applicable percentage thereof. For the purposes of this subsection, the “applicable percentage” is twice the elective-share percentage set forth in the schedule in section one of this article appropriate to the length of time the spouse and the decedent were married to each other.

(b) If, after the application of subsection (a), the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent’s probate estate and that portion of the decedent’s reclaimable estate other than amounts irrevocably transferred within two years before the decedent’s death 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 reclaimable estate 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 that portion of the decedent’s reclaimable estate in proportion to the value of their interests therein.

(c) If, after the application of subsections (a) and (b), the elective share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent’s reclaimable estate 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 portion of the decedent’s reclaimable estate in proportion to the value of their interests therein.
(d) Only original recipients of the reclaimable estate described in subdivision (2) of subsection (b) of section two of this article, and the donees of the recipients of the reclaimable estate 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 reclaimable estate or to pay the value of the amount for which he or she is liable.

§42-3-7. Entitlement of spouse; premarital will.

(a) If a testator's surviving spouse married the testator after the testator executed his or her will, the surviving spouse is entitled to receive, as an intestate share no less than the value of the share of the estate he or she would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised or passes to a descendant of such a child, unless:

(1) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift to a descendant of such a child, abate.
CHAPTER 43. DOWER AND VALUATION OF LIFE ESTATES.

ARTICLE 1. DOWER.

§43-1-1. Dower and curtesy abolished.
1 The estates of dower and curtesy are abolished.

1 (a) For purposes of this section, “conveyance” means a dispositive act intended to create a property interest in land and includes the creation of a security interest in real estate.
2 (b) Any married person who conveys an interest in real estate shall notify his or her spouse prior to or within thirty days of the time of the conveyance if the conveyance involves an interest in real estate to which dower would have attached if the conveyance had been made prior to the date of enactment of this statute.
3 (c) A person making a conveyance described in the previous sections shall have the burden of proof to show compliance with this section. Such burden shall be met either by:
4 (1) The signature of the spouse of the conveying party on the conveyance instrument; or
5 (2) Such other forms of competent evidence as are admissible in a court of general jurisdiction in this state under the rules of evidence.
6 (d) When a married person fails to comply with the notification requirements of this section, then in the event of a subsequent divorce within five years of said conveyance, the value of the real estate conveyed, as determined at the time of the conveyance, shall be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution or awards of support, notwithstanding that any consideration for said interest in the real estate may already be included in the marital property.
7 (e) Nothing in this section shall be construed to create a lien or claim against the interest in real estate
CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.

ARTICLE 7. ACTIONS FOR INJURIES.

§55-7-6. By whom action for wrongful death to be brought; amount and distribution of damages; period of limitation.

(a) Every such action shall be brought by and in the name of the personal representative of such deceased person who has been duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, and the amount recovered in every such action shall be recovered by said personal representative and be distributed in accordance here-with. If the personal representative was duly appointed in another state, territory or district of the United States, or in any foreign country, such personal representative shall, at the time of filing of the complaint, post bond with a corporate surety thereon authorized to do business in this state, in the sum of one hundred dollars, conditioned that such personal representative shall pay all costs adjudged against him or her and that he or she shall comply with the provisions of this section. The circuit court may increase or decrease the amount of said bond, for good cause.

(b) In every such action for wrongful death the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of descent and distribution.
as set forth in chapter forty-two of this code. If the jury
renders only a general verdict on damages and does not
provide for the distribution thereof, the court shall
distribute the damages in accordance with the provi-
sions of this subsection.

(c) (1) The verdict of the jury shall include, but may
not be limited to, damages for the following: (A) Sorrow,
mental anguish, and solace which may include society,
companionship, comfort, guidance, kindly offices and
advice of the decedent; (B) compensation for reasonably
expected loss of (i) income of the decedent, and (ii)
services, protection, care and assistance provided by the
decedent; (C) expenses for the care, treatment and
hospitalization of the decedent incident to the injury
resulting in death; and (D) reasonable funeral expenses.

(2) In its verdict the jury shall set forth separately the
amount of damages, if any, awarded by it for reasonable
funeral, hospital, medical and said other expenses
incurred as a result of the wrongful act, neglect or
default of the defendant or defendants which resulted
in death, and any such amount recovered for such
expenses shall be so expended by the personal
representative.

(d) Every such action shall be commenced within two
years after the death of such deceased person, subject
to the provisions of section eighteen, article two, chapter
fifty-five. The provisions of this section shall not apply
to actions brought for the death of any person occurring
prior to the first day of July, one thousand nine hundred
eighty-eight.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House. Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 27th day of March, 1992.

Governor