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ARTICLE 2- Intestate Succession and Wills-Parts 2,3, and 4

ARTICLE 2- Parts 2,3, and 4-Existing Code	Bill # S. 1243-Article 2-Parts 2,3, and 4
Article 2.Part 2.Elective Share of Surviving Spouse	Article 2. Part 2.
SECTION 62-2-201. Right of elective share. (a) If a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate, as computed under Section 62-2-202, the share to be satisfied as detailed in Sections 62-2-206 and 62-2-207 and, generally, under the limitations and conditions hereinafter stated. (b) If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take an elective share in property in this State is governed by the law of the decedent's domicile at death. (c) "Surviving spouse", as used in this Part, is as defined in Section 62-2-802. REPORTER'S COMMENTS See Section 62-2-802 for the definition of "spouse" which controls in this part. Under the common law, a widow was entitled to dower which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. The South Carolina Supreme Court in Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984) declared that dower was unconstitutional as a violation of the equal protection clauses of the South Carolina and United States Constitutions. South Carolina, like other states, substitutes an elective share in the whole estate for dower and the widower's common law right of curtesy. **SECTION 62-2-202.** Probate estate. For purposes of this Part, probate estate means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administration expenses and enforceable claims.	**SECTION 62-2-201.** (a) If a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate, as computed under Section 62-2-202, the share to be satisfied as detailed in Sections 62-2-206 and 62-2-207 and, generally, under the limitations and conditions hereinafter stated. (b) If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take an elective share in property in this State is governed by the law of the decedent's domicile at death. (c) 'Surviving spouse', as used in this Part, is as defined in Section 62-2-802. REPORTER'S COMMENTS See Section 62-2-802 for the definition of 'spouse' which controls in this part. Under the common law, a widow was entitled to dower which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. The South Carolina Supreme Court in Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984) declared that dower was unconstitutional as a violation of the equal protection clauses of the South Carolina and United States Constitutions. South Carolina, like other states, substitutes an elective share in the whole estate for dower and the widower's common law right of curtesy. **SECTION 62-2-202.** (a) For purposes of this Part, probate estate means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administration expenses and enforceable claims. (b) Except as provided in Section 62-7-401(c) with respect to a revocable inter vivos trust found to be illusory, the elective share shall apply only to the decedent's probate estate.

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REPORTER'S COMMENTS This section rejects the "augmented estate" concept promulgated by the drafters of the Uniform Probate Code as unnecessarily complex. The spouse's protection relates to all real and personal assets owned by the decedent at death but does not take into account the use of various will substitutes which permit an owner to transfer ownership at his death without use of a will. Judicial doctrines identifying certain transfers to be "illusory" or to be in "fraud" of the spouse's share have evolved in some jurisdictions to offset the problems caused by will substitutes. See Sections 62-1-201(11) and 62-1-201(33).	REPORTER'S COMMENTS The 2012 amendment does not change the definition of 'probate estate,' a term with a settled meaning. As defined, the 'probate estate' to which the elective share is applicable is actually the net probate estate, after the probate estate is reduced by funeral and administration expenses and enforceable claims. The 2012 amendment adds a new sub-paragraph (b), which takes into account and leaves unchanged the provisions of Section 62-7-401(c) of the South Carolina Trust Code. SCTC Section 62-7-401(c) is the statutory descendant of former SCPC Section 62-7-112, which was enacted after the Siefert decision, Seifert v. Southern Nat'l Bank of South Carolina , 305 S.C. 353, 409 S.E.2d 337 (1991). Seifert found that the revocable trust before the court was 'illusory' and, even though not a part of the settlor/decedent's probate estate, assets owned by the trust were nevertheless subject to the elective share. The amendment means to leave intact Section 62-7-401(c), including the possibility that assets owned by a revocable inter vivos trust found not to be illusory are not subject to the elective share. The amendment clarifies that the only nonprobate assets subject to the elective share in South Carolina are assets in a revocable trust found to be illusory under Section 67-7-401(c). The intent of the amendment is to clarify and provide certainty with respect to all other of a decedent's nonprobate assets, which by this amendment are not subject to the elective share in South Carolina. The amendment expressly rejects the concept of the 'augmented estate' as the multiplicand of the one-third elective share entitlement. This rejection is in keeping with and continues the intent of the drafters of the elective share statute as originally effective in 1987, whose comment to this section stated 'This section rejects the 'augmented estate' concept promulgated by the drafters of the Uniform Probate Code as unnecessarily complex.' The latest concept of 'augmented estate' promulgated by the drafters of the Uniform Probate Code is more onerous and complex than the version rejected in 1987. The revised Uniform Probate Code last promulgated by the National Conference of Commissioners on Uniform State Laws, as well as statutes adopted in some states (for example, North Carolina) have extended the reach of the statutory spousal share or elective share to nonprobate assets. The property to which the surviving electing spouse is entitled to receive a portion is referred to as the augmented estate. The effective and expeditious administration of decedents' estates would be virtually impossible if nonprobate assets owned by persons not subject to the personal jurisdiction of any South Carolina court are subject to disgorgement by reason of the elective share. A similar

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	problem presently exists in estates in South Carolina where an equitable apportionment of the estate tax imposes on the personal representative the duty of collecting the proportionate share of tax from recipients of nonprobate property. Current laws provide no efficient, cost effective means to reach these assets in the hands of persons outside the range of existing long arm statutes.
SECTION 62-2-203. Exercise of right of election by surviving spouse. The right of election of the surviving spouse may be exercised only during his lifetime by him or by his duly appointed attorney in fact. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending. REPORTER'S COMMENTS See Section 62-5-101 for definitions of protected person and protective proceedings.	**SECTION 62-2-203.** The right of election of the surviving spouse may be exercised only during his lifetime by him or by his duly appointed attorney in fact. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending. REPORTER'S COMMENTS See Section 62-5-101 for definitions of protected person and protective proceedings.
SECTION 62-2-204. Voluntary waiver of surviving spouse's right to elective share, homestead allowance, and exempt property; property settlement in anticipation of divorce. (A) The rights of a surviving spouse to an elective share, homestead allowance, and exempt property, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver voluntarily signed by the waiving party after fair and reasonable disclosures to the waiving party of the other party's property and financial obligations have been given in writing. (B) Unless it provides to the contrary, a waiver of all rights 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 to elective share, homestead allowance, and exempt property by each spouse in the property of the other and a disclaimer by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of a will executed before the waiver or property settlement. REPORTER'S COMMENTS The right to homestead allowance is conferred by Section 15-41-10 of the 1976 Code, and exempt property by Section 62-2-401. The right to disclaim interests passing by testate or intestate succession is recognized by Section 62-2-801. The provisions of this section,	**SECTION 62-2-204.** (A) The rights of a surviving spouse to an elective share, homestead allowance, and exempt property, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver voluntarily signed by the waiving party after fair and reasonable disclosures to the waiving party of the other party's property and financial obligations have been given in writing. (B) Unless it provides to the contrary, a waiver of all rights 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 to elective share, homestead allowance, and exempt property by each spouse in the property of the other and a disclaimer by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of a will executed before the waiver or property settlement. REPORTER'S COMMENTS The right to homestead allowance is conferred by Article 1, Chapter 41, Title 15 of the 1976 Code, and exempt property by Section 62-2-401. The right to disclaim interests passing by testate or intestate succession is recognized by Section 62-2-801. The provisions of this section,

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permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property, seem desirable in view of the common and commendable desire of parties to second and later marriages to ensure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and disclaimer takes care of the situation which arises when a spouse dies while a divorce suit is pending. **SECTION 62-2-205.** Proceedings for elective share; time limit. (a) The surviving spouse may elect to take his elective share in the probate estate by filing in the court and serving upon the personal representative, if any, a summons and petition for the elective share within eight months after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires. (b) The surviving spouse shall give notice of the time and place set for hearing to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the elective share. (c) The surviving spouse may withdraw or reduce his 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 amount of the elective share and shall order its payment from the assets of the probate estate or by contribution as set out in Sections 62-2-206 and 62-2-207. (e) The order or judgment of the court for payment or contribution may be enforced as necessary in other courts of this State or other jurisdictions. **SECTION 62-2-206.** Effect of election on benefits by will or statute. A surviving spouse is entitled to benefits provided under or outside of the decedent's will, by any homestead allowance, by Section 62-2-401, whether or not he elects to take an elective	permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property, seem desirable in view of the common and commendable desire of parties to second and later marriages to ensure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and disclaimer takes care of the situation which arises when a spouse dies while a divorce suit is pending. **SECTION 62-2-205.** (a) The surviving spouse may elect to take his elective share in the probate estate by filing in the court and serving upon the personal representative, if any, a summons and petition for the elective share within eight months after the date of death or within ~~six months after the probate of the decedent's will~~ thirty days after service upon the surviving spouse of a summons and petition contesting the will, whichever limitation last expires. (b) The surviving spouse shall give notice of the time and place set for hearing to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the elective share. (c) The surviving spouse may withdraw or reduce his 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 amount of the elective share and shall order its payment from the assets of the probate estate or by contribution as set out in Sections 62-2-206 and 62-2-207. (e) The order or judgment of the court for payment or contribution may be enforced as necessary in other courts of this State or other jurisdictions. REPORTER'S COMMENTS The 2010 amendment revised subsection (a) by deleting "mailing or delivering" and replacing it with "serving upon" and also adding "summons and" to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for elective share. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP. **SECTION 62-2-206.** A surviving spouse is entitled to benefits provided under or outside of the decedent's will, by any homestead allowance, by Section 62-2-401, whether or not he elects to take an elective

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share, but such amounts as pass under the will or by intestacy, by any homestead allowance, and by Section 62-2-401 are to be charged against the elective share pursuant to Section 62-2-207(a). REPORTER'S COMMENTS This election does not result in a loss of benefits under, outside, or against the will (in the absence of renunciation) but (to the extent that such gifts are part of the estate) they are charged against the elective share under Sections 62-2-201, 62-2-202, and 62-2-207(a). **SECTION 62-2-207.** Charging spouse with gifts received; liability of others for balance of elective share. (a) In the proceeding for an elective share, all property, including beneficial interest, which passes or has passed to the surviving spouse under the decedent's will or by intestacy, by a homestead allowance, and by Section 62-2-401, or which would have passed to the spouse but was renounced, or which is contained in a trust created by the decedent's will or a trust as described in Section 62-7-401(c) in which the spouse has a beneficial interest, is applied first to satisfy the elective share and to reduce contributions due from other recipients of transfers included in the probate estate. A beneficial interest that passes or has passed to a surviving spouse under the decedent's will includes an interest as a beneficiary in a trust created by the decedent's will or an interest as a beneficiary in property passing under the decedent's will to an inter vivos trust created by the decedent. For purposes of this subsection, the value of the electing spouse's beneficial interest in property which qualifies or would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended and in effect on December 31, 2009, must be computed at the full value of the qualifying property. Qualifying for these purposes must be determined without regard to whether an election has been made to treat the property as qualified terminable interest property. (b) Remaining property of the probate estate is applied so that liability for the balance of the elective share of the surviving spouse is satisfied from the probate estate with devises abating in accordance with Section 62-3-902.	share, but such amounts as pass under the will or by intestacy, by any homestead allowance, and by Section 62-2-401 are to be charged against the elective share pursuant to Section 62-2-207(a). REPORTER'S COMMENTS This election does not result in a loss of benefits under, outside, or against the will (in the absence of renunciation) but (to the extent that such gifts are part of the estate) they are charged against the elective share under Sections 62-2-201, 62-2-202, and 62-2-207(a). **SECTION 62-2-207.** (a) ~~In the proceeding for an elective share, all property, including beneficial interest, which passes or has passed to the surviving spouse under the decedent's will or by intestacy, by a homestead allowance, and by Section 62-2-401, or which would have passed to the spouse but was renounced, or which is contained in a trust created by the decedent's will or a trust as described in Section 62-7-401(c) in which the spouse has a beneficial interest, is applied first to satisfy the elective share and to reduce contributions due from other recipients of transfers included in the probate estate. A beneficial interest that passes or has passed to a surviving spouse under the decedent's will includes an interest as a beneficiary in a trust created by the decedent's will or an interest as a beneficiary in property passing under the decedent's will to an inter vivos trust created by the decedent. For purposes of this subsection, the value of the electing spouse's beneficial interest in property which qualifies or would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended and in effect on December 31, 2009, must be computed at the full value of the qualifying property. Qualifying for these purposes must be determined without regard to whether an election has been made to treat the property as qualified terminable interest property.~~ ~~(b) Remaining property of the probate estate is applied so that liability for the balance of the elective share of the surviving spouse is satisfied from the probate estate with devises abating in accordance with Section 62-3-902.~~ In the proceeding for an elective share, all property, including any beneficial interests, which passes or has passed to the surviving spouse must be applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the probate estate, so long as the property is passed to the surviving spouse: (1) under the decedent's will;

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	(2) by intestacy; (3) by the homestead allowance; (4) by Section 62-2-401; (5) by beneficiary designation of any life insurance; (6) by beneficiary designation of any Individual Retirement Account or qualified retirement plan, or annuity; (7) which would have passed to the spouse but was renounced or disclaimed; (8) which is contained in a trust created by the decedent's will; or (9) which is contained in a trust as described in Section 62-7-401(c). (b) A beneficial interest that passes or has passed to a surviving spouse under the decedent's will includes: (1) an interest as a beneficiary in a trust created by the decedent's will; (2) an interest as a beneficiary in property passing under the decedent's will to an inter vivos trust created by the decedent; and (3) an interest as a beneficiary in property contained at the decedent's death in a trust described in Section 62-7-401(c). (c)(1) For purposes of this section, the value of the electing spouse's beneficial interest in any property which qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, or, if the federal estate tax is not applicable at the decedent's death, would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, in effect on December 31, 2009, must be computed at the full value of any such qualifying property. Qualifying for these purposes must be determined without regard to whether an election has been made to treat the property as qualified terminable interest property. (2) The value of such qualifying property shall be the value at the date of death as finally determined in the decedent's estate tax proceedings, or if there is no federal estate tax proceeding, as shown on the inventory and appraisement or as determined by the court. The personal representative may choose assets, in order of abatement pursuant to Section 62-3-902, to satisfy the elective share, using the fair market value at the date of distribution. The elective share is pecuniary in nature. (3) The electing spouse who is the income beneficiary of a trust, the value of which is treated, or could be treated, as qualifying property, shall have the right to require a conversion of the income trust to a total return unitrust as defined in Section 62-7-904B(12) and in accordance with Section 62-7-940N. (d) In choosing assets to fund the elective share, remaining property of the probate estate is

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	so applied so that liability for the balance of the elective share of the surviving spouse is satisfied from the probate estate, with devises abating in accordance with Section 62-3-902.
REPORTER'S COMMENTS Sections 62-2-401 and 62-2-402 have the effect of giving a spouse certain exempt property in addition to the amount of elective share. This section and Section 62-2-206 protect a decedent's plan as far as it provides values for the surviving spouse. The spouse is not compelled to accept the benefits devised by the decedent, but, if these benefits are rejected, the values involved are charged to the electing spouse as if the devises were accepted. The second sentence of subsection (a) values certain life estates and interests in trusts at full value for purposes of determining the elective share.	REPORTER'S COMMENT The 2012 amendment rewrites this section entirely and changes substantively the method of calculation of the elective share in South Carolina. Under the law prior to this amendment, nonprobate assets passing to the surviving spouse were not credited against the elective share. Under the amendment, the amount of the probate estate subject to the elective share is reduced by the value of nonprobate assets passing to the spouse at the death of the decedent. Including the value of nonprobate assets passing to the surviving spouse at the death of the decedent in the calculation of the elective share imposes on the personal representative the duty to ascertain the value of those nonprobate assets as well as the duty to verify that the assets in fact pass to the surviving spouse. Probate Courts may require that nonprobate assets be identified sufficiently on the Inventory and appraisement to enable the calculation to be made. The amendment makes clear that the nonprobate assets are applied first to satisfy the elective share before assets from the probate estate are applied in satisfaction. The amendment clarifies and makes certain that property passing directly to the surviving spouse in a revocable inter vivos trust, including a beneficial interest, will satisfy the elective share. The amendment eliminates the concern that property had to 'pass under the will' first in order to be applied in satisfaction of the elective share. The amendment leaves unchanged the law that the value of the electing spouse's beneficial interest in any property which qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended (or, if the federal estate tax is not applicable at the decedent's death , would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, in effect on December 31, 2009), must be computed at the full value of any such qualifying property. Two comments are relevant here. First, the future of the federal estate tax is at best uncertain. The federal estate tax law in effect on December 31, 2009, as it pertained to the qualification for the federal estate tax marital deduction, was settled law, familiar to laymen and practitioners alike. Consequently, incorporation of the qualification requirements for the federal estate tax marital deduction then in effect, particularly with respect to the so called 'QTIP' marital trust, is the measure least likely to cause confusion and error. Next, in rejecting the 'augmented estate' while at the same time continuing to credit at full value the assets in an income only QTIP trust, this section takes into account the possibility that the consequences to a surviving spouse in the present and projected economy could be harsh as well as changes to South Carolina law since

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	1987, including adoption of the Prudent Investor Act (SCTC Section 62-7-933), predicated on Modern Portfolio Theory. Recognizing that simple, income only trusts may be disappointing and inadequate, the 2012 amendment provides that the electing spouse who is the beneficiary of an income trust, the value of which is treated (or could be treated) as qualifying property, shall have the right to require a conversion of the income trust to a total return unitrust as defined in Section 62-7-904B(12) and in accordance with Section 62-7-940N. The 2012 amendment makes clear that the value of such qualifying property shall be the value at the date of death as finally determined in the decedent's estate tax proceedings, or if there is no federal estate tax proceeding, as shown on the Inventory and Appraisement or as determined by the court. Generally this is fair market value. The amendment makes clear, first, that in satisfying the elective share, probate assets will be valued at date of distribution values; second, the amendment provides that the elective share is pecuniary in nature and not fractional. This is less burdensome and requires revaluation only of assets in kind used to fund the elective share. Although the law prior to the 2012 amendment may have been unclear about whether the elective share was fractional or pecuniary, the treatment of the elective share as pecuniary will be clear prospectively from the effective date of the amendment. The amendment leaves unchanged the order of abatement within the probate estate.
Article 2.Part 3. Spouse and Children Unprovided for in Wills	Article 2.Part 3.
SECTION 62-2-301. Omitted spouse. (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless: (1) it appears from the will that the omission was intentional; or (2) 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 statements of the testator or from the amount of the transfer or other evidence. (b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62-3-902. (c) The spouse may claim a share as provided by this section by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires.	**SECTION 62-2-301.** (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless: (1) it appears from the will that the omission was intentional; or (2) 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 statements of the testator or from the amount of the transfer or other evidence. (b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62-3-902. (c) The spouse may claim a share as provided by this section by filing in the court and ~~mailing or delivering to~~ serving upon the personal representative, if any, a ~~claim~~ summons and petition for such share within eight months after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires. The spouse shall give notice of the time and place set for hearing to the personal representative and to distributees and recipients

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	of portions of the probate estate whose interests will be adversely affected by the taking of the share.
REPORTER'S COMMENTS Section 62-2-301 sets aside an intestate share for any surviving spouse who is married to a testator after the execution of a will which omits provision for the spouse, unless the omission was intentional or the spouse was otherwise provided for outside of and intentionally in lieu of a will's provisions. Compare the set aside for omitted afterborn children under Section 62-2-302. The testator's intentions may be shown on the face of the will or by his statements concerning or from the amount of or from other evidence concerning the nontestamentary transfer. Section 62-2-301 does not totally revoke the will; rather, Section 62-2-301 merely abates the will's devises to the extent necessary to satisfy the spouse's intestate share. Compare Section 62-2-507, effecting a partial revocation of a will's provisions to the extent that they benefit a spouse divorced from testator after execution of the will, and otherwise providing that no change of circumstances, e.g., marriage, revokes a will by operation of law. The spouse's protection accorded by Section 62-2-301 presumably may be waived. See Section 62-2-801.	REPORTER'S COMMENTS Section 62-2-301 sets aside an intestate share for any surviving spouse who is married to a testator after the execution of a will which omits provision for the spouse, unless the omission was intentional or the spouse was otherwise provided for outside of and intentionally in lieu of a will's provisions. Compare the set aside for omitted afterborn children under Section 62-2-302. The testator's intentions may be shown on the face of the will or by his statements concerning or from the amount of or from other evidence concerning the nontestamentary transfer. Section 62-2-301 does not totally revoke the will; rather, Section 62-2-301 merely abates the will's devises to the extent necessary to satisfy the spouse's intestate share. Compare Section 62-2-507, effecting a partial revocation of a will's provisions to the extent that they benefit a spouse divorced from testator after execution of the will, and otherwise providing that no change of circumstances, e.g., marriage, revokes a will by operation of law. The spouse's protection accorded by Section 62-2-301 presumably may be waived. See Section 62-2-801.
SECTION 62-2-302. Pretermitted children. (a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless: (1) it appears from the will that the omission was intentional; or (2) when the will was executed the testator had one or more children and devised substantially all his estate to his spouse; or (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence. (b) If, at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes that child to be dead, the child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate. (c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62-3-902.	**SECTION 62-2-302.** (a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless: (1) it appears from the will that the omission was intentional; or (2) when the will was executed the testator ~~had one or more children and~~ devised substantially all his estate to his spouse; or (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence. (b) If, at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes that child to be dead, the child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate. (c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62-3-902.

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(d) The child, and his guardian or conservator acting for him, may claim a share as provided by this section by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires. REPORTER'S COMMENTS Section 62-2-302 sets aside an intestate share for any surviving child who either was unprovided for because he was thought to be dead at the execution of a will or is born to or adopted by a testator after the execution of a will which omits provision for the child; but, in the case of the afterborn child, he does not take a set aside if the omission was intentional, if the child was otherwise provided for outside of and intentionally in lieu of a will's provisions, or if provision for other children then living was omitted in favor of the other parent of the omitted child. Compare the set aside for omitted spouses under Section 62-2-301. The testator's intentions may be shown on the face of the will or by his statements concerning or from the amount of or from other evidence concerning the nontestamentary transfer.	(d) The child, and his guardian or conservator acting for him, may claim a share as provided by this section by filing in the court and ~~mailing or delivering to~~ serving upon the personal representative, if any, a ~~claim~~ summons and petition for such share within eight months after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires. The child, and his guardian or conservator acting for him, shall give notice of the time and place set for hearing to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the share. REPORTER'S COMMENTS Section 62-2-302 sets aside an intestate share for any surviving child who either was unprovided for because he was thought to be dead at the execution of a will or is born to or adopted by a testator after the execution of a will which omits provision for the child; but, in the case of the afterborn child, he does not take a set aside if the omission was intentional, or if the child was otherwise provided for outside of and intentionally in lieu of a will's provisions. Compare the set aside for omitted spouses under Section 62-2-301. The testator's intentions may be shown on the face of the will or by his statements concerning or from the amount of or from other evidence concerning the nontestamentary transfer. The 2012 amendment addresses afterborn children by providing that a will devising substantially all of a testator's estate to his spouse is valid against the claim of a child omitted under such will regardless of whether the will was executed by the decedent before or after the child was born or adopted.
Article 2.Part 4. Exempt Property	Article 2.Part 4.
SECTION 62-2-401. Exempt property. The surviving spouse of a decedent who was domiciled in this State is entitled from the estate to a value not exceeding five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, minor or dependent children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than five thousand dollars, or if there is not five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the five thousand dollar value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except claims described in Section 62-3-805(a)(1). These	**SECTION 62-2-401.** The surviving spouse of a decedent who was domiciled in this State is entitled from the estate to a value not exceeding ~~five~~ twenty-five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, minor or dependent children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than ~~five~~ twenty-five thousand dollars, or if there is not ~~five~~ twenty-five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the ~~five~~ twenty-five thousand dollar value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except claims

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rights are in addition to any right of homestead and personal property exemption otherwise granted by law but are chargeable against and not in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by the elective share. Any surviving spouse or minor or dependent children of the decedent who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of this section. REPORTER'S COMMENTS Section 62-2-401 sets aside an unencumbered five thousand dollars worth of exempt personal property to a domiciliary decedent's surviving spouse or minor or dependent children. Pursuant to Section 62-2-104, claimants must survive the decedent by one hundred twenty hours in order to qualify under Section 62-2-401. Section 62-2-401 sets aside the indicated amount free of the claims of both the unsecured creditors of the decedent's estate (a creditors' claim exemption) and the decedent's will's named beneficiaries, i.e., notwithstanding any provisions in the will to the contrary (a mandatory set aside). While the mandatory set aside is chargeable against and not in addition to any provisions in the will or in intestacy in favor of the spouse or children, unless otherwise provided in the will, Section 62-2-401 provides that the mandatory set aside and creditors' claim exemption is to be in addition to and not chargeable against any right of homestead allowance, i.e., real property exemption, and personal property exemption, available to the decedent's survivors pursuant to Sections 15-41-10, 15-41-200, 15-41-310 of the 1976 Code, and otherwise. Following the 1981 amendment of Article 3, Section 28, of the South Carolina Constitution, allowing the General Assembly to enact real and personal property exemption laws without restriction as to amounts or types of property eligible for exemption, the 1981 South Carolina Exemption Reform Act added Section 15-41-200 of the 1976 Code, with the proviso, in Section 4 of the Exemption Reform Act, that the provisions of Section 15-41-200 must prevail over any conflicting provisions of the existing law, i.e., over Sections 15-41-10, 15-4l-100, 15-41-310, et al of the 1976 Code. The purpose of adding Section 15-41-200 was merely "to prescribe the property of persons domiciled in the state which is exempt from court process". See the Preamble to the Exemption Reform Act. The focus of the reform of the law was on the nature of and the amount of the property exempt to the debtor during his own life. The provisions of Section 15-41-200 do not speak directly to the two matters central to Section 62-2-401: the debtor's survivors' right to an exemption from the claims of his creditors with respect to property of the debtor which passes to them at his death and their right to have any such property set aside to them even against provisions to the contrary in his will. Section 15-41-200	described in Section 62-3-805(a)(1). These rights are in addition to any right of homestead and personal property exemption otherwise granted by law but are chargeable against and not in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by the elective share. Any surviving spouse or minor or dependent children of the decedent who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of this section. REPORTER'S COMMENTS Section 62-2-401 sets aside an unencumbered twenty-five thousand dollars worth of exempt personal property to a domiciliary decedent's surviving spouse or minor or dependent children. Claimants must survive the decedent by one hundred twenty hours in order to qualify under Section 62-2-401. Section 62-2-401 sets aside the indicated amount free of the claims of both the unsecured creditors of the decedent's estate (a creditors' claim exemption) and the decedent's will's named beneficiaries, i.e., notwithstanding any provisions in the will to the contrary (a mandatory set aside). While the mandatory set aside is chargeable against and not in addition to any provisions in the will or in intestacy in favor of the spouse or children, unless otherwise provided in the will, Section 62-2-401 provides that the mandatory set aside and creditors' claim exemption is to be in addition to and not chargeable against any right of homestead allowance, i.e., real property exemption, and personal property exemption, available to the decedent's survivors pursuant to Section 15-41-30 of the 1976 Code, and otherwise. For a discussion of which of these exemptions apply to a decedent's estate, see (Scholtec v. Estate of Reeves, 327 S.C. 551, 490 S.E. 2d 603 (S.C. App. 1997).

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of the 1976 Code embodies no mandatory set aside rule favoring the decedent's surviving spouse and children. Section 62-2-401 alone has significance on that matter. The enactment of Section 15-41-200 of the 1976 Code saw a substantial increase in the amount of property exempt from the claims of creditors from one thousand dollars of realty and either five hundred or three hundred dollars of personalty under Sections 15-41-10 and 15-41-310 of the 1976 Code to five thousand dollars of residential property or one thousand dollars in cash, Sections 15-41-200(1) and (5) of the 1976 Code, four thousand nine hundred fifty dollars of tangible personal property, items (2), (3), (4), and (6) of Section 15-41-200 of the 1976 Code, four thousand dollar loan value of certain life insurance contracts, Section 15-41-200(8) of the 1976 Code, plus unspecified dollar amounts of other life insurance contracts, health aids, social security benefits and their like, and bodily injury and death benefits and their like, items (7), (9), (10), and (11) of Section 15-41-200 of the 1976 Code. There is some question whether any of the creditors' claims exemptions in Section 15-41-200 of the 1976 Code are available to survivors of the decedent-debtor. Nothing in Section 15-41-200 of the 1976 Code suggests that the exemptions are available after the death of the debtor, except, perhaps, the references in items (1), (3), (4), (6), and (9) of Section 15-41-200 of the 1976 Code to items of property used by "dependent(s) of the debtor". However, without more, it seems strained to read the statute as continuing the exemptions beyond the debtor's death in favor of his dependents. Perhaps, however, Section 15-41-100 continues to be viable and should now be read in conjunction with Section 15-41-200, i.e., to extend the latter's exemptions to the decedent's surviving widow and children. If that is the case, then Section 62-2-401 would work in conjunction with Sections 15-41-10, 15-41-200, and 15-41-310 to exempt from creditors' claims an amount of property of a decedent significantly in excess of the five thousand dollar amount stated in Section 62-2-401.	
SECTION 62-2-402. Source, determination, and documentation.	**SECTION 62-2-402.**
(a) If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians or conservators of the minor children, or children who are adults may select property of the estate as exempt property. The personal representative may make these selections if the surviving spouse, the children, or the guardians or conservators of the minor children are unable or fail to do so within a reasonable time or if there are no guardians or conservators of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property. The personal representative or any interested	(a) If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians or conservators of the minor children, or children who are adults may select property of the estate as exempt property. The personal representative may make these selections if the surviving spouse, the children, or the guardians or conservators of the minor children are unable or fail to do so within a reasonable time or if there are no guardians or conservators of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property. The personal representative or any interested

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person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may make application to the court for appropriate relief. (b) The surviving spouse or the minor or dependent child, and the minor's guardian or conservator acting for him, as the case may be, may claim a share of exempt property as provided in this part by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death, or within six months after the probate of the decedent's will, whichever limitation last expires. REPORTER'S COMMENTS Section 62-2-402 governs the administration of the exempt property provisions of Section 62-2-401. See also comments to Sections 62-3-902, 62-3-906, and 62-3-907.	person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may make application to the court for appropriate relief. (b) The surviving spouse or the minor or dependent child, and the minor's guardian or conservator acting for him, as the case may be, may claim a share of exempt property as provided in this part by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death, or within six months after the probate of the decedent's will, whichever limitation last expires. REPORTER'S COMMENTS Section 62-2-402 governs the administration of the exempt property provisions of Section 62-2-401. The 2010 amendment revised subsection (a) by deleting "petition" and replacing it with "make application," so that the personal representative or any interested person as referred to in this section can make application to the probate court. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in §62-1-201(1).
SECTION 62-2-403. Federal veteran payments shall be exempt from creditors' claims. All moneys paid by the United States of America to the executors, administrators, or heirs-at-law of any deceased veteran of the Spanish-American War, World War I, or World War II whose estate is administered in this State for insurance, compensation, or pensions is hereby declared to be exempt from the claims of any and all creditors of such deceased veteran.	**SECTION 62-2-403.** All ~~moneys~~ monies paid for insurance, compensation, or pensions by the United States of America to the executors, administrators, or heirs-at-law of any deceased veteran who served during any 'period of war' as determined in reference to pension entitlement under 38 U.S.C. 1521, 1541 and 1542 and the regulations issued thereunder, and ~~of the Spanish-American War, World War I, or World War II~~ whose estate is administered in this State for insurance, compensation, or pensions is hereby declared to be exempt from the claims of any and all creditors of such deceased veteran. REPORTER'S COMMENT The 2012 amendment exempts monies paid for insurance, compensation, or pensions by the United States of America to the executors, administrators, or heirs-at-law of any deceased veteran who served during any 'period of war' as that term is defined under federal regulations. Prior to amendment the protection did not cover veterans of conflicts after World War II.