North Carolina's "Statutory Dower" – The Elective Life Estate

By David Bennington, Esq.

The common law concepts of dower and curtesy provided a "low tech" form of social security in the days when Americans largely lived on and from the land. When North Carolina re-wrote its intestate succession statutes (enacted in 1960) dower and curtesy were abolished, however, the General Assembly provided for a statutory marital interest which was intended to accomplish the same purpose of the former marital life estates. (N.C. Gen. Stat. § 29-30)

Under the existing North Carolina intestate succession act, the spouse is made an outright heir of the decedent. Moreover, the act provides that in lieu of an intestate share the spouse has the option to elect to take a life estate in one-third in value of all real estate of which the decedent was seized during coverture. In essence, the law in North Carolina prevents one spouse from unilaterally conveying his or her solely owned property and depleting his or her estate.

As explained below, unless otherwise excused, the non-owning spouse must join in the execution of any deed or deed of trust which conveys the real property. As a practical matter, the elective life estate represents nothing of present value. It is neither alienable nor inheritable and grants no present right of possession. Until exercised it remains strictly an inchoate right. Moreover, unless a decedent's estate contains income-producing property it is difficult to conceive when a spouse would elect a life estate in an undivided interest in real property over other liquid assets.

It should be noted that a conveyance of real property without the joinder of the non-owning spouse is not void although such a provision was proposed during the drafting of N.C. Gen. Stat. § 29-30. The title to the fee does vest in the grantee under these circumstances, subject however, to the contingent interest of the other spouse who may or may not elect to claim the life estate. Since that decision is not made or rejected until the death of the owning spouse during coveture the elective interest continues to affect the marketability of the property.

North Carolina General Statute § 29-30 provides that the title to real property is not affected by the elective life estate in four situations in which the surviving spouse:

(1) Has waived his or her rights by joining with other spouse in a conveyance thereof.

This is the classic resolution of the problem and the reason that the standard practice dictates that both spouses execute all deeds and deeds of trust. No specific language is required to release the right, merely the execution of the particular instrument by the non-owning spouse. It is this procedure that most often creates confusion with out of state lenders who often insist that only the owner/borrower spouse sign the deed of trust. More frequently, the problem arises where spouses have separated and are uncooperative.

(2) Has released or quitclaimed his or her interest therein accordance with N.C. Gen. Stat. § 52-10.

The referenced statute enables married persons and persons "about to be married" to release rights which each has or would respectively acquire by virtue of marriage (including the right to an elective life estate under N.C. Gen. Stat. § 29-30.)

Thus, prenuptial and postnuptial separation agreements are effective instruments for waiving the spouses' elective life estates. Any such instrument should be recorded in the county where the land lies. (N. C. Gen. Stat. § 39-13.4)

(3) Was not required by law to join in conveyance thereof in order to bar the elective life estate.

Although there may be other examples of when this provision applies, N.C. Gen. Stat. § 39-13 is the most certain. That statute provides that a purchasing spouse may give a deed of trust to secure the balance of the purchase price, and that such mortgage will be effective against the non-owning spouse without his or her joinder on the instrument.

The application of the statute is clear in the case where purchasing spouse makes a note and deed of trust to his vendor. A strict construction of N.C. Gen. Stat. § 39-13 would limit its application to the seller financing situation. An argument can be made that the statute should also apply in the situation where a third party lender is providing funds for the acquisition of the real property. In support of this position is the common law of North Carolina which extends the doctrine of "instantaneous seisin" (a purchase money concept) to third party lenders. *Smith Builders Supply, Inc. v. Rivenbark*, 231 N.C. 213, 56, S.E.2d 431 (1949) Under that doctrine, existing encumbrances against a purchaser are essentially subordinated to the lender's lien, which facilitated the acquisition of the property. The theory of favoring the lender is simple - without the loan there would be no property available to benefit the creditor. The same reasoning would seem equally applicable to the spouse's elective life estate. While there is no North Carolina authority which construes the scope of N.C. Gen. Stat. § 39-13, many title insurers will excuse the spouse's joinder on a third party deed of trust where the loan proceeds fund the purchase.

(4) Is otherwise not legally entitled to the election provided by N.C. Gen. Stat. § 29-30.

Again, while there may be other facts which would invoke this provision, it certainly applies in those situations governed by the little known and overlooked Chapter 31A "Acts Barring Property Rights". N.C. Gen. Stat. § 31A-1 provides *inter alia,* that a spouse from whom an absolute divorce, or annulment of marriage, or a divorce from bed and board has been obtained, loses all rights of intestate succession (which would include the elective life estate.) Other grounds based on abandonment are also set out which serve to terminate the rights of the offending spouse.

Due to its limited practical value the existence of the elective life estate is arguably anachronistic in light of the socio-economic realities of the 21st Century. Estate planning concerns, high rates of separation and divorce, and contrary laws in sister states make this "statutory dower" an impediment to the conveyance and encumbrance of North Carolina

real property which probably outweighs any practical social benefit the interest secures. Nevertheless, until our General Assembly sees fit to repeal or replace this provision, settlement agents, lenders and title insurers must deal with the issue.