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THE SOUTH CAROLINA PROBATE CODE'S OMITTED SPOUSE STATUTE AND *IN RE ESTATE OF TIMMERMAN*

I. OLD WILLS AND NEW SPOUSES: AN INTRODUCTION

South Carolina's omitted spouse statute[1] attempts to accomplish two ends—carrying out the decedent's probable intent and protecting the still-surviving spouse.[2] In some instances these two ends obviously merge so that accomplishing one also accomplishes the other. But often courts cannot reconcile these two ends and therefore must furnish an equitable solution. The omitted spouse statute provides a useful tool in our probate system, affording courts flexibility in achieving these two goals ingrained in the Probate Code.

In *In re Estate of Timmerman*,[3] the South Carolina Court of Appeals confronted the situation described above. The case involved a contest over the estate of George Bell Timmerman, Jr., a former South Carolina governor. The parties were Timmerman's widow (and second wife), who claimed an intestate share as an "omitted spouse," and a relative of Timmerman's first wife, who claimed a share as a named beneficiary under the will Timmerman executed during his first marriage.[4] In this case, carrying out the decedent's probable intent and protecting the surviving spouse would not achieve the same result. The court considered the extrinsic facts existing prior to Timmerman's death and how these factored into the omitted spouse statute's provisions in determining the proper disposition of his estate.[5] The court ultimately determined that Timmerman's surviving spouse was entitled only to the protection of the elective share statute.[6]

The parties litigated the disposition of Timmerman's estate for more than three years and before three different courts.[7] By exercising one of many options available to him prior to his death, Timmerman could have spared the parties all of the time, money, and emotion the litigation consumed.

This Comment first examines the situation underlying *Timmerman* to aid in understanding the extrinsic facts. It then reviews how the omitted spouse statute came into existence, its purpose, and how courts have applied it, with emphasis on the statute's application in *Timmerman* and whether the court

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1. S.C. CODE ANN. § 62-2-301 (Law. Co-op. 1987 & Supp. 1998).

2. *See In re* Estate of Murray, 193 Cal. Rptr. 355, 356 (Cal. Ct. App. 1983); Mary Ellen Kazimer, Comment, *The Problem of the "Un-omitted" Spouse Under Section 2-301 of the Uniform Probate Code*, 52 U. CHI. L. REV. 481, 485-86 (1985).

3. 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998).

4. *Id.* at 457, 502 S.E.2d at 920-21.

5. *See id.* at 459, 502 S.E.2d at 921-22.

6. *Id.* at 461, 502 S.E.2d at 922.

7. *See id.* at 458-59, 502 S.E.2d at 921. The probate court, circuit court, and court of appeals all considered Ingrid's omitted spouse claim.

reached an equitable solution. Finally, this Comment analyzes how the statute affects surviving spouses, will beneficiaries, and estate planners and how Timmerman failed to take the appropriate steps before his death to avoid potential conflict.

II. THE HONORABLE GEORGE BELL AND INGRID: THE DECEDENT AND HIS SPOUSE

The man at the center of the *Timmerman* case served the State of South Carolina in different capacities ranging from circuit judge to governor.[8] The legal experience and background of George Bell Timmerman, Jr., whom people called "George Bell,"[9] are important factors to consider when examining his estate and the litigation that surrounded it. His failure to plan his estate properly after his many years of experience on the bench also sheds light on how the omitted spouse statute might affect a citizen with no legal education.

Timmerman spent most of his life married to Helen Dupre Timmerman. The two remained married for forty-five years until her death in 1980.[10] During this marriage, he executed a will leaving his entire estate to Helen or, if she predeceased him, to her sister, and to his "nieces and nephews as alternate beneficiaries."[11] As a result of this provision, the alternate beneficiaries became the primary beneficiaries of Timmerman's will after Helen's death.

After spending thirteen years as a single man, Timmerman married his second wife, Ingrid, who was over thirty years younger than Timmerman.[12] Although the two were married for only twenty-two months,[13] Timmerman gave Ingrid close to $1.2 million in assets[14] and also visited two estate-planning lawyers to discuss his estate during their short marriage. Both advised Timmerman and drafted documents for him, but he never executed any of them.[15] In September 1994, he suffered injuries in the auto accident that eventually resulted in his death at the age of 82 in November of that year.[16] Following his death, the alternate beneficiaries offered the will Timmerman executed during his marriage to Helen for probate, and Ingrid filed a petition claiming her share under the omitted spouse statute.[17]

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8. Obituary, *George Timmerman, Opposed Integration as S.C. Governor*, THE NEWS & OBSERVER (Raleigh, N.C.), Dec. 5, 1994, at B4.

9. Editorial, *Product of His Times*, THE STATE (Columbia, S.C.), Dec. 6, 1994, at A8.

10. *See Timmerman*, 331 S.C. at 457, 502 S.E.2d at 921.

11. *Id.*

12. *Id.*

13. *See id.* at 458, 502 S.E.2d at 921.

14. *See id.* at 459, 502 S.E.2d at 921-22 (including a joint account, retirement benefits, and life insurance proceeds).

15. *See id.* at 458, 502 S.E.2d at 921.

16. *Id.*; Charles Wickenberg & Lee Bandy, *Former S.C. Governor Timmerman Dies at 82*, THE STATE (Columbia, S.C.), Dec. 1, 1994, at A1.

17. *Timmerman*, 331 S.C. at 457, 502 S.E.2d at 920-21.

III. THE OMITTED SPOUSE STATUTE

A. Evolution of the Statute

The will is an ancient concept that has evolved over time, incorporating many refinements.[18] The omitted spouse statute is one of those refinements; it continues today as part of the Probate Code.[19] To understand the statute fully, one has to look to the common law, where marriage affected the wills of men and women differently. For men, marriage alone did not revoke a will executed before marriage, and if a man had a child, this alone did not revoke his will. But a combination of these two events did revoke a man's will.[20] For women, the common law revoked a premarital will upon marriage alone.[21] The rationale behind this result was that the common law acted for a married woman who, because she lacked the capacity to make a will, also lacked the capacity to revoke a premarital will.[22] Most states have discontinued this unequal treatment of men and women, and courts in at least one state have ruled that this type of treatment is unconstitutional.[23]

Whether to revoke a person's will at marriage involves reconciling two principles ingrained in the testamentary process—attempting to carry out the testator's intent and protecting the surviving spouse. Today, most states protect surviving spouses through the use of two devices—elective share statutes[24] and omitted spouse statutes.[25] Some states use both devices, while others use only one.[26] In the twenty-five states that use the elective share device,[27] the courts

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18. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 2, at 7-10 (2d ed. 1953) (tracing the development of the will in ancient Egyptian, Assyrian, Jewish, Greek, and Roman civilizations).

19. S.C. CODE ANN. § 62-2-301 (Law. Co-op. Supp. 1998).

20. 2 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 21.89, at 501 (1960); WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 3.7, at 113 (1988).

21. 2 BOWE & PARKER, *supra* note 20, § 21.95, at 513; MCGOVERN, *supra* note 20, § 3.7, at 113.

22. 2 BOWE & PARKER, *supra* note 20, § 21.95.

23. Parker v. Hall, 362 So. 2d 875, 877 (Ala. 1978); *see* MCGOVERN, *supra* note 20, § 3.7, at 113.

24. *See, e.g.*, S.C. CODE ANN. § 62-2-201 (Law. Co-op. Supp. 1998).

25. *See, e.g.*, S.C. CODE ANN. § 62-2-301 (Law. Co-op. 1987 & Supp. 1998).

26. Of the 31 states using such statutes to protect surviving spouses, 13 states, including South Carolina, use both types. *See infra* notes 27 & 31 (listing those states having elective share statutes and those states having omitted spouse statutes, respectively).

27. ALA. CODE § 43-8-70 (1991); ALASKA STAT. § 13.12.202 (Michie 1998); COLO. REV. STAT. § 15-11-201 (1998); DEL. CODE ANN. tit. 12, § 901 (1995); FLA. STAT. ANN. § 732.201 (West 1995); HAW. REV. STAT. ANN. § 560:2-202 (Michie Supp. 1998); IDAHO CODE § 15-2-201 (1979); KAN. PROB. CODE ANN. § 59-6a202 (West Supp. 1999); ME. REV. STAT. ANN. tit. 18-A, § 2-201 (West 1998); MD. CODE ANN., EST. & TRUSTS § 3-203 (Supp. 1998); MINN. STAT. ANN. § 524.2-201 (West Supp. 1999); MONT. CODE ANN. § 72-2-221 (1997); NEB. REV. STAT. § 30-2313 (1995); N.J. STAT. ANN. § 3B:8-1 (West 1983); N.D. CENT. CODE § 30.1-05-01 (1996); OR. REV. STAT. § 114.105 (Supp. II 1998); 20 PA. CONS. STAT. ANN. § 2203 (West Supp. 1998); S.C.

applying it do not balance the two principles. The elective share statutes automatically balance these principles, mainly by emphasizing the surviving spouse's protection by allowing that spouse to take a portion of the testator's estate even if the testator executed the will after the marriage. On the other hand, the omitted spouse statutes allow courts to balance the testator's probable intent with the concern for protecting the surviving spouse.[28] In reviewing this type of statute and its use, these two principles apparently are the primary concerns of the courts. In *In re Estate of Timmerman*,[29] the court of appeals reconciled these two concerns and provided another example of the statute's equitable application.

B. Section 62-2-301 of the South Carolina Probate Code

South Carolina's omitted spouse statute, which Ingrid Timmerman relied upon in the litigation surrounding her husband's will, provides:

> (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:
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> (1) it appears from the will that the omission was intentional; or
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> (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.

CODE ANN. § 62-2-201; S.D. CODIFIED LAWS § 29A-2-202 (Michie 1997); TENN. CODE ANN. § 31-4-101 (Supp. 1998); UTAH CODE ANN. § 75-2-202 (Supp. 1998); VA. CODE ANN. § 64.1-13 (Michie 1995); W. VA. CODE § 42-3-1 (1997); WIS. STAT. ANN. § 861.02 (West Supp. 1998); WYO. STAT. ANN. § 2-5-101 (Michie 1997).

28. *See* Bruce L. Stout, *Planning for Possible Pretermitted Children and Pretermitted Spouses*, 24 EST. PLAN. 269, 272 (1997) ("The purpose of a pretermitted spouse statute is to protect the surviving spouse of a marriage that was not contemplated when the testator's will was executed."). *But see* Kazimer, *supra* note 2, at 497 ("[The omitted spouse statute] should not be construed to protect the surviving spouse when that goal conflicts with the testator's intent.").

29. 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998).

> (b) In satisfying a share provided by this section, the devises made by the will abate as provided in § 62-3-902, [the intestate transfer statute].
>
> (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.[30]

At least nineteen other states have omitted spouse statutes similar to South Carolina's.[31] The treatment other states give to their statutes provides a better understanding of the South Carolina version and of the *Timmerman* case. Reviewing the use of the statute in other jurisdictions also shows the many different situations in which the statute can arise. Understanding the situations that could potentially cause one to be an omitted spouse is critical in preventing it from ever arising. Preventing a surviving spouse from ever being an omitted spouse is a simple affair, and competent estate planning can prevent the statute's application.

C. Applying the Statute

A surviving spouse must satisfy four conditions to qualify as an omitted spouse under the statute. First, the court must find that the testator married the surviving spouse after executing the will in question.[32] Second, the will must not provide for the surviving spouse.[33] Third, it must not appear "from the will that the omission was intentional."[34] Finally, the court must find that the testator did not provide for the surviving spouse with transfers outside the will, which the testator intended to "be in lieu of a testamentary

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30. S.C. CODE ANN. § 62-2-301.

31. ALA. CODE § 43-8-90 (1991); ARIZ. REV. STAT. ANN. § 14-2301 (West 1995); CAL. PROB. CODE § 21610 (West 1991); COLO. REV. STAT. § 15-11-301 (1998); FLA. STAT. ANN. § 732.301 (West 1995); IDAHO CODE § 15-2-301 (1979); ME. REV. STAT. ANN. tit. 18-A, § 2-301 (West 1998); MICH. COMP. LAWS ANN. § 700.126 (West 1995); MINN. STAT. ANN. § 524.2-301 (West Supp. 1998); MO. ANN. STAT. § 474.235 (West 1992); MONT. CODE ANN. § 72-2-331 (1997); NEB. REV. STAT. § 30-2320 (1995); N.J. STAT. ANN. § 3B:5-15 (West 1983); N.M. STAT. ANN. § 45-2-301 (Michie Supp. 1995); N.D. CENT. CODE § 30.1-06-01 (1996); 20 PA. CONS. STAT. ANN. § 2507(3) (West Supp. 1998); UTAH CODE ANN. § 75-2-301 (Supp. 1998); VA. CODE ANN. § 64.1-69.1 (Michie 1995); WASH. REV. CODE ANN. § 11.12.095 (West 1998).

32. S.C. CODE ANN. § 62-2-301(a).

33. *Id.*

34. *Id.* § 62-2-301(a)(1).

provision."[35]

One can classify each of the four conditions as either qualifying conditions or exclusions. The first two are qualifying conditions, and the surviving spouse must establish them as the first step to qualifying as an omitted spouse. However, even if the surviving spouse meets the qualifying conditions, the court may still deny the surviving spouse classification as an omitted spouse if it finds either of the two exclusions applies. These two exclusions disqualify a surviving spouse, who has satisfied the qualifying conditions, from the statute's protection.[36]

This Comment examines how the court in *Timmerman* and how other courts have approached these conditions and exclusions. Because the first qualifying condition, that of marrying the surviving spouse after the execution of the will, is self-explanatory, this Comment focuses primarily on the "not provided for by the will" condition. Following the examination of the qualifying conditions, this Comment addresses each exclusion and reviews situations where a testator executed a will before marrying a future surviving spouse and failed to mention that person in the will. As discussed above, automatic qualification as an omitted spouse does not necessarily ensue. The courts use the two exclusions to determine the proper disposition of the testator's estate.

1. "Not Provided for by the Will"

After establishing that the surviving spouse married the testator after the execution of the will in question, the court must find that the surviving spouse was not provided for by the will. In many situations, such as in *Timmerman*, the will simply does not mention the surviving spouse.[37] In these situations, courts typically find that this omission satisfies the condition of not being provided for by the will.[38]

A more complex case than that described above arises when a will

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35. *Id.* § 62-2-301(a)(2).

36. *See infra* Part III.C.4 (elaborating on who has the burden under the statute of proving or disproving the four conditions).

37. Timmerman executed a will during his first marriage, many years before he married Ingrid. This will was still valid at his death and obviously did not provide for Ingrid. *See In re* Estate of Timmerman, 331 S.C. 455, 457, 502 S.E.2d 920, 921 (Ct. App. 1998); *see also* Becraft v. Becraft, 628 So. 2d 404, 405-06 (Ala. 1993) (focusing on exclusions where the surviving spouse proved that the testator executed a will during his first marriage that did not mention her); *In re* Estate of Aspenson, 470 N.W.2d 692, 693-94 (Minn. Ct. App. 1991) (applying exclusions where the testator executed his will seven months before he met his future surviving spouse).

38. *See, e.g.*, *In re* Estate of Taggart, 619 P.2d 562, 564 (N.M. Ct. App. 1980) (examining exclusions upon evidence that the will was made before the marriage and did not mention the surviving spouse).

executed before the marriage actually mentions the testator's future spouse.[39] These cases require courts to determine if the testator failed to provide for the surviving spouse even though the surviving spouse is mentioned in the will. In making this decision, many courts focus on whether the testator contemplated marriage when executing the will.[40] These courts theorize that if the testator contemplated marriage with the surviving spouse, then that person is not an omitted spouse and fails the second qualifying condition. If, on the other hand, the testator did not contemplate marriage, then the surviving spouse meets the qualifying conditions, and the court must determine whether one of the exclusions applies. The South Carolina Supreme Court has expressly adopted the contemplation-of-marriage view;[41] in *Miles v. Miles* the court held that "absent specific language in the [w]ill, or sufficient extrinsic evidence that a bequest was made 'in contemplation of marriage,' a spouse has not been 'provided for' under the 'omitted spouse's statute.'"[42]

While many courts discuss the question of marriage contemplation as the primary issue in determining whether the surviving spouse was provided for by the will, other courts reject this question as a factor.[43] For example, in *In re Estate of Keeven*,[44] the Idaho Supreme Court concluded that, considering the Uniform Probate Code's careful drafting, its failure to mention the contemplation-of-marriage requirement "must have been deliberate."[45] As seen in *Keevan* and other cases where courts reject this question as a consideration, many other factors evidence whether the testator provided for the surviving spouse.[46] This approach might be considered the "overall factors" test. Of the

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39. *See, e.g.*, Estate of Ganier v. Estate of Ganier, 418 So. 2d 256, 257 (Fla. 1982); *In re* Estate of Keeven, 716 P.2d 1224, 1226 (Idaho 1986); Miles v. Miles, 312 S.C. 408, 409, 440 S.E.2d 882, 883 (1994); *In re* Estate of Christensen, 655 P.2d 646, 648 (Utah 1982); Porter v. Porter, 726 P.2d 459, 462 (Wash. 1986).

40. *Compare Ganier*, 418 So. 2d at 260 (finding that the will was not made in contemplation of marriage and that the husband was an omitted spouse entitled to an intestate share of his wife's estate where the wife's prior-to-marriage will gave the future husband two bank accounts), *and Miles*, 312 S.C. at 409-11, 440 S.E.2d at 883-84 (finding that the wife had not been provided for by the will where her husband's prior-to-marriage will left her a car and a life estate in his home and where the husband did not make the bequest in contemplation of marriage), *with Keeven*, 716 P.2d at 1226, 1229-30 (finding that the wife provided for her husband with a prior-to-marriage will that gave him one-sixth of her real property even though this devise was not made in contemplation of marriage), *and Christensen*, 655 P.2d at 649 (rejecting the view that a bequest must be made in contemplation of marriage and finding that the wife was provided for by a prior-to-marriage will that left her four percent of her husband's estate and had a value of $436,000).

41. Miles v. Miles, 312 S.C. 408, 440 S.E.2d 882 (1994).

42. *Id.* at 410-11, 440 S.E.2d at 883 (citation omitted).

43. *See, e.g., Christensen*, 655 P.2d at 649.

44. 716 P.2d 1224 (Idaho 1986).

45. *Id.* at 1230.

46. One court listed eight factors to consider in determining whether a will provides for a surviving spouse mentioned in the will:

> (1) the alternative takers under the will, (2) the dollar value of the testamentary gift to the surviving spouse,

factors courts applying this test consider, the two on which the courts primarily focus are the amount of transfers to the surviving spouse and whether these transfers sufficiently provided for that spouse.[47] If these factors are sufficient, then the surviving spouse typically is not found to have passed the second qualifying condition, and the court does not have to consider the exclusions.

Wills that mention the surviving spouse give courts their first opportunity to consider equitable concerns in deciding whether the surviving spouse is entitled to the protection of an omitted spouse statute. Because the will in *Timmerman* did not mention Ingrid, the court did not have this initial opportunity. At any rate, the question of the testator's intent lurks behind the contemplation of marriage view and the overall factors view. As discussed below, courts view this intent as a crucial part of their analysis when determining whether an exclusion applies to the surviving spouse.

2. *"Intentional Omission"*

The first exclusion in South Carolina's omitted spouse statute provides that a spouse will not qualify as an omitted spouse under the statute if "it appears from the will that the omission was intentional."[48] Comparing the statute's language with the factors the court considered in reaching its decision in *Timmerman* is difficult to reconcile. In its opinion, rather than focusing on the will offered for probate, the court of appeals focused on Timmerman's failure to execute a new will even though he consulted estate planners.[49] Under the statute's language, the court should determine intentional omission by looking only at the will the testator prepared before his marriage.[50] This part of the statute does not instruct courts to consider other evidence when determining whether this exclusion applies as it does for determining whether the provided-for-outside-the-will exclusion applies.[51] The court seemingly inferred that, because Timmerman chose to keep the old will over the new wills prepared for

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> (3) the fraction of the estate represented by that gift, (4) whether comparable gifts were made to other persons, (5) the length of time between execution of the testamentary instrument and the marriage, (6) the duration of the marriage, (7) any *inter vivos* gifts the testator has made to the surviving spouse, and (8) the separate property and needs of the surviving spouse.

Christensen, 655 P.2d at 650.

47. *See, e.g., id.* at 648-49 (finding that $436,000 left to a surviving spouse sufficiently provided for her).

48. S.C. CODE ANN. § 62-2-301(a)(1) (Law. Co-op. 1987 & Supp. 1998).

49. *In re* Estate of Timmerman, 331 S.C. 455, 459, 502 S.E.2d 920, 922 (Ct. App. 1998).

50. The statute states that the exception applies "if it appears *from the will* that the omission was intentional." S.C. CODE ANN. § 62-2-301(a)(1) (emphasis added).

51. *See id.* § 62-2-301(a)(2). This subsection explicitly allows for examination of other evidence when making the "provided for" determination.

him and because the old will did not mention his second wife, he intended to omit her.[52]

The majority of jurisdictions that have considered the issue have followed similar logic in ignoring the statutory language. For example, in *In re Estate of Dennis*[53] the Missouri Court of Appeals found that a husband intentionally omitted his spouse by executing a will on the same day they were married.[54] The court focused on extrinsic facts rather than on the will in question,[55] as did the court in *Timmerman*. These cases suggest that looking beyond the language of a will is acceptable when applying the statute and determining if the intentional-omission exclusion applies despite the lack of any sign that legislatures intend courts to do so. This view allows courts to examine not only the will, but also any extrinsic facts that could aid them in interpreting the testator's intent. This use of evidence enables courts to balance the scale in favor of what they view as the testator's intent.

3. *"Provided for Outside the Will"*

The second exclusion in South Carolina's omitted spouse statute allows courts to decide if the testator "intended" to provide for the surviving spouse with nonprobate transfers instead of including the spouse in a new will. This exception is the third part of the statute that enables courts to fashion equitable results. An analysis of this exclusion shows the extent of the courts' maneuvering room. To satisfy this exclusion, the testator must provide for the spouse outside the will and intend this provision to be in lieu of any testamentary disposition.[56] In determining the testator's intent, the court can examine statements made by the testator, it can consider the amount of the transfer, or it can use "*other evidence.*"[57] Essentially, the testator's intent determines whether the spouse was "provided for outside the will." The testator could have intended any amount, no matter how small, to be in lieu of

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52. *Timmerman*, 331 S.C. at 459, 502 S.E.2d at 922.

53. 714 S.W.2d 661 (Mo. Ct. App. 1986).

54. *Id.* at 666.

55. *Id.* at 665-66; *see also* Perkins v. Brown, 27 So. 2d 521 (Fla. 1946). In *Perkins*, the court stated:

> [T]he provision contained in the statute, to the effect that the surviving spouse shall share in the estate of the decedent "unless the will discloses an intention not to make such provision" does not mean that such intention must be written into the will in express words; but that such result may follow as an unavoidable inference to be drawn from the conditions and circumstances of the parties at the time of the execution of the instrument.

Id. at 523.

56. S.C. CODE ANN. § 62-2-301(a)(2).

57. *Id.* (emphasis added).

a testamentary provision. The final two words in this subsection of the statute ("other evidence") enable courts to consider virtually any bit of extrinsic evidence in determining the testator's intent for this exclusion.

In *Timmerman* the court of appeals found that "Timmerman intended to provide for [Ingrid] by transfers outside of the will."[58] This ruling on the statute's second exclusion prevented Ingrid from gaining the protection of South Carolina's omitted spouse statute.[59] In making this determination, the court considered much circumstantial evidence in determining whether Timmerman intended to provide for Ingrid outside the will. The court pointed out that "Timmerman gave Ingrid and her children substantial financial gifts" before the two were married.[60] The court also considered joint bank accounts Ingrid received, the amount of money Ingrid would receive monthly from Timmerman's retirement benefits, money he gave her from timber sales, and proceeds Ingrid would receive from Timmerman's life insurance policy.[61] These transfers amounted to almost $1.2 million.[62] The court based its determination that Timmerman intended to provide for Ingrid outside the will on "the sheer magnitude" of the transfers to Ingrid.[63]

The court also supported its determination that Timmerman provided for Ingrid outside the will with a discussion of Timmerman's visits to estate planners.[64] The court used the magnitude of the transfers and Timmerman's failure to execute a new will to conclude that he had provided for Ingrid and that, if he had wanted her to take more, he would have executed a new will. While the court of appeals apparently used the evidence of Timmerman's visits to estate planners to reach its conclusion, this evidence could point to a very different conclusion. If Timmerman intended the transfers to be in lieu of a testamentary provision, why was he visiting estate planners? A logical answer is that he did not intend those transfers to be all Ingrid received. Also, from his experience with the law, Timmerman certainly knew that Ingrid would receive at least an elective share, so his visits to the estate planners could evince his desire that Ingrid receive more than the elective share.

Most courts focus primarily on the same evidence as the *Timmerman* court—the amount of the nontestamentary transfers. The Alabama Supreme Court concluded that the size of transfers to a surviving spouse is relevant to whether the transfers were in lieu of a testamentary provision, regardless of whether the amount is comparable to the intestate share the spouse could expect

58. *In re* Estate of Timmerman , 331 S.C. 455, 459, 502 S.E.2d 920, 921 (Ct. App. 1998).
59. *Id.* at 459, 502 S.E.2d at 922.
60. *Id.* at 459, 502 S.E.2d at 921.
61. *Id.* at 459, 502 S.E.2d at 921-22.
62. *Id.* at 459, 502 S.E.2d at 922.
63. *Id.*
64. *Id.* at 458, 502 S.E.2d at 921.

to receive.[65] In *In re Estate of Taggart*[66] the New Mexico Court of Appeals found that the decedent intended to provide for the surviving spouse with three transfers outside the will amounting to one-fifth of the decedent's estate.[67] The decedent's statements to friends provided additional evidence that he intended these transfers to provide sufficiently for his spouse.[68] Contrary to the ruling in *Taggart*, the Arizona Court of Appeals, in *In re Estate of Beaman*,[69] ruled that the decedent did not intend for items the surviving spouse removed from the couple's home and money she withdrew from a joint checking account before his death to be transfers in lieu of a testamentary provision,[70] but the small amount of the transfers seemed to be the court's determining factor. In addition to these cases, many courts have found that surviving spouses were not omitted spouses when they received proceeds from life insurance policies, remainders in real estate, and balances of joint accounts.[71] These cases demonstrate that most courts focus mainly on the amount of the transfer, but will also view any other available evidence.

4. *Burden of Proof*

While most courts harmoniously apply and interpret omitted spouse statutes with little difference between jurisdictions, the courts treat the burden of proof differently. The burden of proof raises questions in two portions of the statute. First, when a will mentions the surviving spouse, who has the burden of proving whether the testator has failed to provide by will for his surviving spouse? Second, after resolving this first question, who has the burden of proving whether the intentional-omission and provided-for-outside-the-will exclusions eliminate the spouse?[72] One can rephrase these questions as asking which party has the burden of proving the qualifying conditions and which party has the burden of proving the exclusions. Courts have developed three answers to these questions. First, some courts place the entire burden on the surviving spouse to prove she is an omitted spouse.[73] In these jurisdictions the surviving spouse must prove the qualifying conditions and that neither of the

65. Becraft v. Becraft, 628 So. 2d 404, 407 (Ala. 1993).
66. 619 P.2d 562 (N.M. Ct. App. 1980).
67. *Id.* at 569.
68. *Id.*
69. 583 P.2d 270 (Ariz. Ct. App. 1978).
70. *Id.* at 274-75.
71. *See, e.g.*, Wester v. Baker, 675 So. 2d. 447, 447-48 (Ala. Civ. App. 1996) (survivorship in a joint tenancy); *In re* Estate of Aspenson, 470 N.W.2d 692, 695 (Minn. Ct. App. 1991) (pension plans, joint accounts, stock, and life insurance); *In re* Estate of Knudsen, 342 N.W.2d 387, 391 (N.D. 1984) (life insurance benefits and remainders in joint tenancies). *But see* Noble v. McNerney, 419 N.W.2d 424, 433 (Mich. Ct. App. 1988) (finding that pension benefits of the decedent were not a sufficient transfer to provide for the surviving spouse).
72. *See supra* Parts III.C.2, III.C.3 (discussing these exclusions).
73. *See, e.g., In re* Estate of Keevan, 716 P.2d 1224, 1230 (Idaho 1986); *In re* Estate of Christensen, 655 P.2d 646, 650 (Utah 1982).

exclusions applies. Second, some courts require the proponent of the will to prove disqualification.[74] A surviving spouse has to show only that the marriage occurred after the execution of the will; the will proponents must then prove that the spouse fails the qualifying condition of "not provided for by the will" or that one of the exclusions applies. Third, some courts have adopted a shifting burden of proof.[75] The shifting burden of proof requires the surviving spouse to prove that the testator did not provide for him by will, and if the surviving spouse meets this burden, the proponent of the will must then prove that one of the exclusions applies—either the testator intentionally omitted the surviving spouse or intended to provide for the surviving spouse outside the will.

The court in *Timmerman* did not explicitly discuss the burden of proof for the statute. In *Timmerman*, the will did not mention the surviving spouse; therefore, only the second part of the burden-of-proof problem arose. By laying out the evidence of the transfers to Ingrid and of Timmerman's visits to estate planners, the court seemingly placed the burden on the proponents of the will to prove that one of the exclusions applied.[76] However, to understand fully where South Carolina places the burden of proof, one must analyze *Timmerman* along with an earlier South Carolina omitted spouse case, *Miles v. Miles*.[77]

In *Miles* the South Carolina Supreme Court faced a situation where a prior-to-marriage will mentioned the surviving spouse.[78] In this decision, the court apparently placed the burden of proof on the surviving spouse at the first stage. The court in *Miles* ruled that the will did not provide for the spouse because "there [was] no evidence the bequest was made in contemplation of marriage."[79] The court seemingly reached this determination based on the surviving spouse's testimony that she, at the time the decedent executed the will, "had rejected numerous marriage proposals from" him.[80] Although the *Miles* court considered the burden-of-proof issue for the first part of the statute, the court did not address the burden of proof for the exclusions.

By combining the decisions in *Timmerman* and *Miles*, one gains a complete view of how courts in South Carolina might address the burden of proof. These decisions, when viewed together, indicate that South Carolina uses the shifting burden of proof. This option is popular in commentary on the subject.[81] In *Hellums v. Reinhardt*,[82] the primary decision that discusses and

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74. *See, e.g., In re* Estate of Shannon, 274 Cal. Rptr. 338, 341 (Cal. Ct. App. 1990).

75. *See, e.g.*, Hellums v. Reinhardt, 567 So. 2d 274, 277 (Ala. 1990).

76. *See In re* Estate of Timmerman, 331 S.C. 455, 458-59, 502 S.E.2d 920, 921-22 (Ct. App. 1998).

77. 312 S.C. 408, 440 S.E.2d 882 (1994).

78. *Id.* at 409, 440 S.E.2d at 883.

79. *Id.* at 411, 440 S.E.2d at 883.

80. *Id.*

81. *See, e.g.*, Katrina T. Sather, Comment, *The Omitted Spouse Statute as It Applies in Community Property States*, 31 IDAHO L. REV. 1149, 1166 (1995) ("A shifting burden of proof is more realistic and equitable."). *But see* Kazimer, *supra* note 2, at 507 ("[T]he burden of proof

implements the shifting burden of proof, the Alabama Supreme Court discussed the burden of proof at length and stated that the shifting burden of proof is "most consistent with the terms of the statute . . . ."[83] Notably, the Alabama omitted spouse statute is nearly identical to South Carolina's.[84]

IV. EFFECTS OF THE OMITTED SPOUSE STATUTE

A. Effects on Surviving Spouses and Potential Will Beneficiaries

Omitted spouse statutes attempt to protect surviving spouses and to fulfill testators' desires,[85] but these statutes' effects are widespread. Depending on the situation a testator may leave behind at death, the surviving spouse and beneficiaries may face a confrontation that will affect them in many ways—primarily emotionally and financially.

Litigation involving these statutes causes emotional strain that comes from many directions. First, having to fight in court with someone that is likely a relative immeasurably impacts a person. Second, the amount in controversy can be large, and the potential loss causes great stress, especially considering that each party obviously feels entitled to receive its share, either based on the applicable omitted spouse statute or the will executed by the testator. Finally, the litigation creates emotional uncertainty—even after the court's decision, a party, whether it won or lost, will never know the testator's true intentions. Surviving spouses will always wonder whether the decedent intended to exclude them, and potential beneficiaries will always wonder whether the decedent would have revoked the will if the decedent had remembered to do so or had known the law.

In addition to these emotional concerns, the statute also affects the parties financially. The parties feel this effect primarily in two ways. First, it may take months or years to resolve the issues, and the parties' financial situations will remain uncertain until the court reaches its final determination. Second, as is obvious from *Timmerman*, litigation is costly. While this cost obviously affects both parties, it potentially impacts the party named in the will as a beneficiary most significantly. Unlike the surviving spouse, who may recover some amount under an elective share statute, the named beneficiary may end up with nothing. While seeking to achieve the goals of the statute (protecting the spouse and carrying out the testator's intent), courts could

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should be allocated to the surviving spouse . . . .").

82. 567 So. 2d 274 (Ala. 1990).

83. *Id.* at 277. A second Alabama Supreme Court ruling three years later confirmed the shifting burden of proof as the standard in that state. Becraft v. Becraft, 628 So. 2d 404, 406 (Ala. 1993); *see also* Wester v. Baker, 675 So. 2d 447, 448 (Ala. Civ. App. 1996) (applying the shifting burden of proof).

84. *Compare* ALA. CODE § 43-8-90 (1991) *with* S.C. CODE ANN. § 62-2-301 (Law. Co-op. 1987 & Supp. 1998).

85. *See supra* Part I.

potentially leave the named beneficiary in the worst position of all the parties. Using the *Timmerman* case as an example, if the proponents of the will had lost their battle in the court of appeals and chose not to appeal, they would have gone home empty-handed after spending almost four years in court, whereas Ingrid still received her statutory elective share even though she lost under South Carolina's omitted spouse statute.[86] Unlike the beneficiaries, a surviving spouse, like Ingrid, could use the amount she received under the elective share to pay her cost of litigation.

B. Effects of the Statute on Attorneys

In addition to the effects of omitted spouse statutes on the parties to the action, they also cause problems that estate planners must consider when advising testators and when drafting wills. Malpractice is always a frightening concern. To avoid it, an estate planner must consider the statute when planning any client's estate. First, for married clients, their spouses may die first, and the clients may remarry as in Timmerman's case. The lawyer should draft the will to provide for this contingency. Second, in the case of unmarried persons, the concerns are obvious—the possibility of a future marriage and whether the testator wishes the will to remain valid after the marriage.

A provision stating the testator's desires if there is a marriage or remarriage remedies the concerns in both of these situations.[87] In South Carolina, such a provision should effectively prevent application of the omitted spouse statute, but no court in the state has ruled on this particular issue. A court might instead find the spouse's omission unintentional if the surviving spouse is not specifically named in the will.[88] To counter the possibility of such a decision, a planner should advise the client on the consequences of marriage or remarriage and the need to execute a new will or re-execute the old will after the marriage.

In *Heyer v. Flaig*,[89] an attorney malpractice action, an attorney prepared a will for a single woman devising everything to her daughters.[90] The woman told the attorney that she was about to marry,[91] but the attorney did not advise her of this decision's consequences on her will. The woman later died,

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86. *In re* Estate of Timmerman, 331 S.C. 455, 461, 502 S.E.2d 920, 922 (Ct. App. 1998).

87. Bruce L. Stout recommended the following provision: "This will recognizes that I am unmarried and that I may marry at some future date. Regardless of whether I am married or not at the time of my death, I want this will to control the disposition of my estate." Stout, *supra* note 28, at 273. However, he also noted that "some states require specificity in regard to the potential spouse." *Id.*

88. *Id.*

89. 449 P.2d 161 (Cal. 1969).

90. *Id.* at 162.

91. *Id.*

and the surviving husband successfully claimed a share as an omitted spouse.[92] The daughters then sued the attorney for malpractice,[93] as third party beneficiaries, for failing "to advise" their mother and for failing "to include in the will any provision as to the intended marriage."[94] The court ruled that "[a] reasonably prudent attorney should appreciate the consequences of a post-testamentary marriage, advise the testator of such consequences, and use good judgment to avoid them if the testator so desires."[95]

C. Timmerman's Options Before His Death

Any one of a number of options available to Timmerman would have prevented the situation he left when he died. He may have contemplated one or more of them during his visits to estate planners, but he never properly established any of them. First, Timmerman could have executed a new will properly documenting his intentions. Second, he could have simply re-executed the old will or executed a codicil which would have effectively republished the will at that date.[96] Either of these options would have rendered South Carolina's omitted spouse statute inapplicable because Timmerman would no longer have married "after the execution of the will."[97] In addition, Timmerman could have expressly stated that he intended one of his transfers to Ingrid "be in lieu of a testamentary provision."[98] However, unlike the first two suggestions, which would automatically prevent the use of the statute, this option would still allow the surviving spouse to assert the statute because the decedent executed the will before marriage without mentioning the surviving spouse, thereby establishing the qualifying conditions. However, if Timmerman made his intention to provide outside the will clear enough, then the court could have prevented the surviving spouse from being an omitted spouse under the exclusion in section 62-2-301(a)(2). The only advantage of this option is its easy application

92. *Id.* at 162-63.

93. The elements of a legal malpractice action in South Carolina are well established. *See* Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996) (stating that the elements of malpractice are "1) the existence of an attorney-client relationship; 2) breach of a duty by the attorney; 3) damage to the client; and 4) proximate causation of the client's damages by the breach"). In a situation of blatant bad advice, such as in *Heyer*, an intended beneficiary in South Carolina should have no problem establishing these elements.

94. *Heyer*, 449 P.2d at 163.

95. *Id.* at 165; *see also* Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961) (holding that "intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries").

96. *See In re* Estate of Ivancovich, 728 P.2d 661, 662 (Ariz. Ct. App. 1986) (holding that where testator had executed a will before his marriage to the surviving spouse and then during that marriage executed a codicil republishing the will, the will spoke from the new date and the surviving spouse was not entitled to protection under the omitted spouse statute).

97. S.C. CODE ANN. § 62-2-301(a) (Law. Co-op. 1987 & Supp. 1998).

98. *Id.* § 62-2-301(a)(2).

without visiting an attorney.

V. CONCLUSION AND RECOMMENDATIONS

In light of the elective share statute, what is the purpose of the omitted spouse statute, and is it really needed? Consideration of the statute's two goals, carrying out the testator's intent and protecting the surviving spouse, helps answer these questions. If a spouse's only remedy for exclusion from a will is the elective share, as is the case in many states, then the spouse is automatically protected and courts do not need to attempt to carry out the testator's intent. However, the protection the elective share guarantees the spouse may not be as significant as the testator prefers. The omitted spouse statute combines with the elective share statute to resolve this dilemma. Where both statues are available, courts can weigh the evidence to fashion unique equitable solutions in every case. In a case such as *Timmerman*, the court can determine that the elective share is the only remedy available to the surviving spouse and also carries out the intention of the testator.

The omitted spouse statute serves a valuable purpose in determining the proper disposition of a decedent's estate and works well with the elective share statute to ensure that the surviving spouse is protected and that the testator's intent is carried out. While the statute can fulfill its purpose, estate planners can and are obligated to help prevent the statute's application. If planners fulfill this obligation, and testators listen to them, courts should never have to deal with this statute.

While proper advice from an estate planner helps individuals to avoid the application of the omitted spouse statute, the statute more realistically fulfills its role when applied to individuals who do not have estate planners. In these situations, the statute is most valuable. Many individuals may assume that when they marry, their new spouses are entitled to their entire estates if they predecease those spouses. The result of leaving only the state's statutory elective share, if available, would probably surprise many of these individuals. In such situations, the omitted spouse statute does incredible justice. For this reason and many others, it is an essential part of the Probate Code.

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