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In re Estate of Lunsford and Statutory Ambiguity: Trying to Reconcile Child Abandonment and the Interstate Succession Act

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In re Estate of Lunsford and Statutory Ambiguity: Trying to Reconcile Child Abandonment and the Intestate Succession Act

INTRODUCTION

For over three years, Randy Lunsford and his ex-wife, Dawn Collins Bean, have been fighting over their daughter's $100,000 wrongful death award.[1] Their daughter, Candice Lunsford ("Candi"), was tragically killed in an automobile accident just nine days after her eighteenth birthday.[2] Mrs. Bean, as the admistratrix of Candi's estate, obtained the wrongful death award on behalf of her daughter's estate.[3] In North Carolina, wrongful death proceeds are not part of

1. *In re* Estate of Lunsford, 143 N.C. App. 646, 647–48, 547 S.E.2d 483, 484, *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001); *see* Appellant's Brief at 6, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (____) (No. COA02-904).

2. *Lunsford*, 143 N.C. App. at 647–48, 547 S.E.2d at 484; *see* Appellant's Brief at 4, 6, *Lunsford* (No. COA02-904).

3. *See* Application for Letters of Administration, *In re* Estate of Candice Leigh Lunsford, Surry County, N.C. (July 9, 1999, File No. 99 E 318) (on file with the North Carolina Law Review); Oath, *In re* Estate of Candice Leigh Lunsford, Surry County, N.C. (July 9, 1999, File No. 99 E 318) (on file with the North Carolina Law Review). *See generally* N.C. GEN. STAT. § 28A-18-2(a) (2001) (providing that the decedent's personal representative or collector must bring the wrongful death action); Burcl v. N.C. Baptist

the decedent's estate, but instead are paid to the survivors in accordance with the Intestate Succession Act.[4] Section 31A-2 of the General Statutes of North Carolina applies to the Intestate Succession Act[5] to prevent a parent who abandons his or her child from inheriting from the child through intestate succession.[6] Mrs. Bean contends that Mr. Lunsford abandoned their daughter and is therefore barred from sharing in the wrongful death award.[7] Mr. Lunsford counters that he did not abandon his daughter;[8] that even if he did abandon his daughter, because a court order gave Mrs. Bean full custody of Candi, he therefore falls under an exception to section 31A-2;[9] that section 31A-2 only applies when a child dies as a minor and because Candi died after reaching the age of majority, the statute does not bar him from recovering;[10] and that the statute barring recovery is so vague as to be unconstitutional.[11]

Superior Court Judge L. Todd Burke found that Mr. Lunsford had abandoned Candi and denied him a share of the wrongful death proceeds.[12] On appeal, the North Carolina Court of Appeals upheld

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Hosp., Inc., 306 N.C. 214, 217, 293 S.E.2d 85, 87 (1982) (stating that the personal representative or collector must bring a wrongful death action and that a parent in her individual capacity may not bring a wrongful death action (citing § 28A-18-2(a))).

4. § 28A-18-2(a) (stating that "[t]he amount recovered [in a wrongful death action] . . . shall be disposed of as provided in the Intestate Succession Act"); Williford v. Williford, 288 N.C. 506, 508, 219 S.E.2d 220, 222 (1975) ("It is well established that the proceeds of an action brought for wrongful death are not assets of the estate of the deceased and are not 'any part of' his estate." Under the wrongful death statute, they are distributed in accordance with the Intestate Succession Act.).

5. §§ 29-1 to -30.

6. *Id.* § 31A-2; *see Williford*, 288 N.C. at 508, 219 S.E.2d at 222 (stating that section 31A-2 "must be deemed a part of the Intestate Succession Act"). Section 31A-2 specifically modifies section 29-15(3) of the Intestate Succession Act, which prescribes when parents inherit through intestate succession. § 29-15(3); *Williford*, 288 N.C. at 508–09, 219 S.E.2d at 222–23.

7. Appellee's Brief at 2–8, *Lunsford* (No. COA02-904).

8. Appellant's Brief at 9–11, *Lunsford* (No. COA02-904).

9. *Id.* at 11–15.

10. *Id.* at 15–25.

11. *Id.* at 25–26. Mr. Lunsford only made this constitutional argument after the North Carolina Supreme Court vacated and remanded the decision of the North Carolina Court of Appeals. *See id.* (arguing that section 31A-2 is unconstitutionally vague); Appellant's New Brief, *In re* Estate of Lunsford, 354 N.C. 571, 556 S.E.2d 292 (2001) (No. 362A01) (lacking an argument that section 31A-2 is unconstitutionally vague); Appellant's Brief, *In re* Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483 (2001) (No. COA00-674) (lacking an argument that section 31A-2 is unconstitutionally vague). An analysis of Mr. Lunsford's constitutional argument is beyond the scope of this Comment.

12. Record on Appeal at 26, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (___) (No. COA02-904).

the superior court judge's decision.[13] It refused to disturb his finding of abandonment,[14] and it held that section 31A-2 applied to Mr. Lunsford even though Candi died after reaching the age of majority because the term "child" in section 31A-2 means "child of any age," not just "minor child."[15] Instead of ruling on any of the legal issues, the North Carolina Supreme Court issued a short opinion vacating the court of appeals's decision and remanding the case for additional factual findings.[16] On April 12, 2002, Judge Burke found that Mr. Lunsford had abandoned his daughter and should be barred from inheriting because he did not meet either of the two exceptions to the statute.[17] Mr. Lunsford then appealed the judge's decision.[18] The case is currently before the North Carolina Court of Appeals.[19]

Lunsford illustrates the imprecision and potential inequity of section 31A-2 of the General Statutes of North Carolina. Although the goal of the statute is to prevent a parent who abandons a child from inheriting from that child or sharing in that child's wrongful death award,[20] the statute does not specify the precise circumstances that prevent the parent from sharing in intestate succession. Its language does not indicate whether a parent is only barred from sharing if the child is a minor,[21] it does not describe when a parent has abandoned the child or merely complied with a court order giving

13. *In re* Estate of Lunsford, 143 N.C. App. 646, 654, 547 S.E.2d 483, 488, *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

14. *Id.* at 652, 547 S.E.2d at 486.

15. *Id.* at 652–53, 547 S.E.2d at 486–87.

16. *In re* Estate of Lunsford, 354 N.C. 571, 571, 556 S.E.2d 292, 292 (2001). The North Carolina Supreme Court wanted further findings on the following issues: (1) whether Mr. Lunsford had abandoned his daughter; (2) whether, when, and for how long he had resumed the care and maintenance of his daughter; and (3) whether he had "substantially complied" with the custody order's requirements for the support and maintenance of his daughter. *Id.*

17. Record at 68–70. The statute contains two exceptions. If the parent resumes continuous "care and maintenance" for at least one year before the child's death or if a court order is the reason the parent no longer has custody of the child and the parent complies with his child-support requirements, the parent will not be barred from inheriting. *See* N.C. GEN. STAT. § 31A-2 (2001).

18. Appellant's Brief, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (____) (No. COA02-904).

19. North Carolina Court of Appeals Calendar, Cases Without Oral Arguments, Week of Mar. 24, 2003, at 2 (on file with the North Carolina Law Review) (stating that Judges Patricia Timmons-Goodson, Wanda G. Bryant, and Martha A. Geer are scheduled to decide *Lunsford*).

20. Williford v. Williford, 288 N.C. 506, 508–10, 219 S.E.2d 220, 222–23 (1975); *supra* notes 4–6.

21. *See infra* notes 43–154 and accompanying text.

custody to another person,[22] and it does not give clear guidance as to how the parent can correct his past conduct to again share in intestate succession.[23]

This Comment exposes these deficiencies and critiques the majority and dissenting opinions in the court of appeals's decision. Part I analyzes the court of appeals's holding that section 31A-2 bars an abandoning parent from inheriting from his child, regardless of the child's age. This Comment concludes that the court of appeals was correct in applying section 31A-2 to prevent inheritance from a child who had reached the age of majority but used faulty legal reasoning to reach this holding. Part I also addresses the question of whether Mr. Lunsford should be entitled to inherit under an exception to section 31A-2 that allows an abandoning parent to inherit if he was "deprived of the custody" of his child and "substantially complied" with his child support obligations. This Comment concludes that the court of appeals's decision that Mr. Lunsford did not qualify for this exception is incorrect. The court's decision in *Lunsford* illustrates the ambiguities in section 31A-2. These ambiguities make it impossible to construe that section in a manner that carries out the legislature's intentions for enacting the statute while at the same time operating equitably and with reasonable certainty. Part II proposes major revisions to section 31A-2 so that it clearly states when a parent who has abandoned his child may or may not inherit through intestate succession. The death of a child is difficult enough for a family, and section 31A-2 needlessly compounds a family's suffering by fueling litigation over who is entitled to inherit or share in wrongful death proceeds. While no law could ever eliminate this type of litigation, a clearer law should at least reduce unnecessary legal wrangling and speed the disposition of the child's estate.

I. *IN RE ESTATE OF LUNSFORD*

The North Carolina Intestate Succession Act determines who inherits from someone who dies without a will or with a will that fails

22. *See infra* notes 155–81 and accompanying text.

23. *See infra* note 211 and accompanying text. To provide clarity and to be consistent with the facts in *Lunsford*, this Comment uses male pronouns to refer to abandoning parents and female pronouns to refer to abandoned children. It must be stressed, however, that section 31A-2 of the General Statutes of North Carolina is gender-neutral, and the use of male or female pronouns does not imply that fathers or mothers are more or less likely to abandon their children or should be treated differently. *See* N.C. GEN. STAT. § 31A-2 (2001).

to distribute all of her assets.[24] The Intestate Succession Act also governs the distribution of wrongful death awards[25] and workers' compensation death benefits,[26] even though they are not part of decedents' estates.[27] This Act provides that the estate of a person who dies intestate without a spouse, child, or any lineal descendants will pass to her parents in equal shares if both parents are alive or to the surviving parent if one is dead.[28] Section 31A-2 of the General Statutes of North Carolina, however, bars a parent from inheriting through intestate succession or sharing in a wrongful death award if he abandons his child.[29]

As *Lunsford* reveals, section 31A-2 is ambiguous. It does not specify whether a parent is barred from inheriting from a minor child or a child of any age, nor does it clearly state when an abandoning parent meets the exceptions to the statute and is allowed to inherit or share in a wrongful death award. The statute states:

> Any parent who has wilfully abandoned the care and maintenance of his or her child[30] shall lose all right to

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24. §§ 29-1 to -30 (Intestate Succession Act); *id.* § 31-42 (Failure of Devises by Lapse or Otherwise); *id.* §§ 31A-1 to -15 (Acts Barring Property Rights).

25. *See supra* note 4.

26. § 28A-18-2 (Death by Wrongful Act of Another; Recovery Not Assets); *id.* § 31A-2 (Acts Barring Rights of Parents); *id.* § 97-40 (Commutation and Payment of [Workers'] Compensation in Absence of Dependents). In 1971, the North Carolina Supreme Court held that section 31A-2 applied to the earlier version of section 97-40 to prevent an abandoning parent from sharing in a workers' compensation death benefit. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 588–89, 184 S.E.2d 296, 299–300 (1971). The current Workers' Compensation Act includes an explicit provision preventing an abandoning parent from sharing in a death benefit paid under the Act, and the sole purpose of the Intestate Succession Act is to determine the order of priority of nondependents entitled to receive death benefits. § 97-40; Davis v. MacMillan, 148 N.C. App. 248, 253 n.2, 558 S.E.2d 210, 213–14 n.2 (stating that section 31A-2 no longer applies to section 97-40), *discretionary review denied*, 355 N.C. 490, 563 S.E.2d 564 (2002).

27. § 28A-18-2 (governing the distribution of wrongful death proceeds); § 97-40 (governing the distribution of workers' compensation proceeds); Williford v. Williford, 288 N.C. 506, 508, 219 S.E.2d 220, 222 (1975) (holding that wrongful death proceeds are not part of the decedent's estate); *Smith*, 279 N.C. at 588, 184 S.E.2d at 299 (holding that workers' compensation death benefits are not part of the decedent's estate); *supra* notes 4, 26, and accompanying text.

28. § 29-15(3) (specifying when parents inherit from their children).

29. *Id.* § 31A-2.

30. Two standard definitions of abandonment are used by North Carolina courts:

> Any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence.
>
> . . . .
>
> Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held

> intestate succession in any part of the child's estate and all right to administer the estate of the child, except —
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.[31]

In *Lunsford*, the court of appeals gave two primary reasons for holding that Mr. Lunsford could not receive one-half of the wrongful death proceeds. First, it concluded that section 31A-2 applied to Mr. Lunsford by determining that the term "child" in section 31A-2 means "child of any age."[32] To support this construction, it cited *The American Heritage Dictionary* and *Black's Legal Dictionary*, which both define "child" as "child of any age."[33] To further support its definition, the court of appeals reasoned that the legislature, when drafting the statute, did not use the term "minor child," and the legislature usually uses the term "minor" to refer to a child under the age of eighteen.[34] Having established that "child" means "child of any age," the court concluded that unless the second exception to the statute applied to Mr. Lunsford, he was barred from recovering.[35] The court determined that the divorce judgment technically had not deprived Mr. Lunsford of the custody of his daughter because the judgment had not terminated his parental rights.[36] Finding no deprivation of custody, the court held that the statutory exception did not apply and Mr. Lunsford was therefore barred from sharing in the wrongful death award.[37]

> that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Hixson v. Krebs, 136 N.C. App. 183, 188, 523 S.E.2d 684, 687 (1999) (internal alteration and citations omitted) (quoting Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)).

31. § 31A-2.

32. *In re* Estate of Lunsford, 143 N.C. App. 646, 652–53, 547 S.E.2d 483, 486–87, *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

33. *Id.* (citing BLACK'S LAW DICTIONARY 239 (6th ed. 1990); THE AMERICAN HERITAGE DICTIONARY 265 (2d college ed. 1985)).

34. *Id.* at 653, 547 S.E.2d at 487.

35. *Id.* at 653–54, 547 S.E.2d at 487–88.

36. *Id.*

37. *Id.*

This Comment ultimately agrees with the court of appeals's conclusion that the term "child" in section 31A-2 means "child of any age,"[38] but disagrees with the court's reasoning. The court relied on

38. The court of appeals stated that the question of whether "child" means "child of any age" or "minor child" was "an issue of first impression." *Id.* at 652, 547 S.E.2d at 486. Even though North Carolina courts have previously applied section 31A-2 to prevent abandoning parents from inheriting from children who died after reaching the age of majority, these cases did not explicitly decide this question. Therefore, this Comment agrees with the court of appeals. In *Williford v. Williford*, 288 N.C. 506, 219 S.E.2d 220 (1975), the plaintiff's brief to the North Carolina Supreme Court stated that the deceased child had reached the age of majority. Plaintiff Appellant's New Brief at 5, Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975) (No. 66). In *Smith v. Allied Exterminators, Inc.*, 279 N.C. 583, 184 S.E.2d 296 (1971), the defendants' brief to the North Carolina Court of Appeals stated that the child died at age twenty-two. Defendant Appellants' Brief at 2, Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971) (No. 7114IC109). The opinions in *Williford* and *Smith* do not mention specifically that the children died after reaching the age of majority, but they both hold that because the father abandoned the children during their "minority," he was not entitled to recover. *See Williford*, 288 N.C. at 509–10, 219 S.E.2d at 223 (citing *Smith*, 279 N.C. 583, 184 S.E.2d 296 (1971)) (applying the holding in *Smith* to prevent an abandoning parent from sharing in a wrongful death award because he "had abandoned the deceased during the [deceased's] minority"); *Smith*, 279 N.C. at 589, 184 S.E.2d at 300 (preventing the abandoning parent from recovering because he "wilfully abandoned the care and maintenance of the deceased during the latter's minority"). Mrs. Bean argues that these two cases, read in conjunction with the briefs filed with the courts, establish that the North Carolina Supreme Court has already decided that "child" means "child of any age." Appellee's Brief at 15–17, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (____) (No. COA02-904) (citing and quoting *Williford*, 288 N.C. at 509, 219 S.E.2d at 223; *Smith*, 279 N.C. at 589, 184 S.E.2d at 300; Plaintiff Appellant's New Brief at 5, *Williford* (No. 66); Defendant Appellant's Brief at 2, *Smith* (No. 7114IC109)). Mrs. Bean first made this argument in her brief to the North Carolina Supreme Court. Petitioner Appellee's New Brief at 5–7, *In re* Estate of Lunsford, 354 N.C. 571, 556 S.E.2d 292 (2001) (No. 362A01) (citing *Williford* and *Smith*). She did not address them in her first brief to the North Carolina Court of Appeals. *See* Appellee's Brief, *In re* Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483 (2001) (No. COA00-674). In addition, Mrs. Bean did not point out that *Hixson v. Krebs*, 136 N.C. App. 183, 523 S.E.2d 684 (1999), denied recovery to an abandoning parent whose child died at age eighteen. *See id.* at 185, 523 S.E.2d at 685. These omissions may explain why the court of appeals did not acknowledge that prior North Carolina cases had denied relief to the abandoning parent when the child died after reaching the age of majority even though these cases bolster the court of appeals's reasoning. On the other hand, the court's language that "this is the first time this question has been squarely presented to this Court," *Lunsford*, 143 N.C. App. at 652, 547 S.E.2d at 486, could indicate that the court was cognizant of the prior case law. *See id.* Because neither the courts nor the parties in *Williford*, *Smith*, and *Hixson* specifically addressed the issue of whether a parent should be barred from recovering even though his child died after reaching the age of majority, these earlier cases should not control the resolution of this question. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975); Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971); Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999); Plaintiff Appellant's New Brief, *Williford* (No. 66); Defendant Appellee's New Brief, *Williford* (No. 66); Plaintiff Appellant's Supplemental Brief, Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971) (No. 50); Petitioner-Appellant's Brief, Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999) (No.

other statutes, legal and non-legal dictionaries, and notions of logic to ultimately conclude that the term "child" is unambiguous and clearly means "child of any age." This analysis is unpersuasive and legally flawed. First, under established North Carolina law, the court should not need to engage in statutory interpretation to determine if a term is unambiguous—if the term is unambiguous, statutory interpretation is unnecessary. Second, the court used faulty interpretive methods. The court of appeals should have examined the use of the term "child" within section 31A-2, its meaning in the Intestate Succession Act, and the legislative history behind section 31A-2. Instead, the court resorted to dictionaries and improperly applied unrelated statutes in its attempt to determine the meaning of the term "child."

A. Rules of Statutory Construction

The "cardinal principle" of statutory construction is that the court's interpretation of the statute must comport with the legislature's intent in enacting it.[39] To determine the legislature's intent, the court first must determine if the statute's language is "clear and unambiguous."[40] If its language is "clear and unambiguous," then the court must not engage in "judicial construction" but "must give [the statute] its plain and definite meaning, and [is] without power to interpolate, or superimpose, provisions and limitations not contained therein."[41] But if the language is unclear, the court must engage in statutory construction to determine the legislature's intent and construe the statute in accordance with that intent.[42]

COA99-239); Respondent-Appellee's Brief, *Hixson* (No. COA99-239); Petitioner-Appellant's Reply Brief to Respondent-Appellee's Brief, *Hixson* (No. COA99-239); Defendant Appellants' Brief, *Smith* (No. 7114IC109); Plaintiff Appellee's Brief, *Smith* (No. 7114IC109).

39. Polaroid Corp. v. Offerman, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998).

40. Union Carbide Corp. v. Offerman, 351 N.C. 310, 314, 526 S.E.2d 167, 170 (2000).

41. *In re* Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978) (citations omitted). Professor Singer argues, however, that by holding that statutory language is "clear and unambiguous" and therefore no interpretation is necessary, a court has already engaged in statutory interpretation. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:02 (6th ed. 2000).

42. *Banks*, 295 N.C. at 239, 244 S.E.2d at 389.

B. *Defining the Term "Child" in Section 31A-2: Does It Mean "Child of Any Age" or "Minor Child"?*

1. *Lunsford*'s Analysis

In *Lunsford*, the court of appeals incorrectly held that the term "child" in section 31A-2 is clear and unambiguous.[43] A statute's "language is ambiguous if reasonable minds could differ as to its meaning; if a statute can support two reasonable interpretations, a court must find the language of the statute to be ambiguous."[44] In section 31A-2, an objective reader could reasonably interpret the term "child" as meaning either "child of any age" or "minor child." The term "child" is often used in section 31A-2 in the context of "care and maintenance" and "abandonment."[45] A parent cannot abandon an adult child, nor does he have the obligation to support an adult child.[46]

Although the context of section 31A-2 suggests that "child" means "minor child," it is still unclear whether the legislature intended "child" to mean "minor child" or "child of any age." This ambiguity is apparent because the statute is logically consistent regardless of the definition of "child." On the one hand, "child" could mean just "minor child." The application of this meaning to the term "child" would cause section 31A-2 to only bar parents from inheriting from minor children.[47] This meaning is consistent with the "care and maintenance" provisions in the statute.[48] On the other hand, "child" could also mean "child of any age." Thus, the legislature could have used "child" merely to identify the person the parent abandoned. Under this meaning, section 31A-2 would bar parents from inheriting regardless of the child's age.[49] Using the term "child" as an identifier does not conflict with the "care and maintenance" provisions in section 31A-2. The legislature drafted section 31A-2 to specify to whom the parent owed the "care and maintenance,"[50] not to substantively affect the duration of the parent's "care and maintenance" obligations. Therefore, in the

43. *Lunsford*, 143 N.C. App. at 652–53, 547 S.E.2d at 486–87.

44. 73 AM. JUR. 2D *Statutes* § 114 (2001) (footnote omitted); *see also* 2A SINGER, *supra* note 41, § 45.02 (stating that "[a]mbiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses").

45. *See* N.C. GEN. STAT. § 31A-2 (2001); *infra* notes 77–87 and accompanying text.

46. *See infra* note 82.

47. *See* § 31A-2.

48. *See id.*

49. *See id.*

50. *Id.*

context of section 31A-2, the definition of the term "child" is ambiguous because it "can support two reasonable interpretations."[51]

To support its holding that "child" in section 31A-2 unambiguously means "child of any age," the court of appeals reasoned that unless the term "minor" is used to modify the term "child," "child" means "person of any age."[52] The court reasoned that sections 48A-1 and 48A-2 of the General Statutes of North Carolina compelled this result.[53] At common law, a person under the age of twenty-one was legally considered a minor.[54] But in 1971, the legislature enacted section 48A-1, which abrogated the common law definition of minor.[55] Section 48A-2, enacted in conjunction with section 48A-1, lowered the age of majority to eighteen.[56] In *Crouch v. Crouch*,[57] the North Carolina Court of Appeals interpreted the enactment of these sections to mean "that wherever the term 'minor,' 'minor child' or 'minor children' is used in a statute, the statute now refers to age 18."[58] The court of appeals in *Lunsford* cited this specific language from *Crouch* but misunderstood its meaning.[59] The court stated, "We interpret [these statutes] to mean that, unless the word 'minor' is inserted before the word 'child,' then 'child' can be a person of any age."[60] This reasoning is erroneous. The purpose of Chapter 48A is to change the meaning of statutes that use the term "minor" so that these statutes apply only to persons under eighteen, as opposed to persons under twenty-one.[61] Chapter 48A does not apply to statutes like section 31A-2 that do not use the term "minor," nor does it mandate that any statute referring to a minor child use the term "minor."[62]

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51. 73 AM. JUR. 2D *Statutes* § 114 (2001).

52. *In re* Estate of Lunsford, 143 N.C. App. 646, 652, 547 S.E.2d 483, 487, *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

53. *Id.*

54. Crouch v. Crouch, 14 N.C. App. 49, 50, 187 S.E.2d 348, 349 (1972).

55. § 48A-1; Act of June 17, 1971, ch. 585, § 1, 1971 N.C. Sess. Laws 510, 510 (codified at N.C. GEN. STAT. § 48A-1 (2001)).

56. *See* §§ 48A-1, -2; § 1, 1971 N.C. Sess. Laws at 510 (codified at N.C. GEN. STAT. § 48A-2 (2001)); *Crouch*, 14 N.C. App. at 50–51, 187 S.E.2d at 349.

57. 14 N.C. App. 49, 187 S.E.2d 348 (1972).

58. *Id.* at 51, 187 S.E.2d at 349.

59. *See In re* Estate of Lunsford, 143 N.C. App. 646, 652, 547 S.E.2d 483, 487 (citing *Crouch*, 14 N.C. App. at 51, 187 S.E.2d at 349), *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

60. *Id.* (citing *Crouch*, 14 N.C. App. at 51, 187 S.E.2d at 349). The court in *Lunsford* did not state its reasoning for this extension of *Crouch*. *See id.*

61. *See* §§ 48A-1, -2; *Crouch*, 14 N.C. App. at 50–51, 187 S.E.2d at 349.

62. *See* §§ 48A-1, -2; *Crouch*, 14 N.C. App. at 50–51, 187 S.E.2d at 349.

The court next reasoned that the dictionary definitions of the term "child" are evidence that the unambiguous meaning of that term is "child of any age."[63] The court stated that "[*The American Heritage*] *Dictionary* defines a child as '[a] son or a daughter; an offspring.' "[64] The court also cited *Black's Law Dictionary* as "defin[ing] a child as '[p]rogeny; offspring of parentage.' "[65] The court relied on these dictionaries to conclude that "child may be a newborn or a person of any age."[66] But the court failed to demonstrate the relevance of dictionaries to its conclusions. Clearly the court could not have intended to cite these dictionaries to support the proposition that the *only* meaning of the term "child" is "child of any age" because both dictionaries further define "child" as a young person.[67] The dictionary definitions of "child" undermine the court's holding that the term "child" in the statute is unambiguous because, in actuality, they support the argument that there are two reasonable interpretations of the definition of "child."

The court further reasoned that "child" must mean "child of any age" because "[t]he law has singled out certain ages and attributed legal significance to them."[68] This reasoning builds upon the court's earlier conclusions regarding the application of sections 48A-1 and 48A-2.[69] The court stated that "[g]enerally, the Legislature has used the term 'minor child' when the age of eighteen is significant."[70] The court also found that "*Black's Law Dictionary* defines a minor as '[a]n

63. *Lunsford*, 143 N.C. App. at 653, 547 S.E.2d at 487.

64. *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY 265 (2d college ed. 1985)).

65. *Id.* (quoting BLACK'S LAW DICTIONARY 239 (6th ed. 1990)).

66. *Id.*

67. *The American Heritage Dictionary* defines "child" as "[a] person between birth and puberty," "an unborn infant; fetus," "an infant; baby." THE AMERICAN HERITAGE DICTIONARY 265 (2d college ed. 1985). In fact, this dictionary lists these definitions before the definition the court of appeals cited. *Id.* The court of appeals cited the sixth edition of *Black's Law Dictionary*. *Lunsford*, 143 N.C. App. at 653, 547 S.E.2d at 487 (citing BLACK'S LAW DICTIONARY 239 (6th ed. 1990)). This edition of *Black's* first defines "child" as "[p]rogeny; offspring of parentage." BLACK'S LAW DICTIONARY 239 (6th ed. 1990). But it further defines "child" as an "[u]nborn or recently born human being" and gives the common law definition of "child" as "one who had not attained the age of fourteen years, though the meaning now varies in different statutes." *Id.* The seventh edition of *Black's Law Dictionary* further defines "child" as "[a] boy or girl; a young person." BLACK'S LAW DICTIONARY 232 (7th ed. 1999). In addition, it states that "[a]t common law, ['child' was defined as a] person who has not reached the age of 14, though the age now varies from jurisdiction to jurisdiction." *Id.* The seventh edition lists these two definitions of "child" before the definition the court embraces. *Id.*

68. *Lunsford*, 143 N.C. App. at 653, 547 S.E.2d at 487.

69. *See id.* at 652, 547 S.E.2d at 487 (citing N.C. GEN. STAT. §§ 48A-1, -2 (1999)); *supra* notes 52–62 and accompanying text.

70. *Lunsford*, 143 N.C. App. at 653, 547 S.E.2d at 487.

infant or person who is under the age of legal competence .... In most states, a person is no longer a minor after reaching the age of 18 ....' "[71] Although this citation of *Black's* is technically correct, it cannot support the court's holding. As discussed previously, one of the definitions of "child" in the seventh edition of *Black's* is "a young person."[72] The seventh edition of *Black's* further defines "minor" as "a child or juvenile."[73] *Black's* therefore cannot establish that the *only* plain and ordinary meaning of the term "child" is "child of any age."

The court then engaged in judicial construction of the statute to assist it in deciding that the plain meaning of "child" is "child of any age." The court reasoned that a construction of the term "child" as "minor child" would be illogical because, applying that definition, an abandoning parent could not inherit from a minor child but could inherit from an adult child.[74] The court's reasoning contradicts established North Carolina precedent. Once a court determines that the statutory language is clear and unambiguous, it must apply that language and should not engage in judicial construction.[75] Thus, the court's act of judicial construction is evidence that the language is ambiguous because otherwise judicial construction would be unnecessary.

2. This Comment's Analysis

As the preceding analysis demonstrates, the court of appeals should have found the term "child" to be ambiguous and should not have engaged in judicial construction to prove that the term "child" is unambiguous. Instead, it should have first concluded that the term "child" is reasonably susceptible to two meanings and should have engaged in statutory interpretation to determine which meaning the legislature intended.[76] Only by rigorously applying the proper rules of statutory interpretation will the court's opinion truly answer the

71. *Id.* (quoting BLACK'S LAW DICTIONARY 997 (6th ed. 1990)).

72. *See supra* note 67.

73. BLACK'S LAW DICTIONARY 1011 (7th ed. 1999).

74. *Lunsford*, 143 N.C. App. at 653, 547 S.E.2d at 487. The court seems to cabin this discussion as merely speculation not necessary to its opinion, but by making this observation, the court strongly suggests that it relied on this reasoning, at least in part, in making its decision. *See id.*

75. Union Carbide Corp. v. Offerman, 351 N.C. 310, 314–15, 526 S.E.2d 167, 170 (2000); *In re* Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978); *supra* notes 39–42 and accompanying text.

76. Frye Reg'l Med. Ctr., Inc. v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999); *Banks*, 295 N.C. at 239, 244 S.E.2d at 389.

question of whether the term "child" means "child of any age" or "minor child."

The court should have first looked to intrinsic aids to determine the meaning of "child."[77] One intrinsic aid is how the legislature used the term "child" in the context of section 31A-2.[78] In dissent, Chief Judge Eagles reasoned that, in the context of the statute, "child" must mean "minor child."[79] In analyzing his claim, the definition of the term "child" in the phrase "shall lose all right to intestate succession in any part of the child's estate" is the controlling issue.[80] The term "child" appears six times in the statute.[81] The first and sixth uses of the term "child" exist in the context of parents' financial support, which, because North Carolina law usually only obligates parents to support their minor children,[82] suggests that the legislature meant for "child" to mean "minor child."[83] The fifth use of the term "child" relates to parental custody of the child.[84] Again, a parent usually only

77. *See* HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 242–74, 276 (2d ed. 1911) (discussing the use of intrinsic aids to resolve statutory ambiguities); *see also* 2A SINGER, *supra* note 41, § 45:14 (defining intrinsic aids as "those which derive meaning from the internal structure of the text and conventional or dictionary meanings of the terms used in it").

78. *See* BLACK, *supra* note 77, at 242–44 (stating that statutory terms must be interpreted based on the context in which they are used); *see also* Underwood v. Howland, 274 N.C. 473, 479, 164 S.E.2d 2, 7 (1968) (quoting 7 STRONG'S N.C. INDEX 2d, *Statutes* § 5 (1968)) (stating that "[w]ords and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit' ").

79. *Lunsford*, 143 N.C. App. at 655, 547 S.E.2d at 488 (Eagles, C.J., dissenting).

80. *See* N.C. GEN. STAT. § 31A-2 (2001).

81. *See id.*

82. Shoaf v. Shoaf, 282 N.C. 287, 289–90, 192 S.E.2d 299, 302 (1972) (stating that a parent only has the duty to support an unemancipated minor child). In North Carolina, a parent's duty to support an unemancipated child continues past the age of majority only if the child is enrolled in primary or secondary school and is making "satisfactory academic progress towards graduation." N.C. GEN. STAT. § 50-13.4(c); *see* 2 SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 10.22 (5th ed. 1999 & Supp. 2002); 3 REYNOLDS, *supra*, § 15.4d (rev. 5th ed. 2002) (citing N.C. GEN. STAT. § 50-13.4(c)). Even if the child is still enrolled in primary or secondary school, the parent's support obligation terminates when the child turns twenty. N.C. GEN. STAT. § 50-13.4(c)(2); 3 REYNOLDS, *supra*, § 15.4d (rev. 5th ed. 2002) (citing N.C. GEN. STAT. § 50-13.4(c)). North Carolina does not require parents to support their disabled children past the age of majority, unless they meet the generally applicable requirements of N.C. GEN. STAT. § 50.13.4(c). *See* 2 REYNOLDS, *supra*, § 10.21 (5th ed. 1999); 3 REYNOLDS, *supra*, § 15.4d (rev. 5th ed. 2002); *see also* Jeffrey W. Childers, Recent Development, Hendricks v. Sanks: *One Small Step for the Continued Support of Disabled Children Beyond the Age of Majority in North Carolina*, 80 N.C. L. REV. 2094 (2002) (explaining that North Carolina does not require parents to support their disabled children past the age of majority).

83. *See* N.C. GEN. STAT. § 31A-2; Appellant's Brief at 16–17, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (____) (No. COA02-904).

has custody of a minor child.[85] The fourth use of the term "child" appears in the context of care and custody. Section 31A-2(1) allows an abandoning parent to recover "[w]here the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death . . . ."[86] By including the provision that the care and maintenance must continue until the child's death, the legislature arguably implied "minor child" because parents usually only have the obligation to support minor children.[87]

The preceding discussion weighs heavily in favor of construing the term "child" in the phrase "shall lose all right to intestate succession in any part of the child's estate" as "minor child" and thus limiting the bar on inheritance to the situation in which the abandoned child dies as a minor. Otherwise, it is arguable that "child" would mean "minor child" in some instances and "child of any age" in others.[88] But because the statute has logical consistency whether "child" means "minor child" or "child of any age," this analysis does not require that "child" be interpreted as "minor child."[89] It is reasonable that the legislature used the term "child," as opposed to "minor child," to ensure the broadest possible construction of the statute to prevent an abandoning parent who did not meet either exception from ever inheriting. Because North Carolina law provides that parents generally have no duty to support their children after the age of minority,[90] an objective reader of the statute could reasonably interpret the term "child" to mean "child of

84. *See* N.C. GEN. STAT. § 31A-2; Appellant's Brief at 16–17, *Lunsford* (No. COA02-904).

85. *See Shoaf*, 282 N.C. at 289–90, 192 S.E.2d at 302; 3 REYNOLDS, *supra* note 82, §§ 13.1–13.2 (rev. 5th ed. 2002). A parent, however, can have custody of a disabled child past the age of majority. *See* N.C. GEN. STAT. § 50-13.8; 2 REYNOLDS, *supra* note 82, § 10.21 (5th ed. 1999).

86. N.C. GEN. STAT. § 31A-2(1).

87. *See id.* § 31A-2; Appellant's Brief at 16–17, *Lunsford* (NO. COA02-904).

88. *See* Appellant's Brief at 16–18, *Lunsford* (No. COA02-904) (arguing that construing section 31A-2 to bar an abandoning parent from inheriting from an adult child results in the term "child" having different meanings within the same statute).

89. *See supra* notes 43–51 and accompanying text. Mr. Lunsford argues that because section 31A-2 cannot have "logical consistency" unless each use of the term "child" is construed as "minor child," the court must interpret each use of the term "child" as "minor child." Appellant's Brief at 16–18, *Lunsford* (No. COA02-904). This Comment disagrees with Mr. Lunsford's conclusion.

90. *See supra* note 82 and accompanying text.

any age" because it seems evident that the legislature did not intend to impose indefinite support requirements.[91]

Also relevant is the use of the term "child" in the Intestate Succession Act, specifically as that term is used in section 29-15(3), which prescribes when parents can inherit from their children.[92] The meaning of the term "child" in section 29-15(3) is evidence of the meaning of that term in section 31A-2 because the North Carolina Supreme Court has held that section 31A-2 "must be deemed a part of the Intestate Succession Act and a modification of G.S. 29-15(3), as fully as if it had been written thereinto or specifically designated as an amendment thereto."[93] While the term "child" is not specifically defined in the Intestate Succession Act, it is always used to refer to

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91. The statute does not mention any additional support requirements. *See* § 31A-2. Based on a February 2003 search of cases citing section 31A-2, no court has ever construed section 31A-2 as requiring support past the age of majority. The results of this search comprise the decisions of the highest court that issued an opinion in cases citing section 31A-2. *See* Manning v. Prudential Ins. Co. of Am., 330 F. Supp. 1198 (E.D. Md. 1971); Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975); Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971); *In re* Peacock, 261 N.C. 749, 136 S.E.2d 91 (1964); McKinney v. Richitelli, No. COA01-727, 2002 WL 553980 (N.C. Ct. App. Apr. 16, 2002), *discretionary review granted*, 355 N.C. 750, 565 S.E.2d 669 (2002); Davis v. MacMillan, 148 N.C. App. 248, 558 S.E.2d 210, *discretionary review denied*, 355 N.C. 490, 563 S.E.2d 564 (2002); Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999), *cert. denied*, 352 N.C. 356, 544 S.E.2d 546 (2000); *In re* Estates of Barrow, 122 N.C. App. 717, 471 S.E.2d 669, *discretionary review dismissed as moot*, 344 N.C. 734, 478 S.E.2d 1 (1996); Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), *aff'd per curiam*, 316 N.C. 546, 342 S.E.2d 522 (1986). Thus, the legislature could reasonably have used the term "child" to refer to the abandoning parent's child regardless of the child's age. Under this construction, support requirements would generally end at the age of majority, but the abandoning parent would be forever barred from inheriting.

92. *See* § 29-15(3). Section 29-15(3) states that "[i]f the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by both parents, they shall take in equal shares."

93. *Williford*, 288 N.C. at 508–09, 219 S.E.2d at 222. As a technical matter, it is arguable that the definition of child in section 29-15(3) is not an intrinsic aid but is an extrinsic aid because section 29-15(3) is actually part of a separate statute. This distinction is irrelevant to this analysis. The purpose of this analysis is to determine, using the available textual evidence, whether child means "minor child" or "child of any age." Thus, even if the definition of child in section 29-15(3) were considered an extrinsic aid, the analysis would yield the same result. The use of the term "child" in section 31A-2 would still be ambiguous and additional textual evidence would be necessary to determine its proper meaning. The next source of this evidence would be section 29-15(3), regardless of whether section 29-15(3) is considered an intrinsic or extrinsic aid. Mrs. Bean argues that section 29-15(3) and the holding in *Williford* conclusively prove that the definition of "child" in section 31A-2 must mean "child of any age." Appellee's Brief at 14–15, *Lunsford* (No. COA02-904). This Comment disagrees with Mrs. Bean's argument because section 31A-2's "care and maintenance" language supports the opposite interpretation of the term "child." Therefore, the definition of "child" in section 29-15(3) is not dispositive, but is merely evidence of the true meaning of the term "child" in section 31A-2.

children of any age and is never used to mean "minor child."[94] Therefore, the legislature's use of the term "child" in both the Intestate Succession Act and section 31A-2 (which modifies the Intestate Succession Act), suggests that the legislature intended "child" to mean "child of any age."

The intrinsic aids of interpretation—the use of "child" within section 31A-2 and the definition of child in the Intestate Succession Act—do not provide a conclusive definition of the term "child." In fact, they may conflict. The court should therefore look to the policy of the statute and its legislative history to determine the interpretation the legislature intended. To determine legislative intent, it is necessary to look at the circumstances surrounding and the reasons for the enactment of section 31A-2.[95] The legislature enacted the predecessor to current section 31A-2 in 1927[96] in response to *Avery v. Brantley*,[97] a 1926 North Carolina Supreme Court case

94. *See* §§ 29-1 to -30. The Intestate Succession Act defines lineal descendants as "children," which implies that "child" in section 31A-2 means "child of any age." *See id.* § 29-2(4); *see, e.g.*, Betts v. Parrish, 312 N.C. 47, 49–53, 320 S.E.2d 662, 663–65 (1984) (holding that a sixty-six-year-old decedent's property passed to his mother through section 29-15(3)).

95. The North Carolina Supreme Court has held that legislative history can be useful in determining the legislature's intent in enacting a statute. In *State v. Green*, the court stated:

> [T]he legislative intent ". . . is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means . . . ." Other indicia considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes.

348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (quoting *In re* Banks, 295 N.C. 236, 239–40, 244 S.E.2d 386, 388–89 (1978)) (internal quotations and citations omitted) (emphasis omitted). *See generally* Thomas P. Davis, *Legislative History in North Carolina: Three-Dozen Cases of the Twentieth Century* (Aug. 6, 2001), *at* http://www.aoc.state.nc.us/www/copyright/library/leghrefs.htm (on file with the North Carolina Law Review) (discussing the use of legislative history in North Carolina).

96. Act of Mar. 9, 1927, ch. 231, 1927 N.C. Pub. Laws 591, 591–92 (repealed 1960). The predecessor stated:

> *Provided*, that a parent, or parents, who has wilfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section.

Id. § 1, 1927 N.C. Pub. Laws at 592 (internal quotations omitted).

97. 191 N.C. 396, 131 S.E. 721 (1926). Professor Bryan Bolich, one of the members of the drafting committee for Chapter 31A, stated that the legislature enacted the predecessor to section 31A-2 in response to the decision in *Avery*. W. Bryan Bolich, *Acts*

that awarded an abandoning father one-half of the wrongful death award for the death of his four-year-old child.[98] Former section 28-149(6) of the General Statutes of North Carolina, section 31A-2's predecessor, was abolished in 1960 with the enactment of the new Intestate Succession Act.[99] The North Carolina General Assembly then enacted a new Chapter 31A to update and consolidate all statutes dealing with inheritance by unworthy heirs.[100]

In *Quick v. United Benefit Life Insurance Co.*,[101] the North Carolina Supreme Court used extrinsic aids to construe certain provisions (other than section 31A-2) in Chapter 31A.[102] The court primarily relied on three sources to interpret the statute: a *Special Report* submitted to the legislature by the North Carolina General Statutes Commission;[103] a law review article by Professor Bryan Bolich, who helped draft the statute;[104] and an earlier law review

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Barring Property Rights, 40 N.C. L. REV. 175, 184 (1962); *see also* Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517, 532–33 (1994) (discussing the history of section 31A-2). The North Carolina Supreme Court has cited Professor Bolich's article as an authoritative source of the legislative history of Chapter 31A. *See* Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 52–53, 55–56, 213 S.E.2d 563, 566–67, 568 (1975) (quoting Bolich, *supra*, at 193–94, 221). Oddly, no North Carolina court has ever specifically stated that section 31A-2 and its predecessor were enacted in response to *Avery*. The North Carolina Supreme Court has recognized, however, that because of section 31A-2, *Avery* is no longer good law. *See Williford*, 288 N.C. at 509, 219 S.E.2d at 223.

98. *Avery*, 191 N.C. at 398, 400, 131 S.E. at 721, 723.

99. Act of June 10, 1959, ch. 879, § 1, 1959 N.C. Sess. Laws 886, 886 (codified as amended at N.C. GEN. STAT. §§ 29-1 to -30 (2001)); GENERAL STATUTES COMMISSION, SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION ON AN ACT TO BE ENTITLED "ACTS BARRING PROPERTY RIGHTS," at 4 (Feb. 8, 1961) [hereinafter SPECIAL REPORT]; *see also Quick*, 287 N.C. at 51–52, 55, 57, 213 S.E.2d at 565–66, 568, 569 (citing the *Special Report* as authoritative evidence of the legislative intent behind Chapter 31A). In conjunction with the passage of the new Intestate Succession Act, the North Carolina legislature requested that the General Statutes Commission ("Commission") draft comprehensive legislation preventing unworthy heirs from inheriting through intestate succession. The Commission asked Professors Fred B. McCall, Bryan Bolich, and Norman A. Wiggins to serve on a committee to draft the new Act. SPECIAL REPORT, *supra*, at 1. The Commission submitted the *Special Report*, containing the new statute and the drafting committee's commentary, to the North Carolina General Assembly on February 8, 1961. *Id.*

100. *See* Act of Apr. 13, 1961, ch. 210, 1961 N.C. Sess. Laws 350 (codified as amended at N.C. GEN. STAT. §§ 31A-1 to 31A-15 (2001)); SPECIAL REPORT, *supra* note 99, at 1–3.

101. 287 N.C. 47, 213 S.E.2d 563 (1975).

102. *See generally* BLACK, *supra* note 77, at 275–316 (discussing the use of extrinsic aids); 2A SINGER, *supra* note 41, § 45:14 (defining extrinsic aids as "information which comprises the background of the text, such as legislative history and related statutes").

103. *Quick*, 287 N.C. at 51–52, 55, 57, 213 S.E.2d at 565–66, 568, 569 (citing SPECIAL REPORT, *supra* note 99).

104. *Id.* at 52–53, 55–56, 213 S.E.2d at 566–67, 568 (citing Bolich, *supra* note 97, at 193–94, 221).

article by Professor John Wade, who drafted the model act on which most of Chapter 31A is based.[105] This Comment applies these extrinsic aids to interpret section 31A-2. Professor Wade's model act was a slayer act—an act designed to prevent slayers from profiting from their wrongdoing.[106] Because his model act did not include a provision to prevent abandoning parents from inheriting,[107] the *Special Report* and the Bolich article are the primary sources for determining the legislature's reasons for enacting section 31A-2. The *Special Report* states that section 31A-2 was designed "to revise, broaden, and reintroduce sec[tion] 28-149(6)."[108]

Although neither the *Special Report* nor Professor Bolich's article mentions whether the term "child" means "child of any age" or just "minor child,"[109] both sources discuss the purpose of the statute, and that purpose serves as evidence of the intended definition of the term "child." They agree that section 31A-2's purpose is two-fold: to prevent the inequity of allowing a parent to inherit from a child he has abandoned and to encourage parents to make amends with their children by resuming their obligations of "care and maintenance."[110] Thus, an interpretation of the term "child" as meaning "child of any age" rather than "minor child" more accurately reflects the legislative intent behind the statute. To absolve the abandoning parent of all his past wrongs and allow him to inherit from the child just because the child dies after reaching the age of majority would be inequitable.[111] Along these same lines, there is less incentive for a parent to resume

105. *Id.* (citing John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 751 (1936)). *Quick*, the *Special Report*, and Professor Bolich all state that Chapter 31A is based on Professor Wade's model act. *See Quick*, 287 N.C. at 51, 213 S.E.2d at 565–66 (citing SPECIAL REPORT, *supra* note 99, at 1); SPECIAL REPORT, *supra* note 99, at 1 (stating that "[t]he Committee profited greatly from an outstanding and comprehensive study by Mr. Wade"); Bolich, *supra* note 97, at 188–89 (stating that North Carolina's slayer act is based on Professor Wade's model act).

106. *See* John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 751 (1936) (stating that his model act is designed "to take care of every situation in which the slayer may receive any benefit of any kind as a result of the decedent's death").

107. *See generally* Wade, *supra* note 106, at 751 (proposing a model slayer act).

108. SPECIAL REPORT, *supra* note 99, at 4.

109. *See id.* at 3–5 (proposing a new section 31A-2 and commenting on the purpose and reasons for adopting the new section); Bolich, *supra* note 97, at 182–85 (discussing section 31A-2 and the rationale underlying its adoption).

110. SPECIAL REPORT, *supra* note 99, at 3–5; Bolich, *supra* note 97, at 182–85.

111. *See* Appellee's Brief at 18, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (___) (No. COA02-904).

the "care and maintenance" of his child if he knows that once the child reaches eighteen, he is reinserted into the distribution scheme.[112]

On the other hand, defining the term "child" as "child of any age" prevents a parent who does not make amends with his child before the child turns eighteen from ever being able to inherit from her through intestate succession.[113] The parent therefore has less of an incentive to reestablish a relationship with the child after the child reaches the age of majority.[114] The response to this argument, of course, is that the legislature was not concerned with parents' personal relationships with their children, but was instead primarily concerned with ensuring that parents provide for the "care and maintenance" of their children—duties parents owe to their minor children, not their adult children.[115] Thus, under the statute, the abandoning parent should not be able to redeem himself after the child has reached the age of majority, the time at which these duties expire.

In his dissenting opinion in *Lunsford*, however, Chief Judge Eagles reasoned that section 31A-2 only applies when the child dies as a minor because once the child reaches the age of majority, she can make a will to direct the distribution of her estate.[116] Thus, if an adult child does not want her abandoning parent to receive any of the proceeds from her estate, she can write a will leaving the estate to someone else. This observation is problematic at best. First, it still seems inequitable for an abandoning parent to inherit from his child solely because the child survived, with no help from her parent, to the

112. Professor Monopoli argues that the unlikely event that an abandoning parent will inherit from a deceased child likely will not affect his decision whether to support his child. Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 281–82 (1994). Thus, a rule linking inheritance to support is an inefficient way to promote child support. *Id.* Professor Monopoli notes, however, in certain situations "society may still want to adopt a rule which links bad behavior to forfeiture of inheritance." *Id.* at 282. She ultimately concludes that more states should adopt "[a] carefully crafted rule that bars marital and nonmarital parents who abandon or fail to support their children from taking in intestacy." *Id.* at 298.

113. Appellant's Brief at 18–19, *Lunsford* (No. COA02-904) (illustrating the effect of construing the term "child" as "child of any age" and arguing that such a construction is inequitable). *But see* Appellee's Brief at 18–21, *Lunsford* (No. COA02-904) (arguing that such a construction is the only fair result).

114. *See* Appellant's Brief at 18–19, *Lunsford* (No. COA02-904).

115. *See* SPECIAL REPORT, *supra* note 99, at 4–5 (discussing the two exceptions to section 31A-2); Bolich, *supra* note 97, at 185 (discussing how the exceptions to section 31A-2 were added to give abandoning parents an incentive to care for their children).

116. *In re* Estate of Lunsford, 143 N.C. App. 646, 655, 547 S.E.2d 483, 488 (Eagles, C.J., dissenting), *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

age of majority.[117] Second, this reasoning does not accurately address the situation in *Lunsford*, in which the parents are fighting over a wrongful death award, rather than the assets of Candi's estate.[118] In North Carolina, an adult child without a spouse or child can never use a will to fully cut off an abandoning parent without the aid of section 31A-2 because a will has no effect on wrongful death awards, which are distributed in accordance with the Intestate Succession Act.[119] Evidently, in enacting section 31A-2, the General Assembly fully intended to prevent abandoning parents from sharing in wrongful death awards, as the original statute was enacted in response to an abandoning father who received one-half of a wrongful death award.[120] A full consideration of the legislative goal of preventing unworthy heirs from inheriting through intestate succession or sharing in wrongful death awards strongly supports a finding that "child" means "child of any age."[121]

In light of the legislative history behind section 31A-2 and the use of the term "child" in section 29-15(3) of the General Statutes of North Carolina, this Comment concludes that the legislature intended the phrase "shall lose all right to intestate succession in any part of the child's estate"[122] to mean that an abandoning parent will be barred from inheriting from his child or sharing in wrongful death proceeds regardless of the child's age. As the majority opinion correctly stated, the legislature did not limit the meaning of "child's estate" to "minor child," nor did it mention the age at which the child dies.[123] The legislature's goal in enacting this statute was to prevent abandoning parents from profiting from an abandoned child's death, and a

117. *See supra* note 111 and accompanying text.

118. *See Lunsford*, 143 N.C. App. at 647–48, 547 S.E.2d at 484; *supra* note 1 and accompanying text.

119. *See supra* note 4 and accompanying text.

120. The North Carolina Supreme Court's decision in *Avery v. Brantley*, 191 N.C. 396, 131 S.E. 721 (1926), to allow an abandoning parent to share in a wrongful death award spurred the North Carolina legislature to enact the predecessor to section 31A-2. *See supra* notes 96–98 and accompanying text. Therefore, to properly understand the legislative purpose behind section 31A-2, it is crucial to remember that its predecessor was enacted in response to a wrongful death award. Given this history, any analysis of the meaning of section 31A-2 must be informed by its effects on both the distribution of a decedent's estate and the distribution of wrongful death awards obtained on behalf of the decedent's estate.

121. *But see* Appellant's Brief at 21, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (___) (No. COA02-904) (quoting SPECIAL REPORT, *supra* note 99, at 4 (stating that " '[i]t can and does happen that [a] child is too young to make a will cutting off the guilty parent' ")).

122. N.C. GEN. STAT. § 31A-2 (2001).

123. *Lunsford*, 143 N.C. App. at 652–53, 547 S.E.2d at 487.

construction of the term "child" to mean "child of any age" best effects that intention.

3. Is It Relevant Whether Section 31A-2 Is Penal or Nonpenal?

Determining whether section 31A-2 is a penal statute is also relevant to the definition of the term "child." After losing in the court of appeals, however, Mr. Lunsford now argues that interpreting "child" as "child of any age" is penal and therefore violates the legislature's asserted intent in enacting Chapter 31A.[124] He relies on section 31A-15, which states that Chapter 31A " 'shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong.' "[125] Mr. Lunsford argues that if the court interprets the term "child" to mean "child of any age," instead of "minor child," the court would violate section 31A-15 by construing section 31A-2 in a penal manner.[126] He reasons that if the court were to construe section 31A-2 as barring an abandoning parent from inheriting from his adult child, the statute would be purely penal; the parent could no longer reinsert himself into the distribution scheme by resuming the care and maintenance of his child because a parent has no duty to care for his adult child.[127] Thus, if the statute contains

124. *See* Appellant's New Brief at 14–16, *In re* Estate of Lunsford, 354 N.C. 571, 556 S.E.2d 292 (2001) (No. 362A01) (advancing this argument); Appellant's Brief at ii, *In re* Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483 (2001) (No. COA00-674) (lacking this argument). Because Mr. Lunsford did not make this argument to the court of appeals, it is likely that the authors of the majority and dissenting opinions did not even consider addressing this point, as no North Carolina court has ever discussed whether section 31A-2 is penal. *See infra* note 145 and accompanying text. After remand, Mr. Lunsford continues to advance this argument in his brief to the North Carolina Court of Appeals. Appellant's Brief at 22–25, *Lunsford* (No. COA02-904). While this Comment ultimately rejects this argument, because it is currently before the North Carolina Court of Appeals, it is worthy of thorough analysis.

125. Appellant's Brief at 23, *Lunsford* (No. COA02-904) (quoting N.C. GEN. STAT. § 31A-15 (2001)).

126. *Id.* at 22–25 (arguing that "[i]f the statute is not penal, it should not punish a person for acts that occurred while a child was a minor and who later dies after the age of majority" because once the child reaches the age of majority, the abandoning parent can no longer correct his wrongs). Mr. Lunsford seems skeptical about the legislature's true motives in enacting sections 31A-2 and 31A-15. *See id.* In his brief, he intimates that the legislature was really doing one thing (passing a penal statute) and saying another (that the statute was not penal). *See id.* He argues that although the legislature stated in section 31A-15 that section 31A-2 should not be construed in a penal manner, in fact section 31A-2 "*is penal* in nature, or has, at the very least, been used that way." *Id.* at 24. Ultimately, Mr. Lunsford argues that the court should take the legislature at its word and construe section 31A-2 in a manner that is not penal, and the only way to do that is to construe the term "child" as "minor child." *Id.* at 22–25.

no provision to allow the abandoning parent to absolve himself of his prior mistakes, it would serve only one goal—punishment—and this goal violates the asserted intent of the legislature.[128]

The earlier analysis of the legislative history behind section 31A-2 and the use of the term "child" in the context of the Intestate Succession Act refutes Mr. Lunsford's contention that the term "child" must be construed as "minor child" in order to comport with legislative intent. Further, his argument fails to withstand an analysis of why the legislature enacted section 31A-15. Mr. Lunsford correctly recognizes that the purpose of section 31A-15 is to prevent courts from strictly construing Chapter 31A.[129] But his argument assumes that the legislature enacted section 31A-15 to ensure that courts would not construe section 31A-2 in a manner that penalizes abandoning parents.[130] In his article proposing the model slayer act on which Chapter 31A is based, Professor Wade discussed the reasons for his section 15, which the North Carolina legislature enacted verbatim (with additions) as section 31A-15 of the General Statutes of North Carolina.[131] Professor Wade inserted this section because in many jurisdictions, when the legislature enacted a slayer act, the courts would find the act penal and strictly construe it.[132] He wanted to make clear to the courts that the slayer act is not penal and therefore should not be strictly construed.[133] Professor Wade argued that the slayer act was not penal because "nothing that the slayer already has is taken away from him; he is merely prevented from *acquiring* property as a result of his having killed the decedent—this in pursuit of a principle equitable in its nature rather than penal."[134] As Professor Wade recommended, the legislature enacted section 31A-15 to remind courts that it did not believe Chapter 31A was

127. *See id.* For an analysis of whether construing section 31A-2 to prevent an abandoning parent from inheriting from his adult child is penal, rather than equitable, see *infra* notes 137–47 and accompanying text.

128. Appellant's Brief at 22–25, *Lunsford* (No. COA02-904).

129. *Id.* at 23 (stating that it "would appear the General Assembly wanted to avoid strict scrutiny of [Chapter 31A] by claiming the [Chapter] is not punitive").

130. *See id.* at 22–25.

131. Wade, *supra* note 106, at 750–51. It is unclear, however, whether the legislature is truly commanding the courts to construe this statute broadly because section 31A-2 does not technically deal with a situation in which the unworthy heir, if allowed to inherit, would profit *by* his own wrong; he would really be profiting *in spite of* his wrong. *See* N.C. GEN. STAT. § 31A-2 (2001); Appellant's Brief at 23–24, *Lunsford* (No. COA02-904).

132. Wade, *supra* note 106, at 751.

133. *Id.*

134. *Id.* (discussing section 15 of his model act, on which section 31A-15 is based).

penal and therefore they should not strictly construe it.[135] Mr. Lunsford tries to demonstrate that the child abandonment statute is more penal than the slayer statutes, but this argument is irrelevant to an analysis of whether a broad construction of section 31A-2 is impermissible under section 31A-15.[136] Because the purpose of section 31A-15 is to ensure that courts do not mistake Chapter 31A as penal and construe it strictly, a court's broad construction of section 31A-2 will not conflict with the legislative purpose behind section 31A-15, as a broad construction is actually consistent with that purpose.

Mr. Lunsford next argues that notwithstanding the legislature's statement in section 31A-15 that section 31A-2 is not penal, the manner in which courts have applied it is penal; therefore it must be strictly construed.[137] If a court determines that a statute is penal, it will strictly construe that statute[138] by excluding everything that "does not come within the scope of the language used, taking the words in their natural and ordinary meaning."[139] To address Mr. Lunsford's argument, it is necessary to analyze whether section 31A-2, as applied, is truly a penal statute.

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135. *See* SPECIAL REPORT, *supra* note 99, at 30–32. The authors of the *Special Report* recognized the doctrine that when a statute regulates conduct (in this case the killing of another person) that the common law had previously regulated, courts will presume that the legislature intended to abrogate the common law with respect to any activities previously covered by the common law but not covered by the statute. *Id.* at 31. The *Special Report* states that the purpose of section 31A-15 is to codify explicitly that Chapter 31A does not abrogate any common law remedies that may be used to prevent slayers from receiving property from their victims. *Id.* Chapter 31A should not be construed strictly because it does not seek to supplant the common law. *Id.*; *see also* Bolich, *supra* note 97, at 220–22 (discussing the reasons for section 31A-15). In *Quick v. United Benefit Life Insurance Co.*, 287 N.C. 47, 213 S.E.2d 563 (1975), the court found that Chapter 31A, article 3 (the slayer act provisions) was not in derogation of the common law and should not be strictly construed. *See id.* at 56, 213 S.E.2d at 569.

136. Mr. Lunsford argues that Candi, if she wished, could have written a will to prevent him from inheriting. *See* Appellant's Brief at 24, *Lunsford* (No. COA02-904). As discussed earlier, this argument is erroneous because a will has no effect on the distribution of wrongful death proceeds, which are the focus of this litigation. *See supra* notes 4, 116–18 and accompanying text.

137. Appellant's Brief at 24, *Lunsford* (No. COA02-904).

138. Vogel v. Reed Supply Co., 277 N.C. 119, 131, 177 S.E.2d 273, 280–81 (1970).

139. Jones v. Ga.-Pac. Corp., 15 N.C. App. 515, 518, 190 S.E.2d 422, 424 (1972). It is unclear whether the legislature has the power to force North Carolina's courts to broadly construe a penal statute. *See* 3 SINGER, *supra* note 41, § 59:7 (stating that "legislative attempts to modify the old rule of strict construction have met with little favor from the courts"). Thus, even though section 31A-15 instructs the court to broadly construe Chapter 31A, if the court were to determine that the chapter is penal, it might still construe it strictly.

In the strictest sense, a penal statute is one that prescribes a punishment for a crime.[140] More broadly, a statute that levies a penalty or causes a forfeiture of property may be considered penal.[141] Section 31A-2 does not prescribe a punishment for a crime because it is not a criminal statute.[142] The question, therefore, is whether it penalizes Mr. Lunsford. Mr. Lunsford seeks to distinguish section 31A-2 from the slayer provisions in Chapter 31A by arguing that the slayer sections fulfill the equitable purpose of Chapter 31A by preventing slayers from benefiting from their acts.[143] His position is that section 31A-2, on the other hand, does not *prevent* abandoning parents from benefiting from their bad acts, but instead *punishes* them for these acts.[144] A review of the relevant North Carolina law and the policies behind section 31A-2, however, indicates that section 31A-2 is not a penal statute. No North Carolina court has ever held section 31A-2 to be penal,[145] nor have courts in the nine other states with similar statutes held those statutes to be penal.[146] As mentioned before, Professor Wade, the architect of Chapter 31A's slayer statute provisions, did not believe that a statute preventing unworthy heirs from inheriting is penal.[147] The purpose of section 31A-2 is curative—

140. 73 AM. JUR. 2D *Statutes* § 9 (2001).

141. *Id.*

142. *See* N.C. GEN. STAT. § 31A-2 (2001).

143. Appellant's Brief at 22–25, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (___) (No. COA02-904).

144. *See id.* at 23.

145. No cases have discussed whether section 31A-2 is penal or should be strictly construed. *See supra* note 91 (listing cases citing section 31A-2).

146. The intestacy laws of at least nine states other than North Carolina bar an abandoning parent from inheriting from an intestate child. *See* CONN. GEN. STAT. ANN. § 45a-439 (West 1993); KY. REV. STAT. ANN. § 391.033 (Michie Supp. 2002); MONT. CODE ANN. § 72-2-124 (2001); N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1998); N.D. CENT. CODE § 30.1-04-09 (1996); OHIO REV. CODE ANN. § 2105.10 (Anderson 2002); 20 PA. CONS. STAT. ANN. § 2106(b) (West Supp. 2002); S.C. CODE ANN. § 62-2-114 (Law. Co-op. Supp. 2002); VA. CODE ANN. § 64.1-16.3 (Michie 2002). In a 1994 article, Professor Monopoli identified eight states with abandonment statutes. Monopoli, *supra* note 112, at 267. Since she wrote her article, Kentucky and South Carolina have enacted statutes to prevent abandoning parents from inheriting. Mandy Jo's Law, ch. 414, § 1, 2000 Ky. Acts 1402, 1402 (codified at KY. REV. STAT. ANN. § 391.033 (Michie Supp. 2002)); Act of May 29, 1996, No. 370, § 1, 1996 S.C. Acts 2235, 2236 (codified at S.C. CODE ANN. § 62-2-114 (Law. Co-op. Supp. 2002)). A greater number of states prevent an abandoning parent from sharing in wrongful death proceeds. Emile F. Short, Annotation, *Parent's Desertion, Abandonment, or Failure to Support Minor Child as Affecting Right or Measure of Recovery for Wrongful Death of Child*, 53 A.L.R.3d 566, 569 (1973). A February 2003 search of case law in the nine states other than North Carolina with statutes barring abandoning parents from inheriting revealed no cases discussing whether those statutes should be construed strictly.

147. *See supra* note 134 and accompanying text.

it is designed to encourage abandoning parents to comply with child support orders and to reestablish relationships with their children.

This Comment argues that section 31A-2 is not penal and therefore should not be strictly construed. Even assuming the statute is penal, a strict construction of the statute would not force a court to construe the term "child" to mean "minor child." Mr. Lunsford is correct when he states that "[p]enal statutes must be strictly construed to exclude everything from the operation of the statutory language that is not within the reasonable meaning of the explicit wording of the statute."[148] But construing the term "child" to be "child of any age" is "within the reasonable meaning" of section 31A-2 because this is the definition of "child" used in the Intestate Succession Act.[149] It is also one of the plain meanings of the term "child."[150] In addition, just because a court must construe a statute strictly, the court should not interpret the statute narrowly; instead, the court should construe it in accordance with legislative intent.[151] One of the purposes of construing statutes strictly is to ensure that the defendant knows what conduct is proscribed.[152] In this case, the conduct that section 31A-2 seeks to proscribe is child abandonment.[153] Whether the term "child" is defined as "minor child" or "child of any age" has no effect on the definition of the underlying wrong the legislature seeks to address. Even Mr. Lunsford does not contest that the statute is clear that child abandonment is the trigger that could prevent him from inheriting from his daughter.[154]

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148. Appellant's Brief at 24, *Lunsford* (No. COA02-904) (citing Hilgreen v. Sherman's Cleaners & Tailors, Inc., 225 N.C. 656, 660–61, 36 S.E.2d 252, 255 (1945); Moose v. Barrett, 223 N.C. 524, 527, 27 S.E.2d 532, 534 (1943); Harrison v. Guilford County, 218 N.C. 718, 721–22, 12 S.E.2d 269, 272 (1940)).

149. *See* N.C. GEN. STAT. § 29-15(3) (2001); *supra* note 94 and accompanying text.

150. *See supra* notes 64–65 and accompanying text.

151. *In re* Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978) (stating that a criminal statute must be construed "with regard to the evil which it is intended to suppress"); Harrison v. Guilford County, 218 N.C. 718, 722, 12 S.E.2d 269, 272 (1940) (stating that statutes should not be "narrowly construed").

152. 3 SINGER, *supra* note 41, § 59:3 (stating that the doctrine of strict construction is designed to ensure that persons subjected to penal statutes receive "clear and unequivocal warning . . . concerning actions that would expose them to liability for penalties and what the penalties would be").

153. *See* N.C. GEN. STAT. § 31A-2; SPECIAL REPORT, *supra* note 99, at 4–5.

154. *See* Appellant's Brief, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (____) (No. COA02-904). Mrs. Bean makes a much less persuasive and more cursory counterargument to Mr. Lunsford's penal statute/strict construction argument. She simply states that applying section 31A-2 to prevent Mr. Lunsford from sharing in the wrongful death award "is not penal. Its application simply requires consequences to be imposed for one's own sorry, irresponsible, and willfully neglectful actions." Appellee's Brief at 21, *Lunsford* (No. COA02-904).

Section 31A-2 is not penal and should not be strictly construed. Even if courts were required to construe this statute strictly, strict construction would still require that they construe it in accordance with legislative intent. To effect this intent, courts should interpret the term "child" to mean "child of any age."

C. *Analyzing the Applicability of Section 31A-2(2) to Mr. Lunsford*

After holding that the term "child" means "child of any age" and not "minor child," the court of appeals analyzed Mr. Lunsford's claim that the second exception to section 31A-2 allowed him to share in the wrongful death award.[155] The court of appeals's analysis of section 31A-2(2) is significantly flawed, and, if adopted by North Carolina's courts, would effectively eliminate the statute's second exception. The second exception to section 31A-2 states that "[w]here a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child," section 31A-2 will not apply.[156] The court of appeals's decision in *Lunsford* focused on whether the divorce judgment truly deprived Mr. Lunsford of the custody of his daughter.[157] In support of its conclusion that the divorce judgment did not deprive Mr. Lunsford of custody, the court cited *Lessard v. Lessard*[158] and *Hixson v. Krebs*,[159] the only other North Carolina cases that have construed section 31A-2(2). Both of these cases dealt with the significance of divorce judgments to section 31A-2(2).[160] A close reading of *Lessard* demonstrates that it has no relevance to the question of whether Mr. Lunsford was truly "deprived of the custody" of Candi because the issue in *Lessard* was whether the father had "substantially complied" with the custody

155. Mr. Lunsford disputes Superior Court Judge Burke's April 12, 2002, factual finding that he abandoned his daughter. Appellant's Brief at 9–11, *Lunsford* (No. COA02-904). Mr. Lunsford argues that the evidence does not support a finding of abandonment and therefore section 31A-2 should not prevent him from sharing in the wrongful death award. *Id.* A determination of abandonment is highly factual and an analysis of the propriety of the superior court judge's ruling is beyond the scope of this Comment.

156. § 31A-2(2).

157. *In re* Estate of Lunsford, 143 N.C. App. 646, 653–54, 547 S.E.2d 483, 487–88, *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

158. *Id.* (citing Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985)).

159. *Id.* (citing Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999)).

160. *Id.* at 653–54, 547 S.E.2d at 487.

order.[161] *Hixson*, however, squarely addressed the issue of whether a divorce judgment actually deprived the abandoning parent of the custody of his child.[162] In *Hixson*, the North Carolina Court of Appeals reasoned that a divorce judgment did not deprive the mother of custody because she had entered into an earlier separation agreement giving sole custody of their children to her husband.[163] Therefore, the court-issued divorce judgment only continued the custody arrangement to which the mother had already agreed and did not take custody away from her.[164]

In *Lunsford*, the court of appeals disregarded the plain meaning of the statute that supported Mr. Lunsford's assertion that he was deprived of custody by the divorce judgment,[165] and instead reasoned that because the divorce judgment did not terminate Mr. Lunsford's parental rights, the exception to section 31A-2 did not apply.[166] To support its construction, the court erroneously "analogized" from *Lessard* and *Hixson*. The majority admitted that the divorce judgment "granted sole 'care, custody and control' of Candi Lunsford" to Mrs. Bean.[167] But it concluded that because the divorce judgment did not forever bar Mr. Lunsford from *seeking* custody or visitation of his daughter or prevent him from making child support payments, it did not deprive him of the custody of his daughter for the purposes of section 31A-2(2).[168] The majority thus thoroughly misinterpreted the purpose of section 31A-2(2). Its purpose is to encourage the payment of child support by providing an exception for a parent who, while he indisputably had abandoned the care and maintenance of his child, nevertheless made his required child

161. *See* Lessard v. Lessard, 77 N.C. App. 97, 101–02, 334 S.E.2d 475, 478 (1985). In *Lessard*, the issue was whether the trial court should have granted summary judgment to the plaintiff, the abandoning father, on the question of whether he had substantially complied with the child support order. *Id.* The plaintiff, instead of making the full child support payments each month, allegedly transferred property to his ex-wife to satisfy the difference. *Id.* at 102, 334 S.E.2d at 478. The court of appeals held that summary judgment was improper and remanded the case for trial. *Id.*

162. *See* Hixson v. Krebs, 136 N.C. App. 183, 190–91, 523 S.E.2d 684, 688 (1999).

163. *Id.*

164. *Id.*

165. *See Lunsford*, 143 N.C. App. at 653, 547 S.E.2d at 487 (stating that "[t]he 1985 divorce judgment granted sole 'care, custody and control' of Candi Lunsford to petitioner [Bean]"); Appellant's Brief at 12–15, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (____) (No. COA02-904).

166. *Lunsford*, 143 N.C. App. at 653–54, 547 S.E.2d at 487–88; *see* Appellant's Brief at 12–13, *Lunsford* (No. COA02-904).

167. *Lunsford*, 143 N.C. App. at 653, 547 S.E.2d at 487.

168. *Id.* at 653–54, 547 S.E.2d at 487–88.

support payments.[169] To qualify for the section 31A-2(2) exception, a parent need not resume the care and maintenance of his child; he need only pay his child support payments.[170] If the parent resumed the care and maintenance of his child, he would not need the benefit of section 31A-2(2) because he could qualify for the section 31A-2(1) exception. Here the majority has significantly changed the meaning of the clear statutory language.

The court also completely disregarded its holding in *Hixson*, which turned on the fact that the abandoning mother had already given up her rights to custody in an earlier separation agreement.[171] The court further violated the rules of statutory construction by disregarding the plain meaning of the term "custody" and replacing it with "parental rights."[172] If the divorce judgment had deprived Mr. Lunsford of his parental rights, there would be no lawsuit, because a parent whose parental rights have been terminated cannot inherit through intestacy;[173] section 31A-2 is therefore inapplicable.[174] Thus,

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169. *See* Bolich, *supra* note 97, at 185 ("It seems desirable to permit a parent deprived of custody of his or her child to participate in the child's estate if the parent has supported the child. Moreover, such a provision should encourage child care.").

170. *See* N.C. GEN. STAT. § 31A-2(2) (2001).

171. *See* Hixson v. Krebs, 136 N.C. App. 183, 190–91, 523 S.E.2d 684, 688 (1999). In *Hixson*, the court focused on the fact that because the abandoning mother had given up her custody rights in the separation agreement, the court-issued divorce judgment did not take these rights away from her. *Id.* The court in *Hixson* held that the plain language of the term "deprive" meant that, for the section 31A-2(2) exception to apply, the divorce judgment had to take custody away from the abandoning parent. *Id.*

172. *See Lunsford*, 143 N.C. App. at 653–54, 547 S.E.2d at 487–88. In *Lunsford*, the court of appeals, in direct opposition to *Hixson*'s command that the court adhere to the plain language of section 31A-2(2), failed to construe the term "custody" in accordance with its plain meaning. *See id.* There is a significant legal difference between the deprivation of custody and the termination of parental rights. A parent whose parental rights are terminated no longer has any rights or obligations to his child. N.C. GEN. STAT. § 7B-1112 (2001); *see* 3 REYNOLDS, *supra* note 82, § 17.44 (rev. 5th ed. 2002) (discussing the consequences of an order terminating a parent's parental rights). Once a parent's parental rights are terminated, he does not even have standing to seek custody of his children. Krauss v. Wayne County Dep't of Soc. Servs., 347 N.C. 371, 374–75, 493 S.E.2d 428, 430–31 (1997). A parent who is deprived of custody, however, only loses the rights and obligations of custody. Custody includes those "rights and obligations related to giving care, providing protection, and exercising control over a child." 3 REYNOLDS, *supra* note 82, § 13.2a (rev. 5th ed. 2002). Custody is further divided into legal custody and physical custody. Legal custody "refer[s] to the rights and obligations associated with making major decisions affecting the child's life." *Id.* Physical custody "refer[s] to the rights and obligations of the person with whom the child resides." *Id.*

173. *See* N.C. GEN. STAT. § 7B-1112.

174. *See id.*; Appellant's Brief at 13, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (___) (No. COA02-904). By equating parental rights with custody, the court adopts the following logic: (1) Section 31A-2 bars inheritance through intestate succession; (2) the termination of parental rights also bars inheritance through intestate

the court also violated another rule of statutory construction—that a court must construe a statute "so that none of its provisions shall be rendered useless or redundant."[175] By equating custody with parental rights, the court effectively eliminated section 31A-2(2). Because the court's reasoning contravenes the statute's express meaning, principles of logic, and the rules of statutory construction, it should not be followed.

On remand, although Superior Court Judge Burke found that the divorce judgment deprived Mr. Lunsford of custody, he still found a way to prevent the exception from applying. Because the divorce judgment did not require Mr. Lunsford to pay child support, Judge Burke held that Mr. Lunsford "could not comply with all orders of a court requiring contribution to the support of Candi"[176] and therefore section 31A-2(2) did not apply to allow him to share in the wrongful death award. As a matter of statutory interpretation, the language in section 31A-2(2) does not seem to require that the court order depriving the abandoning parent of custody contain support provisions.[177] It merely states that the parent must have "substantially complied with all orders of the court requiring contribution to the support of the child."[178] Judge Burke reasoned that if there is no order there can be no compliance, and without compliance the parent cannot claim the exception.[179] The counterargument is that section 31A-2(2) does not mandate that there be a court order requiring

succession; (3) section 31A-2(2) only allows inheritance if the parent has had his parental rights terminated; (4) therefore, section 31A-2(2) never allows inheritance, because a finding that parental rights have been terminated precludes inheritance. *See* Appellant's Brief at 12–15, *Lunsford* (No. COA02-904) (arguing that by substituting "termination of parental rights" for the term "custody" in section 31A-2(2), the court of appeals effectively eliminated the second exception to the statute).

175. Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981).

176. Record on Appeal at 68–70, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (___) (No. COA02-904).

177. *See* § 31A-2(2). The divorce judgment mentioned child support but did not state why Mr. Lunsford was not required to pay any. Record at 7–8. The judgment stated that Mrs. Bean is the "fit and proper person to have custody of Candice Leigh Lunsford, the minor child" and that there were no outstanding support claims against Mr. Lunsford. *Id.* Mr. Lunsford contends that the divorce judgment considered child support but did not require him to pay any and he fully complied with the divorce decree; thus, he should receive the benefit of the exception. Appellant's Brief at 13–14, *Lunsford* (No. COA02-904) (citing Record at 7–8). Mrs. Bean asserts that the divorce judgment did not prevent Mr. Lunsford from participating in the care and support of Candi, but he refused to do so anyway; therefore, he should not share in the wrongful death award. Appellee's Brief at 8–12, *Lunsford* (No. COA02-904).

178. § 31A-2(2).

179. *See supra* note 176 and accompanying text.

support, and with no order there can be no noncompliance, and no noncompliance equals compliance. As a matter of policy, however, allowing Mr. Lunsford to claim this exception might seem inequitable. Professor Bolich stated that one of the purposes of section 31A-2(2) is to encourage child support.[180] If the court order contains no support requirements, this goal cannot be fulfilled. On the other hand, it seems unfair to deny Mr. Lunsford the benefit of the exception when the divorce judgment considered child support and he has fully complied with that judgment. Therefore, because Mr. Lunsford "substantially complied with all orders of support," he should receive the benefit of the second exception to the statute.[181]

II. REVISED SECTION 31A-2

As the above discussion of *Lunsford* demonstrates, section 31A-2 is imprecise. Chief Judge Eagles noted that "hard cases make bad law."[182] In *Lunsford*, an imprecise law has made a hard case. If section 31A-2 provided clear definitions of "child," "deprived of the custody," and "substantially complied with all orders of support," the court of appeals could have easily dispensed with this case. Instead, the litigation continues. This Comment, therefore, proposes statutory revisions to address the ambiguities in section 31A-2 and to provide a better balance between the often competing goals of equity, the decedent's likely intention, and precision.

A. Location of the Revised Statute

The first question to answer when revising section 31A-2 is where in the statutory scheme it should be located. North Carolina's Intestate Succession Act is located in Chapter 29 of the General Statutes of North Carolina.[183] The statute barring abandoning parents from inheriting from their children through intestate succession (section 31A-2) is located in Article 2 of Chapter 31A: Acts Barring Property Rights.[184] Chapter 31A is divided into four articles: (1) Rights of Spouse; (2) Parents; (3) Wilful and Unlawful Killing of

180. Bolich, *supra* note 97, at 185.

181. *See* Appellant's Brief at 14, *Lunsford* (No. COA02-904).

182. *In re* Estate of Lunsford, 143 N.C. App. 646, 656, 547 S.E.2d 483, 489 (Eagles, C.J., dissenting) (observing that the majority misconstrued section 31A-2 to prevent Mr. Lunsford, whom it considered an unworthy heir, from inheriting), *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

183. §§ 29-1 to -30.

184. *Id.* § 31A-2.

Decedent; and (4) General Provisions.[185] The first question is whether section 31A-2 should remain in Chapter 31A or be moved to Chapter 29. Because it bars property rights, this statute logically fits within Chapter 31A.[186] One of the general provisions of Chapter 31A, however, is section 31A-15, which states that "[t]his chapter . . . shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong."[187] This provision, as written, is somewhat inconsistent with section 31A-2.[188] The legislature enacted section 31A-15 to ensure that courts would prevent slayers, both covered and not covered by the slayer act, from profiting *by* their wrongs.[189] This provision is inconsistent with section 31A-2 because 31A-2 does not prevent abandoning parents from profiting by their wrongs (i.e., the parent is not the one who kills the child), but rather *in spite of* their wrongs. Although section 31A-2 should remain in Chapter 31A, the legislature should amend section 31A-15 so that it logically harmonizes with section 31A-2.[190]

B. The Revised Statute

Professor Anne-Marie Rhodes, an expert in the law of estates and estate planning, identified five questions to consider when drafting a parental abandonment statute: (1) who the parties are; (2) what specific activities by the parent will preclude him from inheriting; (3) how the abandoning parent can remedy past conduct to allow inheritance; (4) how the parental bar will affect the estate's distribution; and (5) what the procedure for determining abandonment will be.[191] The following proposal attempts to address the questions Professor Rhodes has identified, resolve the ambiguities and inconsistencies *Lunsford* revealed in the North Carolina statute, and reassess the balance between the competing interests affected by section 31A-2:

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185. *Id.* §§ 31A-1 to -15.

186. *See id.*

187. *Id.* § 31A-15.

188. *See id.* §§ 31A-2, -15; *supra* note 131.

189. *See* § 31A-15; *supra* note 131.

190. As this Comment has demonstrated, section 31A-15 was enacted to ensure that the slayer act provisions would not be interpreted strictly. *See supra* notes 129–36 and accompanying text. The author suggests revising the first sentence of section 31A-15 to read as follows: "This Chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by [or in spite of] his own wrong."

191. Rhodes, *supra* note 97, at 537–41. *Lunsford* demonstrates that several of these questions remain unanswered by section 31A-2.

Revised § 31A-2. Acts barring rights of parents

(1) Definitions. For the purposes of this section:

(a) Child — When not modified by the term "minor," the term "child" shall have the same meaning as the term "child" in section 29-15(3) of the General Statutes of North Carolina and shall not be limited to "minor child."[192]

(b) Deprived of the custody — A court order that states that a person, entity, or agency other than the parent has the custody of a minor child deprives the parent of the custody of that child. Whether the parent abandoned or otherwise relinquished, voluntarily or involuntarily, custody of the minor child prior to the issuance of the court order is irrelevant to a determination of whether the parent was deprived of custody.[193]

(c) Inherit — The term inherit includes the right to distributions from the child's estate and also the right to share in wrongful death awards.

(d) Minor child — A person is a "minor child" until he or she reaches the age at which section 50-13.4(c) of the General Statutes of North Carolina would no longer require his or her parent(s) to make child support payments.

(2) Subject to subdivisions (a) and (b) of this subsection and to subsection (3), any parent who has wilfully abandoned the care and maintenance of his or her minor child shall not inherit from that child pursuant to the Intestate Succession Act. The administrator of the child's estate must prove wilful abandonment by clear and convincing evidence.

(a) This section prevents inheritance under the Intestate Succession Act without regard to whether the child dies as a minor or as an adult.[194]

(b) If a parent is prohibited by this section from inheriting from his or her deceased child, the property of the deceased child shall be distributed pursuant to

192. *See* § 29-15(3).

193. *See id.* § 31A-2(2).

194. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.4(a) (McKinney 1998) (stating that a parent may not inherit from his or her child if the parent "has failed or refused to provide for, or has abandoned such child while such child is under the age of twenty-one years, whether or not such child dies before having attained the age of twenty-one years").

the Intestate Succession Act as if the parent had predeceased the deceased child.[195]

(3) This section shall not bar a parent from inheriting through intestate succession from his or her child when the parent proves by clear and convincing evidence that:

(a) He or she resumed the care and maintenance of the minor child for at least one year while the child was still a minor child and continued that care until the earlier of either:[196]

(1) The minor child's death; or

(2) The child was no longer a minor child; or

(b) The parent has been deprived of the custody of his or her minor child under an order of a court of competent jurisdiction and the parent has substantially complied with any orders of any court requiring contribution to the support of the minor child.[197] Nothing in this subdivision shall be construed to impose an obligation on an abandoning parent to seek to regain custody or visitation in order to qualify for this exception.

(4) A parent who is barred from inheriting through intestate succession from his deceased child loses all right to administer the deceased child's estate.[198]

(5) No provisions of this section shall be construed to prevent any child from inheriting, either by will or by intestate succession, from a deceased parent.

C. *Discussion of the Revised Statute*

The revised statute answers the relevant questions raised by Professor Rhodes and the ambiguities that are the subject of litigation in the *Lunsford* case. To prevent (or at least limit) disputes over the definitions of the terms "child" and "deprived of the custody" in the statute, subsection (1) clearly defines these terms. The term "child," the construction of which was the subject of the *Lunsford* litigation, is clearly defined to have the same meaning as the term "child" in

195. *See* OHIO REV. CODE ANN. § 2105.10 (Anderson 2002) (providing that "[i]f a parent is prohibited by this division from inheriting from his deceased child, the real or personal property of the deceased child shall be distributed . . . as if the parent had predeceased the deceased child").

196. *See* N.C. GEN. STAT. § 31A-2(1).

197. *See id.* § 31A-2(2).

198. *See id.* § 31A-2.

section 29-15(3) in the Intestate Succession Act and, unless specifically noted, is not limited to "minor child."[199] The revised statute clearly defines the term "deprived of the custody" to prevent disputes over whether a custody order legally deprives someone of custody. This definition not only clarifies existing law, but overrules the holding in *Hixson v. Krebs*.[200] The change is designed to encourage abandoning parents to comply with court orders without the fear that a hypertechnical reading of the term "deprive" will prevent them from inheriting.[201] The term "inherit" is now defined to remedy the technical inapplicability of current section 31A-2 to wrongful death awards.[202]

The addition of the term "minor child" is perhaps the most significant definitional change in the revised statute.[203] The definition of the term "minor child" is tied to the support requirements of section 50-13.4(c) to ensure that revised section 31A-2 is consistent with North Carolina law governing child support. Section 50-13.4(c) governs child support payments and provides that, subject to two exceptions, a parent must pay child support until his child reaches the age of majority.[204] The first exception terminates child support obligations before the age of majority if the child is emancipated.[205] The second exception extends child support obligations until the age of twenty if the child is enrolled in primary or secondary school and is making "satisfactory academic progress towards graduation."[206] Defining "minor child" in accordance with section 50-13.4(c) makes clear that abandoning a child after the child reaches the age of majority but prior to her completion of primary or secondary school could prevent a parent from inheriting from that child. This definition also promotes the curative aspect of section 31A-2 by

199. *See id.* § 29-15(3).

200. 136 N.C. App. 183, 523 S.E.2d 684 (1999); *see supra* notes 162–64 and accompanying text.

201. *See supra* notes 162–64 and accompanying text.

202. Section 31A-2 states that an abandoning parent "shall lose all right to intestate succession in any part of the child's *estate*." § 31A-2 (emphasis added). It specifically limits its operation to the child's estate. Wrongful death proceeds, however, are not part of the child's estate. Although this is a hypertechnical point that the courts have correctly disregarded, the proposed statute corrects it to avoid any ambiguities.

203. This statute does not follow Professor Rhodes's advice against using limiting language such as "minor." Her concern was that a limiting term would lead to questions about the timing of the death of the child. Rhodes, *supra* note 97, at 537–38. As the litigation in *Lunsford* demonstrates, the omission of limiting and explanatory language may cause more problems than it solves.

204. § 50-13.4(c); *see supra* note 82.

205. § 50-13.4(c)(1).

206. *Id.* § 50-13.4(c)(2).

requiring that for abandoning parents to qualify for exception (3)(b), they must make child support payments to the full extent of the law.

Subsection (2) clarifies existing law by explicitly stating that whether the child dies as a minor or an adult makes no difference in whether the abandoning parent will inherit.[207] This subsection does, however, add a procedural change, requiring the estate administrator to prove wilful abandonment by clear and convincing evidence. The revised statute adopts this standard to protect parents against false claims of abandonment,[208] add certainty to the intestate distribution system,[209] and harmonize section 31A-2 with the law governing termination of parental rights.[210]

Subsection (3) is primarily a clarification of existing law, but it contains two notable modifications. Just like current section 31A-2(1), subsection (3)(a) requires one year of both care and maintenance before an abandoning parent may inherit. It clarifies current section 31A-2(1) by explicitly stating that this care and maintenance must be performed while the child is still dependent on her parents for support.[211] Subsection (3) departs from the current statute by requiring abandoning parents to prove by clear and convincing evidence that they meet exception (3)(a) or (3)(b). This heightened burden is imposed to make the abandoning parent's

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207. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.4(a) (McKinney 1998); *supra* note 194.

208. The proposed statute adds this clear and convincing standard to dissuade frivolous charges of abandonment and to ensure that the court will only find abandonment when it is clearly shown by the evidence.

209. One of the goals of intestate succession statutes is to promote certainty in the distribution of the decedent's estate. *See* Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 931 (1989). Certainty is promoted by basing inheritance on easily ascertainable familial relationships. Revised section 31A-2, like current section 31A-2, reduces the certainty in the Intestate Succession Act by basing inheritance not just on a parent's relationship to the deceased (which in most cases is readily ascertainable from the decedent's birth certificate), but on whether the parent abandoned the child. The question of abandonment adds an additional factual inquiry to what is generally a reasonably straightforward process.

210. Barring a parent from inheriting from his child is highly analogous to depriving him of his parental rights—his last right as a parent over his deceased child is to inherit through intestacy. *See* N.C. GEN. STAT. § 7B-1111(b) (providing that the petitioner must show that termination of parental rights is supported by "clear and convincing evidence").

211. Subsection (3) addresses the issue currently being litigated in *McKinney v. Richitelli*, No. COA01-727, 2002 WL 553980 (N.C. Ct. App. Apr. 16, 2002), *discretionary review granted*, 355 N.C. 750, 565 S.E.2d 669 (2002). The question in *McKinney* is whether an abandoning parent who resumes the care and maintenance of his child after the child reaches the age of majority can meet the first exception to section 31A-2. *Id.* at *3. Subsection (3) clearly answers this question in the negative. In so doing, the proposed statute reiterates that parents must meet their obligations to their minor children and post-majority attempts to remedy past abandonment will be ineffective.

burden consistent with that of the administrator, dissuade frivolous claims by abandoning parents, and promote greater certainty in the intestate succession laws.[212]

The other significant departure of subsection (3) from current section 31A-2 is in the method by which an abandoning parent can avoid disinheritance by complying with a court order. As discussed above, the revised statute modifies the definition of "deprived" to overrule *Hixson v. Krebs*.[213] Subsection (3)(b) also provides that the parent must show that he "has substantially complied with *any* orders of *any* court." The use of the term "any," instead of the term "all," before the term "order" explicitly rejects Superior Court Judge Burke's reasoning that because the divorce decree giving Mrs. Bean custody of Candi did not require Mr. Lunsford to make child support payments, he could not have complied with the statutory exception.[214] The insertion of the phrase "of any court" codifies the requirement that to be reinserted into the inheritance scheme, the abandoning parent must comply with all support orders, whether or not issued by the court that deprived him of custody.[215] The current statute implies this requirement, but subsection (3) makes it explicit. Further, the revised statute states explicitly that parents are not required to try to regain custody in order to meet the exception to the bar on inheritance. This provision rejects the majority's holding in *Lunsford* that Mr. Lunsford was not deprived of custody because he could have tried to regain custody.[216] The final two subsections of the revised statute merely codify existing law.

Revised section 31A-2 both clarifies and modifies current section 31A-2. Most importantly, it codifies the notion that an abandoning parent is forever barred from inheriting through intestate succession if he abandons his *minor* child and does not meet one of the statutory exceptions during his child's *minority*. Thus, the revised statute executes the legislative intent to shift the burden to an adult child to specifically include an abandoning parent in her will if she wishes him to inherit. It rejects an interpretation of "child" as "minor child" because, as a matter of policy, a parent should not inherit from a child

212. *See supra* note 196 and accompanying text.

213. *See supra* notes 200–01 and accompanying text.

214. *See supra* notes 176–81 and accompanying text. As discussed *supra*, it seems unfair to prevent a parent from inheriting for not paying child support when the custody order does not require it.

215. This provision ensures that an abandoning parent must comply with all valid support orders to be allowed to inherit.

216. *See In re* Estate of Lunsford, 143 N.C. App. 646, 653–54, 547 S.E.2d 483, 487–88, *vacated and remanded by* 354 N.C. 571, 556 S.E.2d 292 (2001).

through intestate succession merely because the child, through no efforts of the parent, survives until age eighteen. The revised statute also recognizes, as demonstrated in *Lunsford*, that typical eighteen-year-olds do not draft wills.

D. Revised Section 31A-2 and Wrongful Death Awards

The revised statute, therefore, operates equitably with respect to intestate succession. It clearly specifies under what circumstances an abandoning parent will inherit through intestate succession from his child. The revised statute is arguably still deficient, however, in its application to wrongful death awards. Because wrongful death awards always pass by intestacy, even if the child writes a will including a parent as a beneficiary, revised section 31A-2 would still prohibit that parent from sharing in a wrongful death award.[217] In certain situations the inflexibility in the wrongful death statute could lead to inequitable results for an abandoning parent who tries to recover a wrongful death award on behalf of an adult child.[218]

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217. *See supra* notes 4–5 and accompanying text.

218. Consider the absurd result that would be reached in the following hypothetical: A parent abandons his minor child but reestablishes relations with her when she is eighteen. He puts her through college and law school. He then helps her purchase a house. None of these activities qualify as "care and maintenance" under the statute, as they are not legal obligations of the parent. *See* Hixson v. Krebs, 136 N.C. App. 183, 185, 523 S.E.2d 684, 685 (1999) (citations omitted) (quoting Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)) (stating that care and maintenance are the parent's " 'natural and legal obligations' "); *supra* note 30. As discussed *supra*, except in limited situations, parents have no legal obligation to support their children past the age of majority. *Supra* note 82 and accompanying text. Decades later, the parent, who now has a close relationship with his child, has grown old and ill and is fully dependent on the child for support. The child is divorced and has no children. She is tragically killed by a drunk driver. In this situation, the parent needs part of the wrongful death award, but he is not entitled to it because he abandoned the child decades before. The current state of their relationship is irrelevant. Mr. Lunsford uses a similar hypothetical in his brief to illustrate this point. *See* Appellant's Brief at 18–19, *In re* Estate of Lunsford, ___ N.C. App. ___, ___ S.E.2d ___ (____) (No. COA02-904). This hypothetical rests on an understanding of section 31A-2(1) that parents cannot use post-majority attempts at reconciliation to reinsert themselves into intestate succession. This reasoning is consistent with the legislative history of section 31A-2, which demonstrates that one of the statute's primary purposes is to encourage parents to support their minor children. *Supra* notes 109–12 and accompanying text. It is also consistent with the law of parental support. Parents are only legally obligated to provide "care and maintenance" to their minor children. *Supra* note 82 and accompanying text. As these are only legal obligations to minor children, it is only logical that parents may only remedy abdications of parental *obligations* by resuming their parental *obligations*—post-majority gifts of love or money should not suffice. *See supra* note 211 (noting that this issue is currently being litigated in *McKinney v. Richitelli*, No. COA01-727, 2002 WL 553980 (N.C. Ct. App. Apr. 16, 2002), *discretionary review granted*, 355 N.C. 750, 565 S.E.2d 669 (2002)).

Correcting the potentially inequitable effects of revised section 31A-2's application to the wrongful death statute can be accomplished in two ways: amending revised section 31A-2 or amending the wrongful death statute. This Comment focuses on potential revisions to revised section 31A-2; a thorough discussion of potential amendments to the wrongful death statute is beyond the scope of this Comment.

A simple way to ensure that revised section 31A-2 never inequitably bars a parent from sharing in a wrongful death award would be to amend the statute so that it does not apply to wrongful death awards. This would be tantamount to throwing out the baby with the bath water. Wrongful death proceeds often represent the most valuable asset available to the child's survivors. As a result, allowing abandoning parents to share in wrongful death awards would effectively eliminate revised section 31A-2.[219]

A more equitable way to address the inconsistency between wrongful death awards and inheritance through intestacy is to make the application of section 31A-2 to wrongful death awards elective. The legislature could add language to revised section 31A-2 allowing a child in her will to make clear that she wishes to negate the application of section 31A-2 to wrongful death awards. An example of language to this effect would be:

> (6) The child's execution of a will complying with the requirements of Chapter 31 of the General Statutes of North Carolina containing the following or substantially similar language will operate to prevent the application of section 31A-2 to the Intestate Succession Act:
>
> > "I wish to negate any effect section 31A-2 of the General Statutes of North Carolina or any successor statute may have on distributions to [insert name of abandoning parent(s)] through the Intestate Succession Act and ensure that section 31A-2 does not prevent [insert name of abandoning parent(s)] from receiving any distributions pursuant to that Act."

This proposal gives the child the opportunity to decide whether an abandoning parent should be allowed to share in a wrongful death

219. Adopting such a rule would also be inconsistent with the law in the majority of jurisdictions. Short, *supra* note 146, at 569 (stating that "[t]he overwhelming weight of authority is that a parent's desertion or abandonment or failure to support his minor child precludes recovery of damages for the wrongful death of such child").

award. It also prevents litigation over the child's purported intent. If a child includes the provision in her will, section 31A-2 will not apply to wrongful death awards; if she does not, section 31A-2 will apply. Thus, the provision eliminates potentially difficult questions of fact that could slow down the distribution of a wrongful death award.

A disadvantage of this provision is that it is complex. A testator likely would not even be aware that the provision exists. Because of its complexity, unless it became boilerplate, it probably would not be used.[220] A competent lawyer, however, could mitigate these problems. He would simply need to ask his client a few questions regarding the client's parents and any wishes she had with respect to those parents inheriting or sharing in a potential wrongful death award. And because the language is statutorily prescribed, the lawyer would merely need to copy it into the will if his client wished to ensure that an abandoning parent could share in a wrongful death award.

Another way to way to modify revised section 31A-2 would be to allow the abandoning parent to make a showing that he had reestablished a relationship with his adult child and should be allowed to share in the wrongful death award. The following statutory language could be added:

> (6) This section shall not prevent an abandoning parent from sharing in a wrongful death award obtained on behalf of his or her adult child's estate if the parent proves by clear and convincing evidence that he or she established a continuous, caring relationship with his or her adult child after the cessation of the abandonment. The parent must prove that this relationship lasted for five years while the child was an adult and was present at the time of the child's death.

This subsection is narrowly drawn to ensure that it only allows deserving abandoning parents to share in a wrongful death award. The "five years while the child was an adult" provision is designed to prevent a parent from circumventing the "care and maintenance" requirements of revised section 31A-2. For example, a parent could claim that he had always had a continuous relationship with his minor child, but had never paid her support because he could not afford it.

220. E-mail from John V. Orth, William Rand Kenan, Jr., Professor of Law, The University of North Carolina School of Law (Jan. 31, 2003, 17:53 EST) (on file with the North Carolina Law Review) (stating that "[u]nless [subsection (6)] becomes boilerplate, which I can't imagine, it will never be used").

Without this provision, the parent might be able to share in the wrongful death award if the child died shortly after reaching the age of majority, which would be inequitable. In comparison with the earlier statutory revision, this revision has the advantage of providing the abandoning parent a share of the wrongful death award in situations in which the child did not write a will. It has the disadvantage, however, of creating more litigation by introducing additional factual issues.

The legislature could instead modify the wrongful death statute[221] in a number of ways to ensure that it operates logically in conjunction with section 31A-2. First, it could revise the statute to state that wrongful death proceeds pass in accordance with the decedent's will.[222] This provision would carry out the child's intent. If the child wrote a will including the abandoning parent as a beneficiary, the abandoning parent would not be precluded from sharing in the wrongful death award. Second, the legislature could radically overhaul the wrongful death statute and distribute damages to beneficiaries in accordance with their actual losses.[223] Thus, if the abandoning parent could show that he suffered losses under the wrongful death statute, he would be allowed to recover.

CONCLUSION

Section 31A-2 and its interpretation by North Carolina's courts have created unnecessary uncertainty in the administration of the Intestate Succession Act. The *Lunsford* litigation calls into question the accuracy of Professor Bolich's statement that section 31A-2 "specifies with reasonable certainty the conditions under which an abandoning parent may regain expectant rights or interests in his or her child's estate."[224] The legislature should replace current section 31A-2 to achieve reasonable certainty and equity in North Carolina's laws of inheritance.

HEYWARD D. ARMSTRONG

221. Section 28A-18-2 of the General Statutes of North Carolina prescribes how wrongful death awards are distributed. *See supra* notes 3–4 and accompanying text.

222. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-448(b) (West 1993) (providing that wrongful death proceeds are distributed like other assets of the decedent's estate); N.H. REV. STAT. ANN. § 556:14 (1997) (same).

223. Professor Robert G. Byrd has noted that by distributing damages in accordance with the Intestate Succession Act, the manner in which the Act distributes damages is logically inconsistent with the manner in which it calculates damages. Robert G. Byrd, *Recent Developments in North Carolina Tort Law*, 48 N.C. L. REV. 791, 806 (1970).

224. Bolich, *supra* note 97, at 185.