

D R A F T

FOR DISCUSSION ONLY

**AMENDMENTS TO INTESTACY PROVISIONS OF THE  
UNIFORM PROBATE CODE**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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For Drafting Committee Meeting, February 23-25, 2007

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February 6, 2007

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UNIFORM PROBATE CODE**

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**AMENDMENTS TO INTESTACY PROVISIONS OF THE UNIFORM PROBATE CODE**

**TABLE OF CONTENTS**

SECTION 2-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE . . . . . 1

SECTION 2-104. REQUIREMENT THAT HEIR SURVIVE DECEDENT FOR 120  
HOURS; AFTERBORN HEIRS . . . . . 3

SECTION 2-108. [RESERVED.] AFTERBORN HEIRS . . . . . 4

SECTION 2-113. ~~INDIVIDUALS RELATED TO DECEDENT THROUGH TWO LINES~~  
NOT ENTITLED TO MORE THAN ONE SHARE . . . . . 5

SECTION 2-114. PARENT BARRED FROM INHERITING IN CERTAIN  
CIRCUMSTANCES . . . . . 7

SECTION 2-115. PARENT AND CHILD RELATIONSHIP; MARITAL AND  
NONMARITAL CHILDREN . . . . . 9

SECTION 2-116. PARENT AND CHILD RELATIONSHIP; ADOPTED INDIVIDUAL . . . . 10

SECTION 2-117. PARENT AND CHILD RELATIONSHIP; WHEN UNADOPTED  
STEPCHILD TREATED AS ADOPTED . . . . . 12

SECTION 2-118. PARENT AND CHILD RELATIONSHIP; CHILD OF ASSISTED  
REPRODUCTION OTHER THAN A CHILD BORN TO A GESTATIONAL  
MOTHER . . . . . 14

SECTION 2-119. PARENT AND CHILD RELATIONSHIP; CHILD BORN TO A  
GESTATIONAL MOTHER . . . . . 18

SECTION 2-705. CLASS GIFTS CONSTRUED TO ACCORD WITH INTESTATE  
SUCCESSION . . . . . 19

SECTION 3-916. DISTRIBUTION IN CASE OF POSTHUMOUS CONCEPTION . . . . . 21

1                                   **AMENDMENTS TO INTESTACY PROVISIONS**  
2                                   **OF THE UNIFORM PROBATE CODE**

3  
4                                   \* \* \*

5  
6                   **SECTION 2-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.** Any  
7 part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or  
8 the entire intestate estate if there is no surviving spouse, passes in the following order to the  
9 individuals designated below who survive the decedent:

10                   (1) to the decedent's descendants by representation;

11                   (2) if there is no surviving descendant, to the decedent's parents equally if both survive,  
12 or to the surviving parent;

13                   (3) if there is no surviving descendant or parent, to the descendants of the decedent's  
14 parents or either of them by representation;

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

1           (5) if there is no surviving spouse, descendant, parent, descendant of a parent,  
2 grandparent, or descendant of a grandparent, the following rules apply:

3           (A) if there is one deceased spouse, deceased former spouse, or surviving former  
4 spouse who has one or more surviving descendants, the entire intestate estate passes by  
5 representation to the deceased or former spouse’s descendants who survive the intestate  
6 decedent.

7           (B) if there is more than one deceased spouse, deceased former spouse, or  
8 surviving former spouse who has one or more surviving descendants, the entire intestate is  
9 divided into as many equal shares as there are such deceased and surviving former spouses, each  
10 share to be divided by representation among each such spouse’s descendants who survive the  
11 intestate decedent.

12 **Legislative Note:** States that recognize civil unions, domestic partnerships, or similar  
13 relationships between unmarried individuals should add appropriate language after “spouse.”

1           **SECTION 2-104. REQUIREMENT THAT HEIR SURVIVE DECEDENT FOR**  
2 **120 HOURS; AFTERBORN HEIRS.**

3           (a) An individual who was born before the decedent's death but who fails to survive the  
4 decedent by 120 hours is deemed to have predeceased the decedent ~~for purposes of homestead~~  
5 ~~allowance, exempt property, and intestate succession, and the decedent's heirs are determined~~  
6 ~~accordingly. If it is not established by clear and convincing evidence that an individual who~~  
7 ~~would otherwise be an heir survived the decedent by 120 hours, it is deemed that the individual~~  
8 ~~failed to survive for the required period. This section is not to be applied if its application would~~  
9 ~~result in a taking of intestate estate by the state under Section 2-105.~~

10           (b) An individual who was in gestation at the decedent's death is treated as living at the  
11 decedent's death if the individual lives 120 hours after birth.

12           (c) This section applies for purposes of homestead allowance, exempt property, and  
13 intestate succession, and the decedent's heirs are determined accordingly. If it is not established  
14 by clear and convincing evidence that (i) an individual who was born before the decedent's death  
15 survived the decedent by 120 hours for purposes of subsection (a) or (ii) an individual who was  
16 in gestation at the decedent's death lived 120 hours after birth for purposes of subsection (b), it is  
17 deemed that the individual failed to survive for the required period.

18           (d) This section is not to be applied if its application would result in a taking of intestate  
19 estate by the state under Section 2-105.



1           **SECTION 2-113. INDIVIDUALS ~~RELATED TO DECEDENT THROUGH TWO~~**  
2 **~~LINES~~ NOT ENTITLED TO MORE THAN ONE SHARE.** An individual who is related to  
3 the decedent ~~through two lines of relationship~~ in such a manner as would entitle the individual to  
4 more than one share is entitled to only a ~~single~~ one share based on the relationship that would  
5 entitle the individual to the larger or largest share.

1            **~~SECTION 2-114. PARENT AND CHILD RELATIONSHIP.~~**

2            ~~(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by,~~  
3 ~~through, or from a person, an individual is the child of his [or her] natural parents, regardless of~~  
4 ~~their marital status. The parent and child relationship may be established under [the Uniform~~  
5 ~~Parentage Act] [applicable state law] [insert appropriate statutory reference].~~

6            ~~(b) An adopted individual is the child of his [or her] adopting parent or parents and not of~~  
7 ~~his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no~~  
8 ~~effect on (i) the relationship between the child and that natural parent or (ii) the right of the child~~  
9 ~~or a descendant of the child to inherit from or through the other natural parent.~~

10           ~~(c) Inheritance from or through a child by either natural parent or his [or her] kindred is~~  
11 ~~precluded unless that natural parent has openly treated the child as his [or hers], and has not~~  
12 ~~refused to support the child.~~



1 while such child is under the age of+>> <<+twenty-one years:+>>

2  
3 <<+(1) has failed or refused to provide for the child or has abandoned+>> <<+such child,  
4 whether or not such child dies before having attained the+>> <<+age of twenty-one years,  
5 unless the parental relationship and duties are+>> <<+subsequently resumed and continue  
6 until the death of the child; or+>>

7  
8 <<+(2) has been the subject of a proceeding pursuant to section three+>> <<+hundred  
9 eighty-four-b of the social services law which:+>>

10  
11 <<+(A) resulted in an order terminating parental rights, or+>>

12  
13 <<+(B) resulted in an order suspending judgment, in which event the+>> <<+surrogate's  
14 court shall make a determination disqualifying the parent on+>> <<+the grounds  
15 adjudicated by the family court, if the surrogate's court+>> <<+finds, by a preponderance  
16 of the evidence, that the parent, during the+>> <<+period of suspension, failed to comply  
17 with the family court order to+>> <<+restore the parent-child relationship.+>>

18  
19 <<+(b) Subject to the provisions of subdivision eight of section two+>> <<+hundred  
20 thirteen of the civil practice law and rules, the provisions of+>> <<+subparagraph one of  
21 paragraph (a) of this section shall not apply to a+>> <<+biological parent who places the  
22 child for adoption based upon:+>>

23  
24 <<+(1) a fraudulent promise, not kept, to arrange for and complete the+>> <<+adoption  
25 of such child, or+>>

26  
27 <<+(2) other fraud or deceit by the person or agency where, before the+>> <<+death of  
28 the child, the person or agency fails to arrange for the adop+>> <<+tive placement or  
29 petition for the adoption of the child, and fails to+>> <<+comply timely with conditions  
30 imposed by the court for the adoption to+>> <<+proceed.+>>

31  
32 <<+(c) In the event that a parent or spouse is disqualified from taking a+>>  
33 <<+distributive share in the estate of a decedent under this section or+>> <<+5-1.2, the  
34 estate of such decedent shall be distributed in accordance+>> <<+with 4- 1.1 as though  
35 such spouse or parent had predeceased the decedent.+>>

36  
37 § 2. This act shall take effect on the first of January next succeeding the date on which it  
38 shall have become a law.

1            **SECTION 2-115. PARENT AND CHILD RELATIONSHIP; MARITAL AND**  
2 **NONMARITAL CHILDREN.**

3            (a) This section applies for purposes of determining the status of a marital or a nonmarital  
4 child under [this Part] [the laws of intestate succession].

5            (b) Except as provided in Sections 2-118 and 2-119 (relating to children of assisted  
6 reproduction), an individual is the child of his [or her] genetic parents, regardless of their marital  
7 status. The genetic parent and child relationship may be established under [Articles 1 through 6  
8 of the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].

9            ***Legislative Note: States that have enacted the Uniform Parentage Act should use the first***  
10 ***bracketed language in the second sentence of subsection (b).***

1           **SECTION 2-116. PARENT AND CHILD RELATIONSHIP; ADOPTED**

2           **INDIVIDUAL.**

3           (a) This section applies for purposes of determining the status of an adopted individual  
4 under [this Part] [the laws of intestate succession].

5           (b) An adopted individual is the child of his [or her] adopting parent or parents.

6           (c) Except as provided in subsections (d) and (e), an adopted individual is not the child of  
7 his [or her] genetic parents.

8           (d) An individual who is adopted by the spouse of either genetic parent continues to be  
9 the child of:

10                   (1) that genetic parent; and

11                   (2) the other genetic parent, but only for purposes of intestate succession from or  
12 through that genetic parent.

13           (e) If the adoption occurs after the death or incapacity of either genetic parent:

14                   (1) the child remains a child of both genetic parents if the adoption is by a relative  
15 of either genetic parent or the spouse or surviving spouse of such a relative;

16                   (2) the child remains a child of both genetic parents if the adoption is by someone  
17 nominated by a genetic parent to be the child's guardian, but only for purposes of intestate  
18 succession from or through either genetic parent; and

19                   (3) the child remains a child of a genetic parent if the child does not subsequently  
20 become estranged from the genetic family of that genetic parent, but only for purposes of  
21 intestate succession from or through that genetic parent.

22           (f) If a child was adopted more than once, the term "genetic parent" in subsections (d) and

- 1 (e) includes a “previous adoptive parent.”
- 2 **Legislative Note:** States that recognize civil unions, domestic partnerships, or similar
- 3 relationships between unmarried individuals should add appropriate language after “spouse.”



1 **Harry's Comment**

2  
3 According to the ALR annotation, "Modern Status of Law as to Equitable Adoption or  
4 Adoption by Estoppel, 122 ALR 5<sup>th</sup> 205 (2004), 29 states recognize equitable adoption and 15 do  
5 not recognize equitable adoption.  
6

7 There are several issues in equitable adoption discussed in the above article not addressed  
8 in this draft. Wrongful death claims, child support, taxation, etc. To address all issues would  
9 make the statutory language too long and complicated.

1            **SECTION 2-118. PARENT AND CHILD RELATIONSHIP; CHILD OF**  
2 **ASSISTED REPRODUCTION OTHER THAN A CHILD BORN TO A GESTATIONAL**  
3 **MOTHER.**

4            (a) This section applies for purposes of intestate succession by, through, or from a child  
5 conceived by means of assisted reproduction by a woman other than a gestational mother.

6            (b) In this section:

7                    (1) “assisted reproduction” means a method of causing pregnancy other than  
8 sexual intercourse. The term includes:

9                                    (A) intrauterine insemination;

10                                   (B) donation of eggs;

11                                   (C) donation of embryos;

12                                   (D) in-vitro fertilization and transfer of embryos; and

13                                   (E) intracytoplasmic sperm injection.

14                    (2) “Third-party Donor” means an individual who produces eggs or sperm used  
15 for assisted reproduction, whether or not for consideration. The term does not include:

16                                   (A) a husband who provides sperm, or a wife who provides eggs, to be  
17 used for assisted reproduction by the wife;

18                                   (B) a woman who gives birth to a child by means of assisted reproduction  
19 other than a gestational mother; or

20                                   (C) a parent under subsection (d).

21                    (3) “functioned as the child’s parent” means performing functions that are  
22 customarily performed by a parent.

1 (c) A child who is conceived by means of assisted reproduction is not the child of a third-  
2 party donor.

3 (d) Except as provided in subsections (e) and (f), a child who is conceived by means of  
4 assisted reproduction is a child of an individual who consented to be the child's parent. Consent  
5 can be shown by:

6 (1) signing a record, before or after the child's birth, expressing consent to be the  
7 child's parent; or

8 (2) residing with the child in the same household and holding out the child as his  
9 [or her] own during the first two years of the child's life; or

10 (3) behaving in a manner consistent with being the parent of the child or, if death  
11 or incapacity occurs before the birth of the child, planning to be the parent of the child.

12 If the child is born to a married woman and she and her husband are not separated and no  
13 divorce or annulment proceedings are pending, it is presumed that both spouses consented to be  
14 the child's parent.

15 **Note from Reporter:**

16 **We need to address posthumous conception.**

17 (e) If a marriage is dissolved before placement of eggs, sperm, or embryos, the resulting  
18 child is not a child of the former spouse unless the former spouse consented in a record that if  
19 assisted reproduction were to occur after a dissolution of the marriage, the child would be the  
20 child of the former spouse.

21 (f) If, in a record, a man or a woman withdraws consent to assisted reproduction before  
22 placement of eggs, sperm, or embryos, the resulting child is not a child of that individual, unless

1 the individual subsequently satisfies the consent requirements of subsection (d).

2 (g) If the intestate decedent is the child’s deceased parent, the decedent’s child conceived  
3 posthumously by assisted reproduction is treated as in gestation at the decedent’s death for  
4 purposes of Section 2-104(b), if the child was born within forty-five months after the decedent’s  
5 death. If the intestate decedent is someone other than the child’s parent, a child conceived  
6 posthumously by assisted reproduction is treated as in gestation on the date that the child is in  
7 utero for purposes of Section 2-104(b).

8 (h) A child of assisted reproduction is a marital child if the child is produced for a  
9 married couple, before or after the decedent-spouse’s death.

10 *Legislative Note: States that recognize civil unions, domestic partnerships, or similar*  
11 *relationships between two unmarried individuals should add appropriate language after*  
12 *“spouse” or “married individual.”*

13  
14 *States are encouraged to enact a provision requiring genetic depositories to provide a*  
15 *consent form that would satisfy subsection (d)(1). The following provision is copied from Cal.*  
16 *Health & Safety Code § 1644.7 and .8, except that the word “heir” is changed to “child.”*

17  
18 **[SECTION XXX. DUTY OF GENETIC DEPOSITORIES TO PROVIDE**  
19 **CONSENT FORM TO DEPOSITORS.**  
20

21 (a) Any entity that receives genetic material of a human being that may be used for  
22 conception shall provide to the person depositing his [or her] genetic material a form for use by  
23 the depositor that, if signed by the depositor, would satisfy the conditions set forth in Section 2-  
24 118(d) regarding the decedent’s intent for the use of that material. The use of the form is not  
25 mandatory, and the form is not the exclusive means of expressing a depositor’s intent. The form  
26 shall include advisements in substantially the following form:

27  
28 “The use of this form for designating whether a child conceived during your life or after  
29 your death will be your child is not mandatory. However, if you wish to allow a child conceived  
30 during your life or after your death to be considered as your child (or beneficiary of other benefits  
31 such as life insurance or retirement) you must specify that in writing and you must sign that  
32 written expression of intent.

33  
34 This specification can be revoked or amended only in writing signed by you (and not by

1 spoken words).  
2

3 You should consider how having a child conceived during your life or after your death  
4 affects your estate planning (including your will, trust, and other beneficiary designations for  
5 retirement benefits, life insurance, financial accounts, etc.) These issues can be complex, and you  
6 should discuss them with your attorney.”  
7

8 (b) Any entity that receives genetic material of a human being that may be used for  
9 conception shall make available to the person depositing his or her genetic material a form that, if  
10 signed by the depositor, would revoke any previous expression of intent regarding the use of his  
11 or her genetic material necessary to satisfy the conditions set forth in Section 2-118(f). The use of  
12 the form is not mandatory, and the form is not the exclusive means of expressing a depositor’s  
13 intent with respect to revocation or amendment of a prior expression of intent. The form shall  
14 include advisements in substantially the following form:  
15

16 “The use of this form to revoke or amend a previous form for designating whether a child  
17 conceived during your life or after your death will be your child is not mandatory. This  
18 specification can be revoked or amended only in a writing signed by you (and not by spoken  
19 words).  
20

21 These issues can be complex, and you should discuss them with your attorney.”]



1           **SECTION 2-705. CLASS GIFTS CONSTRUED TO ACCORD WITH**  
2 **INTESTATE SUCCESSION.**

3           (a) Adopted individuals, ~~and~~ individuals born out of wedlock, stepchildren, children of  
4 assisted reproduction, and children born to a gestational mother, and their respective descendants  
5 if appropriate to the class, are included in class gifts and other terms of relationship in accordance  
6 with the rules for intestate succession. Terms of relationship that do not differentiate  
7 relationships by blood from those by affinity, such as “uncles,” “aunts,” “nieces,” or “nephews,”  
8 are construed to exclude relatives by affinity. Terms of relationship that do not differentiate  
9 relationships by the half blood from those by the whole blood, such as “brothers,” “sisters,”  
10 “nieces,” or “nephews,” are construed to include both types of relationships.

11           (b) In addition to the requirements of subsection (a), in construing a dispositive provision  
12 of a transferor who is not the ~~natural~~ genetic parent, an individual born out of wedlock to the  
13 ~~natural~~ genetic parent is not considered the child of that parent unless the individual lived while a  
14 minor as a regular member of the household of that ~~natural~~ genetic parent or of that parent’s  
15 parent, brother, sister, spouse, or surviving spouse.

16           (c) In addition to the requirements of subsection (a), in construing a dispositive provision  
17 of a transferor who is not the adopting parent, an adopted individual is not considered the child of  
18 the adopting parent unless (i) the adoption took place before the child reached the age of  
19 majority; (ii) the adopting parent was the child’s stepparent or foster parent; or (ii) the adopted  
20 individual lived while a minor, either before or after the adoption, as a regular member of the  
21 household of the adopting parent.

22                           **[Alternative (c) for consideration by Drafting Committee]**

1 (c) In addition to the requirements of subsection (a), in construing a dispositive provision  
2 of a transferor who is not the adopting parent, an adopted individual is not considered the child of  
3 the adopting parent unless (i) the adopting parent was the child’s stepparent or foster parent; or  
4 (ii) the adopted individual lived while a minor, either before or after the adoption, as a regular  
5 member of the household of the adopting parent. If the adoption took place before the child  
6 reached the age of majority, it is presumed that the adopted individual lived while a minor, either  
7 before or after the adoption, as a regular member of the household of the adopting parent.

8 (d) For purposes of the class closing rules, an individual in utero at a particular time is  
9 treated as living at that time if the individual lives 120 hours after birth. If the distribution date is  
10 the deceased parent’s death, a child produced posthumously by assisted reproduction is treated as  
11 living at the decedent’s death, if the child was born within 45 months after the deceased parent’s  
12 death and if the child lives 120 hours after birth. If the distribution date arises after the deceased  
13 parent’s death, a child produced posthumously by assisted reproduction is living when the child  
14 is in utero.

15 (e) For purposes of the class closing rules, an individual who is in the process of being  
16 adopted when the class closes is treated as an adopted child when the class closes if the adoption  
17 is subsequently granted.

18 *Legislative Note: States that recognize civil unions, domestic partnerships, or similar*  
19 *relationships between unmarried individuals should add appropriate language after “spouse.”*  
20

### 21 Comment

22  
23 Under Section 3-1006, an heir is allowed to recover property improperly distributed or its  
24 value from any distributee during the later of 3 years after the decedent’s death or 1 year after  
25 distribution. The 45 month period in subsection (d) is based on the 3-year period, with an  
26 additional 9 months tacked on to allow for a normal period of pregnancy.

