

D R A F T

FOR DISCUSSION ONLY

**AMENDMENTS TO THE
UNIFORM PROBATE CODE**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

Draft for February 1-2, 2008 Drafting Committee Meeting

WITH PARTIAL COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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AMENDMENTS TO THE UNIFORM PROBATE CODE

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1 **AMENDMENTS TO THE UNIFORM PROBATE CODE**

2
3 **Cost-of-living Adjustments.** The UPC contains a number of specific dollar amounts.

4 These amounts were last revised in 1990. Between 1990 and today, the consumer price index
5 (CPI) has increased about 50 percent. According to the inflation calculator on the Bureau of
6 Labor Statistics website (www.bls.gov), \$1.00 in 1990 is worth \$1.60 in October 2007. The JEB-
7 UTEA proposes increasing the UPC’s specific dollar amounts by 50 percent, as follows:

8 Section 2-102(2) is amended to change \$200,000 to \$300,000; 2-102(3) is amended to
9 change \$150,000 to \$225,000; and 2-102(4) is amended by changing \$100,000 to \$150,000.

10 Section 2-201(b) is amended by changing \$50,000 to \$75,000.

11 Section 2-402 is amended by changing \$15,000 to \$22,500; 2-403 is amended by
12 changing \$10,000 to \$15,000; and 2-405 is amended by changing \$18,000 to \$27,000 and by
13 changing \$1,500 to \$2,250.

14 Section 3-1201 is amended by changing \$5,000 to \$7,500.

15 The dollar amounts stated in Sections 2-102 (Intestate Share of Spouse), 2-201(b)
16 (Supplemental Elective-Share Amount), 2-402 (Homestead Allowance), 2-403 (Exempt
17 Property), 2-405 (Source, Determination, and Documentation), and 3-1201 (Collection of
18 Personal Property by Affidavit) are adjusted for inflation.

19
20 **SECTION 1-109. COST OF LIVING ADJUSTMENT OF CERTAIN DOLLAR**
21 **AMOUNTS.**

22 (a) In this section, "CPI for [a specified calendar year]" means the "Consumer Price
23 Index (Annual Average) for All Urban Consumers (CPI-U): U.S. city average — All items" for
24 the specified calendar year, reported by the U.S. Department of Labor or by a successor federal
25 reporter, or, if that index is discontinued, an equivalent index reported by a federal authority. If

1 no such index is issued, the term means the substitute index chosen by [insert appropriate state
2 agency or court] for the specified calendar year.

3 (b) The dollar amounts stated in Sections 2-102, 2-201(b), 2-402, 2-403, 2-405, and 3-
4 1201 apply to the estates of decedents who die in or after [insert year in which Act becomes
5 effective], except that, for the estates of decedents dying after [insert year after the year in which
6 Act becomes effective], these dollar amounts shall be increased or decreased if the CPI for the
7 calendar year next preceding the year of death exceeds or is less than the CPI for calendar year
8 [insert year next preceding the year in which Act becomes effective]. The amount of each
9 increase or decrease, if any, shall be computed by multiplying each dollar amount by the
10 percentage by which the CPI for the calendar year next preceding the year of death exceeds or is
11 less than the CPI for the calendar year [insert year next preceding the year in which Act becomes
12 effective]. If any increase or decrease produced by this computation is not a multiple of \$100,
13 the increase or decrease shall be rounded down, if an increase, or up, if a decrease, to the next
14 lower or higher multiple of \$100, except that, for purposes of Section 2-405, the periodic
15 installment amount shall not be rounded down or up but shall be the lump sum amount divided
16 by 12.

17 [(c) Not later than January 31 of [insert year after the year in which Act becomes
18 effective], and of each succeeding year, the [insert appropriate state agency] shall issue a
19 cumulative list, beginning with the dollar amounts effective for the estates of decedents dying in
20 [insert year after the year in which Act becomes effective], of each dollar amount as increased or
21 decreased under this section.]

22 **Reporter's Explanation**

23
24 **New § 1-109: Cost-of-living Adjustment.** In addition to the proposed cost-of-living

1 adjustments, the proposed amendment adds a new section that will automatically adjust each of
2 the specific dollar amounts annually. The addition of this section will make it unnecessary for
3 ULC or individual enacting states to amend the UPC periodically to adjust the dollar amounts for
4 inflation. The Michigan enactment of the UPC already contains such a provision.

5
6 *Legislative Note. An enacting state that has already enacted the above sections should bring*
7 *those dollar amounts up to date. A state enacting the sections listed in subsection (b) after 2008*
8 *should adjust the dollar figures for changes in the cost of living that have occurred between*
9 *2008 and the effective date of the new enactment.*

10
11 **Partial Comment**
12

13 In each January issue of *CPI Detailed Report*, the Bureau of Labor Statistics of the U.S.
14 Department of Labor reports the CPI (annual average) for the preceding calendar year. The
15 information can also be obtained by telephone (202/691-5200) or on the internet at
16 <<http://www.bls.gov/cpi>>. Because of this one-year lag in reporting the CPI, the adjustment of
17 the dollar amounts in these sections were based on the CPI (annual average) for 2007.

18
19 New Section 1-109 operates in conjunction with the inflation adjustments adopted in
20 2008. Section 1-109 is added to make it unnecessary in the future for NCCUSL or individual
21 enacting states to continue to amend the UPC periodically to adjust the dollar amounts for
22 inflation. This new section provides for an automatic adjustment of each of the above dollar
23 amounts annually.

24
25 Subsection (c) is bracketed because some enacting states might not have a state agency
26 that could appropriately be assigned the task of issuing updated amounts. Such an enacting state
27 might consider tasking the state supreme court to issue a court rule each year making the
28 appropriate adjustment.

1 relating to inclusion of adopted persons in class gift language exemplifies this type of rule of
2 construction. The 1990 revisions divided pre-1990 Part 6 into two parts — Part 6, containing
3 rules of construction for wills only; and Part 7, containing rules of construction for wills and
4 other governing instruments. A few new rules of construction ~~are~~ were also added.

5
6 In addition to separating the rules of construction into two parts, and adding new rules of
7 construction, the revocation-upon-divorce provision (section 2-804) ~~is~~ was substantially revised
8 so that divorce not only revokes devises, but also nonprobate beneficiary designations, in favor
9 of the former spouse. Another feature of the 1990 revisions ~~is~~ was a new section (section 2-503)
10 that ~~brings~~ brought the execution formalities for wills more into line with those for nonprobate
11 transfers.

12
13 The 1990 Article II revisions also responded to other modern trends. During the period
14 from 1969 to 1990, many developments occurred in the case law and statutory law. Also, many
15 specific topics in probate, estate, and future-interests law were examined in the scholarly
16 literature. The influence of many of these developments ~~is~~ was seen in the 1990 revisions of
17 Article II.

18
19 **2008 Revisions.** In 2008, another round of revisions was adopted. The principal features
20 of these revisions are summarized as follows:

21
22 **Inflation Adjustments.** Between 1990 and 2008, the Consumer Price Index rose by
23 about 50 percent. By technical amendment, all of the dollar amounts in the following sections
24 were raised by 50 percent: Sections 2-102, 2-201, 2-402, 2-403, 2-405, and 3-1201. In addition, a
25 new cost of living adjustment section — Section 1-109 — was added.

26
27 {more TBA}

28
29 **Legislative Note:** *The word “spouse” appears throughout Article II. States that recognize civil*
30 *unions, domestic partnerships, or similar relationships between unmarried individuals should*
31 *add appropriate language after “spouse” wherever that word appears in Article II. States that*
32 *do not recognize such relationships between unmarried individuals, or marriages between same-*
33 *sex partners, should also consider whether to recognize the spousal-type rights that partners*
34 *acquired under the law of another jurisdiction in which the relationship was formed but who die*
35 *domiciled in this state. Doing so would not be the equivalent of recognizing such relationships in*
36 *this state but simply allowing those who move to and die in this state to retain the rights they*
37 *previously acquired elsewhere.*

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PART 1

INTESTATE SUCCESSION

General Comment
{partially revised}

The pre-1990 Code’s basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 revisions are intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy.

1990 Revisions. The principal features of the 1990 revisions ~~are~~ were:

1. So-called negative wills ~~are~~ were authorized, under which the decedent who dies intestate, in whole or in part, can by will disinherit a particular heir.

2. A surviving spouse ~~receives~~ was granted the whole of the intestate estate, if the decedent left no surviving descendants and no parents or if the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has no descendants who are not descendants of the decedent. The surviving spouse receives the first \$200,000 plus three-fourths of the balance if the decedent left no surviving descendants but a surviving parent. The surviving spouse receives the first \$150,000 plus one-half of the balance of the intestate estate, if the decedent’s surviving descendants are also descendants of the surviving spouse but the surviving spouse has one or more other descendants. The surviving spouse receives the first \$100,000 plus one-half of the balance of the intestate estate, if the decedent has one or more surviving descendants who are not descendants of the surviving spouse.

3. A system of representation called per capita at each generation ~~is~~ was adopted as a means of more faithfully carrying out the underlying premise of the pre-1990 UPC system of representation. Under the per-capita-at-each-generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares.

4. Although only a modest revision of the section dealing with the status of adopted children and children born of unmarried parents ~~is~~ was then made ~~at this time~~, the question ~~is~~ was under continuing review and it was anticipated that further revisions ~~may be presented~~ would be forthcoming in the future.

5. The section on advancements ~~is~~ was revised so that it applies to partially intestate estates as well as to wholly intestate estates.

2008 Revisions. As noted in Item 4 above, it was recognized in 1990 that further revisions on matters of status were needed. The 2008 revisions fulfilled that need. Specifically, the 2008 revisions contained the following principal features: {to be continued}

1 **SUBPART 1. GENERAL RULES**

2
3 **SECTION 2-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.** Any

4 part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or
5 the entire intestate estate if there is no surviving spouse, passes in the following order to the
6 individuals designated below who survive the decedent:

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

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

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

12 (4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent
13 is survived by one or more grandparents or descendants of grandparents, the following rules
14 apply:

15 (A) half of the intestate estate passes to the decedent's paternal grandparents
16 equally if both survive, or to the surviving paternal grandparent, or to the descendants of the
17 decedent's paternal grandparents or either of them if both are deceased, the descendants taking
18 by representation; and the other half passes to the decedent's maternal relatives in the same
19 manner;

20 (B) ~~but~~ if there is no surviving grandparent or descendant of a grandparent on
21 either the paternal or the maternal side, the entire intestate estate passes to the decedent's
22 relatives on the other side in the same manner as the half;

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

1 ~~intestate property, for a comparable provision as to wills and other governing instruments, see~~
2 ~~Section 2-702.~~ This section avoids multiple administrations and in some instances prevents the
3 property from passing to persons not desired by the decedent. See Halbach & Waggoner, The
4 UPC's New Survivorship and Antilapse Provisions, 55 Alb. L. Rev. 1091, 1094-1099 (1992).
5 The 120-hour period will not delay the administration of a decedent's estate because Sections
6 3-302 and 3-307 prevent informal issuance of letters for a period of five days from death. The
7 last sentence of subsection (a) prevents the survivorship requirement from defeating inheritance
8 by the last eligible relative of the intestate who survives him or her for any period.

9

10 In the case of a surviving spouse who survives the 120-hour period, the 120-hour
11 requirement of survivorship does not disqualify the spouse's intestate share for the federal
12 estate-tax marital deduction. See Int.Rev.Code § 2056(b)(3).

13

14 **2008 Revisions.** In 2008, this section was reorganized, revised, and combined with
15 former Section 2-108. What appeared as former Section 2-104 now appears as subsections (a)
16 and (b). What appeared as former Section 2-108 now appears as subsection (c). Subsections (b)
17 and (c) now distinguish between an individual who was born before the decedent's death and an
18 individual who was in gestation at the decedent's death. With respect to an individual who was
19 born before the decedent's death, it must be established by clear and convincing evidence that
20 the individual survived the decedent by 120 hours. For a comparable provision applicable to
21 wills and other governing instruments, see Section 2-702. With respect to an individual who was
22 in gestation at the decedent's death, it must be established by clear and convincing evidence that
23 the individual lived for 120 hours after birth.

24

25 **Historical Note.** This Comment was revised in 2008.

26

27

28 **SECTION 2-108. [RESERVED.] AFTERBORN HEIRS.** ~~An individual in gestation at~~
29 ~~a particular time is treated as living at that time death if the individual lives 120 hours or more~~
30 ~~after birth.~~

1 (b) For purposes of intestate succession from or through the deceased child, a parent who
2 is barred from inheriting under this section is treated as if the parent predeceased the child.

3 **Alternative 2**

4 **SECTION 2-114. PARENT BARRED FROM INHERITING IN CERTAIN**
5 **CIRCUMSTANCES.**

6 (a) A parent is barred from inheriting from or through a child of the parent if the child
7 died before reaching the age of majority and (i) the parent’s parental rights were terminated and
8 the parent-child relationship was not judicially reestablished or (ii) it is established by clear and
9 convincing evidence that a proceeding to terminate the parent’s parental rights filed immediately
10 before the child’s death would have been successful.

11 (b) For purposes of intestate succession from or through the deceased child, a parent who
12 is barred from inheriting under this section is treated as if the parent predeceased the child.

13 **Partial Comment**

14
15 {The JEB-UTEA recommends that the Comment state that the clear and convincing requirement
16 in (a)(ii) applies not just to the grounds for termination but to the prospect of success.}

17
18 This Section replaces former Section 2-114(c), which provided: “(c) Inheritance from or
19 through a child by either natural parent or his [or her] kindred is precluded unless that natural
20 parent has openly treated the child as his [or hers], and has not refused to support the child.”

21
22 Statutes providing the grounds for termination of parental rights include Mich. Comp. L.
23 Ann. § 712A.19b; Tex. Fam. Code §§ 161.001 to .007; {more citations to be added}
24 {Comment to be continued}

1 individual.”

2
3 **Partial Comment**

4
5 **Definition of “Functioned as a Parent of the Child”.** The term “functioned as a parent
6 of the child” is derived from the Restatement (Third) of Property: Wills and Other Donative
7 Transfers (2007). The definition of that term in paragraph (1) is amplified in the Reporter’s Note
8 No. 4 to Section 14.5 of the Restatement as follows:

9
10 *Custodial responsibility* refers to physical custodianship and supervision of a
11 child. It usually includes, but does not necessarily require, residential or overnight
12 responsibility.

13 *Decisionmaking responsibility* refers to authority for making significant life
14 decisions on behalf of the child, including decisions about the child’s education, spiritual
15 guidance, and health care.

16 *Caretaking functions* are tasks that involve interaction with the child or that
17 direct, arrange, and supervise the interaction and care provided by others. Caretaking
18 functions include but are not limited to all of the following:

19 (a) satisfying the nutritional needs of the child, managing the child’s
20 bedtime and wake-up routines, caring for the child when sick or injured, being attentive
21 to the child’s personal hygiene needs including washing, grooming, and dressing, playing
22 with the child and arranging for recreation, protecting the child’s physical safety, and
23 providing transportation;

24 (b) directing the child’s various developmental needs, including the
25 acquisition of motor and language skills, toilet training, self-confidence, and maturation;

26 (c) providing discipline, giving instruction in manners, assigning and
27 supervising chores, and performing other tasks that attend to the child’s needs for
28 behavioral control and self-restraint;

29 (d) arranging for the child’s education, including remedial or special
30 services appropriate to the child’s needs and interests, communicating with teachers and
31 counselors, and supervising homework;

32 (e) helping the child to develop and maintain appropriate interpersonal
33 relationships with peers, siblings, and other family members;

34 (f) arranging for health-care providers, medical follow-up, and home
35 health care;

36 (g) providing moral and ethical guidance;

37 (h) arranging alternative care by a family member, babysitter, or other
38 child-care provider or facility, including investigation of alternatives, communication
39 with providers, and supervision of care.

40 *Parenting functions* are tasks that serve the needs of the child or the child’s
41 residential family. Parenting functions include caretaking functions, as defined [above],
42 and all of the following additional functions:

43 (a) providing economic support;

44 (b) participating in decisionmaking regarding the child’s welfare;

45 (c) maintaining or improving the family residence, including yard work,

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and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.

1 **SECTION 2-116. PARENT-CHILD RELATIONSHIP: EFFECT.** If, under this
2 [Subpart], and except as otherwise provided in a specific section or subsection, a parent-child
3 relationship exists with a child, the child is a child of the parent and the parent is a parent of the
4 child for purposes of intestate succession by, through, or from the child.

1 **SECTION 2-119. PARENT-CHILD RELATIONSHIP: ADOPTED INDIVIDUAL.**

2 **(a) [Parent-Child Relationship Between Adopted Individual and Adopting Parent or**

3 **Parents.]** A parent-child relationship exists between an adopted individual and the individual's
4 adopting parent or parents.

5 **(b) [Individual in Process of Being Adopted.]** For purposes of subsection (a), an

6 individual who is in the process of being adopted by:

7 (1) a married couple when one of the spouses dies is treated as adopted by the
8 deceased spouse if the adoption is subsequently granted to the decedent's surviving spouse.

9 (2) the spouse of a genetic parent when that spouse dies is treated as adopted by
10 that deceased spouse if the genetic parent survives the deceased spouse by 120 hours.

11 {Reporter's Note: At its December 2007 meeting, the JEB-UTEA recommended
12 that the Comment state that the phrase "in the process of being adopted" is not
13 limited to the filing of court papers but can be satisfied much earlier when the
14 adoption is in the planning stages. If we go that way, perhaps the phrase "in the
15 process of being adopted" is the wrong phrase.}

17 **(c) [Parent-Child Relationship Between Adopted Individual and Genetic Parents.]**

18 Except as otherwise provided in subsections (d) through (f), no parent-child relationship exists
19 between an adopted individual and the individual's genetic parents.

20 **(d) [Individual Adopted by Spouse of a Genetic Parent.]** A parent-child relationship

21 exists between an individual who is adopted by the spouse of either genetic parent and:

22 (1) that genetic parent; and

23 (2) the other genetic parent, but only for purposes of the right of the child or a
24 descendant of the child to inherit from or through that other genetic parent.

25 **(e) [Individual Adopted by Relative of a Genetic Parent.]** A parent-child relationship

1 exists between an individual who is adopted by a relative of a genetic parent, or by the spouse or
2 surviving spouse of a relative of a genetic parent, and both genetic parents, but only for purposes
3 of the right of the child or a descendant of the child to inherit from or through either genetic
4 parent.

5 **(f) [Individual Adopted After Death of Both Genetic Parents.]** A parent-child
6 relationship exists between both genetic parents and an individual who is adopted after the death
7 of both genetic parents, but not by a relative of a genetic parent, nor by the spouse or surviving
8 spouse of a relative of a genetic parent, but only for purposes of the right of the child or a
9 descendant of the child to inherit through either genetic parent.

10 **(g) [Individual Adopted More Than Once.]** If an individual was adopted more than
11 once, the term “genetic parent” in subsections (c) through (f) includes a previous adoptive
12 parent.

13 **Partial Comment**

14
15 **2008 Revisions.** This Section replaces former Section 2-114(b), which provided: “(b) An
16 adopted individual is the child of his [or her] adopting parent or parents and not of his [or her]
17 natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i)
18 the relationship between the child and that natural parent or (ii) the right of the child or a
19 descendant of the child to inherit from or through the other natural parent”.

20
21 **Defined Terms.** This section contains terms that are defined in Section 2-115.

22
23 *Genetic parent.* The term “genetic parent”, which appears in subsections (b) through (g),
24 is defined in Section 2-115 as an individual whose sperm or eggs were used to conceive a child.
25 If the father-child relationship is established under [Section 201(b)(1), (2), or (3) of the Uniform
26 Parentage Act (2000), as amended], the term means the man for whom that relationship is
27 established and not another man.

28
29 *Relative.* The word “relative”, which appears in subsections (e) and (f), is defined in
30 Section 2-115 as a grandparent or a descendant of a grandparent.

31
32 **Subsection (a).** Subsection (a) states the general rule that a parent-child relationship
33 exists between an adopted individual and the individual’s adopting parent or parents.

1 Subsection (b). {to be explained}

2
3 Subsection (c). Subsection (c) states the general rule a no parent-child relationship exists
4 between an adopted individual and the individual's genetic parents. This rule recognizes that an
5 adoption severs the parent-child relationship between the adopted individual and the individual's
6 genetic parents. The adoption gives the adopted individual a replacement family, sometimes
7 referred to in the case law as "a fresh start". For further elaboration of this theory, see
8 Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5(2)(A) & cmts. d & e
9 (1999). Subsection (c) also states, however, that there are exceptions to this general rule, and that
10 those exceptions are stated in subsections (d) through (f).

11
12 Subsection (d): Stepparent Adoption. Subsection (d) continues the so-called "step-
13 parent exception" contained in the Code since its original promulgation in 1969. When a
14 stepparent adopts his or her stepchild, subsection (a) provides that a parent-child relationship
15 exists between the child and his or her adopting stepparent and subsection (d)(1) provides that a
16 parent-child relationship exists between the child and the child's genetic parent who is married
17 to the adopting stepparent. Under subsection (d)(2), a parent-child relationship also exists
18 between an adopted stepchild and his or her other genetic parent (the noncustodial genetic
19 parent) for purposes of inheritance from and through that genetic parent, but not for purposes of
20 inheritance from or through the child

21
22 Example 1. A and B were married and had two children, X and Y. A died, and B married
23 C. C adopted X and Y. Under subsection (d)(1), X and Y are treated as B's children and under
24 subsection (a) as C's children for all purposes of inheritance. Under subsection (d)(2), X and Y
25 are treated as A's children for purposes of inheritance from and through A but not for purposes of
26 inheritance from or through X or Y. Thus, if A's father, G, died intestate, survived by X and Y
27 and by G's daughter (A's sister), S, G's heirs would be S, X, and Y. S would take half and X and
28 Y would take one-fourth each.

29
30 Example 2. The facts are the same as in Illustration 1, except that A and B got divorced;
31 A did not die. The result would be the same. C's adoption of X and Y would not break G's ties
32 with X and Y, and they would inherit from him.

33
34 Subsection (e): Adoption by a Maternal or a Paternal Relative. Under subsection (e),
35 a child who is adopted by a maternal or a paternal relative of either genetic parent, or by the
36 spouse or surviving spouse of such a relative, remains a child of both genetic parents.

37
38 Example 3. F and M, a married couple with one child, X, were killed in an airplane crash.
39 After the deaths of F and M, M's sister, A, and A's husband, B, adopted X. F's father, PGF, a
40 widower, then died intestate. Under subsection (e), X is treated as PGF's grandchild (F's child).

41
42 Subsection (f): Post-Death Adoption. Usually, a post-death adoption does not remove a
43 child from contact with the genetic families. When someone with ties to the genetic family or
44 families adopts a child after the deaths of the child's genetic parents, even if the adopting parent
45 is not a relative of either genetic parent or a spouse or surviving spouse of such a relative, the

1 child continues to be in a parent-child relationship with both genetic parents. Once a child has
2 taken root in a family, an adoption after the death of both genetic parents is likely to be by
3 someone chosen or approved of by the genetic family, such as a person named as guardian of the
4 child in a deceased parent's will. In such a case, the child does not become estranged from the
5 genetic family. Such an adoption does not “remove” the child from the families of both genetic
6 parents. Such a child continues to be a child of both genetic parents, as well as a child of the
7 adopting parents.

8

9 *Example 4.* F and M, a married couple with a four-year-old child, X, were involved in an
10 automobile accident that killed F and M. Neither M's parents nor F's father (F's mother had died
11 before the accident) nor any other relative was in a position to take custody of X. X was adopted
12 by F and M's close friends, A and B, a married couple approximately of the same ages as F and
13 M. After the adoption became final, F's father and M's parents continued to have close contact
14 with X, often visiting each other and sharing some holidays together. A and B often brought X to
15 M's bedside for visits. F's father, PGF, a widower, then died intestate. Under subsection (f), X is
16 treated as PGF's grandchild (F's child). The result would be the same if F's or M's will appointed
17 A and B as the guardians of the person of X, and A and B subsequently successfully petitioned
18 to adopt X.

19

20 **Subsection (g).** {to be explained}

1 **SECTION 2-120. PARENT-CHILD RELATIONSHIP: CHILD CONCEIVED BY**
2 **ASSISTED REPRODUCTION OTHER THAN A CHILD BORN TO A GESTATIONAL**
3 **MOTHER.**

4 **(a) [Definitions.] In this section:**

5 (1) “child of assisted reproduction” means a child conceived by means of assisted
6 reproduction by a woman other than a gestational mother as defined in Section 2-121.

7 (2) “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 (3) “Birth mother” means a woman, other than a gestational mother as defined in
15 Section 2-121, who gave birth to a child of assisted reproduction, whether or not she is the
16 child’s genetic mother.

17 (4) “Third-party donor” means an individual who produces eggs or sperm used
18 for assisted reproduction, whether or not for consideration. The term does not include:

19 (A) a husband who provides sperm, or a wife who provides eggs, to be
20 and that were used for assisted reproduction by the wife;

21 (B) the birth mother of a child of assisted reproduction; or

22 (C) an individual who, under subsection (d), is determined to have a
23 parent-child relationship with a child of assisted reproduction.

1 {Reporter’s Question: Do we need (a)(4)(A)? That paragraph came from the
2 UPA.}

3 **(b) [Third-Party Donor.]** No parent-child relationship exists between a child of assisted
4 reproduction and a third-party donor.

5 **(c) [Parent-Child Relationship With Birth Mother.]** A parent-child relationship exists
6 between a child of assisted reproduction and the child’s birth mother.

7 **(d) [Parent-Child Relationship With Another.]** Except as otherwise provided in
8 subsections (f) and (g), a parent-child relationship exists between a child of assisted reproduction
9 and an individual other than the birth mother who consented to assisted reproduction by the birth
10 mother with intent to be treated as a parent of the child. Consent to assisted reproduction by the
11 birth mother with intent to be treated as a parent of the child is established if the individual:

12 {Reporter’s Questions: In line 7, do we want to say “who, before or after the
13 placement of eggs, sperm, or embryos, consented to assisted reproduction by the
14 birth mother with intent to be treated as a parent of the child” in order to
15 coordinate this requirement with subsections (f) and (g)? If so, do we want to
16 delete “before or after the birth of the child” in (1), below?}
17

18 (1) signed a record, before or after the birth of the child, evidencing such consent,
19 in light of all the facts and circumstances; or

20 {Reporter’s Question: Do we want to say that if the individual signed the record
21 after the child reached the age of majority, the individual does not inherit from the
22 child?}
23

24 (2) in the absence of a signed record that satisfies paragraph (1):

25 (A) functioned as a parent of the child before the child reached the age of
26 majority;

27 (B) intended to function as a parent of the child before the child reached

1 the age of majority but was prevented from doing so by an event such as death or incapacity; or
2 (C) intended to be treated as a parent of a posthumously conceived child if
3 such intent is established by clear and convincing evidence.

4 **(e) [Presumption: Birth Mother is Married or Surviving Spouse.]** For purposes of
5 subsection (d):

6 (1) If (i) the birth mother is married, (ii) she and her spouse are not separated, and
7 (iii) no divorce or annulment proceedings are pending, then, in the absence of clear and
8 convincing evidence to the contrary, and in the absence of a record that satisfies subsection
9 (d)(1), her spouse is deemed to have satisfied subsection (d)(2)(A) or (B).

10 (2) If (i) the birth mother is a surviving spouse and (ii) at her deceased spouse's
11 death, she and her spouse were not separated and no divorce or annulment proceedings were then
12 pending, then, in the absence of clear and convincing evidence to the contrary, and in the
13 absence of a record that satisfies subsection (d)(1), her deceased spouse is deemed to have
14 satisfied subsection (d)(2)(B) or (C).

15 **(f) [Marriage Dissolved Before Placement of Eggs, Sperm, or Embryos.]** If a
16 marriage is dissolved before placement of eggs, sperm, or embryos, a resulting child of assisted
17 reproduction is not a child of the birth mother's former spouse, unless the former spouse
18 consented in a record that if assisted reproduction were to occur after a dissolution of the
19 marriage, the child would be treated as the former spouse's child.

20 **(g) [Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos.]** If, in a
21 record, an individual withdraws consent to assisted reproduction before placement of eggs,
22 sperm, or embryos, a resulting child of assisted reproduction is not a child of that individual,
23 unless the individual subsequently satisfies the requirements of subsection (d).

1 **(h) [When Posthumously Conceived Child Treated as in Gestation.]** If a parent of a
2 child of assisted reproduction who is conceived posthumously dies intestate, the child is treated
3 as in gestation at the decedent’s death for purposes of Section 2-104(c) if the child is either (i) in
4 utero within thirty-six months after the decedent’s death or (ii) born within forty-five months
5 after the decedent’s death. If an individual other than the parent of a child of assisted
6 reproduction who is conceived posthumously dies intestate, the child is treated as in gestation on
7 the date that the child is in utero for purposes of Section 2-104(c).

8 *Legislative Note: States are encouraged to enact a provision requiring genetic depositories to*
9 *provide a consent form that would satisfy subsection (d)(1). The following provision is adapted*
10 *from Cal. Health & Safety Code § 1644.7 and .8.”*

11
12 **SECTION XXX. DUTY OF GENETIC DEPOSITORIES TO PROVIDE**
13 **CONSENT FORM TO DEPOSITORS.**

14 (a) Any entity that receives genetic material of a human being that may be used
15 for conception shall provide to the person depositing genetic material a form for use by
16 the depositor that, if signed by the depositor, would satisfy the conditions set forth in
17 [Section 2-120(d)(1)] regarding the depositor’s consent to assisted reproduction by the
18 birth mother with intent to be treated as a parent of the child. The use of the form is not
19 mandatory, and the form is not the exclusive means of expressing a depositor’s intent.
20 The form shall include advisements in substantially the following form:

21
22 “The use of this form for designating whether you consent to be treated as the
23 parent of a child conceived during your life or after your death is not mandatory.
24 However, if you wish to allow a child conceived during your life or after your death to be
25 treated as your child (or beneficiary of other benefits such as life insurance or retirement)
26 you should specify that in writing and sign that written expression of consent.

27 This specification can be revoked or amended only in writing signed by you (and
28 not by spoken words).

29 You should consider how being treated as a parent of a child conceived during
30 your life or after your death affects your estate planning (including your will, trust, and
31 other beneficiary designations for retirement benefits, life insurance, financial accounts,
32 etc.) These issues can be complex, and you should discuss them with your attorney.”

33
34 (b) Any entity that receives genetic material of a human being that may be used
35 for conception shall make available to the person depositing his or her genetic material a
36 form that, if signed by the depositor, would revoke any previous expression of consent
37 satisfying the conditions set forth in Section 2-120(g). The use of the form is not
38 mandatory, and the form is not the exclusive means of expressing a depositor’s intent

1 with respect to revocation or amendment of a prior expression of consent. The form shall
2 include advisements in substantially the following form:

3
4 “The use of this form to revoke or amend a previous form for designating whether
5 you consent to be treated as a parent of a child conceived during your life or after your
6 death is not mandatory. This specification can be revoked or amended only in a writing
7 signed by you (and not by spoken words).

8 These issues can be complex, and you should discuss them with your attorney.”
9

10 Partial Comment

11
12 **Data on Children of Assisted Reproduction.** The ethics policies of the American
13 Medical Association state that “[i]f semen is frozen and the donor dies before it is used, the
14 frozen semen should not be used or donated for purposes other than those originally intended by
15 the donor. If the donor left no instructions, it is reasonable to allow the remaining partner to use
16 the semen for artificial insemination but not to donate it to someone else. However, the donor
17 should be advised of such a policy at the time of donation and be given an opportunity to
18 override it.” Am. Med. Assn. Council on Ethical & Judicial Affairs, Code of Medical Ethics:
19 Current Opinions E-2.04 (2005), available at
20 <http://www.ama-assn.org/ama/pub/category/8391.html> (last visited October 21, 2007).

21
22 The Center for Disease Control (CDC) of the U.S. Department of Health and Human
23 Services collects data on children of assisted reproduction (ART). See Center for Disease
24 Control, 2004 Assisted Reproductive Technology Success Rates (Dec. 2006) (2004 CDC
25 Report), available at <http://www.cdc.gov/ART/ART2004>. The data, however, is of limited use
26 because the definition of ART used in the CDC Report excludes artificial insemination (2004
27 CDC Report at 3), which is probably the most common form of assisted reproductive
28 procedures. The CDC estimates that in 2004 ART procedures (excluding artificial insemination)
29 accounted for slightly more than one percent of total U.S. births. 2004 CDC Report at 13.
30 According to the Report: “The number of infants born who were conceived using ART increased
31 steadily between 1996 and 2004. In 2004, 49,458 infants were born, which was more than
32 double the 20,840 born in 1996.” 2004 CDC Report at 57. “The average age of women using
33 ART services in 2004 was 36. The largest group of women using ART services were women
34 younger than 35, representing 41% of all ART cycles carried out in 2004. Twenty-one percent of
35 ART cycles were carried out among women aged 35-37, 19% among women aged 38-40, 9%
36 among women aged 41-42, and 9% among women older than 42.” 2004 CDC Report at 15.
37 Updates of the 2004 CDC Report are to be posted at <http://www.cdc.gov/ART/ART2004>.

38
39 **Defined Terms.** In addition to the terms defined in subsection (a), this section contains
40 terms that are defined in Section 2-115.

41
42 *Functioned as a parent of the child.* The phrase “functioned as a parent of the child”,
43 which appears in subsection (d), is defined in Section 2-115 as behaving toward the child in a
44 manner consistent with being the child’s parent and performing functions that are customarily
45 performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or

1 holding out the child as the individual’s child, materially participating in the child’s upbringing,
2 bringing the child into the individual’s household as a regular member of that household, and
3 assuming physical custody of the child. See also the Comment to Section 2-115 for additional
4 explanation of the term.

5

6 *Incapacity.* The word “incapacity”, which appears in subsection (d), is defined in Section
7 2-115 as the inability of an individual to function as a parent of a child because of the
8 individual’s physical or mental condition.

9

10 **Subsection (d)(1): Signed Record Evidencing Consent, in Light of All the Facts and**
11 **Circumstances, to Assisted Reproduction with Intent to Be Treated as a Parent of the**
12 **Child.** In the case of Trust of Martin B., -- N.Y.S.2d ----, 2007 WL 2177221 (N.Y.Sur. Ct.
13 2007), the New York Surrogate’s Court held that a child of posthumous conception was included
14 in a class gift in a case in which the deceased father had signed a form that stated: “In the event
15 of my death I agree that my spouse shall have the sole right to make decisions regarding the
16 disposition of my semen samples. I authorize repro lab to release my specimens to my legal
17 spouse [naming her].” Another form he signed stated: “I, [naming him], hereby certify that I am
18 married or intimately involved with [naming her] and the cryopreserved specimens stored at
19 repro lab will be used for future inseminations of my wife/intimate partner.” Although these
20 forms do not explicitly say that the decedent intended to be treated as a parent of the child, they
21 do evidence such intent in light of all of the facts and circumstances and would therefore satisfy
22 subsection (d)(1).

23

24 {Comment to be continued}

1 **SECTION 2-121. PARENT-CHILD RELATIONSHIP: CHILD BORN TO A**
2 **GESTATIONAL MOTHER.**

3 **(a) [Definitions.]** In this section:

4 (1) “Gestational agreement” means an agreement, whether enforceable or not, in
5 which a woman agrees to carry a child to birth for an intended parent or intended parents or an
6 individual described in subsection (d), whether or not she is the child’s genetic mother. A
7 gestational agreement does not apply to the birth of a child conceived by means of sexual
8 intercourse.

9 (2) “Gestational child” means a child born to a gestational mother under a
10 gestational agreement.

11 (3) “Gestational mother” means a woman who is not an intended parent and who
12 gives birth to a child under a gestational agreement, whether or not she is the child’s genetic
13 mother.

14 (4) “Intended parent” is an individual who entered into an agreement providing
15 that the individual will be the parent of a child born to a gestational mother by means of assisted
16 reproduction, whether or not the individual has a genetic relationship with the child.

17 (5) “Legal custody” means the right and duty to exercise continuing general
18 supervision of a minor as authorized by law. The term includes the right and duty to protect,
19 educate, nurture, and discipline the minor and to provide the minor with food, clothing, shelter,
20 medical care, and a supportive environment.

21 (6) “Physical custody” means the assumption of physical control and supervision
22 of a minor.

23 **(b) [Gestational Mother.]** A parent-child relationship does not exist between a

1 gestational child and the child’s gestational mother unless she retained or gained legal {???
2 physical ???} custody of and functioned as a parent of the child.

3 {Reporter’s Explanation: In (b), for the time being, I’ve inserted “or physical”
4 because we need to decide what happens if the gestational mother retains or gains
5 physical custody of the child without legal authority. Should we tack on at the end
6 of the sentence “, but only for purposes of the right of the child to inherit from or
7 through the gestational mother”?
8 }

9 **(c) [Parent-Child Relationship With Intended Parent or Parents.]** A parent-child
10 relationship exists between a gestational child and an intended parent who:

11 (1) gained legal or physical custody of and functioned as a parent of the child
12 before the child reached the age of majority; or

13 (2) died while the gestational mother was pregnant if:

14 (A) (i) there were two intended parents and (ii) the other intended parent
15 survived the birth of the child and gained legal or physical custody of and functioned as a parent
16 of the child;

17 (B) (i) there were two intended parents, (ii) the other intended parent also
18 died while the gestational mother was pregnant, and (iii) a relative of either deceased intended
19 parent or the spouse or surviving spouse of a relative of either deceased intended parent gained
20 legal or physical custody of and functioned as a parent of the child; or

21 (C) (i) there was no other intended parent and (ii) a relative of or the
22 spouse or surviving spouse of a relative of the deceased intended parent gained legal or physical
23 custody of and functioned as a parent of the child.

24 **(d) [Gestational Agreement After Death or Incapacity.]** A parent-child relationship
25 exists between a gestational child and an individual {??? WHOSE SPERM OR EGGS ???} {???

1 WHO, BEFORE DEATH OR INCAPACITY, DEPOSITED SPERM OR EGGS THAT ???}
2 were used after the individual's death or incapacity by the gestational mother to conceive a child
3 under a gestational agreement entered into after the individual's death or incapacity if the
4 individual intended to be treated as the parent of the child. Such intent can be shown by:

5 (1) a record, signed by the individual, evidencing such intent, in light of all the
6 facts and circumstances; or

7 (2) facts and circumstances establishing such intent by clear and convincing
8 evidence.

9 **(e) [Presumption: Gestational Agreement After Spouse's Death or Incapacity.]** For
10 purposes of subsection (d), if the individual (i) before death or incapacity, deposited the sperm or
11 eggs that were used by the gestational mother to conceive a child, (ii) was then married and not
12 separated, and (iii) no divorce or annulment proceedings were then pending, then, in the absence
13 of clear and convincing evidence to the contrary, and in the absence of a record that satisfies
14 subsection (d)(1), the individual is deemed to have intended to be treated as the parent of the
15 child if the individual's spouse or surviving spouse functioned as a parent of the child.

16 **(f) [When Posthumously Conceived Gestational Child Treated as in Gestation.]** If,
17 under subsection (d), an individual is a parent of a gestational child conceived after the
18 individual's death, the child is treated as in gestation at the decedent's death for purposes of
19 Section 2-104(c) if the child is either (i) in utero within thirty-six months after the decedent's
20 death or (ii) born within forty-five months after the decedent's death. If another individual dies
21 intestate, the child is treated as in gestation on the date that the child is in utero for purposes of
22 Section 2-104(c).

23

Partial Comment

1 **Gestational Agreement.** The definition of gestational agreement in subsection (a) is
2 based on the Comment to Article 8 of the Uniform Parentage Act, which states that the term
3 “gestational mother” “applies to both a woman who, through assisted reproduction, performs the
4 gestational function without being genetically related to a child, and a woman who is both the
5 gestational and genetic mother. The key is that an agreement has been made that the child is to
6 be raised by the intended parents.” The Comment also points out that “The [practice in which the
7 woman is both the gestational and genetic mother] has elicited disfavor in the ART community,
8 which has concluded that the gestational mother’s genetic link to the child too often creates
9 additional emotional and psychological problems in enforcing a gestational agreement.”

10
11 **Legal Custody.** The definition in subsection (a) of the term “legal custody”, which
12 appears in subsections (b) and (c), comes from the Model Adoption Act.

13
14 **Other Defined Terms.** In addition to the terms defined in subsection (a), this section
15 contains terms that are defined in Section 2-115.

16
17 *Functioned as a parent of the child.* The phrase “functioned as a parent of the child”,
18 which appears in subsections (d) and (e), is defined in Section 2-115 as behaving toward the
19 child in a manner consistent with being the child’s parent and performing functions that are
20 customarily performed by a parent, such as fulfilling parental responsibilities toward the child,
21 recognizing or holding out the child as the individual’s child, materially participating in the
22 child’s upbringing, bringing the child into the individual’s household as a regular member of that
23 household, and assuming physical custody of the child. See also the Comment to Section 2-115
24 for additional explanation of the term.

25
26 *Incapacity.* The word “incapacity”, which appears in subsections (d) and (e), is defined in
27 Section 2-115 as the inability of an individual to function as a parent of a child because of the
28 individual’s physical or mental condition.

29
30 *Relative.* The word “relative”, which appears in subsection (c), is defined in Section 2-
31 115 as a grandparent or a descendant of a grandparent.

32
33 {Comment to be continued}

1 **SECTION 2-213. WAIVER OF RIGHT TO ELECT AND OF OTHER RIGHTS.**

2 **(a) [Scope.] A waiver is enforceable against the surviving spouse if it is enforceable**
3 **under (i) this section or (ii) the law governing the enforceability of the waiver where and when it**
4 **was executed.**

5 **(a)(b) [Waiver Before or After Marriage.]** The right of election of a surviving spouse
6 and the rights of the surviving spouse to homestead allowance, exempt property, ~~and~~ family
7 allowance, and intestate share, or any of them, may be waived, wholly or partially, before or
8 after marriage, unilaterally or pursuant to an agreement contained in ~~by a record signed by the~~
9 surviving spouse ~~written contract, agreement, or waiver signed by the surviving spouse.~~

10 ~~(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:~~

11 ~~(1) he [or she] did not execute the waiver voluntarily; or~~

12 ~~(2) the waiver was unconscionable when it was executed and, before execution of~~
13 ~~the waiver, he [or she]:~~

14 ~~(i) was not provided a fair and reasonable disclosure of the property or~~
15 ~~financial obligations of the decedent;~~

16 ~~(ii) did not voluntarily and expressly waive, in writing, any right to~~
17 ~~disclosure of the property or financial obligations of the decedent beyond the disclosure~~
18 ~~provided; and~~

19 ~~(iii) did not have, or reasonably could not have had, an adequate~~
20 ~~knowledge of the property or financial obligations of the decedent.~~

21 **(c) [Consideration Unnecessary.]** Consideration is not necessary to the enforcement of a
22 waiver.

23 **(d) [Requirements for Enforceability; Burden of Persuasion.]** For a waiver to be

1 enforceable against the surviving spouse, the spouse's waiver must have been informed and not
2 obtained by fraud, undue influence, or duress. Except as otherwise provided in subsection (e),
3 the enforcing party has the burden of persuasion to establish that the spouse's waiver was
4 informed. The surviving spouse has the burden of persuasion to establish that the waiver was
5 obtained by fraud, undue influence, or duress.

6 **(e) [Presumption.]** A rebuttable presumption arises that the surviving spouse's waiver
7 was informed, shifting the burden of persuasion to the surviving spouse to establish that his or
8 her waiver was not informed, if the enforcing party establishes that:

9 (1) before the waiver was executed, (i) the surviving spouse knew, at least
10 approximately, the decedent's assets and asset values, income, and liabilities; or (ii) the decedent
11 or his or her representative provided in timely fashion to the surviving spouse a written statement
12 accurately disclosing the decedent's significant assets and asset values, income, and liabilities;
13 and either

14 (2) the surviving spouse was represented by independent legal counsel; or

15 (3) if the surviving spouse was not represented by independent legal counsel, (i)
16 the decedent or the decedent's representative advised the surviving spouse, in timely fashion, to
17 obtain independent legal counsel, and offered to advance sufficient funds to pay for the
18 reasonable costs of the surviving spouse's representation or to reimburse those costs; and (ii) the
19 waiver stated, in language easily understandable by an adult of ordinary intelligence with no
20 legal training, the nature of any rights or claims otherwise arising at death that were altered by
21 the waiver, and the nature of that alteration.

22 **(e) (f) [Unconscionability.]** A waiver is unenforceable if it was unconscionable when it
23 was executed. An issue of unconscionability of a waiver is for decision by the court as a matter

1 of law.

2 **(d)(g) [Waiver of “All Rights”]** Unless it provides to the contrary, a waiver of “all
3 rights”, or equivalent language, in the property or estate of a present or prospective spouse or a
4 complete property settlement entered into after or in anticipation of separation or divorce is a
5 waiver of all rights of elective share, homestead allowance, exempt property, and family
6 allowance by each spouse in the property of the other and a renunciation by each of all benefits
7 that would otherwise pass to him [or her] from the other by intestate succession or by virtue of
8 any will executed before the waiver or property settlement.

9 **(h) [Dead Man’s Act Inapplicable.]** [Insert appropriate statutory reference to enacting
10 State’s Dead Man’s Act] is inapplicable to the determination of the enforceability of a waiver
11 under this section.]

12 **Reporter’s Explanation**

13
14 I added subsection (a) in order to make this section in effect prospective only in the
15 enacting state and to recognize the enforceability of a waiver signed elsewhere, before or after
16 the effective date of this section, if it was enforceable under the governing law of the other place.
17 In the enacting state, a waiver executed before the effective date of this section is enforceable if
18 it is enforceable under this section or under the prior law of the enacting state. At its December
19 7-8, 2007 meeting, the JEB-UTEA reacted favorably to the language of subsection (a). For
20 comparison, Fla. Stat. 732.702(1) provides: “Any contract, agreement, or waiver executed by a
21 nonresident of Florida, either before or after this law takes effect, is valid in this state if valid
22 when executed under the laws of the state or country where it was executed, whether or not he or
23 she is a Florida resident at the time of death.”

24
25 JEB-UTEA recommended that I add a bracketed subsection for states that have a Dead
26 Man’s Act, which I’ve done, though the drafting needs to be improved.

27
28 Also, JEB-UTEA wanted the burden of persuasion on fraud, undue influence, or duress
29 to be on the surviving spouse. The above draft now does that, subject of course to the approval of
30 the Drafting Committee.

31 **Reporter’s Explanation**

32
33
34 **§ 2-213. Waiver of Right to Elect and of Other Rights.** This proposal amends § 2-213,

1 which deals with the validity of a premarital or marital agreement or waiver regarding the UPC
2 elective share of the decedent's surviving spouse. Current § 2-213 is based on the Uniform
3 Premarital Agreement Act (1983). A more recent provision on marital and premarital agreements
4 was adopted by the American Law Institute in the new Restatement (Third) of Property: Wills
5 and Other Donative Transfers § 9.4 (2003).

6
7 Elective share systems and other statutory rights arising on death protect against
8 unilateral disinheritance of a spouse but do not interfere with genuinely consensual arrangements
9 that waive or reduce such spousal rights. Although protective in purpose, elective share law is
10 default law, which the parties may alter or abrogate. The parties may decline to have an
11 economic partnership of the kind characteristic of most first marriages. It is particularly
12 common, for example, for two previously married older persons contemplating marriage to wish
13 to ensure that on the first spouse's death, all or most of the decedent's property will go to the
14 decedent's children rather than to the surviving spouse (and ultimately, perhaps, to the surviving
15 spouse's children). Freedom to make an enforceable agreement or waiver of this character not
16 only facilitates the marriage of such a couple, but may also improve the quality of the marriage,
17 smoothing the spouses' relationship to their respective children by providing assurance that the
18 new marriage will not interfere with the children's expectations.

19
20 While there are good reasons to respect such contracts or waivers, the relationship
21 between parties contracting in anticipation of marriage, or in the midst of an ongoing marriage,
22 requires legal standards different from ordinary commercial settings. A party negotiating a
23 commercial contract can engage in arms-length dealings to maximize partisan advantage. Parties
24 to a premarital or a marital agreement or waiver are in a relationship of trust and confidence.
25 Entering into or operating within a marriage, an individual may have expectations about his or
26 her partner that may impair the capacity for self-protective judgment, or the inclination to
27 exercise it. The law reasonably requires greater assurance that the parties understand and
28 appreciate the consequences of such a premarital or a marital agreement or waiver.

29
30 It is believed that the Restatement's standards strike a fairer balance between two
31 objectives: (1) the objective of assuring that the agreement or waiver is valid if the Restatement's
32 requirements are satisfied and (2) the objective of reasonably requiring greater assurance that the
33 parties understand and appreciate the consequences of such a premarital or marital agreement or
34 waiver. The proposed amendment to § 2-213 reflects the Restatement's standards for validity.

35 36 **Comment**

37
38 ~~This section incorporates the standards by which the validity of a premarital agreement is~~
39 ~~determined under the Uniform Premarital Agreement Act § 6.~~

40
41 This section applies to a waiver, in whole or in part, of elective share rights and rights to
42 homestead allowance, exempt property, family allowance, and intestate share, or any of them. A
43 waiver can be made before or after the marriage and can be unilateral or pursuant to an
44 agreement. A waiver is enforceable against the surviving spouse if it is enforceable under (i) this
45 section or (ii) the law governing the enforceability of the waiver where and when it was

1 executed. Subsection (a) thus makes this section in effect prospective only in the enacting state
2 and to recognize the enforceability of a waiver signed elsewhere, before or after the effective
3 date of this section, if it was enforceable under the governing law of the other place. In the
4 enacting state, a waiver executed before the effective date of this section is enforceable if it is
5 enforceable under this section or under the prior law of the enacting state.
6

7 The right to homestead allowance, exempt property and family allowance are conferred
8 by the provisions of Part 4. The right to disclaim interests is recognized by Section 2-1105. The
9 provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights
10 in the other spouse's property, seem desirable in view of the common desire of parties to second
11 and later marriages to insure that property derived from the prior spouse passes at death to the
12 joint children (or descendants) of the prior marriage instead of to the later spouse. The operation
13 of a property settlement in anticipation of separation or divorce as a waiver and renunciation
14 takes care of most situations arising when a spouse dies while a divorce suit is pending.
15

16 Elective share systems and other statutory rights arising on death protect against
17 unilateral disinheritance of a spouse but do not interfere with genuinely consensual arrangements
18 that waive or reduce such spousal rights. Although protective in purpose, elective share law is
19 default law, which the parties may alter or abrogate. The parties may decline to have an
20 economic partnership of the kind characteristic of most first marriages. It is particularly
21 common, for example, for two previously married older persons contemplating marriage to wish
22 to ensure that on the first spouse's death, all or most of the decedent's property will go to the
23 decedent's children rather than to the surviving spouse (and ultimately, perhaps, to the surviving
24 spouse's children). Freedom to make an enforceable agreement of this character not only
25 facilitates the marriage of such a couple, but may also improve the quality of the marriage,
26 smoothing the spouses' relationship to their respective children by providing assurance that the
27 new marriage will not interfere with the children's expectations.
28

29 While there are good reasons to respect such contracts, the relationship between parties
30 contracting in anticipation of marriage, or in the midst of an ongoing marriage, requires legal
31 standards different from ordinary commercial settings. A party negotiating a commercial
32 contract can engage in arms-length dealings to maximize partisan advantage. Parties to a waiver
33 are in a relationship of trust and confidence. Entering into or operating within a marriage, an
34 individual may have expectations about his or her partner that may impair the capacity for self-
35 protective judgment, or the inclination to exercise it. The law reasonably requires greater
36 assurance that the waiving party understand and appreciate the consequences of the waiver.
37

38 **Signed Record.** To be enforceable, a waiver covered by this section must be in a record,
39 and must be signed by the surviving spouse. The waiver need not be supported by consideration.
40

41 **Burden of Persuasion.** Because the parties to a premarital or a marital agreement or
42 waiver are in a relationship of trust and confidence, subsection (d) places the burden of
43 persuasion on the enforcing party (the party seeking to enforce the waiver against a surviving
44 spouse who claims the elective share or other statutory rights in violation of the waiver). The
45 enforcing party must establish that the surviving spouse's consent was informed. The burden of

1 persuasion shifts to the surviving spouse to establish the opposite, however, if the rebuttable
2 presumption established in subsection (e) applies. The surviving spouse has the burden of
3 persuasion on undue influence, duress, or fraud, in the same manner that a will contestant has the
4 burden on these issues. See Restatement (Third) of Property: Wills and Other Donative Transfers
5 § 8.3 (2003).

6
7 **Presumption That Surviving Spouse’s Consent Was Informed.** If the enforcing party
8 establishes the existence of the circumstances described in subsection (e), the enforcing party
9 benefits from a rebuttable presumption that the requirements of subsection (d) are satisfied,
10 shifting the burden of persuasion to the surviving spouse.

11
12 The rebuttable presumption minimizes the risk of the agreement being found defective in
13 circumstances in which, before the waiver’s execution, the surviving spouse knew the decedent’s
14 financial situation, understood what legal rights or claims he or she might have as the decedent’s
15 surviving spouse, understood how the proposed agreement intended to alter those rights, and had
16 (or had a reasonable opportunity to have) independent legal representation in negotiating the
17 agreement or waiver. The rebuttable presumption is thus designed to increase the predictability
18 and enforceability of premarital and marital agreements and waivers by facilitating planning that
19 minimizes the risk of the agreement or waiver being found defective.

20
21 **Knowledge of the Decedent’s Financial Situation.** The surviving spouse must be
22 shown to have had knowledge of the decedent’s financial situation when the agreement was
23 executed in order for the rebuttable presumption provided in subsection (e) to arise. Such
24 knowledge is crucial to understanding the significance of the agreement or waiver, as the assets
25 are themselves the subject of the agreement or waiver.

26
27 To have the benefit of the rebuttable presumption under subsection (e), the enforcing
28 party must establish that, before the execution of the agreement or waiver, (i) the surviving
29 spouse knew, at least approximately, the decedent’s assets and asset values, income, and
30 liabilities; or (ii) the decedent or his or her representative provided in timely fashion to the
31 surviving spouse a written statement accurately disclosing the decedent’s significant assets and
32 asset values, income, and liabilities. In circumstances in which the decedent’s property consisted
33 importantly of assets for which an immediately ascertainable market price is not available, such
34 as close corporation shares or interests in real estate, the duty to disclose asset values requires the
35 decedent to supply suitable appraisals.

36
37 If the parties to the agreement were married or lived together for many years and
38 commingled their finances, or had been business partners, they may have had knowledge of each
39 other’s financial situation before the negotiations were begun, and such a showing will satisfy
40 the requirements of subsection (e)(1). In the more typical case in which the parties did not have
41 such knowledge, written disclosure in connection with the agreement is required.

42
43 **Representation by Independent Legal Counsel.** Showing that the surviving spouse had
44 knowledge of the decedent’s financial situation when the agreement or waiver was executed is
45 essential but not sufficient to give rise to the rebuttable presumption provided in subsection (e).

1 The surviving spouse must also have understood what legal rights or claims that he or she
2 might have as the decedent’s surviving spouse and understood how the proposed agreement or
3 waiver intended to alter those rights. Under subsection (e)(2), that requirement can be satisfied
4 by establishing that the surviving spouse was represented by independent legal counsel. An
5 independent counsel can be expected to provide advice that is customized to the client’s
6 particular situation, explain the legal rights that would accrue to the client as surviving spouse,
7 and negotiate the terms of the agreement or waiver on behalf of the client.

8
9 **Reasonable Opportunity to Obtain Independent Legal Counsel and Clear**
10 **Explanation of the Import of the Agreement or Waiver.** If the surviving spouse was not
11 represented by independent legal counsel, the enforcing party can obtain the benefit of the
12 rebuttable presumption by making two further showings. First, the enforcing party must establish
13 that the surviving spouse had a reasonable opportunity to obtain independent legal counsel in a
14 timely fashion. That is, the enforcing party must establish that the decedent or the decedent’s
15 representative advised the surviving spouse, in timely fashion, to obtain independent legal
16 counsel; and offered to advance the funds to pay for the reasonable costs of the surviving
17 spouse’s representation or reimburse the surviving spouse for those costs.

18
19 The enforcing party must also establish that the agreement stated, in language easily
20 understandable by an adult of ordinary intelligence with no legal training, the nature of any
21 rights or claims otherwise arising at death that were altered by the agreement, and the nature of
22 that alteration.

23
24 To qualify under subsection (e)(3), the language must be explicit, concrete, and
25 reasonably complete, but need not address every detail of the legal significance of the agreement
26 or waiver. For example, the language need not ordinarily explain the tax consequences of the
27 agreement’s or waiver’s provisions (although such an explanation would be necessary if tax
28 planning was a primary purpose of the agreement and the tax impact on the surviving spouse is
29 both significant and adverse).

30
31 **Unconscionability.** A spousal waiver is unenforceable if it was unconscionable when it
32 was executed. In accordance with general principles of contract law, subsection (f) provides that
33 an issue of unconscionability is for decision by the court as a matter of law.

34
35 **Effect of Premarital Agreement or Waiver on ERISA Benefits.** As amended in 1984
36 by the Retirement Equity Act, ERISA requires each employee benefit plan subject to its
37 provisions to provide that an election of a waiver shall not take effect unless
38 (i) the spouse of the participant consents in writing to such election,
39 (ii) such election designates a beneficiary (or form of benefits) which may not be
40 changed without spousal consent (or the consent of the spouse expressly permits designation by
41 the participant without any requirement of further consent by the spouse), and
42 (iii) the spouse’s consent acknowledges the effect of such election and is witnessed by a
43 plan representative or a notary public.

44
45 See 29 U.S.C. § 1055(c) (1988); Int. Rev. Code § 417(a).

1 In *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir.1992), the court held that a premarital
2 agreement was not an effective waiver of a wife’s claims to spousal death benefits under a
3 qualified profit sharing plan in which the deceased husband was the sole participant. The
4 premarital agreement provided, in part, that “each party hereby waives and releases to the other
5 party and to the other party’s heirs, executor, administrators and assigns any and all rights and
6 causes of action which may arise by reason of the marriage between the parties ... with respect to
7 any property, real or personal, tangible or intangible ... now owned or hereafter acquired by the
8 other party, as fully as though the parties had never married....” The court held that the
9 premarital agreement was not an effective waiver because it “did not designate a beneficiary and
10 did not acknowledge the effect of the waiver as required by ERISA.” 982 F.2d at 781. Although
11 the district court had held that the premarital agreement was also ineffective because the wife
12 was not married to the participant when she signed the agreement, the Second Circuit “reserve[d]
13 judgment on whether the [premarital] agreement might have operated as an effective waiver if its
14 only deficiency were that it had been entered into before marriage.” *Id.* at 781 n. 3. The court
15 did, however, quote *Treas. Reg. § 1.401(a)-20* (1991), which specifically states that “an
16 agreement entered into prior to marriage does not satisfy the applicable consent requirements....”
17 *Id.* at 762. Other cases involving the validity of premarital agreements on ERISA benefits
18 include *Callahan v. Hutsell*, *Callahan & Buchino*, 813 F.Supp. 541 (W.D.Ky.1992); *Zinn v.*
19 *Donaldson Co., Inc.*, 799 F.Supp. 69 (D.Minn.1992); *Estate of Hopkins*, 574 N.E.2d 230
20 (Ill.App.Ct.1991); see also *Howard v. Branham & Baker Coal Co.*, 1992 U.S.App. LEXIS 16247
21 (6th Cir.1992).

22

23 **Cross Reference.** See also Section 2-208 and Comment.

1 UPC § 2-503. Harmless Error. Although a document or writing added upon a
2 document was not executed in compliance with Section 2-502, the document or
3 writing is treated as if it had been executed in compliance with that section if the
4 proponent of the document or writing establishes by clear and convincing
5 evidence that the decedent intended the document or writing to constitute (i) the
6 decedent’s will, (ii) a partial or complete revocation of the will, (iii) an addition to
7 or an alteration of the will, or (iv) a partial or complete revival of his [or her]
8 formerly revoked will or of a formerly revoked portion of the will.
9

10 There is little doubt that a notarized will would almost always if not always be upheld under this
11 harmless-error rule. See *Estate of Hall*, 51 P.3d 1134 (Mont. 2002) (attorney assured client that
12 will was valid if he notarized it; will upheld under Montana’s enactment of UPC harmless-error
13 rule). Some UPC enacting states, however, have not adopted the harmless-error rule. Treating
14 notarized wills as validly executed under § 2-502 would allow such wills to be upheld without
15 the need to satisfy the clear and convincing standard of proof, and be beneficial in states that left
16 § 2-503 out of their enactment. The will-execution formalities are thought to serve several
17 functions — evidentiary, cautionary (ceremonial), channeling, and protective. A notarized will
18 would seem to serve all of these functions. The danger that a notarized will would not reliably
19 represent the decedent’s wishes seems minimal.
20

21 Also, the UPC authorizes holographic wills. One of the reasons why such wills are valid
22 is that the requirement that the material portions of the will be in the decedent’s handwriting
23 serves to give a larger writing sample than a mere signature. In the case of a notarized will, the
24 notarial seal serves the same function, because one of the notary’s principal duties is to verify the
25 identity of the person signing the document.
26

27 Of course, the conventional wisdom is that the American notary — as distinguished from
28 the quasi-judicial notary in the civil law countries — merely acts as a “rubber stamp.” But the
29 civil-law notary supervises an “authenticated will”, in which the notary determines whether the
30 testator has mental capacity and is not acting under duress or undue influence. Compliance with
31 the Anglo-American attestation formalities do no such thing: A validly executed will is subject
32 to contest on grounds of lack of capacity and undue influence, etc. Also, the UPC does not even
33 require that the attesting witnesses be disinterested, and this does not seem to have caused wills
34 that should be invalid to be upheld.
35

36 In conjunction with adding notarization as an optional method of execution, this proposal
37 adds a subsection to § 3-406, which is the section of the UPC that provides for the effect of
38 various methods of execution in contested cases. The amendment proposes that a notarized will
39 be rebuttably presumed to have been executed properly, subject to rebuttal by any contrary
40 evidence, including proof of fraud or forgery affecting the acknowledgment. See below, under
41 the title “§ 3-406: Formal Testacy Proceedings; Contested Cases.”
42

43 Cases have begun to emerge in which the supervising attorney, with the client and all
44 witnesses present, circulates one or more estate-planning documents for signature, and fails to
45 notice that the client or one of the witnesses has unintentionally neglected to sign one of the

1 documents. This often, but not always, arises when the attorney prepares multiple estate-
2 planning documents — a will, a durable power of attorney, a health-care power of attorney, and
3 perhaps a revocable trust.¹ It is common practice, and sometimes required by state law, that the
4 documents other than the will be notarized. It would reduce confusion and chance for error if all
5 of these documents could be executed with the same formality.

6
7 Also, lay people (and, sad to say, some lawyers) think that a will is valid if notarized.
8 See, e.g., *Estate of Hall*, supra. There are lots of cases in which a testator goes to his/her bank to
9 get the will executed, and the bank’s notary notarizes the document. The will is usually held
10 invalid in such cases, despite the lack of evidence raising any doubt that the will truly represents
11 the decedent’s wishes.

12
13 Other uniform acts affecting property or person do not require either attesting witnesses
14 or notarization. For example:

15
16 *Uniform Trust Code § 402(a)(2)* provides that a trust is created if the settlor
17 “indicates an intention to create the trust.” Such a trust can be a revocable inter-
18 vivos trust, which in many respects is the equivalent of a will.

19
20 *Power of Attorney Act § 105* provides that a power of attorney must be signed by
21 the principal or in the principal’s conscious presence by another individual
22 directed by the principal to sign the principal’s name on the power of attorney. A
23 signature on a power of attorney is presumed to be genuine if the principal
24 acknowledges the signature before a notary public or other individual authorized
25 by law to take acknowledgments.

26
27 *Uniform Health-care Decisions Act § 2(f)* provides that a health-care power must
28 be in writing and signed by the principal.

29
30 **§ 2-502(c): Extrinsic Evidence to Establish Meaning of Holographic Will.** This
31 proposal amends § 2-502(c), which authorizes holographic wills. The proposed amendment adds
32 the phrase “or its meaning” so that extrinsic evidence, including portions of the document that
33 are not in the testator’s handwriting, can be used to establish the meaning of a holographic will.

34
35 The added phrase is designed to conform the UPC to Restatement (Third) of Property:
36 Wills and Other Donative Transfers § 3.2, Comment c (1999), which provides:

37
38 § 3.2, *Comment c. Testamentary intent — holographic wills.* Holographic
39 wills as well as attested wills must be executed with testamentary intent. . . .
40 Testamentary intent need not be shown from the face of the will, but can be
41 established by extrinsic evidence. Extrinsic evidence can also be used to establish

¹ See, e.g., *Dalk v. Allen*, 774 So.2d 787 (Fla. Dist. Ct. App. 2000); *Sisson v. Park Street Baptist Church*, 24 E.T.R.2d 18 (Ont. Gen. Div. 1998).

1 the meaning of a holographic will.

2
3 The added phrase would produce a more just result in cases like *Estate of Foxley*, 575
4 N.W.2d 150 (Neb. 1998), which was decided under a holographic will statute similar to the
5 former UPC's holographic will statute. Neb. Rev. Stat. § 30-2328 provides: "An instrument
6 which purports to be testamentary in nature but does not comply with [the statute relating to
7 attested wills] is valid as a holographic will, whether or not witnessed, if the signature, the
8 material provisions, and an indication of the date of signing are in the handwriting of the
9 testator."

10
11 Eileen C. Foxley executed a valid will on February 8, 1985. When she executed the will,
12 she had six daughters and two sons. The will divided the bulk of her estate among her six
13 daughters in equal shares. In December 1993, one of the daughters, Jane F. Jones, died and was
14 survived by her only son, Hogan. The evidence at trial indicated that Foxley did not want her
15 grandson, Hogan, to participate in her estate because she believed that he had abused his mother
16 (Foxley's daughter).

17
18 Foxley died in October 1994. Upon her death, two of her daughters found a folder
19 containing the original will and a photocopy of the will in the den of Foxley's home. Foxley had
20 made handwritten alterations on the photocopy of the will. In its original form, Article I
21 provided:

22
23 My only children are William C. Foxley, Sarah F. Gross, John C. Foxley,
24 Winifred F. Wells, Elizabeth F. Leach, Sheila F. Radford, Mary Ann Pirotte and
25 Jane F. Jones.

26
27 Foxley had lined through "Jane F. Jones", and written in her own handwriting: "her share to be
28 divided to between 5 daughters. E.F. 1-7-94."

29
30 In its original form, Article III provided: "I hereby give, devise and bequeath all of the
31 rest of my proper [*sic*] to my six (6) daughters in equal shares." Foxley had lined through "six",
32 and written "5" below "(6)."

33
34 The trial court found that Foxley had substantially complied with the requirements of a
35 holographic codicil and admitted the photocopy and original will to probate. The Court of
36 Appeals affirmed, finding that Foxley's signature, the material provisions, and an indication of
37 the date of signing were in her handwriting and that she had clearly demonstrated her intentions
38 by her spoken words, her writings, and her actions.

39
40 The Supreme Court of Nebraska reversed. The court held that the holographic codicil
41 was invalid because the "handwritten words, standing alone, do not evidence a clear
42 testamentary intent." The court also held that the handwritten portions, "[w]hen read on their
43 own without reference to the original will . . . cannot be understood (575 N.W.2d at 155):
44

1 The statement “her share to be divided to between 5 daughters” does not express
2 testamentary intent and is not clear without a handwritten reference to which
3 daughter is to be excluded. Similarly, the line through “Jane F. Jones” is not
4 sufficient because that line has no meaning unless read in conjunction with the
5 typewritten names. Without the requisite testamentary intent, Foxley’s
6 handwritten words cannot be deemed material provisions.

7
8 The result was that one-sixth of Mrs. Foxley’s estate went to her grandson under the Nebraska
9 antilapse statute.

10
11 The Reporter’s Note to Restatement (Third) of Property § 3.2 said this of *Foxley*: “By
12 refusing to treat the nonhandwritten portions of the original, attested will as extrinsic evidence
13 that can be considered in determining testamentary intent and the meaning of the handwritten
14 codicil, the court reached a manifestly unjust result.”

15
16 **Partial Comment**

17
18 ~~**Scope and Purpose of Revision.** Section 2-502 and pre-1990 Section 2-503 are~~
19 ~~combined to make room for new Section 2-503. Also, a cross reference to new Section 2-503 is~~
20 ~~added, and fairly minor clarifying revisions are made.~~

21
22 **Subsection (a).** Three formalities for execution of a witnessed will are imposed.
23 Subsection (a)(1) requires the will to be in writing. Any reasonably permanent record is
24 sufficient. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. i
25 (1999). ~~A tape-recorded will has been held not to be “in writing.” Estate of Reed, 672 P.2d 829~~
26 ~~(Wyo. 1983).~~

27
28 Under subsection (a)(2), the testator must sign the will or some other individual must
29 sign the testator’s name in the testator’s presence and by the testator’s direction. If the latter
30 procedure is followed, and someone else signs the testator’s name, the so-called “conscious
31 presence” test is codified, under which a signing is sufficient if it was done in the testator’s
32 conscious presence, i.e., within the range of the testator’s senses such as hearing; the signing
33 need not have occurred within the testator’s line of sight. For application of the
34 “conscious-presence” test, see *Cunningham v. Cunningham*, 80 Minn. 180, 83 N.W. 58 (1900)
35 (conscious-presence requirement held satisfied where “the signing was within the sound of the
36 testator’s voice; he knew what was being done ...”); *Healy v. Bartless*, 73 N.H. 110, 59 A. 617
37 (1904) (individuals are in the decedent’s conscious presence “whenever they are so near at hand
38 that he is conscious of where they are and of what they are doing, through any of his senses, and
39 where he can readily see them if he is so disposed.”); *Demaris’ Estate*, 166 Or. 36, 110 P.2d 571
40 (1941) (“[W]e do not believe that sight is the only test of presence. We are convinced that any of
41 the senses that a testator possesses, which enable him to know whether another is near at hand
42 and what he is doing, may be employed by him in determining whether [an individual is] in his
43 [conscious] presence ...”).

1 Under subsection (a)(3), at least two individuals must sign the will, each of whom
2 witnessed at least one of the following: the signing of the will; the testator’s acknowledgment of
3 the signature; or the testator’s acknowledgment of the will.

4
5 Signing may be by mark, nickname, or initials, subject to the general rules relating to that
6 which constitutes a “signature.” There is no requirement that the testator “publish” the document
7 as his or her will, or that he or she request the witnesses to sign, or that the witnesses sign in the
8 presence of the testator or of each other. The testator may sign the will outside the presence of
9 the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or
10 that his or her name was signed by another) or that the document is his or her will. An
11 acknowledgment need not be expressly stated, but can be inferred from the testator’s conduct.
12 Norton v. Georgia Railroad Bank & Tr. Co., 248 Ga. 847, 285 S.E.2d 910 (1982). The witnesses
13 must sign as witnesses (see, e.g., Mossler v. Johnson, 565 S.W.2d 952 (Tex. Civ.App. 1978)),
14 and must sign within a reasonable time after having witnessed the signing or acknowledgment.
15 There is, however, no requirement that the witnesses sign before the testator’s death; in a given
16 case, the reasonable-time requirement could be satisfied even if the witnesses sign after the
17 testator’s death.

18
19 There is no requirement that the testator’s signature be at the end of the will; thus, if he or
20 she writes his or her name in the body of the will and intends it to be his or her signature, this
21 would satisfy the statute. See Estate of Siegel, 214 N.J.Super. 586, 520 A.2d 798 (App.Div.
22 1987).

23
24 A will that does not meet these requirements may be valid under subsection (b) as a
25 holograph or under the harmless-error rule of Section 2-503.

26
27 Signature Guarantee. A signature guarantee does not satisfy subsection (a)(2)(B). A
28 signature guarantee is not an acknowledgment before a notary public or other person authorized
29 to take acknowledgments. The signature guarantee program is regulated by federal law and is
30 designed to facilitate transactions relating to securities. See 17 C.F.R. § 240.17Ad-15.

31
32 **Subsection (b).** This subsection authorizes holographic wills. It enables a testator to
33 write his or her own will in handwriting. There need be no witnesses. The only requirement is
34 that the signature and the material portions of the document be in the testator’s handwriting.

35
36 By requiring only the “material portions of the document” to be in the testator’s
37 handwriting (rather than requiring, as some existing statutes do, that the will be “entirely” in the
38 decedent’s handwriting), a holograph may be valid even though immaterial parts such as date or
39 introductory wording are printed, typed, or stamped.

40
41 A valid holograph can also be executed on a printed will form if the material portions of
42 the document are handwritten. The fact, for example, that the will form contains printed
43 language such as “I give, devise, and bequeath to _____” does not disqualify the document as

1 a holographic will, as long as the testator fills out the remaining portion of the dispositive
2 provision in his or her own hand.

3

4 Under subsection (c), testamentary intent can be shown by extrinsic evidence, including
5 for holographic wills the printed, typed, or stamped portions of the form or document.

1 similar self-proving will provisions in a few states, under which a signature on the self-proving
2 affidavit has been held not to constitute a signature on the will, resulting in invalidity of the will
3 in cases where the testator or witnesses got confused and only signed on the self-proving
4 affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U.
5 L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash.Ct.App.1989).

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

3 **(a) [Definitions.]** In this section:

4 (1) “Distribution date” means the time when an immediate or a postponed class
5 gift is to take effect in possession or enjoyment.

6 (2) “Genetic parent” means an individual whose sperm or eggs were used to
7 conceive a child. If the father-child relationship is established under [Section 201(b)(1), (2), or
8 (3) of the Uniform Parentage Act (2000), as amended], the term means the man for whom that
9 relationship is established and not another man.

10 (3) “Relative” means a grandparent or a descendant of a grandparent.

11 (4) “Functioned as a parent of the child” means behaving toward the child in a
12 manner consistent with being the child’s parent and performing functions that are customarily
13 performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or
14 holding out the child as the individual’s child, materially participating in the child’s upbringing,
15 bringing the child into the individual’s household as a regular member of that household, and
16 assuming physical custody of the child.

17 ~~(a)~~ **(b) [Terms of Relationship.]** An adopted individual, and an individual
18 born to parents who are not married to each other ~~individuals born out of wedlock~~, a child of
19 assisted reproduction, and a child born to a gestational mother, and their respective descendants
20 if appropriate to the class, are included in class gifts and other terms of relationship in
21 accordance with the rules for intestate succession. Terms of relationship that do not differentiate
22 relationships by blood from those by affinity, such as “uncles”, “aunts”, “nieces”, or “nephews”,
23 are construed to exclude relatives by affinity, unless (i) when the governing instrument was

1 executed, the class was then and foreseeably would be empty; or (ii) the facts and circumstances
2 otherwise indicate that relatives by affinity were intended to be included. Terms of relationship
3 that do not differentiate relationships by the half blood from those by the whole blood, such as
4 “brothers”, “sisters”, “nieces”, or “nephews”, are construed to include both types of
5 relationships.

6 ~~(b)~~ **(c) [Transferor Not Genetic Parent.]** In addition to the requirements of subsection
7 ~~(a b)~~, in construing a dispositive provision of a transferor who is not the ~~natural~~ genetic parent,
8 an individual born to the ~~natural~~ genetic parent is not considered the child of that parent unless
9 the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of a relative
10 of the genetic parent functioned as a parent of the child before the child reached the age of
11 majority individual lived while a minor as a regular member of the household of that natural
12 parent or of that parent’s parent, brother, sister, spouse, or surviving spouse.

13 ~~(c)~~ **(d) [Transferor Not Adopting Parent.]** In addition to the requirements of subsection
14 ~~(a b)~~, in construing a dispositive provision of a transferor who is not the adopting parent, an
15 adopted individual is not considered the child of the adopting parent unless (i) the adoption took
16 place before the adopted individual reached the age of majority; (ii) the adopting parent was the
17 adopted individual’s stepparent or foster parent; or (iii) the adopting parent functioned as a
18 parent of the adopted individual before the adopted individual reached the age of majority
19 adopted individual lived while a minor, either before or after the adoption, as a regular member
20 of the household of the adopting parent.

21 **(e) [Class Closing Rules.]** The following rules apply for purposes of the class closing
22 rules:

23 (1) An individual in utero at a particular time is treated as living at that time if the

1 individual lives 120 hours after birth.

2 (2) If the distribution date is the deceased parent’s death, a child conceived
3 posthumously by assisted reproduction is treated as living on the distribution date if the child
4 lives 120 hours after birth and was either (i) in utero within thirty-six months after the deceased
5 parent’s death or (ii) born within forty-five months after the deceased parent’s death.

6 (3) If the distribution date arises after the deceased parent’s death, a child
7 conceived posthumously by assisted reproduction is living on the distribution date if the child is
8 then in utero and if the child lives 120 hours after birth.

9 (4) An individual who is in the process of being adopted when the class closes is
10 treated as an adopted child when the class closes if the adoption is subsequently granted.

11 ***Legislative Note:** States that have not enacted the Uniform Parentage Act (2000, as amended)*
12 *should insert in subsection (a)(2) either “applicable state law” or an appropriate statutory*
13 *reference instead of the reference to the Uniform Parentage Act (2000, as amended). Two of the*
14 *principal features of Articles 1 through 6 of the Uniform Parentage Act (2000, as amended), are*
15 *(i) the presumption of paternity and the procedure under which that presumption can be*
16 *disproved by adjudication and (ii) the acknowledgment of paternity and the procedure under*
17 *which that acknowledgment can be rescinded or challenged. States that have not enacted similar*
18 *provisions should consider whether such provisions should be added as part of Section 2-115(b).*
19 *States that have not enacted the Uniform Parentage Act (2000, as amended) should also make*
20 *sure that applicable state law authorizes parentage to be established after the death of the*
21 *alleged parent, as provided in the Uniform Parentage Act § 509 (2000, as amended), which*
22 *provides: “For good cause shown, the court may order genetic testing of a deceased*
23 *individual.”*

24 **Partial Comment**

25
26
27 This Section is largely consistent with the Restatement (Third) of Property: Wills and
28 Other Donative Transfers §§ 14.5, 14.6, 14.7 (2007). These sections of the Restatement apply to
29 the treatment of an adopted child and a nonmarital child for class-gift purposes. Unlike
30 Restatement § 14.7, however, subsection (c) applies to marital and nonmarital children alike.

31
32 **Subsection (b): Relatives by Affinity.** Subsection (b) provides that “Terms of
33 relationship that do not differentiate relationships by blood from those by affinity, such as
34 “uncles”, “aunts”, “nieces”, or “nephews”, are construed to exclude relatives by affinity.” This is
35 a rule of construction that, under Section 2-701, yields to a finding of a contrary intention. The

1 Restatement (Third) of Property: Wills and Other Donative Transfers § 14.9 (2007) adopts a
2 similar rule of construction, but notes in Comment that there are some situations in which the
3 circumstances would tend to rebut the presumption, resulting in inclusion of a relative by
4 marriage. One is the situation in which, looking at the facts existing when the governing
5 instrument was executed, the class was then and foreseeably would be empty unless the
6 transferor intended to include relatives by marriage. Another is the case of reciprocal wills.
7 Suppose that a husband’s will devises his entire estate “to my wife if she survives me, but if not,
8 to my nieces and nephews”, and his wife’s will devises her entire estate “to my husband if he
9 survives me, but if not, to my nieces and nephews.” Both husband and wife have nieces and
10 nephews. The husband dies first. All of his property passes to his widow. On her subsequent
11 death, the term “my nieces and nephews” is presumptively construed to include her nieces and
12 nephews by marriage (her husband’s nieces and nephews). Were it otherwise, the combined
13 estates of husband and wife would pass only to the nieces and nephews of the spouse who
14 happened to survive.

15

16 **Subsection (e): Class Closing Rules.** For an exposition of the class-closing rules, see
17 Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 (2007). Section 15.1
18 provides that, “unless the language or circumstances establish that the transferor had a different
19 intention, a class gift that has not yet closed physiologically closes to future entrants on the
20 distribution date if a beneficiary of the class gift is then entitled to distribution.”

21

22 Subsection (e) changes the class-closing rules in one respect. If the distribution date is the
23 deceased parent’s death, a child produced posthumously by assisted reproduction is treated as
24 living on the distribution date if the child was either (i) in utero within 36 months after the
25 deceased parent’s death or (ii) born within 45 months after the deceased parent’s death, and if
26 the child lives 120 hours after birth. If, however, the distribution date arises after the deceased
27 parent’s death, the ordinary class-closing rules apply, i.e., a child produced posthumously by
28 assisted reproduction is treated as living on the distribution date if the child is then in utero and if
29 the child lives 120 hours after birth.

30

31 **Subsection (f): 36-month and 45-month Periods.** Under Section 3-1006, an heir is
32 allowed to recover property improperly distributed or its value from any distributee during the
33 later of 3 years after the decedent’s death or 1 year after distribution. The 36-month period in
34 subsection (e) is based on the 3-year period and the 45-month period is based on the 3-year
35 period with an additional 9 months tacked on to allow for a normal period of pregnancy.

36

37 {Comment to be continued}

1 a. Scope note. This section only addresses reformation as a method of correcting
2 mistakes in donative documents. It does not address the full range of equitable remedies for
3 correcting mistakes in donative transfers. For example, this section does not address situations
4 such as those in which a donor is entitled to restitution or rescission in equity because the donor
5 was induced by a mistake of fact or law to make a gift that the donor would not have made if the
6 donor had known the truth. Nor does this section address denial of probate or partial denial of
7 probate as a possible remedy for correcting mistakes in wills in appropriate circumstances.
8

9 b. Rationale. When a donative document is unambiguous, evidence suggesting that the
10 terms of the document vary from intention is inherently suspect but possibly correct. The law
11 deals with situations of inherently suspicious but possibly correct evidence in either of two ways.
12 One is to exclude the evidence altogether, in effect denying a remedy in cases in which the
13 evidence is genuine and persuasive. The other is to consider the evidence, but guard against
14 giving effect to fraudulent or mistaken evidence by imposing an above-normal standard of proof.
15 In choosing between exclusion and high-safeguard allowance of extrinsic evidence, this
16 Restatement adopts the latter. Only high-safeguard allowance of extrinsic evidence achieves the
17 primary objective of giving effect to the donor’s intention. To this end, the full range of direct
18 and circumstantial evidence relevant to the donor’s intention described in § 10.2 may be
19 considered in a reformation action.
20

21 Equity rests the rationale for reformation on two related grounds: giving effect to the
22 donor’s intention and preventing unjust enrichment. The claim of an unintended taker is an
23 unjust claim. Using the equitable remedy of reformation to correct a mistake is necessary to
24 prevent unjustly enriching the mistaken beneficiary at the expense of the intended beneficiary.
25

26 c. Historical background. The reformation doctrine for donative documents other than
27 wills is well established. Equity has long recognized that deeds of gift, inter-vivos trusts, life-
28 insurance contracts, and other donative documents can be reformed if it is established by clear
29 and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement,
30 affected specific terms of the document; and (2) what the donor’s intention was. Reformation of
31 these documents is granted, on an adequate showing of proof, even after the death of the donor.
32

33 This section unifies the law of wills and will substitutes by applying to wills the
34 standards that govern other donative documents. Until recently, courts have not allowed
35 reformation of wills. The denial of a reformation remedy for wills was predicated on observance
36 of the Statute of Wills, which requires that wills be executed in accordance with certain
37 formalities. See § 3.1. Reforming a will, it was feared, would often require inserting language
38 that was not executed in accordance with the statutory formalities. Section 11.2, however,
39 authorizes inserting language to resolve ambiguities in accordance with the donor’s intention.
40 As noted in § 11.2, Comment c, modern authority is moving away from insistence on strict
41 compliance with the statutory formalities on the question of initial execution of wills. Section §
42 3.3 adopts the position a harmless error in executing a will may be excused “if the proponent
43 establishes by clear and convincing evidence that the decedent adopted the document as his or
44 her will.” See also Restatement Second, Property (Donative Transfers) § 33.1, Comment g. The
45 Revised Uniform Probate Code § 2-503 also adopts a harmless-error rule. Under the Revised

1 UPC, a document or writing on a document that was not executed in compliance with the
2 statutory formalities is treated as if it had been properly executed “if the proponent of the
3 document or writing establishes by clear-and-convincing evidence that the decedent intended the
4 document or writing to constitute . . . the decedent’s will”

5
6 The trend away from insisting on strict compliance with statutory formalities is based on
7 a growing acceptance of the broader principle that mistake, whether in execution or in
8 expression, should not be allowed to defeat intention. A common principle underlies the
9 movement to excuse defective execution: § 11.2, authorizing insertion of language to resolve
10 ambiguities in donative documents; and this section, authorizing reformation of unambiguous
11 donative documents (including wills) to correct mistakes.

12
13 The important difference between § 11.2 and this section is the burden of proof.
14 Ambiguity shows that the donative document contains an inadequate expression of the donor’s
15 intention. Here, because there is no ambiguity, clear and convincing evidence is required to
16 establish that the document does not adequately express intention.

17
18 Recent cases have begun to recognize that wills can be reformed. The Restatement
19 Second, Property (Donative Transfers) § 34.7, Comment *d* also accepted the proposition that
20 wills as well as other donative documents can be reformed to correct mistakes, stating:

21
22 The general law of mistake, under which a mistake may be significant enough to justify
23 the conclusion that the donative transfer should be set aside or reformed, is incorporated
24 herein by reference and made applicable to both wills and other donative documents of
25 transfer.

26
27 This section carries forward the position of the Restatement Second by extending the
28 conventional reformation remedy for inter-vivos donative documents to wills, hence to all
29 donative documents.

30
31 *d. Plain meaning rule disapproved.* The so-called plain meaning rule is disapproved to
32 the extent that that rule purports to exclude extrinsic evidence of the donor’s intention. The plain
33 meaning, Wigmore noted, “is simply the meaning of the people who did *not* write the
34 document.” The objective of the plain meaning rule, to prevent giving effect to mistaken or
35 fraudulent testimony, is sufficiently preserved by subjecting extrinsic evidence that contradicts
36 what appears to be the plain meaning of the text to a higher than normal standard of proof, the
37 clear-and-convincing-evidence standard.

38
39 *e. Standard of proof— clear and convincing evidence.* There are two standards of proof
40 for civil cases—preponderance of the evidence and clear and convincing evidence. This section
41 imposes the clear-and-convincing-evidence standard of proof. Reformation is permissible only
42 if the elements stated in this section are established by clear and convincing evidence.

43
44 The normal standard of proof in civil cases is preponderance of the evidence. Under that
45 standard, the evidence must establish a probability that an assertion is true, *i.e.*, that it is more

1 probable than not that the assertion is true. A higher degree of probability is required under the
2 clear-and-convincing-evidence standard. Although this higher standard of proof defies
3 quantification, it is generally agreed that it requires an assertion to be established by a high
4 degree of probability, though not to an absolute or moral certainty or beyond a reasonable doubt.
5

6 The standard of proof serves various functions. It alerts potential plaintiffs to the
7 strength of evidence required in order to prevail, instructs the trier of fact regarding the level of
8 confidence needed to find for the plaintiff, and allocates the risk of an erroneous factual
9 determination.
10

11 The higher standard of proof under this section imposes a heightened sense of
12 responsibility upon the trier of fact. When the case is tried before a judge, the judge should
13 respond by rendering a thorough, reasoned set of findings that deal with the relevant contested
14 facts. A collateral benefit of requiring clear and convincing proof is that an appellate court will
15 rightly feel free to scrutinize the trial court's work more closely than in the typical
16 preponderance-of-the-evidence review. As a practical matter, this greater scrutiny pressures the
17 trial judge to do an especially careful job.
18

19 Absolute certainty about the truth of assertions of fact can seldom be established.
20 Because a determination of fact is based on probability, not certainty, there is always a risk of
21 error. An erroneous factual determination can result in a judgment for the plaintiff when the
22 truth, were it known, would warrant a judgment for the defendant, and vice versa. The higher
23 standard of proof under this section imposes a greater risk of an erroneous factual determination
24 on the party seeking reformation than on the party opposing reformation. Tilting the risk of an
25 erroneous factual determination in this fashion is appropriate because the party seeking
26 reformation is seeking to establish that a donative document does not reflect the donor's
27 intention. This tilt also deters a potential plaintiff from bringing a reformation suit on the basis
28 of insubstantial evidence.
29

30 *f. Nature of reformation and constructive trust.* The grounds stated in this section, if
31 established by clear and convincing evidence, support an order of reformation and, if necessary,
32 other equitable relief such as the imposition of a constructive trust. An order of reformation
33 alters the text of a donative document so that it expresses the intention it was intended to
34 express. Thus, unless otherwise stated, a judicial order of reformation relates back and operates
35 to alter the text as of the date of execution rather than as of the date of the order or any other
36 post-execution date.
37

38 If property was previously distributed under the mistaken terms of the document, the
39 court may impose a constructive trust or take other remedial steps in addition to issuing an order
40 of reformation. A constructive trust is an equitable remedy that orders property in the hands of
41 an unintended recipient to be transferred to the intended beneficiary. Thus, the court imposes the
42 constructive trust in favor of the intended beneficiary. Unless otherwise stated, the constructive
43 trust imposed under this section presupposes that the order of reformation relates back and
44 operates to alter the text as of the date of the donor's execution of the document, as described
45 above.

1 g. Grounds for reformation. In order to support the equitable remedy of reformation, the
2 extrinsic evidence must establish, by clear and convincing evidence, (1) that a mistake of fact or
3 law affected the expression, inclusion, or omission of specific terms of the document and (2)
4 what the donor’s actual intention was in a case of mistake in expression or what the donor’s
5 actual intention would have been in a case of mistake in the inducement. A petition for
6 reformation can be brought under this section by any interested person, before or after the
7 donor’s death.

8
9 h. Limitations on the scope of reformation. Reformation is a rule governing mistakes in
10 the content of a donative document, in a case in which the donative document does not say what
11 the transferor meant it to say. Accordingly, reformation is not available to correct a failure to
12 prepare and execute a document (Illustration 1). Nor is reformation available to modify a
13 document in order to give effect to the donor’s post-execution change of mind (Illustration 2) or
14 to compensate for other changes in circumstances (Illustration 3).

15
16 **Illustrations:**

17 1. G decided to leave his estate to his niece, X. G orally communicated his intent
18 to X, mistakenly thinking that he could effectuate his intent in this manner. Thereafter G
19 died intestate, leaving his sister, A, as his sole heir.

20 Because G did not reduce his testamentary intent to writing and execute it as
21 required by the Statute of Wills, X cannot invoke the reformation doctrine to implement
22 G’s true intent. G’s mistake did not refer to specific terms in a donative document,
23 because G never executed a document. There is no document to reform.

24 2. G validly executed a will that devised his estate to his sister, A. After
25 execution, G formed an intent to alter the disposition in favor of A’s daughter, X, in the
26 mistaken belief that he could substitute his new intent by communicating it to X orally.

27 G’s oral communication to X does not support a reformation remedy. Although a
28 donative document exists that could be reformed by substituting “X” for “A”, the remedy
29 does not lie because G’s will was not the product of mistake. The will when executed
30 stated G’s intent accurately. G’s mistake was his subsequent failure to execute a codicil
31 or a new will to carry out his new intent. This is a mistake of the same sort that G made
32 in Illustration 1 in not making a valid will in the first place.

33 3. G’s will devised his government bonds to his daughter, A, and the residue of
34 his estate to a friend. Evidence shows that the bonds are worth only half of what they
35 were worth at the time of execution of the will and that G would probably have left A
36 more had he known that the bonds would depreciate in value.

37 This evidence does not support a reformation remedy. G’s mistake did not relate
38 to facts that existed when the will was executed.

39
40 i. Mistake in expression or inducement. If proved by clear and convincing evidence, a
41 mistake justifies an equitable remedy, whether the mistake is one of expression or inducement.
42 A mistake of expression arises when a donative document includes a term that misstates the
43 donor’s intention (Illustration 4), fails to include a term that was intended to be included
44 (Illustration 5), or includes a term that was not intended to be included (Illustration 6). A
45 mistake in the inducement arises when a donative document includes a term that was intended to

1 be included or fails to include a term that was not intended to be included, but the intention to
2 include or not to include the term was the product of a mistake of fact or law (Illustrations 7 and
3 8).

4
5 **Illustrations:**

6 4. G's will devised "\$1,000 to A." Extrinsic evidence, including the testimony
7 and files of the drafting attorney, shows that there was a mistake in transcription and that
8 G's intention was to devise \$10,000 to A.

9 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
10 will is reformed to substitute "\$10,000" for "\$1,000."

11 5. G created an inter-vivos trust. The trust document did not contain a clause
12 reserving to G a power to revoke the trust. Controlling law provides that a trust is
13 irrevocable in the absence of an expressly retained power to revoke. After G signed the
14 document, G's financial condition changed and G sought to revoke the trust.

15 Extrinsic evidence shows that G intended to create a revocable trust and so
16 instructed her attorney; and shows that G's attorney mistakenly failed to include the
17 revocation clause.

18 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
19 trust document is reformed to insert the mistakenly omitted power to revoke.

20 6. G's will devised "\$1,000 to A." Extrinsic evidence, including the testimony
21 and files of the drafting attorney, shows that there was a mistake in transcription and that
22 G's intention was not to devise any property to A. Although earlier drafts of G's will
23 contained the devise to A, there is evidence that G had instructed his attorney to delete
24 the devise in the final draft and that, by mistake, G's attorney failed to carry out G's
25 instructions.

26 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
27 will is reformed to delete the devise to A.

28 7. G created an inter-vivos trust. The trust document did not contain a clause
29 reserving to G a power to revoke the trust. Controlling law provides that a trust is
30 irrevocable in the absence of an expressly retained power to revoke. After G signed the
31 document, G's financial condition changed and G sought to revoke the trust.

32 Extrinsic evidence shows that G intended to create a revocable trust and did not
33 understand the need for a revocation clause.

34 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
35 trust document is reformed to insert a power to revoke.

36 8. G created an inter-vivos trust of the bulk of his assets. The trust document did
37 not contain a clause reserving to G a power to revoke the trust. Controlling law provides
38 that a trust is irrevocable in the absence of an expressly retained power to revoke. After
39 G signed the document, G sought to revoke the trust.

40 Extrinsic evidence shows that G established the trust when he was in line for a
41 high-level position in the federal government. From the press reports he had read, he
42 mistakenly believed that he had to place all of his assets into an irrevocable trust in order
43 to comply with federal policies on public service conflicts of interest. G liquidated much
44 of his property, and placed the bulk of his assets into the irrevocable trust. Subsequently,
45 G learned that federal policies did not require him to transfer his assets to an irrevocable

1 trust.

2 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
3 trust document is reformed to insert a power to revoke.

4
5 *j. Particularity of proof.* In order to support an order of reformation or the imposition of a
6 constructive trust, the petitioner must prove, by clear and convincing evidence, both (1) that a
7 mistake of fact or law affected specific terms of the document and (2) what the donor’s true
8 intention was. Both elements must be proved with particularity. For example, a claim that “if
9 only my aunt had known how much I loved her, she would have left me more” lacks sufficient
10 particularity to support a petition for remedy. Proof that the donor instructed his or her attorney
11 to “give me an estate plan that incurs the lowest possible tax liability” lacks sufficient
12 particularity to support a reformation remedy.

13
14 Notice, however, that the requirement of particularity does not require proof that the
15 donor personally made the mistake nor proof that the donor formulated the exact language
16 needed to carry out his or her intention. A remedy will lie if a mistake of the donor’s advisor or
17 drafting agent has affected specific terms of the document by failing properly to formulate the
18 language necessary to carry out the donor’s intention. Suppose, for example, that the petitioner
19 proves by clear and convincing evidence that the testator instructed his lawyer to draft a will that
20 devised certain property to child A. A remedy will lie if the lawyer drafted a will that
21 misdescribed the intended property or the intended devisee. The petitioner need not prove that
22 the testator formulated the exact language necessary to carry out his intention, which the
23 testator’s lawyer mistakenly failed to include. The testator properly relies upon the lawyer to
24 draft the language necessary to carry out his intention.

25
26 *k. Statutory rules of construction.* Just as the requirement of particularity discussed in
27 Comment *j* does not require the petitioner to prove that the donor formulated the exact language
28 necessary to carry out intention, neither does the petitioner need to prove that the donor
29 expressly intended to overcome a statutory rule of construction. Statutes often provide that a
30 particular rule of construction prevails unless the donative document, another specified
31 document, or one of a list of specified documents expressly provides otherwise. See § 11.3.
32 Such rules of construction purport to govern when the document is silent. If the elements of this
33 section are satisfied by clear and convincing evidence, however, a petition for reformation can
34 be sustained to insert language into the document that rebuts the rule of construction. Suppose,
35 for example, that the petitioner proves by clear and convincing evidence that the donor instructed
36 his or her lawyer to draft a will that devised certain property to child, A, but not to A’s children
37 if A predeceased the donor leaving children who survived the donor. A remedy will lie if the
38 lawyer drafted a will that failed to include language necessary to defeat the applicable antilapse
39 statute. As reformed under this section, the donor’s will defeats the antilapse statute because it
40 includes language expressly contradicting that statutory rule of construction. As stated in
41 Comment *j*, the petitioner need not prove that the donor formulated the exact language necessary
42 to carry out his or her intention and that the donor’s lawyer, by mistake, failed to include the
43 donor’s language; the donor properly relies upon the lawyer to draft the language necessary to
44 carry out his or her intention.

1 *l. Donor's signature after having read document does not bar remedy.* Proof that the
2 donor read the document or had the opportunity to read the document before signing it does not
3 preclude an order of reformation or the imposition of a constructive trust. The English Law
4 Reform Committee, in recommending the adoption of a reformation doctrine for wills, stated
5 well the rationale for this position:

6
7 We have also considered whether any special significance ought to be given to
8 cases in which the will has been read over to the testator, perhaps with explanation, and
9 expressly approved by him before execution. In our view it should not. Some testators
10 are inattentive, some find it difficult to understand what their solicitors say and do not
11 like to confess it, and some make little or no attempt to understand. As long as they are
12 assured that the words used carry out their instructions, they are content. Others may
13 follow every word with meticulous attention. It is impossible to generalise, and our view
14 is that reading over is one of the many factors to which the court should pay attention,
15 but that it should have no conclusive effect.

16
17 Law Reform Committee, Nineteenth Report: Interpretation of Wills, Cmnd. No. 5301, at 12
18 (1973).

19
20 *m. Defenses: change of position by recipient; bona fide purchaser; laches; etc.* All
21 defenses generally available in equity to a suit to reform a donative document or to impose a
22 constructive trust upon the recipient of property distributed under a donative document are
23 available under this section. For example, a reformation order is ineffective and the imposition
24 of a constructive trust does not lie against a person regarding property that he or she received
25 without giving value therefor if, after receiving the property and without knowledge of the
26 circumstances justifying reformation under this section, the recipient changed position in a way
27 that makes it inequitable to require the recipient to return that property or its value. See
28 Restatement, Restitution §§ 69, 142. See also Restatement Second, Trusts §§ 292, 333;
29 Restatement Second, Contracts § 155 and Comment *f*.

30
31 A reformation order is ineffective and the imposition of a constructive trust does not lie
32 against a person regarding property that he or she has received if the recipient gave value
33 therefor without knowledge of the circumstances justifying reformation under this section. See
34 Restatement, Restitution §§ 13, 123, 141, 173, 174. See also Restatement Second, Trusts §§
35 283-320; Restatement Second, Contracts § 155 and Comment *f*.

36
37 A person otherwise entitled to reformation or to a constructive trust is barred from
38 recovery if the complainant has failed to bring, or, having brought, has failed to prosecute a suit
39 for so long a time and under such circumstances that it would be inequitable to permit the
40 complainant to prosecute the suit. A cause of action may also be barred by lapse of time because
41 of an applicable statute of limitations. See Restatement, Restitution § 148.

42
43 *n. Contractual transfers.* If a will, trust, beneficiary designation, or similar document is
44 made pursuant to a contract, such as a premarital or postmarital agreement, a divorce settlement,
45 or a will contract, ambiguities in the implementing document of transfer are presumptively

1 resolved in accordance with the transferor's contractual obligation. See § 11.2, Comments *g* and
2 *m*, § 11.3, Comment *k*. If, however, the implementing document of transfer is unambiguous and
3 clearly deviates from the transferor's contractual obligation, the remedy would normally lie in a
4 breach of contract action against the transferor or the transferor's estate. On the other hand, if
5 clear and convincing evidence establishes that the deviation was the product of mistake, the rule
6 of this section supplies an alternative means of curing the breach by reforming the document of
7 transfer to accord with the contract.

1 *d. Achieving the donor's tax objectives.* Achieving the donor's tax objectives by
2 modifying a donative document is straightforward if the donor's tax objectives concern state
3 taxes, unless controlling state law expressly disallows the governing effect of the modification
4 for state tax purposes.

5
6 Achieving the donor's tax objectives is more complicated if the donor's tax objectives
7 concern federal taxes, as they often do. Federal law controls the federal tax consequences of a
8 transaction. From time to time, however, federal law expressly recognizes specified
9 modifications of a donative document as controlling for certain federal tax purposes. Current
10 examples of federal statutory recognition include modifying split-interest charitable trusts in
11 certain cases to qualify the value of the charitable interest for the federal income, gift, or estate
12 tax charitable deduction, modifying trusts for noncitizen spouses in order to qualify them as
13 qualified domestic trusts, and dividing trusts for purposes of the federal generation-skipping
14 transfer tax. The primary purpose of this section is to authorize any modification that is clearly
15 effective under federal law if the donor's tax objectives relate to federal taxes, or that is clearly
16 effective under state law if the donor's tax objectives relate to state taxes, subject to the
17 requirement in either case that the modification not violate the donor's probable intention.

18
19 When federal tax law is unclear regarding the tax consequences of a proposed
20 modification, modification to achieve the donor's federal tax objectives is more problematic.
21 Courts should be cautious in granting a requested order of modification in such circumstances.
22 In addition to requiring that the modification not violate the donor's probable intention (see
23 Comment f), the proponent of modification bears the burden of showing a reasonable prospect
24 that the proposed modification will be effective for federal tax purposes.

25
26 *e. Failure to achieve tax objectives need not be related to post-execution change in tax*
27 *law.* Although failure to achieve the donor's tax objectives is often due to a change in the tax
28 law occurring after the document was executed, this section is not restricted to that situation.
29 Federal law sometimes accepts modification in situations in which the tax law did not change
30 after execution. It would be too restrictive, therefore, to limit this section to post-execution
31 changes in tax law.

32
33 *f. Modification not to violate the donor's probable intention.* To be authorized under this
34 section, the proposed modification must not violate the donor's probable intention. In many
35 cases, this requirement is easily satisfied. The modification necessary to achieve the donor's tax
36 objectives may consist merely of an order to divide a trust into two or more trusts, leaving the
37 combined interests of each beneficiary unaffected. Indeed, for some tax purposes, federal law
38 may accept a modification only if it does not change the quality, value, or timing of the interests
39 of the beneficiaries.

40
41 In other situations, the modification necessary to achieve the donor's tax objectives may
42 require an alteration of beneficial interests. Such an alteration is acceptable so long as it does
43 not violate the donor's probable intention. In determining the donor's probable intention, the
44 donor's non-tax as well as tax objectives are to be considered. The greater the proposed
45 alteration, the more rigorous the court should be in measuring the requested modification against

1 the donor's probable intention. One measure of the donor's probable intention is the donor's
2 general dispositive plan. Even if it is questionable whether the modification would be consistent
3 with the donor's general dispositive plan, however, the court can still find that it does not violate
4 the donor's probable intention if the detrimentally affected beneficiaries consent to the proposed
5 modification. Such consent makes it more likely that the donor would have approved of the
6 modification, whether or not the modification alters the donor's general dispositive plan.

7
8 *g. Time when modification becomes effective.* Unlike a court-ordered reformation under
9 § 12.1, a court-ordered modification under this section does not necessarily relate back to the
10 date of execution. This is because modification, unlike reformation (see § 12.1), does not give
11 effect to original, particularized intention but to probable intention — to what the donor's
12 intention would probably have been had the donor known that his or her objectives could not be
13 achieved under the donative document as formulated. Under this section, a court-ordered
14 modification takes effect whenever necessary to achieve the purpose for which the modification
15 is ordered.

1 **SECTION 3-406. FORMAL TESTACY PROCEEDINGS; CONTESTED CASES;**
2 **~~TESTIMONY OF ATTESTING WITNESSES.~~**

3 ~~(a) If evidence concerning execution of an attested will which is not self-proved is~~
4 ~~necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the~~
5 ~~state, competent and able to testify, is required. Due execution of an attested or unattested will~~
6 ~~may be proved by other evidence.~~

7 ~~(b) If the will is self-proved, compliance with signature requirements for execution is~~
8 ~~conclusively presumed and other requirements of execution are presumed subject to rebuttal~~
9 ~~without the testimony of any witness upon filing the will and the acknowledgment and affidavits~~
10 ~~annexed or attached thereto, unless there is proof of fraud or forgery affecting the~~
11 ~~acknowledgment or affidavit.~~

12 In a contested case in which the proper execution of a will is at issue, the following rules
13 apply:

14 (1) If the will is self-proved pursuant to Section 2-504, compliance with the requirements
15 for execution is conclusively presumed without the testimony of any attesting witness, upon
16 filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is
17 evidence of fraud or forgery affecting the acknowledgment or affidavit.

18 (2) If the will is notarized pursuant to Section 2-502(a)(2)(B), but not self-proved,
19 compliance with the requirements for execution is rebuttably presumed upon filing the will,
20 subject to rebuttal by any contrary evidence, including evidence of fraud or forgery affecting the
21 acknowledgment.

22 (3) If the will is witnessed pursuant to Section 2-502(a)(2)(A), but not notarized or self-
23 proved, the testimony of at least one of the attesting witnesses, if within the state, competent and

1 able to testify, is required. Proper execution may be established by other evidence, including an
2 affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses
3 raises a rebuttable presumption that the events recited in the clause occurred.

4 **Reporter’s Explanation**

5
6 **§ 3-406: Formal Testacy Proceedings; Contested Cases.** Section 3-406 is the provision
7 in the UPC that states the effect of a self-proved will in contested cases. This section, in its
8 current form, is poorly drafted and unclear. The current version of § 3-406(b) and the Comment
9 contain several problems:

10
11 1. Under § 2-502, the witnesses do not have to sign “in the presence of” the testator, yet
12 the Comment incorrectly refers to that as a requirement.

13
14 2. Subsection (a) states that, if a will is self-proved, compliance with the “signature
15 requirements” is conclusively presumed but the “other requirements” are presumed subject to
16 rebuttal. It is not clear exactly which requirements are “signature requirements” and which are
17 “other requirements.”² Here are the “execution requirements” under § 2-502:

18
19 First, the will must be in writing;

20
21 Second, the will must be signed by the testator or in the testator’s name by some other
22 individual in the testator’s conscious presence and by the testator’s direction;

23
24 Third, two witnesses must sign within a reasonable time after they witnessed any one of
25 the following: the testator’s act of signing, the testator’s act of acknowledging his/her signature,
26 or the testator’s acknowledgment of the will. (If the above proposal to add authorization of a
27 notarized will is accepted, notarization would be an alternative to signatures by attesting
28 witnesses.)

29
30 The Comment to § 2-504 also suffers from the same imprecision. Here is the Comment
31 to 2-504:

32
33 A self-proved will may be admitted to probate as provided in Sections 3-
34 303, 3-405, and 3-406 without the testimony of any subscribing witness, but
35 otherwise it is treated no differently from a will not self proved. Thus, a
36 self-proved will may be contested (except in regard to signature requirements),
37 revoked, or amended by a codicil in exactly the same fashion as a will not self

² The fact that this is unclear in § 3-406 is illustrated by *Estate of Zeno*, 672 N.W.2d 574 (Minn. Ct. App. 2003), where the lower court held that the attestation by the witnesses were “other requirements”, but the Court of Appeals reversed, holding that they were “signature requirements.”

1 proved. The procedural advantage of a self-proved will is limited to formal
2 testacy proceedings because Section 3-303, which deals with informal probate,
3 dispenses with the necessity of testimony of witnesses even though the instrument
4 is not self proved under this section.

5
6 Amending this section is desirable to make it clear that, in the case of a self-proved will,
7 compliance with all of the requirements for execution is conclusively presumed without the
8 testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits
9 annexed or attached thereto, unless there is proof of fraud or forgery affecting the
10 acknowledgment or affidavit.³ Adding a subsection regarding the effect of a notarized will
11 (assuming that the above proposed amendment is approved) is also desirable. Finally, it is also
12 desirable to amend the subsection dealing with proof of a will that is neither self-proved nor
13 notarized by relocating the original subsection dealing with this issue and also adding a sentence
14 regarding the evidentiary effect of an attestation clause.

15
16 **Partial Comment**

17 {Comment to be further revised if above amendments are approved}
18

19 ~~Model Probate Code section 76, combined with section 77, substantially unchanged.~~ The
20 self-proved will is described in Article II. See Section 2-504. In the absence of evidence of fraud
21 or forgery affecting the acknowledgment or affidavit, The the "conclusive presumption"
22 described here would foreclose questions like whether the witnesses signed in the presence of
23 the testator of proper execution. It would not preclude proof evidence of undue influence, lack of
24 testamentary capacity, revocation or any relevant proof that the testator was unaware of the
25 contents of the document. ~~The balance of the section is derived from Model Probate Code~~
26 ~~sections 76 and 77.~~

27
28 For further explanation of the effect of an attestation clause, see Restatement (Third) of
29 Property: Wills and Other Donative Transfers § 3.1 cmt. q (1999).

³ This is the result reached by the Minnesota Court of Appeals in *Estate of Zeno*, supra footnote 2.

1 **Alternative 1**

2 **SECTION 3-916. DISTRIBUTION IN CASE OF POSTHUMOUS CONCEPTION.**

3 The personal representative may delay distribution of all or part of the decedent's estate if:

4 (a) the personal representative has received notice or has actual knowledge that there is
5 an intention to use genetic material to create a child after the decedent's death; and

6 (b) the posthumous birth of a child of assisted reproduction may have an effect on the
7 distribution of the decedent's estate.

8 **PARTIAL COMMENT**

9
10 This section is based on Cal. Prob. Code § 249.6.

11 {Comment to be continued.}

12
13 **Alternative 2**

14
15 **SECTION 3-703. GENERAL DUTIES; RELATION AND LIABILITY TO**
16 **PERSONS INTERESTED IN ESTATE; POSTHUMOUS CONCEPTION; STANDING**
17 **TO SUE.**

18 (a) A personal representative is a fiduciary who shall observe the standards of care
19 applicable to trustees as described by Section 7-302. A personal representative is under a duty to
20 settle and distribute the estate of the decedent in accordance with the terms of any probated and
21 effective will and this Code, and as expeditiously and efficiently as is consistent with the best
22 interests of the estate. He shall use the authority conferred upon him by this Code, the terms of
23 the will, if any, and any order in proceedings to which he is party for the best interests of
24 successors to the estate.

25 (b) The personal representative may delay distribution of all or part of the decedent's
26 estate if:

1 (1) the personal representative has received notice or has actual knowledge that
2 there is an intention to use genetic material to create a child after the decedent’s death; and

3 (2) the posthumous birth of a child of assisted reproduction may have an effect on
4 the distribution of the decedent’s estate.

5 {Reporter’s Question: Instead of the above, should we use UTC 817(b) as a
6 model? UTC 817(b) provides that “Upon the occurrence of an event terminating
7 or partially terminating a trust, the trustee shall proceed expeditiously to distribute
8 the trust property to the persons entitled to it, subject to the right of the trustee to
9 retain a reasonable reserve for the payment of debts, expenses, and taxes.”}

10
11 ~~(b)~~(c) A personal representative may not be surcharged for acts of administration or
12 distribution if the conduct in question was authorized at the time. Subject to other obligations of
13 administration, an informally probated will is authority to administer and distribute the estate
14 according to its terms. An order of appointment of a personal representative, whether issued in
15 informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs
16 of the decedent if, at the time of distribution, the personal representative is not aware of a
17 pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy
18 proceeding, a formal proceeding questioning his appointment or fitness to continue, or a
19 supervised administration proceeding. This section does not affect the duty of the personal
20 representative to administer and distribute the estate in accordance with the rights of claimants
21 whose claims have been allowed, the surviving spouse, any minor and dependent children and
22 any pretermitted child of the decedent as described elsewhere in this Code.

23 ~~(c)~~(d) Except as to proceedings which do not survive the death of the decedent, a
24 personal representative of a decedent domiciled in this state at his death has the same standing to
25 sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent

1 had immediately prior to death.

1 normally does not intend to make an irrevocable gift of all or any part of the funds represented
2 by the deposit. Rather, the person usually intends no present change of beneficial ownership. The
3 section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to
4 the matter of how beneficial ownership should be apportioned between them.

5
6 The assumption that no present change of beneficial ownership is intended may be
7 disproved by showing that a gift was intended. For example, under subsection (c) it is presumed
8 that the beneficiary of a POD designation has no present ownership interest during lifetime.
9 However, it is possible that in the case of a POD designation in trust form an irrevocable gift was
10 intended.

11
12 It is important to note that the section is limited to ownership of an account while parties
13 are alive. Section 6-212 prescribes what happens to beneficial ownership on the death of a party.
14

15 ~~The section does not undertake to describe the situation between parties if one party~~
16 ~~withdraws more than that party is then entitled to as against the other party. Sections 6-221 and~~
17 ~~6-226 protect a financial institution in that circumstance if one party withdraws more than that~~
18 ~~that to which that party is entitled without reference to whether a withdrawing party may be~~
19 ~~entitled to less than that party withdraws as against another party. Rights between parties in this~~
20 ~~situation are governed by general law other than this part. The protection of the financial~~
21 ~~institution, however, does not change the ownership rights of the parties if there is a~~
22 ~~disproportionate withdrawal by one party. The first sentence of subsection (b) was amended in~~
23 ~~2008 to make this clear and to correct an unjust result reached by the court in *Lee v. Yang*, 111~~
24 ~~Cal.App.4th 481, 3 Cal.Rptr.3d 819 (2003). In that case, a former boyfriend brought an action~~
25 ~~against his former girlfriend to recover his funds that she had withdrawn from their joint~~
26 ~~account. The California Court of Appeal held that the former girlfriend's withdrawal of funds~~
27 ~~disproportionate to her contribution to funds on deposit had the effect of transferring ownership~~
28 ~~of the withdrawn funds to her by way of gift. The California statute (Cal. Prob. Code § 5301) is~~
29 ~~copied from UPC § 6-211 prior to its 2008 amendment. Prior to its 2008 amendment, the first~~
30 ~~sentence of subsection (b) provided: "During the lifetime of all parties, an account belongs to~~
31 ~~the parties in proportion to the net contribution of each to the sums on deposit, unless there is~~
32 ~~clear and convincing evidence of a different intent." The court held that once the funds were~~
33 ~~withdrawn, they were no longer "on deposit," and therefore no longer owned in proportion to~~
34 ~~their individual contributions to the account. To prevent a court from reaching the result reached~~
35 ~~in *Lee v. Yang*, the first sentence of subsection (b) was amended in 2008 to delete the phrase~~
36 ~~"sums on deposit" and to insert the phrase "sums deposited into" instead.~~

37
38 "Net contribution" as defined by subsection (a) has no application to the financial
39 institution-depositor relationship. Rather, it is relevant only to controversies that may arise
40 between parties to a multiple-party account.

41
42 The last sentence of subsection (b) provides a clear rule concerning the amount of "net
43 contribution" in a case where the actual amount cannot be established as between spouses. This
44 part otherwise contains no provision dealing with a failure of proof. The omission is deliberate.
45 The theory of these sections is that the basic relationship of the parties is that of individual

1 ownership of values attributable to their respective deposits and withdrawals, and not equal and
2 undivided ownership that would be an incident of joint tenancy.

3

4 In a state that recognizes tenancy by the entireties for personal property, this section
5 would not change the rule that parties who are married to each other own their combined net
6 contributions to an account as tenants by the entireties. See Section 6-216 (community property
7 and tenancy by the entireties).

8

9 **Historical Note.** This Comment was revised in 2008.