

D R A F T

FOR APPROVAL

AMENDMENTS TO UNIFORM PROBATE CODE

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-SEVENTEENTH YEAR
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AMENDMENTS TO UNIFORM PROBATE CODE

With Partial Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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1 **AMENDMENTS TO THE UNIFORM PROBATE CODE**

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

3 These amounts were last revised in 1990. Between 1990 and today, the consumer price index
4 (CPI) has increased about 50 percent. According to the inflation calculator on the Bureau of
5 Labor Statistics website (www.bls.gov), \$1.00 in 1990 is worth \$1.64 in June 2008. The Drafting
6 Committee proposes increasing the UPC's specific dollar amounts by 50 percent, as follows:

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

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

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

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

14
15 **SECTION 1-109. COST OF LIVING ADJUSTMENT OF CERTAIN DOLLAR**
16 **AMOUNTS.**

17 (a) In this section, "CPI" means the Consumer Price Index (Annual Average) for All
18 Urban Consumers (CPI-U): U.S. city average — All items, reported by the United States
19 Department of Labor or by a successor federal reporter, or, if that index is discontinued, an
20 equivalent index reported by a federal authority. If no such index is issued, the term means the
21 substitute index chosen by [insert appropriate state agency].

22 (b) The dollar amounts stated in Sections 2-102, 2-201(b), 2-402, 2-403, 2-405, and 3-
23 1201 apply to the estates of decedents who die in or after [insert year in which this act becomes

1 effective], except that, for the estates of decedents dying after [insert year after the year in which
2 this act becomes effective], these dollar amounts must be increased or decreased if the CPI for
3 the calendar year immediately preceding the year of death exceeds or is less than the CPI for
4 calendar year [insert year immediately preceding the year in which this act becomes effective].
5 The amount of each increase or decrease, if any, is computed by multiplying each dollar amount
6 by the percentage by which the CPI for the calendar year immediately preceding the year of death
7 exceeds or is less than the CPI for the calendar year [insert year immediately preceding the year
8 in which this act becomes effective]. If any increase or decrease produced by the computation is
9 not a multiple of \$100, the increase or decrease is rounded down, if an increase, or up, if a
10 decrease, to the next lower or higher multiple of \$100, except that, for purposes of Section 2-405,
11 the periodic installment amount may not be rounded down or up but is the lump-sum amount
12 divided by 12.

13 [(c) Before February 1 of [insert year after the year in which this act becomes effective],
14 and before February 1 of each succeeding year, the [insert appropriate state agency] shall issue a
15 cumulative list, beginning with the dollar amounts effective for the estates of decedents dying in
16 [insert year after the year in which this act becomes effective], of each dollar amount as increased
17 or decreased under this section.]

18 **Legislative Note:** To establish and maintain uniformity among the states, an enacting state that
19 has already enacted the sections listed in subsection (b) should bring those dollar amounts up to
20 date. A state enacting these sections after 2008 should adjust the dollar figures for changes in
21 the cost of living that have occurred between 2008 and the effective date of the new enactment.

Partial Comment

24 [subject to further revision and elaboration]

26 **Automatic Adjustments for Inflation.** Section 1-109, added in 2008, operates in
27 conjunction with the inflation adjustments of the dollar amounts listed in subsection (b) also
28 adopted in 2008. Section 1-109 was added to make it unnecessary in the future for the ULC or
29 individual enacting states to continue to amend the UPC periodically to adjust the dollar amounts

1 for inflation. This section provides for an automatic adjustment of each of the above dollar
2 amounts annually.

3
4 In each January, the Bureau of Labor Statistics of the U.S. Department of Labor reports
5 the CPI (annual average) for the preceding calendar year. The information can be obtained by
6 telephone (202/691-5200) or on the Bureau's website <<http://www.bls.gov/cpi>>.

7
8 Subsection (c) tasks an appropriate state agency, such as the Department of Revenue, to
9 issue an official cumulative list of the adjusted amounts beginning in January of the year after the
10 effective date of the act. This subsection is bracketed because some enacting states might not
11 have a state agency that could appropriately be assigned the task of issuing updated amounts.
12 Such an enacting state might consider tasking the state supreme court to issue a court rule each
13 year making the appropriate adjustment.

14
15 **SECTION. 1-201. GENERAL DEFINITIONS.** Subject to additional definitions
16 contained in the subsequent ~~Articles~~ articles that are applicable to specific ~~Articles~~ articles, parts,
17 or sections, and unless the context otherwise requires, in this [code]:

18 * * *

19 (41) "Record" means information that is inscribed on a tangible medium or that is stored
20 in an electronic or other medium and is retrievable in perceivable form.

21 * * *

22 (45) "Sign" means, with present intent to authenticate or adopt a record other than a will:

23 (A) to execute or adopt a tangible symbol; or

24 (B) to attach to or logically associate with the record an electronic symbol, sound,
25 or process.

26 * * *

27 **PREFATORY NOTE**
28 **ARTICLE II REVISIONS**

29 [Prefatory Note subject to further revision and elaboration

30
31 The Uniform Probate Code was originally promulgated in 1969.

32
33 **1990 Revisions.** In 1990, Article II ~~of the Code~~ underwent significant revision. The 1990

1 revisions ~~are~~ were the culmination of a systematic study of the Code conducted by the Joint
2 Editorial Board for the Uniform Probate Code (~~JEB-UPC~~ now named the Joint Editorial Board
3 for Uniform Trust and Estate Acts) and a special Drafting Committee to Revise Article II. The
4 1990 revisions concentrated on Article II, which is the article that covers the substantive law of
5 intestate succession; spouse's elective share; omitted spouse and children; probate exemptions
6 and allowances; execution and revocation of wills; will contracts; rules of construction;
7 disclaimers; and the effect of homicide and divorce on succession rights; and the rule against
8 perpetuities and honorary trusts.

9
10 *Themes of the 1990 Revisions.* In the twenty or so years between the original
11 promulgation of the Code and ~~the~~ 1990 ~~revisions~~, several developments occurred that prompted
12 the systematic round of review. Three themes were sounded: (1) the decline of formalism in
13 favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos
14 transfers have so proliferated that they now constitute a major, if not the major, form of wealth
15 transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of
16 the population being married more than once and having stepchildren and children by previous
17 marriages and ~~in~~ (4) the acceptance of a partnership or marital-sharing theory of marriage.

18
19 The 1990 revisions responded to these themes. The multiple-marriage society and the
20 partnership/marital-sharing theory ~~are~~ were reflected in the revised elective-share provisions of
21 Part 2. As the General Comment to Part 2 ~~explains~~ explained, the revised elective share ~~grants~~
22 granted the surviving spouse a right of election that ~~implements~~ implemented the
23 partnership/marital-sharing theory of marriage ~~by adjusting the elective share to the length of the~~
24 marriage.

25
26 The children-of-previous-marriages and stepchildren phenomena ~~are~~ were reflected most
27 prominently in the revised rules on the spouse's share in intestacy.

28
29 The proliferation of will substitutes and other inter-vivos transfers ~~is~~ was recognized,
30 mainly, in measures tending to bring the law of probate and nonprobate transfers into greater
31 unison. One aspect of this tendency ~~is~~ was reflected in the restructuring of the rules of
32 construction. Rules of construction are rules that supply presumptive meaning to dispositive and
33 similar provisions of governing instruments. See Restatement (Third) of Property: Wills and
34 Other Donative Transfers § 11.3 (2003). Part 6 of the pre-1990 Code contained several rules of
35 construction that applied only to wills. Some of those rules of construction appropriately applied
36 only to wills; provisions relating to lapse, testamentary exercise of a power of appointment, and
37 ademption of a devise by satisfaction exemplify such rules of construction. Other rules of
38 construction, however, properly apply to all governing instruments, not just wills; the provision
39 relating to inclusion of adopted persons in class gift language exemplifies this type of rule of
40 construction. The 1990 revisions divided pre-1990 Part 6 into two parts — Part 6, containing
41 rules of construction for wills only; and Part 7, containing rules of construction for wills and
42 other governing instruments. A few new rules of construction ~~are~~ were also added.

43
44 In addition to separating the rules of construction into two parts, and adding new rules of
45 construction, the revocation-upon-divorce provision (section 2-804) ~~is~~ was substantially revised
46 so that divorce not only revokes testamentary devises, but also nonprobate beneficiary

1 designations, in favor of the former spouse. Another feature of the 1990 revisions ~~is~~ was a new
2 section (section 2-503) that ~~brings~~ brought the execution formalities for wills more into line with
3 those for nonprobate transfers.

4
5 ~~The 1990 Article II revisions also respond to other modern trends. During the period from~~
6 ~~1969 to 1990, many developments occurred in the case law and statutory law. Also, many~~
7 ~~specific topics in probate, estate, and future-interests law were examined in the scholarly~~
8 ~~literature. The influence of many of these developments is~~ was ~~seen in the 1990 revisions of~~
9 ~~Article II.~~

10
11 **2008 Revisions.** In 2008, another round of revisions was adopted. The principal features
12 of the 2008 revisions are summarized as follows:

13
14 *Inflation Adjustments.* Between 1990 and 2008, the Consumer Price Index rose by
15 somewhat more than 50 percent. The 2008 revisions raised the dollar amounts by 50 percent in
16 Sections 2-102, 2-201, 2-402, 2-403, 2-405, and 3-1201, and added a new cost of living
17 adjustment section — Section 1-109.

18
19 *Intestacy.* Part 1 on intestacy was divided into two subparts: Subpart 1 on general rules of
20 intestacy and subpart 2 on parent-child relationships. For details, see the General Comment to
21 Part 1.

22
23 *Execution of Wills.* Section 2-502 was amended to allow notarized wills as an alternative
24 to wills that are attested by two witnesses. That amendment necessitated minor revisions to
25 Section 2-504 on self-proved wills and to Section 3-406 on the effect of notarized wills in
26 contested cases.

27
28 *Class Gifts.* Section 2-705 on class gifts was revised in a variety of ways, as explained in
29 the revised Comment to that section.

30
31 *Reformation and Modification.* New Sections 2-805 and 2-806 bring the reformation and
32 modification sections now contained in the Uniform Trust Code into the Uniform Probate Code.

33
34 ***Legislative Note:* References to spouse or marriage appear throughout Article II. States that**
35 ***recognize civil unions, domestic partnerships, or similar relationships between unmarried***
36 ***individuals should add appropriate language wherever such references or similar references***
37 ***appear.***

38
39 *States that do not recognize such relationships between unmarried individuals, or*
40 *marriages between same-sex partners, are urged to consider whether to recognize the spousal-*
41 *type rights that partners acquired under the law of another jurisdiction in which the relationship*
42 *was formed but who die domiciled in this state. Doing so would not be the equivalent of*
43 *recognizing such relationships in this state but simply allowing those who move to and die in this*
44 *state to retain the rights they previously acquired elsewhere.*

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PART 1
INTESTATE SUCCESSION

General Comment

{General Comment subject to further revision and elaboration}

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:

Part 1 Divided into Two Subparts. Part 1 was divided into two subparts: Subpart 1 on general rules of intestacy and subpart 2 on parent-child relationships.

Subpart 1: General Rules of Intestacy. Subpart 1 contains Sections 2-101 (unchanged), 2-102 (dollar figures adjusted for inflation), 2-103 (restyled and amended to grant intestacy rights to certain stepchildren as a last resort before the intestate estate escheats to the state), 2-104 (amended to clarify the requirement of survival by 120 hours as it applies to heirs who are born before the intestate's death and those who are in gestation at the intestate's death), 2-105 (unchanged), 2-106 (unchanged), 2-107 (unchanged), 2-108 (deleted and matter dealing with heirs in gestation at the intestate's death relocated to 2-104), 2-109 (unchanged), 2-110 (unchanged), 2-111 (unchanged), 2-112 (unchanged), 2-113 (unchanged), and 2-114 (deleted and replaced with a new section addressing situations in which a parent is barred from inheriting).

Subpart 2: Parent-Child Relationships. New Subpart 2 contains several new or substantially revised sections. New Section 2-115 contains definitions of terms that are used in subpart 2. New Section 2-116 is an umbrella section declaring that, except as otherwise provided in Section 2-119(b) through (d), if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession. Section 2-117 continues the rule that, except as otherwise provided in Sections 2-120 and 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of their marital status. Regarding adopted children, Section 2-118 continues the rule that adoption establishes a parent-child relationship between the adoptive parents and the adoptee for purposes of intestacy. Section 2-119 addresses the extent to which an adoption severs the parent-child relationship with the adoptee's genetic parents. New Sections 2-120 and 2-121 turn to various parent-child relationships resulting mainly from new biology and practices in forming families. As one researcher reported: "Roughly 10 to 15 percent of all adults experience some form of infertility." Debora L. Spar, *The Baby Business* 31 (2006). Infertility, coupled with the desire of unmarried individuals to have children, have led to increased questions concerning children of assisted reproduction. Sections 2-120 and 2-121 address inheritance rights in cases of children of assisted reproduction, whether the birth mother is the one who parents the child or is a gestational carrier who bears the child for an intended parent or intended parents. As two authors have noted: "Parents, whether they are in a married or unmarried union with another, whether they are a single parent, whether they procreate by sexual intercourse or by assisted reproductive technology, are entitled to the respect the law gives to family choice." Charles P. Kindregan, Jr. & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science* 6-7 (2006). The final section, new Section 2-122, provides that nothing contained in subpart 2 should be construed as precluding, limiting, or affecting application of the judicial doctrine of equitable adoption.

{to be continued}

SUBPART 1. GENERAL RULES

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

part of the intestate estate not passing to ~~the~~ a decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the

1 individuals ~~designated below~~ who survive the decedent:

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

3 (2) if there is no surviving descendant, to the decedent's parents equally if both survive,

4 or to the surviving parent;

5 (3) if there is no surviving descendant or parent, to the descendants of the decedent's

6 parents or either of them by representation;

7 (4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent

8 is survived on both the paternal and maternal sides by one or more grandparents or descendants

9 of grandparents:

10 (A) ~~half of the estate passes to~~ the decedent's paternal grandparents equally if both

11 survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal

12 grandparents or either of them if both are deceased, the descendants taking by representation; and

13 (B) ~~the other half passes to the decedent's maternal relatives in the same manner~~

14 grandparents equally if both survive, or to the surviving maternal grandparent, or to the

15 descendants of the decedent's maternal grandparents or either of them if both are deceased, the

16 descendants taking by representation;

17 (5) if there is no surviving descendant, parent, or descendant of a parent, but the decedent

18 is survived by one or more grandparents or descendants of grandparents on the paternal but not

19 the maternal side, or on the maternal but not the paternal side, if there is no surviving grandparent

20 or descendant of a grandparent either the paternal or the maternal side, the entire estate passes to

21 the decedent's relatives on the other side with one or more surviving members in the same

22 manner as the half described in paragraph (4);

23 (6) if there is no surviving spouse, descendant, parent, descendant of a parent,

1 grandparent, or descendant of a grandparent, but the intestate decedent has:

2 (A) one deceased spouse who has one or more descendants who survive the
3 decedent, to those descendants by representation; or

4 (B) more than one deceased spouse who has one or more descendants who survive
5 the decedent, the estate is divided into as many equal shares as there are deceased spouses, each
6 share passing to those descendants by representation.

7 **Comment**
8

9 This section provides for inheritance by descendants of the decedent, parents and their
10 descendants, and grandparents and collateral relatives descended from grandparents; in line with
11 modern policy, it eliminates more remote relatives tracing through great-grandparents.
12

13 **Purpose and Scope of 1990 Revisions.** The 1990 revisions ~~are~~ were stylistic and
14 clarifying, not substantive. The pre-1990 version of this section contained the phrase “if they are
15 all of the same degree of kinship to the decedent they take equally (etc.).” That language ~~has been~~
16 was removed. It was unnecessary and confusing because the system of representation in Section
17 2-106 gives equal shares if the decedent’s descendants are all of the same degree of kinship to the
18 decedent.
19

20 The word “descendants” ~~replaces~~ replaced the word “issue” in this section and throughout
21 the revisions of Article II. The term issue is a term of art having a biological connotation. Now
22 that inheritance rights, in certain cases, are extended to adopted children, the term descendants is
23 a more appropriate term.
24

25 **2008 Revisions.** In addition to making a few stylistic changes, which were not intended
26 to change meaning, the 2008 revisions added paragraph (6), granting inheritance rights to
27 descendants of the intestate’s deceased spouse(s). The term deceased spouse refers to an
28 individual to whom the intestate was married at the individual’s death.
29

30 **Historical Note.** This Comment was revised in 2008.
31
32

33 **SECTION 2-104. REQUIREMENT ~~THAT HEIR SURVIVE DECEDENT FOR~~ OF**
34 **SURVIVAL BY 120 HOURS; INDIVIDUAL IN GESTATION.**

35 **(a) [Requirement of Survival by 120 Hours; Individual in Gestation.]** For purposes of
36 intestate succession, homestead allowance, and exempt property, and except as otherwise

provided in subsection (b):

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

(2) an individual who was in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual who was in gestation at the decedent's death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

(b) [Section Inapplicable if Escheat Would Result.] This section does not apply if it would result in a taking of the intestate estate by the state under Section 2-105.

Comment

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of one another. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. (Section 2-702 recommends revision of the Uniform Simultaneous Death Act.)

~~This section requires an heir to survive by five days in order to succeed to the decedent's intestate property; for a comparable provision as to wills and other governing instruments, see Section 2-702. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. See Halbach & Waggoner, The UPC's New Survivorship and Antilapse Provisions, 55 Alb. L. Rev. 1091, 1094-1099 (1992). The 120-hour period will not delay the administration of a decedent's estate because Sections 3-302 and 3-307 prevent informal issuance of letters for a period of five days from death. ~~The last sentence~~ Subsection (b) prevents the survivorship requirement from defeating inheritance by~~

1 the last eligible relative of the intestate who survives him or her for any period.

2
3 In the case of a surviving spouse who survives the 120-hour period, the 120-hour
4 requirement of survivorship does not disqualify the spouse's intestate share for the federal
5 estate-tax marital deduction. See Int.Rev.Code § 2056(b)(3).

6
7 **2008 Revisions.** In 2008, this section was reorganized, revised, and combined with
8 former Section 2-108. What appeared as former Section 2-104 now appears as subsections (a)
9 and (b). What appeared as former Section 2-108 now appears as subsection (a)(2). Subsections
10 (a)(1) and (a)(2) now distinguish between an individual who was born before the decedent's
11 death and an individual who was in gestation at the decedent's death. With respect to an
12 individual who was born before the decedent's death, it must be established by clear and
13 convincing evidence that the individual survived the decedent by 120 hours. For a comparable
14 provision applicable to wills and other governing instruments, see Section 2-702. With respect to
15 an individual who was in gestation at the decedent's death, it must be established by clear and
16 convincing evidence that the individual lived for 120 hours after birth.

17
18 **Historical Note.** This Comment was revised in 2008.

19
20
21 **SECTION 2-108. [RESERVED.] AFTERBORN HEIRS.** An individual in gestation at
22 a particular time is treated as living at that time death if the individual lives 120 hours or more
23 after birth.

24 ***Legislative Note:*** Section 2-108 is reserved for possible future use. The 2008 amendments moved
25 the content of this section to Section 2-104(a)(2).
26

27 **SECTION 2-114. PARENT AND CHILD RELATIONSHIP.**

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

32 (b) An adopted individual is the child of his [or her] adopting parent or parents and not of
33 his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no
34 effect on (i) the relationship between the child and that natural parent or (ii) the right of the child

1 ~~or a descendant of the child to inherit from or through the other natural parent.~~

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

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

7 (a) A parent is barred from inheriting from or through a child of the parent if:

8 (1) the parent's parental rights were terminated and the parent-child relationship
9 was not judicially reestablished; or

10 (2) the child died before reaching [18] [the age of majority] and it is established
11 by clear and convincing evidence that a proceeding to terminate the parent's parental rights, if
12 filed immediately before the child's death, would have been successful.

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

15 **Partial Comment**

16 [subject to further revision and elaboration]

17
18 {The Comment will make it clear that the clear and convincing requirement in (a)(2) applies not
19 just to the grounds for termination but to the prospect of success.}

20
21 **2008 Revisions.** In 2008, this section replaced former Section 2-114(c), which provided:
22 “(c) Inheritance from or through a child by either natural parent or his [or her] kindred is
23 precluded unless that natural parent has openly treated the child as his [or hers], and has not
24 refused to support the child.”

25
26 Statutes providing the grounds for termination of parental rights include Mich. Comp. L.
27 Ann. § 712A.19b; Tex. Fam. Code §§ 161.001 to .007; {more citations to be added}
28 {Comment to be continued}

29
30
31 **SUBPART 2. PARENT-CHILD RELATIONSHIPS**

1 **SECTION 2-115. DEFINITIONS.** In this [subpart]:

2 (1) “Adoptee” means an individual who is adopted.

3 (2) “Assisted reproduction” means a method of causing pregnancy other than sexual
4 intercourse.

5 (3) “Adult” means an individual who has attained 18 years of age.

6 (4) “Divorce” includes annulment.

7 (5) “Functioned as a parent of the child” means behaving toward the child in a manner
8 consistent with being the child’s parent and performing functions that are customarily performed
9 by a parent, such as fulfilling parental responsibilities toward the child, recognizing or holding
10 out the child as the individual’s child, materially participating in the child’s upbringing, and
11 residing with the child in the same household as regular members of that household.

12 (6) “Genetic father” means the man whose sperm fertilized the egg of a child’s genetic
13 mother. If the father-child relationship is established under the presumption of paternity under
14 [applicable state law], the term means only the man for whom that relationship is established.

15 (7) “Genetic mother” means the woman whose egg was fertilized by the sperm of the
16 child’s genetic father.

17 (8) “Genetic parent” means a child’s genetic father or genetic mother.

18 (9) “Incapacity” means the inability of an individual to function as a parent of a child
19 because of the individual’s physical or mental condition.

20 (10) “Minor” means an individual who has not attained 18 years of age.

21 (11) “Relative” means a grandparent or a descendant of a grandparent.

22 **Legislative Note:** States that have enacted the Uniform Parentage Act (2000, as amended)
23 should replace “applicable state law” in paragraph (6) with “Section 201(b)(1), (2), or (3) of the
24 Uniform Parentage Act (2000), as amended”. Two of the principal features of Articles 1 through
25 6 of the Uniform Parentage Act (2000, as amended) are (i) the presumption of paternity and the

procedure under which that presumption can be disproved by adjudication and (ii) the acknowledgment of paternity and the procedure under which that acknowledgment can be rescinded or challenged. States that have not enacted similar provisions should consider whether such provisions should be added as part of Section 2-115(6). States that have not enacted the Uniform Parentage Act (2000, as amended) should also make sure that applicable state law authorizes parentage to be established after the death of the alleged parent, as provided in the Uniform Parentage Act § 509 (2000, as amended), which provides: “For good cause shown, the court may order genetic testing of a deceased individual.”

Partial Comment

[subject to further revision and elaboration]

Definition of “Adoptee”. The term “adoptee” is not limited to an individual who is adopted as a minor, but includes an individual who is adopted as an adult. [more explanation to be added]

Definition of “Assisted Reproduction”. The definition of assisted reproduction is copied from the Uniform Parentage Act § 102. Methods of assisted reproduction include intrauterine insemination (previously and sometimes currently called artificial insemination), donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

Definition of “Functioned as a Parent of the Child”. The term “functioned as a parent of the child” is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers (2008). The Reporter’s Note No. 4 to § 14.5 of the Restatement lists the following parental functions:

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

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

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

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

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

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

1 (d) arranging for the child's education, including remedial or special
2 services appropriate to the child's needs and interests, communicating with teachers and
3 counselors, and supervising homework;

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

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

8 (g) providing moral and ethical guidance;

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

12 *Parenting functions* are tasks that serve the needs of the child or the child's
13 residential family. Parenting functions include caretaking functions, as defined [above],
14 and all of the following additional functions:

15 (a) providing economic support;

16 (b) participating in decisionmaking regarding the child's welfare;

17 (c) maintaining or improving the family residence, including yard work,
18 and house cleaning;

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

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

24
25 Ideally, a parent would perform all of the above functions throughout the child's minority.
26 In cases falling short of the ideal, the trier of fact must balance both time and conduct. The
27 question is, did the individual perform sufficient parenting functions over a sufficient period of
28 time to justify concluding that the individual functioned as a parent of the child. Clearly,
29 insubstantial conduct, such as an occasional gift or social contact, would be insufficient.
30 Moreover, merely obeying a child support order would not, by itself, satisfy the requirement.
31 Involuntarily providing support is inconsistent with functioning as a parent of the child.

32
33 The context in which the question arises is also relevant. If the question is whether the
34 individual claiming to have functioned as a parent of the child inherits from the child, the court
35 might require more substantial conduct over a more substantial period of time than if the
36 question is whether the child inherits from the individual.

37
38 **SECTION 2-116. PARENT-CHILD RELATIONSHIP: EFFECT.** Except as

39 otherwise provided in Section 2-119(b) through (d), if a parent-child relationship exists or is

40 established under this [subpart], the parent is a parent of the child and the child is a child of the

41 parent for purposes of intestate succession.

parent survives the deceased spouse by 120 hours.

Partial Comment

[subject to further revision and elaboration]

2008 Revisions. In 2008, this section and Section 2-119 replaced former Section 2-114(b), which provided: “(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent”. The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Subsection (a) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Section 2-119(a) and (b)(1) covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsection (b)(2), which is explained below.

Data on Adoptions. Official data on adoptions are not regularly collected. Partial data are sometimes available from the Children’s Bureau of the U.S. Department of Health and Human Services, the U.S. Census Bureau, and the Evan B. Donaldson Adoption Institute.

For an historical treatment of adoption, from ancient Greece, through the Middle Ages, 19th- and 20th-century America, to open adoption and international adoption, see Debora L. Spar, *The Baby Business* ch. 6 (2006) and sources therein cited.

Defined Term. *Adoptee* is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor, but includes an individual who is adopted as an adult.

Subsection (a): Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents. Subsection (a) states the general rule that adoption creates a parent-child relationship between the adoptee and the adoptee’s adoptive parent or parents.

Subsection (b)(1): Individual in Process of Being Adopted by Married Couple. {to be explained}. {explain that the phrase “in the process of being adopted” is not limited to the filing of legal process}

Subsection (b)(2): Stepchild in Process of Being Adopted by Stepparent. {explain that “in the process of being adopted” could be different for a stepparent adoption; to be explained}

1 **SECTION 2-119. PARENT-CHILD RELATIONSHIP: ADOPTEE AND**

2 **ADOPTEE'S GENETIC PARENTS.**

3 **(a) [Parent-Child Relationship Between Adoptee and Genetic Parents.]** Except as
4 otherwise provided in subsections (b) through (d), a parent-child relationship does not exist
5 between an adoptee and the adoptee's genetic parents.

6 **(b) [Stepchild Adopted by Stepparent.]** A parent-child relationship exists between an
7 individual who is adopted by the spouse of either genetic parent and:

8 (1) the genetic parent whose spouse adopted the individual; and

9 (2) the other genetic parent, but only for purposes of the right of the adoptee or a
10 descendant of the adoptee to inherit from or through the other genetic parent.

11 **(c) [Individual Adopted by Relative of a Genetic Parent.]** A parent-child relationship
12 exists between both genetic parents and an individual who is adopted by a relative of a genetic
13 parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for
14 purposes of the right of the adoptee or a descendant of the adoptee to inherit from or through
15 either genetic parent.

16 **(d) [Individual Adopted After Death of Both Genetic Parents.]** A parent-child
17 relationship exists between both genetic parents and an individual who is adopted after the death
18 of both genetic parents, but only for purposes of the right of the adoptee or a descendant of the
19 adoptee to inherit through either genetic parent.

20 **(e) [Individual Adopted More Than Once.]** If an individual was adopted more than
21 once, genetic parent in subsections (a) through (c) includes a previous adoptive parent and in
22 subsection (d) means only a previous adoptive parent.

23 **Partial Comment**

24 [subject to further revision and elaboration]

1 **2008 Revisions.** In 2008, this section and Section 2-118 replaced former Section 2-
2 114(b), which provided: “(b) An adopted individual is the child of his [or her] adopting parent or
3 parents and not of his [or her] natural parents, but adoption of a child by the spouse of either
4 natural parent has no effect on (i) the relationship between the child and that natural parent or (ii)
5 the right of the child or a descendant of the child to inherit from or through the other natural
6 parent”. The 2008 revisions divided the coverage of former Section 2-114(b) into two sections.
7 Section 2-118(a) covered that part of former Section 2-114(b) that provided that an adopted
8 individual is the child of his or her adopting parent or parents. Subsections (a) and (b) of this
9 section covered that part of former Section 2-114(b) that provided that an adopted individual is
10 not the child of his natural parents, but adoption of a child by the spouse of either natural parent
11 has no effect on the relationship between the child and that natural parent or (ii) the right of the
12 child or a descendant of the child to inherit from or through the other natural parent.

13
14 The 2008 revisions also added subsections (c), (d), and (e), which are explained below.

15
16 **Defined Terms.** Section 2-119 contains terms that are defined in Section 2-115.

17
18 *Adoptee* is defined in Section 2-115 as an individual who is adopted. The term is not
19 limited to an individual who is adopted as a minor, but includes an individual who is adopted as
20 an adult.

21
22 *Genetic parent* is defined in Section 2-115 as the child’s genetic father or genetic mother.
23 *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of the child’s
24 genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child’s
25 genetic mother.

26
27 *Relative* is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

28
29 **Subsection (a): Parent-Child Relationship Between Adoptee and Adoptee’s Genetic**
30 **Parents.** Subsection (a) states the general rule a parent-child relationship does not exist between
31 an adopted child and the child’s genetic parents. This rule recognizes that an adoption severs the
32 parent-child relationship between the adopted child and the child’s genetic parents. The adoption
33 gives the adopted child a replacement family, sometimes referred to in the case law as “a fresh
34 start”. For further elaboration of this theory, see Restatement (Third) of Property: Wills and
35 Other Donative Transfers § 2.5(2)(A) & cmts. d & e (1999). Subsection (a) also states, however,
36 that there are exceptions to this general rule, and that those exceptions are stated in subsections
37 (b) through (d).

38
39 **Subsection (b): Stepchild Adopted by Stepparent.** Subsection (b) continues the so-
40 called “stepparent exception” contained in the Code since its original promulgation in 1969.
41 When a stepparent adopts his or her stepchild, Section 2-118 provides that the adoption creates a
42 parent-child relationship between the child and his or her adoptive stepparent. Section 2-
43 119(b)(1) provides that a parent-child relationship continues to exist between the child and the
44 child’s genetic parent whose spouse adopted the child. Section 2-119(b)(2) provides that a
45 parent-child relationship also continues to exist between an adopted stepchild and his or her other
46 genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that

1 genetic parent, but not for purposes of inheritance from or through the child.

2
3 *Example 1—Post-Widowhood Remarriage.* A and B were married and had two children,
4 X and Y. A died, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are
5 treated as B’s children and under Section 2-118(a) as C’s children for all purposes of inheritance.
6 Under subsection (b)(2), X and Y are treated as A’s children for purposes of inheritance from and
7 through A but not for purposes of inheritance from or through X or Y. Thus, if A’s father, G,
8 died intestate, survived by X and Y and by G’s daughter (A’s sister), S, G’s heirs would be S, X,
9 and Y. S would take half and X and Y would take one-fourth each.

10
11 *Example 2—Post-Divorce Remarriage.* A and B were married and had two children, X
12 and Y. A and B got divorced, and B married C. C adopted X and Y. Under subsection (b)(1), X
13 and Y are treated as B’s children and under Section 2-118(a) as C’s children for all purposes of
14 inheritance. Under subsection (b)(2), X and Y are treated as A’s children for purposes of
15 inheritance from and through A but not for purposes of inheritance from or through X or Y. C’s
16 adoption of X and Y would not break A’s ties with X and Y, and they would inherit from or
17 through A.

18
19 **Subsection (c): Individual Adopted by Relative of a Genetic Parent.** Under subsection
20 (c), a child who is adopted by a maternal or a paternal relative of either genetic parent, or by the
21 spouse or surviving spouse of such a relative, remains a child of both genetic parents.

22
23 *Example 3.* F and M, a married couple with a four-year old child, X, were badly injured in
24 an automobile accident. F subsequently died. M, who was in a vegetative state and on life
25 support, was unable to care for X. Thereafter, M’s sister, A, and A’s husband, B, adopted X. F’s
26 father, PGF, a widower, then died intestate. Under subsection (c), X is treated as PGF’s
27 grandchild (F’s child).

28
29 **Subsection (d): Individual Adopted After Death of Both Genetic Parents.** Usually, a
30 post-death adoption does not remove a child from contact with the genetic families. When
31 someone with ties to the genetic family or families adopts a child after the deaths of the child’s
32 genetic parents, even if the adoptive parent is not a relative of either genetic parent or a spouse or
33 surviving spouse of such a relative, the child continues to be in a parent-child relationship with
34 both genetic parents. Once a child has taken root in a family, an adoption after the death of both
35 genetic parents is likely to be by someone chosen or approved of by the genetic family, such as a
36 person named as guardian of the child in a deceased parent’s will. In such a case, the child does
37 not become estranged from the genetic family. Such an adoption does not “remove” the child
38 from the families of both genetic parents. Such a child continues to be a child of both genetic
39 parents, as well as a child of the adoptive parents.

40
41 *Example 4.* F and M, a married couple with a four-year-old child, X, were involved in an
42 automobile accident that killed F and M. Neither M’s parents nor F’s father (F’s mother had died
43 before the accident) nor any other relative was in a position to take custody of X. X was adopted
44 by F and M’s close friends, A and B, a married couple approximately of the same ages as F and
45 M. After the adoption became final, F’s father and M’s parents continued to have close contact
46 with X, often visiting each other and sharing some holidays together. F’s father, PGF, a widower,

1 then died intestate. Under subsection (d), X is treated as PGF's grandchild (F's child). The result
2 would be the same if F's or M's will appointed A and B as the guardians of the person of X, and
3 A and B subsequently successfully petitioned to adopt X.

4
5 **Subsection (e): Individual Adopted More Than Once.** Subsection (e) applies in cases
6 in which an individual was adopted more than once. In such a case, the term "genetic parent" in
7 subsections (a) through (c) includes a previous adoptive parent and in subsection (d) means only
8 a previous adoptive parent. Consequently, for purposes of subsections (a) through (c), the term
9 "genetic parent" refers to a previous adoptive parent as well as to an actual genetic parent. For
10 purposes of subsection (d), however, the term refers only to a previous adoptive parent.

11
12 Subsection (e) is illustrated by the following examples:

13
14 Example 5. H and W, a married couple, adopted X as an infant. When X was four years
15 old, H and W were badly injured in an automobile accident. H subsequently died. W, who was in
16 a vegetative state and on life support, was unable to care for X. Thereafter, W's sister, A, and A's
17 husband, B, adopted X. H's father, PGF, a widower, then died intestate. Under subsection (e), H
18 and W are treated as X's genetic parents, which means that under subsection (c), X is treated as
19 PGF's grandchild (H's child).

20
21 Example 6. H and W, a married couple, adopted X as an infant. When X was four years
22 old, H and W were killed in an automobile accident. Neither W's parents nor H's father (H's
23 mother had died before the accident) nor any other relative was in a position to take custody of X.
24 X was adopted by H and W's close friends, A and B, a married couple approximately of the same
25 ages as H and W. After the adoption became final, H's father and W's parents continued to have
26 close contact with X, often visiting each other and sharing some holidays together. H's father,
27 PGF, a widower, then died intestate. Under subsection (e), H and W (and only H and W) are
28 treated as X's genetic parents, which means that under subsection (d), X is treated as PGF's
29 grandchild (H's child). The result would be the same if H's or W's will appointed A and B as the
30 guardians of the person of X, and A and B subsequently successfully petitioned to adopt X.

31
32 **SECTION 2-120. PARENT-CHILD RELATIONSHIP: CHILD CONCEIVED BY**
33 **ASSISTED REPRODUCTION OTHER THAN A CHILD BORN TO A GESTATIONAL**
34 **CARRIER.**

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

36 (1) "Birth mother" means a woman, other than a gestational carrier under Section
37 2-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman
38 who is the child's genetic mother.

1 (2) “Child of assisted reproduction” means a child conceived by means of assisted
2 reproduction by a woman other than a gestational carrier under Section 2-121.

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

5 (A) a husband who provides sperm, or a wife who provides eggs, that are
6 used for assisted reproduction by the wife;

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

8 (C) an individual who is determined under subsection (e) or (f) to have a
9 parent-child relationship with a child of assisted reproduction.

10 **(b) [Third-Party Donor.]** A parent-child relationship does not exist between a child of
11 assisted reproduction and a third-party donor.

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

14 **(d) [Parent-Child Relationship with Husband Whose Sperm Were Used During His**
15 **Lifetime by His Wife for Assisted Reproduction.]** Except as otherwise provided in subsections
16 (i) and (j), a parent-child relationship exists between a child of assisted reproduction and the
17 husband of the child’s birth mother if the husband provided the sperm that the birth mother used
18 during his lifetime for assisted reproduction, and the husband is the genetic father of the child.

19 **(e) [Birth Certificate: Presumptive Effect.]** A birth certificate identifying an individual
20 other than the birth mother as the other parent of a child of assisted reproduction presumptively
21 establishes a parent-child relationship between the child and that individual.

22 **(f) [Parent-Child Relationship with Another.]** Except as otherwise provided in
23 subsections (g), (i), and (j), and unless a parent-child relationship is established under subsection

(d) or (e), a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(1) signed a record, before or after the child's birth, evidencing the individual's consent, considering all the facts and circumstances; or

(2) in the absence of a signed record under paragraph (1):

(A) functioned as a parent of the child no later than two years after the child's birth;

(B) intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(C) intended to be treated as a parent of a posthumously conceived child if that intent is established by clear and convincing evidence.

(g) [Record Signed More than Two Years after the Birth of the Child: Effect]. For purposes of subsection (f)(1), neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached the age of majority.

(h) [Presumption: Birth Mother is Married or Surviving Spouse.] For purposes of subsection (f)(2):

(1) If the birth mother is married, she and her spouse are not separated, and no

divorce proceedings are pending, then, in the absence of clear and convincing evidence to the contrary, her spouse is deemed to have satisfied subsection (f)(2)(A) or (B).

(2) If the birth mother is a surviving spouse and at her deceased spouse's death, she and her spouse were not separated and no divorce proceedings were then pending, then, in the absence of clear and convincing evidence to the contrary, her deceased spouse is deemed to have satisfied subsection (f)(2)(B) or (C).

(i) [Divorce Before Placement of Eggs, Sperm, or Embryos.] If a marriage couple are divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

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

(k) [When Posthumously Conceived Child Treated as in Gestation.] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual's death; or

(2) born not later than 45 months after the individual's death.

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

1 **SECTION XXX. DUTY OF GENETIC DEPOSITORIES TO PROVIDE CONSENT**
2 **FORM TO DEPOSITORS.**

3 (a) Any entity that receives genetic material of a human being that may be used for
4 conception shall provide to the person depositing genetic material a form for use by the
5 depositor that, if signed by the depositor, would satisfy the conditions set forth in [Section 2-
6 120(f)(1)] regarding the depositor's consent to assisted reproduction by the birth mother with
7 intent to be treated as a parent of the child. The use of the form is not mandatory, and the form is
8 not the exclusive means of expressing a depositor's intent. The form shall include advisements in
9 substantially the following form:

10
11 "The use of this form for designating whether you consent to be treated as the parent of a
12 child conceived during your life or after your death is not mandatory. However, if you wish to
13 allow a child conceived during your life or after your death to be treated as your child (or
14 beneficiary of other benefits such as life insurance or retirement) you should specify that in
15 writing and sign that written expression of consent.

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

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

22
23 (b) Any entity that receives genetic material of a human being that may be used for
24 conception shall make available to the person depositing his or her genetic material a form that,
25 if signed by the depositor, would revoke any previous expression of consent satisfying the
26 conditions set forth in Section 2-120(j). The use of the form is not mandatory, and the form is not
27 the exclusive means of expressing a depositor's intent with respect to revocation or amendment
28 of a prior expression of consent. The form shall include advisements in substantially the
29 following form:

30
31 "The use of this form to revoke or amend a previous form for designating whether you
32 consent to be treated as a parent of a child conceived during your life or after your death is not
33 mandatory. This specification can be revoked or amended only in a writing signed by you (and
34 not by spoken words). These issues can be complex, and you should discuss them with your
35 attorney."

36
37 **Partial Comment**

38 [subject to further revision and elaboration]

39
40 **Data on Children of Assisted Reproduction.** The Center for Disease Control (CDC) of
41 the U.S. Department of Health and Human Services collects data on children of assisted
42 reproduction (ART). See Center for Disease Control, 2004 Assisted Reproductive Technology
43 Success Rates (Dec. 2006) (2004 CDC Report), available at <http://www.cdc.gov/ART/ART2004>.
44 The data, however, is of limited use because the definition of ART used in the CDC Report
45 excludes intrauterine (artificial) insemination (2004 CDC Report at 3), which is probably the
46 most common form of assisted reproductive procedures. The CDC estimates that in 2004 ART

procedures (excluding intrauterine insemination) accounted for slightly more than one percent of total U.S. births. 2004 CDC Report at 13. According to the Report: “The number of infants born who were conceived using ART increased steadily between 1996 and 2004. In 2004, 49,458 infants were born, which was more than double the 20,840 born in 1996.” 2004 CDC Report at 57. “The average age of women using ART services in 2004 was 36. The largest group of women using ART services were women younger than 35, representing 41% of all ART cycles carried out in 2004. Twenty-one percent of ART cycles were carried out among women aged 35-37, 19% among women aged 38-40, 9% among women aged 41-42, and 9% among women older than 42.” 2004 CDC Report at 15. Updates of the 2004 CDC Report are to be posted at <http://www.cdc.gov/ART/ART2004>.

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

Subsection (a): Definitions. Subsection (a) defines the following terms:

Birth mother is defined as the woman (other than a gestational carrier under Section 2-121) who gave birth to a child of assisted reproduction.

Child of assisted reproduction is defined as a method of causing pregnancy other than sexual intercourse.

Third-party donor. The definition of third-party donor is based on the definition of “donor” in the Uniform Parentage Act § 102.

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

Assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Functioned as a parent of the child is defined in Section 2-115 as behaving toward the child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as regular members of that household. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic father is defined in Section 2-115 as the man whose sperm fertilized the egg of a

1 child's genetic mother.

2
3 *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of the
4 child's genetic father.

5
6 *Incapacity* is defined in Section 2-115 as the inability of an individual to function as a
7 parent of a child because of the individual's physical or mental condition.

8
9 **Subsection (b): Third-Party Donor.** Subsection (b) is consistent with the Uniform
10 Parentage Act § 702. Under subsection (b), a third-party donor does not have a parent-child
11 relationship with a child of assisted reproduction, despite the donor's genetic relationship with
12 the child.

13
14 **Subsection (c): Parent-Child Relationship With Birth Mother.** Subsection (c) is in
15 accord with the Uniform Parentage Act § 201 in providing that a parent-child relationship exists
16 between a child of assisted reproduction and the child's birth mother. The child's birth mother,
17 defined in subsection (a) as the woman (other than a gestational carrier) who gave birth to the
18 child, made the decision to undergo the procedure with intent to become pregnant and give birth
19 to the child. Therefore, in order for a parent-child relationship to exist between her and the child,
20 there does not need to be proof that she consented to the procedure with intent to be treated as the
21 parent of the child.

22
23 **Subsection (d): Parent-Child Relationship with Husband Whose Sperm Were Used**
24 **During His Lifetime By His Wife for Assisted Reproduction.** The principal application of
25 subsection (d) is in the case of the assisted reproduction procedure known as intrauterine
26 insemination husband (IIH), or, in older terminology, artificial insemination husband (AIH).
27 Subsection (d) provides that, except as otherwise provided in subsection (i), a parent-child
28 relationship exists between a child of assisted reproduction and the husband of the child's birth
29 mother if the husband provided the sperm that were used during his lifetime by her for assisted
30 reproduction and the husband is the genetic father of the child. The exception contained in
31 subsection (i) relates to the withdrawal of consent in a record before the placement of eggs,
32 sperm, or embryos. Note that subsection (d) only applies if the husband's sperm were used
33 during his lifetime by his wife to cause a pregnancy by assisted reproduction. Subsection (d) does
34 not apply to posthumous conception.

35
36 **Subsection (e): Birth Certificate: Presumptive Effect.** A birth certificate will name the
37 child's birth mother as mother of the child. Under subsection (c), a parent-child relationship
38 exists between a child of assisted reproduction and the child's birth mother. Note that the term
39 "birth mother" is a defined term in subsection (a) as not including a gestational carrier as defined
40 in Section 2-121.

41
42 Subsection (e) applies to the individual, if any, who is identified on the birth certificate as
43 the child's other parent. Subsection (e) grants presumptive effect to a birth certificate identifying
44 an individual other than the birth mother as the other parent of a child of assisted reproduction. In
45 the case of unmarried parents, federal law requires that states enact procedures under which "the
46 name of the father shall be included on the record of birth," but only if the father and mother

1 have signed a voluntary acknowledgment of paternity or a court of an administrative agency of
2 competent jurisdiction has issued an adjudication of paternity. See 42 U.S.C. § 666(a)(5)(D).
3 This federal statute is included as an appendix to the Uniform Parentage Act.
4

5 **Subsection (f): Parent-Child Relationship with Another.** In order for someone other
6 than the birth mother to have a parent-child relationship with the child, there needs to be proof
7 that the individual consented to assisted reproduction by the birth mother with intent to be treated
8 as the other parent of the child. The other individual's genetic material might or might not have
9 been used to create the pregnancy. Except as otherwise provided in this section, merely
10 depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with
11 the child.
12

13 *Subsection (f)(1): Signed Record Evidencing Consent, in Light of All the Facts and*
14 *Circumstances, to Assisted Reproduction with Intent to Be Treated as the Other Parent of the*
15 *Child.* Subsection (f)(1) provides that a parent-child relationship exists between a child of
16 assisted reproduction and an individual other than the birth mother who consented to assisted
17 reproduction by the birth mother with intent to be treated as the other parent of the child. Consent
18 to assisted reproduction with intent to be treated as the other parent of the child is established if
19 the individual signed a record, before or after the child's birth, evidencing such consent,
20 considering all the facts and circumstances. Recognizing consent in a record not only signed
21 before the child's birth but also at any time after the child's birth is consistent with the Uniform
22 Parentage Act §§ 703 and 704.
23

24 As noted, the signed record need not explicitly express consent to the procedure with
25 intent to be treated as the other parent of child, but only needs to evidence such consent
26 considering all the facts and circumstances. An example of a signed record that would satisfy this
27 requirement comes from *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, the New
28 York Surrogate's Court held that a child of posthumous conception was included in a class gift in
29 a case in which the deceased father had signed a form that stated: "In the event of my death I
30 agree that my spouse shall have the sole right to make decisions regarding the disposition of my
31 semen samples. I authorize repro lab to release my specimens to my legal spouse [naming her]."
32 Another form he signed stated: "I, [naming him], hereby certify that I am married or intimately
33 involved with [naming her] and the cryopreserved specimens stored at repro lab will be used for
34 future inseminations of my wife/intimate partner." Although these forms do not explicitly say
35 that the decedent consented to the procedure with intent to be treated as the other parent of the
36 child, they do evidence such consent in light of all of the facts and circumstances and would
37 therefore satisfy subsection (f)(1).
38

39 *Subsection (f)(2): {to be explained}*
40

41 **Subsection (g): Record Signed More than Two Years after the Birth of the Child:**
42 **Effect.** Subsection (g) is designed to prevent an individual who has never functioned as a parent
43 of the child from signing a record in order to inherit from or through the child or in order to make
44 it possible for a relative of the individual to inherit from or through the child. Thus, subsection
45 (g) provides that, for purposes of subsection (f)(1), an individual who signed a record more than
46 two years after the birth of the child, and a relative of that individual, does not inherit from or

1 through the child unless the individual functioned as a parent of the child before the child
2 reached the age of majority.

3
4 **Subsection (h): Presumption: Birth Mother is Married or Surviving Spouse.** {to be
5 explained}.

6
7 **Subsection (i): Divorce Before Placement of Eggs, Sperm, or Embryos.** Subsection (i)
8 is derived from the Uniform Parentage Act § 706(b).

9
10 **Subsection (j): Withdrawal of Consent Before Placement of Eggs, Sperm, or**
11 **Embryos.** Subsection (j) is derived from the Uniform Parentage Act § 706(a). Subsection (j)
12 provides that if, in a record, an individual withdraws consent to assisted reproduction before
13 placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a
14 child of that individual, unless the individual subsequently satisfies the requirements of
15 subsection (f). {to be further explained}.

16
17 **Subsection (k): When Posthumously Conceived Gestational Child Treated as in**
18 **Gestation.** Subsection (k) provides that if, under this section, an individual is a parent of a
19 gestational child who is conceived after the individual's death, the child is treated as in gestation
20 at the individual's death for purposes of Section 2-104(a)(2) if the child is either (i) in utero no
21 later than 36 months after the individual's death or (ii) born no later than 45 months after the
22 individual's death. Note also that Section 3-703 gives the decedent's personal representative
23 authority to take account of the possibility of posthumous conception in the distribution of the
24 estate.

25
26 The 36-month period in subsection (k) is designed to allow a surviving spouse or partner
27 a period of grieving, time to make up his or her mind about whether to go forward with assisted
28 reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The
29 three-year period also coincides with Section 3-1006, under which an heir is allowed to recover
30 property improperly distributed or its value from any distributee during the later of three years
31 after the decedent's death or one year after distribution. The 45-month period is based on the
32 three-year period with an additional nine months tacked on to allow for a normal period of
33 pregnancy. Providing an alternative of in utero within 36 months rather than requiring birth no
34 later than 45 months is designed to decrease any incentive for the survivor to force a premature
35 birth, thereby possibly jeopardizing the health of the mother or child.

36
37 **SECTION 2-121. PARENT-CHILD RELATIONSHIP: CHILD BORN TO A**
38 **GESTATIONAL CARRIER.**

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

40 (1) "Gestational agreement" means an enforceable or unenforceable agreement for
41 assisted reproduction in which a woman agrees to carry a child to birth for an intended parent.

1 intended parents, or an individual described in subsection (e).

2 (2) “Gestational child” means a child born to a gestational carrier under a
3 gestational agreement.

4 (3) “Gestational carrier” means a woman who is not an intended parent and who
5 gives birth to a child under a gestational agreement. The term is not limited to a woman who is
6 the child’s genetic mother.

7 (4) “Intended parent” means an individual who entered into a gestational
8 agreement providing that the individual will be the parent of a child born to a gestational carrier
9 by means of assisted reproduction. The term is not limited to an individual who has a genetic
10 relationship with the child.

11 **(b) [Court Order Adjudicating Parentage: Effect.] A parent-child relationship is**
12 **conclusively established by a court order designating the parent or parents of a gestational child.**

13 **(c) [Gestational Carrier.] A parent-child relationship between a gestational child and the**
14 **child’s gestational carrier does not exist unless the gestational carrier is:**

15 (1) designated as a parent of the child in a court order described in subsection (b);
16 or

17 (2) the child’s genetic mother and a parent-child relationship does not exist with
18 an individual other than the gestational carrier under this section.

19 **(d) [Parent-Child Relationship With Intended Parent or Parents.] In the absence of a**
20 **court order under subsection (b), a parent-child relationship exists between a gestational child**
21 **and an intended parent who:**

22 (1) functioned as a parent of the child no later than two years after the child’s
23 birth; or

1 (2) died while the gestational carrier was pregnant if:

2 (A) there were two intended parents and the other intended parent survived
3 the birth of the child and functioned as a parent of the child no later than two years after the
4 child's birth;

5 (B) there were two intended parents, the other intended parent also died
6 while the gestational carrier was pregnant, and a relative of either deceased intended parent or the
7 spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent
8 of the child no later than two years after the child's birth; or

9 (C) there was no other intended parent and a relative of or the spouse or
10 surviving spouse of a relative of the deceased intended parent functioned as a parent of the child
11 no later than two years after the child's birth.

12 **(e) [Gestational Agreement After Death or Incapacity.]** In the absence of a court order
13 under subsection (b), a parent-child relationship exists between a gestational child and an
14 individual whose sperm or eggs were used after the individual's death or incapacity to conceive a
15 child under a gestational agreement entered into after the individual's death or incapacity if the
16 individual intended to be treated as the parent of the child. The individual's intent can be shown
17 by:

18 (1) a record, signed by the individual, evidencing the individual's intent,
19 considering all the facts and circumstances; or

20 (2) facts and circumstances establishing the individual's intent by clear and
21 convincing evidence.

22 **(f) [Presumption: Gestational Agreement After Spouse's Death or Incapacity.]**

23 Except as otherwise provided in subsection (g), an individual is deemed to have intended to be

1 treated as the parent of a gestational child for purposes of subsection (e)(2) if:

2 (1) the individual, before death or incapacity, deposited the sperm or eggs that
3 were used to conceive the child;

4 (2) when the individual deposited the sperm or eggs, the individual was married
5 and not separated, and no divorce proceedings were pending; and

6 (3) the individual's spouse or surviving spouse functioned as a parent of the child
7 not later than two years after the child's birth.

8 **(g) [Subsection (f) Inapplicable.]** Subsection (f) does not apply if there is:

9 (1) a court order under subsection (b);

10 (2) a signed record that satisfies subsection (e)(1); or

11 (3) clear and convincing evidence of a contrary intention.

12 **(h) [When Posthumously Conceived Gestational Child Treated as in Gestation.]** If,
13 under this section, an individual is a parent of a gestational child who is conceived after the
14 individual's death, the child is treated as in gestation at the individual's death for purposes of
15 Section 2-104(a)(2) if the child is:

16 (1) in utero not later than 36 months after the individual's death; or

17 (2) born not later than 45 months after the individual's death.

18 **Partial Comment**

19 [subject to further revision and elaboration]
20

21 **Subsection (a): Definitions.** Subsection (a) defines the following terms:

22
23 *Gestational agreement.* The definition of gestational agreement is based on the Comment
24 to Article 8 of the Uniform Parentage Act, which states that the term "gestational carrier"
25 "applies to both a woman who, through assisted reproduction, performs the gestational function
26 without being genetically related to a child, and a woman who is both the gestational and genetic
27 mother. The key is that an agreement has been made that the child is to be raised by the intended
28 parents." The Comment also points out that "The [practice in which the woman is both the
29 gestational and genetic mother] has elicited disfavor in the ART community, which has

1 concluded that the gestational carrier's genetic link to the child too often creates additional
2 emotional and psychological problems in enforcing a gestational agreement."

3
4 *Gestational child.* {to be explained}

5
6 *Gestational carrier.* {to be explained}

7
8 *Intended parent.* {to be explained}

9
10 **Other Defined Terms.** In addition to the terms defined in subsection (a), this section
11 contains terms that are defined in Section 2-115.

12
13 *Child of assisted reproduction* is defined in Section 2-115 as a method of causing
14 pregnancy other than sexual intercourse.

15
16 *Functioned as a parent of the child* is defined in Section 2-115 as behaving toward the
17 child in a manner consistent with being the child's parent and performing functions that are
18 customarily performed by a parent, such as fulfilling parental responsibilities toward the child,
19 recognizing or holding out the child as the individual's child, materially participating in the
20 child's upbringing, and residing with the child in the same household as regular members of that
21 household. See also the Comment to Section 2-115 for additional explanation of the term.

22
23 *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of the
24 child's genetic father.

25
26 *Incapacity* is defined in Section 2-115 as the inability of an individual to function as a
27 parent of a child because of the individual's physical or mental condition.

28
29 *Relative* is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

30
31 **Subsection (b): Court Order Adjudicating Parentage: Effect.** A court order issued
32 under § 807 of the Uniform Parentage Act (UPA) would qualify as a court order adjudicating
33 parentage for purposes of subsection (b). UPA § 807 provides:

34
35 UPA § 807. Parentage under Validated Gestational Agreement.

36 (a) Upon birth of a child to a gestational carrier, the intended parents shall file
37 notice with the court that a child has been born to the gestational carrier within 300 days
38 after assisted reproduction. Thereupon, the court shall issue an order:

39 (1) confirming that the intended parents are the parents of the child ;
40 (2) if necessary, ordering that the child be surrendered to the intended
41 parents; and

42 (3) directing the [agency maintaining birth records] to issue a birth
43 certificate naming the intended parents as parents of the child.

44 (b) If the parentage of a child born to a gestational carrier is alleged not to be the
45 result of assisted reproduction, the court shall order genetic testing to determine the
46 parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational carrier or the appropriate State agency may file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

Subsection (c): Gestational Carrier. {to be explained}.

Subsection (d): Parent-Child Relationship With Intended Parent or Parents. {to be explained}.

Subsection (e): Gestational Agreement After Death or Incapacity. {to be explained}.

Subsections (f) and (g): Presumption: Gestational Agreement After Spouse's Death or Incapacity. {to be explained}.

Subsection (h): When Posthumously Conceived Gestational Child is Treated as in Gestation. Subsection (h) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (i) in utero not later than 36 months after the individual's death or (ii) born not later than 45 months after the individual's death. Note also that Section {insert reference to section on distribution in case of possible posthumous conception}.

The 36-month period in subsection (g) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. The 45-month period is based on the three-year period with an additional nine months tacked on to allow for a normal period of pregnancy. Providing an alternative of in utero no later than 36 months rather than requiring birth no later than 45 months is designed to decrease any incentive for the survivor to force a premature birth, thereby possibly jeopardizing the health of the mother or child.

SECTION 2-122. EQUITABLE ADOPTION. This [subpart] does not preclude, limit, or affect application of the doctrine of equitable adoption.

Comment

On the doctrine of equitable adoption, see Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5, cmt. k & Reporter's Note No. 7 (1999).

1 **SECTION 2-502. EXECUTION; WITNESSED OR NOTARIZED WILLS;**
2 **HOLOGRAPHIC WILLS.**

3 **(a) [Attested or Notarized Wills.]** Except as otherwise provided in subsection (b) and in
4 Sections 2-503, 2-506, and 2-513, a will must be:

5 (1) in writing;

6 (2) signed by the testator or in the testator's name by some other individual in the
7 testator's conscious presence and by the testator's direction; and

8 (3) one of the following:

9 (A) signed by at least two individuals, each of whom signed within a
10 reasonable time after ~~he [or she]~~ the individual witnessed either the signing of the will as
11 described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment
12 of the will; or

13 (B) acknowledged by the testator before a notary public or other individual
14 authorized by law to take acknowledgments.

15 **(b) [Holographic Wills.]** A will that does not comply with subsection (a) is valid as a
16 holographic will, whether or not witnessed, if the signature and material portions of the
17 document are in the testator's handwriting.

18 **(c) [Extrinsic Evidence.]** Intent that ~~the~~ a document constitute the testator's will and the
19 will's meaning can be established by extrinsic evidence, including, for holographic wills,
20 portions of the document that are not in the testator's handwriting.

21
22 **Partially Revised Comment**
23 [subject to further revision and elaboration]
24

25 ~~**Scope and Purpose of Revision.** Section 2-502 and pre-1990 Section 2-503 are~~
26 ~~combined to make room for new Section 2-503. Also, a cross reference to new Section 2-503 is~~

1 added, and fairly minor clarifying revisions are made.

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

8
9 Under subsection (a)(2), the testator must sign the will or some other individual must sign
10 the testator’s name in the testator’s presence and by the testator’s direction. If the latter procedure
11 is followed, and someone else signs the testator’s name, the so-called “conscious presence” test
12 is codified, under which a signing is sufficient if it was done in the testator’s conscious presence,
13 i.e., within the range of the testator’s senses such as hearing; the signing need not have occurred
14 within the testator’s line of sight. For application of the “conscious-presence” test, see
15 Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. n (1999);
16 Cunningham v. Cunningham, 80 Minn. 180, 83 N.W. 58 (1900) (conscious-presence requirement
17 held satisfied where “the signing was within the sound of the testator’s voice; he knew what was
18 being done ...”); Healy v. Bartless, 73 N.H. 110, 59 A. 617 (1904) (individuals are in the
19 decedent’s conscious presence “whenever they are so near at hand that he is conscious of where
20 they are and of what they are doing, through any of his senses, and where he can readily see them
21 if he is so disposed.”); Demaris’ Estate, 166 Or. 36, 110 P.2d 571 (1941) (“[W]e do not believe
22 that sight is the only test of presence. We are convinced that any of the senses that a testator
23 possesses, which enable him to know whether another is near at hand and what he is doing, may
24 be employed by him in determining whether [an individual is] in his [conscious] presence ...”).

25
26 ~~Under subsection (a)(3), at least two individuals must sign the will, each of whom~~
27 ~~witnessed at least one of the following: the signing of the will; the testator’s acknowledgment of~~
28 ~~the signature; or the testator’s acknowledgment of the will.~~

29
30 Signing may be by mark, nickname, or initials, subject to the general rules relating to that
31 which constitutes a “signature.” See Restatement (Third) of Property: Wills and Other Donative
32 Transfers § 3.1 cmt. j (1999). There is no requirement that the testator “publish” the document as
33 his or her will, or that he or she request the witnesses to sign, or that the witnesses sign in the
34 presence of the testator or of each other. The testator may sign the will outside the presence of
35 the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or
36 that his or her name was signed by another) or that the document is his or her will. An
37 acknowledgment need not be expressly stated, but can be inferred from the testator’s conduct.
38 Norton v. Georgia Railroad Bank & Tr. Co., 248 Ga. 847, 285 S.E.2d 910 (1982). ~~The witnesses~~
39 ~~must sign as witnesses (see, e.g., Mossler v. Johnson, 565 S.W.2d 952 (Tex. Civ.App. 1978));~~
40 ~~and must sign within a reasonable time after having witnessed the signing or acknowledgment.~~
41 ~~There is, however, no requirement that the witnesses sign before the testator’s death; in a given~~
42 ~~case, the reasonable-time requirement could be satisfied even if the witnesses sign after the~~
43 ~~testator’s death.~~

44
45 There is no requirement that the testator’s signature be at the end of the will; thus, if he or
46 she writes his or her name in the body of the will and intends it to be his or her signature, this

1 would satisfy the statute. See Restatement (Third) of Property: Wills and Other Donative
2 Transfers § 3.1 cmts. j & k (1999). Estate of Siegel, 214 N.J.Super. 586, 520 A.2d 798 (App.Div.
3 1987).

4
5 Subsection (a)(3) requires that the will either be (A) signed by at least two individuals,
6 each of whom witnessed at least one of the following: (i) the signing of the will; (ii) the testator's
7 acknowledgment of the signature; or (iii) the testator's acknowledgment of the will; or (B)
8 acknowledged by the testator before a notary public or other individual authorized by law to take
9 acknowledgments. Subparagraph (B) was added in 2008 in order to recognize the validity of
10 notarized wills.

11
12 Under subsection (a)(3)(A), the witnesses must sign as witnesses (see, e.g., Mossler v.
13 Johnson, 565 S.W.2d 952 (Tex. Civ.App. 1978)), and must sign within a reasonable time after
14 having witnessed the testator's act of signing or acknowledgment. There is, however, no
15 requirement that the witnesses sign before the testator's death. In a particular case, the
16 reasonable-time requirement could be satisfied even if the witnesses sign after the testator's
17 death.

18
19 Under subsection (a)(3)(B), a will, whether or not it is properly witnessed under
20 subsection (a)(3)(A), can be acknowledged by the testator before a notary public or other
21 individual authorized by law to take acknowledgments. Note that a signature guarantee is not an
22 acknowledgment before a notary public or other person authorized by law to take
23 acknowledgments. The signature guarantee program, which is regulated by federal law, is
24 designed to facilitate transactions relating to securities. See 17 C.F.R. § 240.17Ad-15.

25
26 Allowing notarized wills as an optional method of execution addresses cases that have
27 begun to emerge in which the supervising attorney, with the client and all witnesses present,
28 circulates one or more estate-planning documents for signature, and fails to notice that the client
29 or one of the witnesses has unintentionally neglected to sign one of the documents. See, e.g.,
30 Dalk v. Allen, 774 So.2d 787 (Fla. Dist. Ct. App. 2000); Sisson v. Park Street Baptist Church, 24
31 E.T.R.2d 18 (Ont. Gen. Div. 1998). This often, but not always, arises when the attorney prepares
32 multiple estate-planning documents — a will, a durable power of attorney, a health-care power of
33 attorney, and perhaps a revocable trust. It is common practice, and sometimes required by state
34 law, that the documents other than the will be notarized. It would reduce confusion and chance
35 for error if all of these documents could be executed with the same formality.

36
37 In addition, lay people (and, sad to say, some lawyers) think that a will is valid if
38 notarized. See, e.g., Estate of Saueressig, 136 P.3d 201 (Cal. 2006); Estate of Hall, 51 P.3d 1134
39 (Mont. 2002). There are also cases in which a testator goes to his or her bank to get the will
40 executed, and the bank's notary notarizes the document, mistakenly thinking that notarization
41 makes the will valid. Cf., e.g., Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985). The will is
42 usually held invalid in such cases, despite the lack of evidence raising any doubt that the will
43 truly represents the decedent's wishes.

44
45 Other uniform acts affecting property or person do not require either attesting witnesses
46 or notarization. For example:

1 Uniform Trust Code § 402(a)(2) provides that a trust is created if the settlor
2 “indicates an intention to create the trust.” Such a trust can be a revocable inter-
3 vivos trust, which in many respects is the equivalent of a will.
4

5 Power of Attorney Act § 105 provides that a power of attorney must be signed by
6 the principal or in the principal’s conscious presence by another individual
7 directed by the principal to sign the principal’s name on the power of attorney. A
8 signature on a power of attorney is presumed to be genuine if the principal
9 acknowledges the signature before a notary public or other individual authorized
10 by law to take acknowledgments.
11

12 Uniform Health-Care Decisions Act § 2(f) provides that a health-care power must
13 be in writing and signed by the principal.
14

15 A will that does not meet ~~these~~ the requirements of subsection (a) may be valid under
16 subsection (b) as a holograph or under the harmless-error rule of Section 2-503.
17

18 **Subsection (b): Holographic Wills.** This subsection authorizes holographic wills. On
19 holographic wills, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2
20 (1999). It Subsection (b) enables a testator to write his or her own will in handwriting. There
21 need be no witnesses. The only requirement is that the signature and the material portions of the
22 document be in the testator’s handwriting.
23

24 By requiring only the “material portions of the document” to be in the testator’s
25 handwriting (rather than requiring, as some existing statutes do, that the will be “entirely” in the
26 decedent’s handwriting), a holograph may be valid even though immaterial parts such as date or
27 introductory wording are printed, typed, or stamped.
28

29 A valid holograph can also be executed on a printed will form if the material portions of
30 the document are handwritten. The fact, for example, that the will form contains printed language
31 such as “I give, devise, and bequeath to _____” does not disqualify the document as a
32 holographic will, as long as the testator fills out the remaining portion of the dispositive
33 provision in his or her own hand.
34

35 **Subsection (c): Extrinsic Evidence.** Under subsection (c), testamentary intent and the
36 will’s meaning can be shown by extrinsic evidence, including for holographic wills the printed,
37 typed, or stamped portions of the form or document. The phrase “and the will’s meaning” was
38 added in 2008 in order to make it clear that handwritten alterations, if signed, can derive their
39 meaning, and hence their validity as a holographic codicil, from nonhandwritten portions of the
40 document. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 cmt. g
41 (1999). This position is intentionally contrary to Estate of Foxley, 575 N.W.2d 150 (Neb. 1998),
42 a decision condemned in Reporter’s Note No. 4 to the Restatement as a decision that “reached a
43 manifestly unjust result”.
44

45 **2008 Revisions.** In 2008, this section was amended by adding subsection (a)(3)(B) and by
46 adding “and the will’s meaning” in subsection (c).

Historical Note. This Comment was revised in 2008.

SECTION 2-504. SELF-PROVED WILL.

(a) A will that is executed with attesting witnesses may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I, _____, the testator, sign my name to this instrument this ____ day of _____, and
being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this
instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I
execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen
years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as ~~[his][her]~~ (him)(her) will and that ~~[he][she]~~ (he)(she) signs it willingly (or willingly directs another to sign for ~~[him][her]~~ (him)(her)), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is ~~eighteen~~ 18 years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

The State of _____

[County of _____]

Subscribed, sworn to and acknowledged before me by _____, the testator, and
subscribed and sworn to before me by _____, and _____, witness, this ____ day of
_____.

(Seal)

(Signed) _____

(Official capacity of officer)

(b) ~~An attested A~~ will that is executed with attesting witnesses may be made self-proved
at any time after its execution by the acknowledgment thereof by the testator and the affidavits of
the witnesses, each made before an officer authorized to administer oaths under the laws of the
state in which the acknowledgment occurs and evidenced by the officer's certificate, under the
official seal, attached or annexed to the will in substantially the following form:

The State of _____

[County of _____]

We, _____, _____, and _____, the testator and the witnesses, respectively,
name name name
whose names are signed to the attached or foregoing instrument, being first duly sworn,
do hereby declare to the undersigned authority that the testator signed and executed the
instrument as the testator's will and that ~~he~~she (he) (she) had signed willingly (or
willingly directed another to sign for ~~him~~her (him) (her)), and that ~~he~~she (he)(she)
executed it as ~~his~~her (his)(her) free and voluntary act for the purposes therein

expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of ~~his~~~~her~~ (his)(her) knowledge the testator was at that time ~~eighteen~~ 18 years of age or older, of sound mind, and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this ____ day of _____.

(Seal)

(Signed) _____

(Official capacity of officer)

(c) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.

Partial Comment

[subject to further revision and elaboration]

A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405, and 3-406 without the testimony of any subscribing witness, but otherwise it is treated no differently from a will not self proved. Thus, a self-proved will may be contested (except in regard to ~~signature requirements~~ questions of proper execution), revoked, or amended by a codicil in exactly the same fashion as a will not self proved. The procedural advantage of a self-proved will is limited to formal testacy proceedings because Section 3-303, which deals with informal

1 probate, dispenses with the necessity of testimony of witnesses even though the instrument is not
2 self proved under this section.

3
4 A new subsection (c) ~~is~~ was added to counteract an unfortunate judicial interpretation of
5 similar self-proving will provisions in a few states, under which a signature on the self-proving
6 affidavit has been held not to constitute a signature on the will, resulting in invalidity of the will
7 in cases where the testator or witnesses got confused and only signed on the self-proving
8 affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U.
9 L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash.Ct.App.1989).

10
11 **2008 Revision.** Section 2-502(a) was amended in 2008 to add an optional method of
12 execution by having a will notarized rather than witnessed by two attesting witnesses. The
13 amendment to Section 2-502 necessitated amending this section so that it only applies to a will
14 that is executed with attesting witnesses.
15

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

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

19 (1) “Adoptee” has the meaning set forth in Section 2-115.

20 (2) “Child of assisted reproduction” has the meaning set forth in Section 2-120.

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

23 (4) “Functioned as a parent of the adoptee” has the meaning set forth in Section 2-
24 115, substituting “adoptee” for “child” in that definition.

25 (5) “Functioned as a parent of the child” has the meaning set forth in Section 2-
26 115.

27 (6) “Gestational child” has the meaning set forth in Section 2-121.

28 (7) “Genetic parent” has the meaning set forth in Section 2-115.

29 (8) “Relative” has the meaning set forth in Section 2-115.

30 ~~(a)-(b)~~ **[Terms of Relationship.]** A child of assisted reproduction, a gestational child,

1 and, except as otherwise provided in subsections (e) and (f), an ~~adopted individuals-adoptee~~ and
2 a child born to parents who are not married to each other ~~individuals born out of wedlock~~, and
3 their respective descendants if appropriate to the class, are included in class gifts and other terms
4 of relationship in accordance with the rules for intestate succession.

5 **(c) [Relatives by Marriage.]** Terms of relationship in a governing instrument that do not
6 differentiate relationships by blood from those by affinity marriage, such as ~~“uncles”, “aunts”,~~
7 ~~“nieces”, or “nephews”~~ uncles, aunts, nieces, or nephews, are construed to exclude relatives by
8 affinity marriage, unless:

9 (1) when the governing instrument was executed, the class was then and
10 foreseeably would be empty; or

11 (2) the language or circumstances otherwise establish that relatives by marriage
12 were intended to be included.

13 **(d) [Half-Blood Relatives.]** Terms of relationship in a governing instrument that do not
14 differentiate relationships by the half blood from those by the whole blood, such as ~~“brothers”,~~
15 ~~“sisters”, “nieces”, or “nephews”~~ brothers, sisters, nieces, or nephews, are construed to include
16 both types of relationships.

17 **(b)(e) [Transferor Not Genetic Parent.]** ~~In addition to the requirements of subsection~~
18 ~~(a), in~~ construing a dispositive provision of a transferor who is not the ~~natural~~ genetic parent, an
19 individual a child born to the ~~natural~~ of a genetic parent is not considered the child of that parent
20 unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of a
21 relative of the genetic parent functioned as a parent of the child before the child reached the age
22 of majority ~~individual lived while a minor as a regular member of the household of that natural~~
23 parent or of that parent’s parent, brother, sister, spouse, or surviving spouse.

1 ~~(e)~~ **(f) [Transferor Not Adoptive Parent.]** In addition to the requirements of subsection

2 ~~(a)~~, in construing a dispositive provision of a transferor who is not the adopting adoptive parent,

3 an adopted individual adoptee is not considered the child of the adopting adoptive parent unless:

4 (1) the adoption took place before the adoptee reached [18] [the age of majority];

5 (2) the adoptive parent was the adoptee's stepparent or foster parent; or

6 (3) the adoptive parent functioned as a parent of the adoptee before the adoptee
7 reached [18] [the age of majority] ~~adopted individual lived while a minor, either before or after~~

8 ~~the adoption, as a regular member of the household of the adopting parent.~~

9 **(g) [Class-Closing Rules.]** The following rules apply for purposes of the class-closing
10 rules:

11 (1) A child in utero at a particular time is treated as living at that time if the child
12 lives 120 hours after birth.

13 (2) If a child of assisted reproduction or a gestational child is conceived
14 posthumously and the distribution date is the deceased parent's death, the child is treated as
15 living on the distribution date if the child lives 120 hours after birth and was in utero not later
16 than 36 months after the deceased parent's death or born not later than 45 months after the
17 deceased parent's death.

18 (3) An individual who is in the process of being adopted when the class closes is
19 treated as adopted when the class closes if the adoption is subsequently granted.

20 **Partially Revised Comment**

21
22 **Purpose and Scope of Revisions.** This section facilitates a modern construction of gifts
23 that identify the recipient by reference to a relationship to someone; usually these gifts will be
24 class gifts. This section is substantially consistent with the Restatement (Third) of Property:
25 Wills and Other Donative Transfers §§ 14.5 through 14.9 (2008). These sections of the
26 Restatement apply to the treatment for class-gift purposes of an adoptee, a nonmarital child, a
27 child of assisted reproduction, a gestational child, and a relative by marriage.

1 The rules set forth in this section are rules of construction, which under Section 2-701 are
2 controlling in the absence of a finding of a contrary intention. With two exceptions, Section 2-
3 705 invokes the rules pertaining to intestate succession as rules of construction for interpreting
4 terms of relationship in private instruments.

5
6 ~~The pre-1990 version of this section applied only to devises contained in wills. As revised~~
7 ~~and relocated in Part 7, this section is freed of that former restriction; it now applies to~~
8 ~~dispositive provisions of all governing instruments, as prescribed by Section 2-701.~~

9
10 ~~Subsections (b) and (c) are based on Cal.Prob.Code § 6152. These subsections impose~~
11 ~~requirements for inclusion that are additional to the requirement of subsection (a). Put differently,~~
12 ~~a child must satisfy subsection (a) in all cases. In addition, if either subsection (b) or (c) applies,~~
13 ~~the child must also satisfy the requirements of that subsection to be included under the class gift~~
14 ~~or term of relationship.~~

15
16 **Subsection (a): Definitions.** With one exception, the definitions in subsection (a) rely on
17 definitions contained in intestacy sections. The one exception is the definition of “distribution
18 date,” which is relevant to the class-closing rules contained in subsection (g).

19
20 **Subsection (b): Terms of Relationship.** Subsection (b) provides that a child of assisted
21 reproduction and a gestational child, and their respective descendants if appropriate to the class,
22 are included in class gifts and other terms of relationship in accordance with the rules for
23 intestate succession. See Examples 11 through 14.

24
25 Subsection (b) also provides that, except as otherwise provided in subsections (e) and (f),
26 an adoptee and a child born to parents who are not married to each other, and their respective
27 descendants if appropriate to the class, are included in class gifts and other terms of relationship
28 in accordance with the rules for intestate succession. The subsection (e) exception relates to
29 situations in which the transferor is not the genetic parent of the child. The subsection (f)
30 exception relates to situations in which the transferor is not the adoptive parent of the adoptee.
31 Consequently, if the transferor is the genetic or adoptive parent of the child, neither exception
32 applies, and the class gift or other term of relationship is construed in accordance with the rules
33 for intestate succession. See Examples 9 and 10.

34
35 **Subsection (c): Relatives by Marriage.** Subsection (c) provides that terms of
36 relationship that do not differentiate relationships by blood from those by marriage, such as
37 “uncles”, “aunts”, “nieces”, or “nephews”, are construed to exclude relatives by marriage, unless
38 (i) when the governing instrument was executed, the class was then and foreseeably would be
39 empty or (ii) the language or circumstances otherwise establish that relatives by marriage were
40 intended to be included. The Restatement (Third) of Property: Wills and Other Donative
41 Transfers § 14.9 (2008) adopts a similar rule of construction. As recognized in both subsection
42 (c) and the Restatement, there are situations in which the circumstances would tend to include a
43 relative by marriage.

44
45 One situation in which the circumstances would tend to establish an intent to include a
46 relative by marriage is the situation in which, looking at the facts existing when the governing

1 instrument was executed, the class was then and foreseeably would be empty unless the
2 transferor intended to include relatives by marriage.

3
4 Example 1. G's will devised property in trust, directing the trustee to pay the income in
5 equal shares "to G's children who are living on each income payment date and on the death of
6 G's last surviving child, to distribute the trust property to G's issue then living, such issue to take
7 per stirpes, and if no issue of G is then living, to distribute the trust property to the X Charity."
8 When G executed her will, she was past the usual childbearing age, had no children of her own,
9 and was married to a man who had four children by a previous marriage. These children had
10 lived with G and her husband for many years, but G had never adopted them. Under these
11 circumstances, it is reasonable to conclude that when G referred to her "children" in her will she
12 was referring to her stepchildren. Thus her stepchildren should be included in the presumptive
13 meaning of the gift "to G's children" and the issue of her stepchildren should be included in the
14 presumptive meaning of the gift "to G's issue." If G, at the time she executed her will, had
15 children of her own, in the absence of additional facts, G's stepchildren should not be included in
16 the presumptive meaning of the gift to "G's children" or in the gift to "G's issue."

17
18 Example 2. G's will devised property in trust, directing the trustee to pay the income to
19 G's wife W for life, and on her death, to distribute the trust property to "my grandchildren." W
20 had children by a prior marriage who were G's stepchildren. G never had any children of his own
21 and he never adopted his stepchildren. It is reasonable to conclude that under these circumstances
22 G meant the children of his stepchildren when his will gave the future interest under the trust to
23 G's "grandchildren."

24
25 Example 3. G's will devised property in trust, directing the trustee to pay the income "to
26 my daughter for life and on her death, to distribute the trust property to her children." When G
27 executed his will, his son had died, leaving surviving the son's wife, G's daughter-in-law, and
28 two children. G had no daughter of his own. Under these circumstances, the conclusion is
29 justified that G's daughter-in-law is the "daughter" referred to in G's will.

30
31 Another situation in which the circumstances would tend to establish an intent to include
32 a relative by marriage is the case of reciprocal wills, as illustrated in Example 4, which is based
33 on Martin v. Palmer, 1 S.W.3d 875 (Tex. Ct. App. 1999).

34
35 Example 4. G's will devised her entire estate "to my husband if he survives me, but if not,
36 to my nieces and nephews." G's husband H predeceased her. H's will devised his entire estate "to
37 my wife if she survives me, but if not, to my nieces and nephews." Both G and H had nieces and
38 nephews. In these circumstances, "my nieces and nephews" is construed to include G's nieces
39 and nephews by marriage. Were it otherwise, the combined estates of G and H would pass only
40 to the nieces and nephews of the spouse who happened to survive.

41
42 Still another situation in which the circumstances would tend to establish an intent to
43 include a relative by marriage is a case in which an ancestor participated in raising a relative by
44 marriage other than a stepchild.

45
46 Example 5. G's will devised property in trust, directing the trustee to pay the income in

1 equal shares “to my nieces and nephews living on each income payment date until the death of
2 the last survivor of my nieces and nephews, at which time the trust shall terminate and the trust
3 property shall be distributed to the X Charity.” G’s wife W was deceased when G executed his
4 will. W had one brother who predeceased her. G and W took the brother’s children, the wife’s
5 nieces and nephews, into their home and raised them. G had one sister who predeceased him, and
6 G and W were close to her children, G’s nieces and nephews. Under these circumstances, the
7 conclusion is justified that the disposition “to my nieces and nephews” includes the children of
8 W’s brother as well as the children of G’s sister.

9
10 The language of the disposition may also establish an intent to include relatives by
11 marriage, as illustrated in Examples 6, 7, and 8.

12
13 Example 6. G’s will devised half of his estate to his wife W and half to “my children.” G
14 had one child by a prior marriage, and W had two children by a prior marriage. G did not adopt
15 his stepchildren. G’s relationship with his stepchildren was close, and he participated in raising
16 them. The use of the plural “children” is a factor indicating that G intended to include his
17 stepchildren in the class gift to his children.

18
19 Example 7. G’s will devised the residue of his estate to “my nieces and nephews named
20 herein before.” G’s niece by marriage was referred to in two earlier provisions as “my niece.”
21 The previous reference to her as “my niece” indicates that G intended to include her in the
22 residuary devise.

23
24 Example 8. G’s will devised the residue of her estate “in twenty-five (25) separate equal
25 shares, so that there shall be one (1) such share for each of my nieces and nephews who shall
26 survive me, and one (1) such share for each of my nieces and nephews who shall not survive me
27 but who shall have left a child or children surviving me.” G had 22 nieces and nephews by blood
28 or adoption and three nieces and nephews by marriage. The reference to twenty-five nieces and
29 nephews indicates that G intended to include her three nieces and nephews by marriage in the
30 residuary devise.

31
32 **Subsection (d): Half Blood Relatives.** In providing that terms of relationship that do not
33 differentiate relationships by the half blood from those by the whole blood, such as “brothers”,
34 “sisters”, “nieces”, or “nephews”, are construed to include both types of relationships, subsection
35 (d) is consistent with the rules for intestate succession. See Section 2-107 and the phrase “or
36 either of them” in Section 2-103(3) and (4).

37
38 **Subsection (e): Transferor Not Genetic Parent.** The general theory of subsection (b e)
39 is that a transferor who is not the ~~natural (biological)~~ genetic parent of a child would want the
40 child to be included in a class gift as a child of the ~~biological~~ genetic parent only if the genetic
41 parent (or one or more of the specified relatives of the child’s genetic parent functioned as a
42 parent of the child before the child reached the age of majority lived while a minor as a regular
43 member of the household of that biological parent (or of specified relatives of that biological
44 parent).

45
46 Example 9. G’s will created a trust, income to G’s son, A, for life, remainder in corpus to

1 A's descendants who survive A, by representation. A fathered a child, X; A and X's mother, D,
2 never married each other, and ~~X A never lived while a minor as a regular member of A's~~
3 ~~household or the household of A's parent, brother, sister, spouse, or surviving spouse~~ functioned
4 as a parent of the child, nor did any of A's relatives or spouses or surviving spouses of any of A's
5 relatives. D later married E; D and E raised X as a member of their household. ~~Solution: Never~~
6 ~~having X lived as a regular member of A's household or of the household of any of A's specified~~
7 ~~relatives.~~ Because neither A nor any of A's specified relatives ever functioned as a parent of X, X
8 would not be included as a member of the class of A's descendants who take the corpus of G's
9 trust on A's death.

10
11 If, however, ~~D's parent had created a similar trust, income to D for life, remainder in~~
12 ~~corpus to D's descendants who survive D, by representation, X would be included as a member~~
13 ~~of the class of D's descendants who take the corpus of this trust on D's death.~~ Also if A executed
14 a will containing a devise to his children or designated his children as beneficiary of his life
15 insurance policy, X would be included in the class. Under Section ~~2-114~~ 2-117, X would be A's
16 child for purposes of intestate succession. Subsection (~~b~~ c) is inapplicable because the transferor,
17 A, is the biological genetic parent.

18
19 **Subsection (f): Transferor Not Adoptive Parent.** The general theory of subsection (~~e~~ f)
20 is that a transferor who is not the adopting adoptive parent of an adopted child-adoptee would
21 want the child to be included in a class gift as a child of the adopting adoptive parent only if ~~the~~
22 ~~child lived while a minor, either before or after the adoption, as a regular member of the~~
23 ~~household of that adopting parent~~ (i) the adoption took place before the adoptee reached the age
24 of majority; (ii) the adoptive parent was the adoptee's stepparent or foster parent; or (iii) the
25 adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of
26 majority.

27
28 *Example 10.* G's will created a trust, income to G's daughter, A, for life, remainder in
29 corpus to A's descendants who survive A, by representation. A and A's husband adopted a 47-
30 year old man, X, ~~who never lived while a minor as a regular member of A's household~~
31 ~~Solution: Never having lived while a minor as a regular member of A's household.~~ Because the
32 adoption did not take place before X reached the age of majority, A was not X's stepparent or
33 foster parent, and A did not function as a parent of X before X reached the age of majority. X
34 would not be included as a member of the class of A's descendants who take the corpus of G's
35 trust on A's death.

36
37 If, however, A executed a will containing a devise to her children or designated her
38 children as beneficiary of her life insurance policy, X would be included in the class. Under
39 Section ~~2-114~~ 2-118, X would be A's child for purposes of intestate succession. Subsection (~~e~~ d)
40 is inapplicable because the transferor, A, is an adopting adoptive parent.

41
42 **Subsection (g): Class-Closing Rules.** For an exposition of the class-closing rules, see
43 Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 (2008). Section 15.1
44 provides that, "unless the language or circumstances establish that the transferor had a different
45 intention, a class gift that has not yet closed physiologically closes to future entrants on the
46 distribution date if a beneficiary of the class gift is then entitled to distribution."

1 **Subsection (g)(1): Child in Utero.** Subsection (g)(1) codifies the well-accepted rule that
2 a child in utero at a particular time is treated as living at that time if the child lives 120 hours
3 after birth.

4
5 **Subsection (g)(2): Children of Assisted Reproduction and Gestational Children;**
6 **Class Gift in Which Distribution Date Arises At Deceased Parent's Death.** Subsection (g)(2)
7 changes the class-closing rules in one respect. If a child of assisted reproduction (as defined in
8 Section 2-120) or a gestational child (as defined in Section 2-121) is conceived posthumously,
9 and if the distribution date is the deceased parent's death, then the child is treated as living on the
10 distribution date if the child lives 120 hours after birth and was either (i) in utero no later than 36
11 months after the deceased parent's death or (ii) born no later than 45 months after the deceased
12 parent's death.

13
14 The 36-month period in subsection (e)(2) is designed to allow a surviving spouse or
15 partner a period of grieving, time to make up his or her mind about whether to go forward with
16 assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a
17 pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is
18 allowed to recover property improperly distributed or its value from any distributee during the
19 later of three years after the decedent's death or one year after distribution. The 45-month period
20 is based on the three-year period with an additional nine months tacked on to allow for a normal
21 period of pregnancy. Providing an alternative of in utero no later than 36 months rather than
22 requiring birth no later than 45 months is designed to decrease any incentive for the survivor to
23 force a premature birth, thereby possibly jeopardizing the health of the mother or child.

24
25 *Example 11.* G, a member of the armed forces, executed a military will shortly before
26 being deployed to a war zone. G's will devised "90 percent of my estate to my wife W and 10
27 percent of my estate to my children." G also left frozen sperm at a sperm bank in case he should
28 be killed in action. G consented to be treated as the parent of the child within the meaning of § 2-
29 120(f). G was killed in action. After G's death, W decided to become inseminated with his frozen
30 sperm so she could have his child. If the child so produced was either (i) in utero within 36
31 months after G's death or (ii) born within 45 months after G's death, and if the child lived 120
32 hours after birth, the child is treated as living at G's death and is included in the class.

33
34 *Example 12.* G, a member of the armed forces, executed a military will shortly before
35 being deployed to a war zone. G's will devised "90 percent of my estate to my husband H and 10
36 percent of my estate to my issue by representation." G also left frozen embryos in case she should
37 be killed in action. G consented to be the parent of the child within the meaning of § 2-120(f). G
38 was killed in action. After G's death, H arranged for the embryos to be implanted in the uterus of
39 a gestational carrier. If the child so produced was either (i) in utero within 36 months after G's
40 death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after
41 birth, the child is treated as living at G's death and is included in the class.

42
43 *Example 13.* The will of G's mother created a testamentary trust, directing the trustee to
44 pay the income to G for life, then to distribute the trust principal of the trust to G's children.
45 When G's mother died, G was married but had no children. Shortly after being diagnosed with
46 leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the

disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class under the rule of convenience.

Subsection (g)(2) Inapplicable If Distribution Date Arises after Deceased Parent's Death. Subsection (g)(2) does not apply if the distribution date arises after the deceased parent's death. This means that, with respect to children of assisted reproduction and gestational children, a class gift in which the distribution date arises after the deceased parent's death is not limited to children who are born before or in utero at the deceased parent's death or, in the case of posthumous conception, either (i) in utero within 36 months after the deceased parent's death or (ii) born within 45 months after the deceased parent's death. Instead, the ordinary class-closing rules apply. Thus, the class-closing rules would only exclude a child of assisted reproduction or a gestational child if the child was not yet born or in utero on the distribution date (or who was then in utero but who failed to live 120 hours after birth).

Example 14. G created a revocable inter vivos trust shortly before her death. The trustee was directed to pay the income to G for life, then "to pay the income to the children of my son S commencing upon each child's twenty-first birthday, and at the death of S's last surviving child, to pay the principal of the trust to X Charity." When G died, S, had an infant daughter with his wife W. Shortly after being diagnosed with leukemia, S feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. S consented to be the parent of the child within the meaning of § 2-120(f). After G's death, S died, and S's widow W decided to become inseminated with his frozen sperm so that she could have a second child by him. After S's death, W raised both children. Upon reaching 21, S's second child is included in the class, and is therefore entitled to receive half of the income, because that child lived 120 hours after birth and was living on the distribution date.

{The Reporter plans to describe or insert an example based on *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007), in which the deceased father's widow underwent in vitro fertilization three years and five years after the father's death with his frozen sperm. The court held that the resulting children were members of classes described as the "issue" or "descendants" of the deceased father's deceased father. The grandchildren in this case were living on the distribution dates.}

Subsection (g)(3). {to be explained}

Companion Statute. A state enacting this provision should also consider enacting the Uniform Status of Children of Assisted Conception Act (1988):

Reference. Halbach, "Issues About Issue", 48 Mo.L.Rev. 333 (1983).

Historical Note. This Comment was revised in 1993 and 2008. For the prior version, see 8 U.L.A. 143 (Supp.1992).

SECTION 2-805. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

Comment

Scope and rationale of new section. This new section is based on Section 415 of the Uniform Trust Code, which in turn was based on Section 12.1 of the Restatement (Third) of Property: Wills and Other Transfers (2003). Section 12.1 of the Restatement and accompanying Comments are reproduced below. It is not intended that this section and Comments will be reproduced in the final version of the Comment to Section 2-805. In the final version of this Comment, the Reporter intends to merely cite to the Restatement. The Restatement is reproduced below for the benefit of those who are not familiar with that Restatement section.

Restatement § 12.1. Reforming Donative Documents to Correct Mistakes

A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

Restatement Comment:

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

b. Rationale. When a donative document is unambiguous, evidence suggesting that the terms of the document vary from intention is inherently suspect but possibly correct. The law deals with situations of inherently suspicious but possibly correct evidence in either of two ways. One is to exclude the evidence altogether, in effect denying a remedy in cases in which the evidence is genuine and persuasive. The other is to consider the evidence, but guard against giving effect to fraudulent or mistaken evidence by imposing an above-normal standard of proof. In choosing between exclusion and high-safeguard allowance of extrinsic evidence, this

1 Restatement adopts the latter. Only high-safeguard allowance of extrinsic evidence achieves the
2 primary objective of giving effect to the donor's intention. To this end, the full range of direct
3 and circumstantial evidence relevant to the donor's intention described in § 10.2 may be
4 considered in a reformation action.

5
6 Equity rests the rationale for reformation on two related grounds: giving effect to the
7 donor's intention and preventing unjust enrichment. The claim of an unintended taker is an
8 unjust claim. Using the equitable remedy of reformation to correct a mistake is necessary to
9 prevent unjustly enriching the mistaken beneficiary at the expense of the intended beneficiary.

10
11 *c. Historical background.* The reformation doctrine for donative documents other than
12 wills is well established. Equity has long recognized that deeds of gift, inter-vivos trusts, life-
13 insurance contracts, and other donative documents can be reformed if it is established by clear
14 and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement,
15 affected specific terms of the document; and (2) what the donor's intention was. Reformation of
16 these documents is granted, on an adequate showing of proof, even after the death of the donor.

17
18 This section unifies the law of wills and will substitutes by applying to wills the standards
19 that govern other donative documents. Until recently, courts have not allowed reformation of
20 wills. The denial of a reformation remedy for wills was predicated on observance of the Statute
21 of Wills, which requires that wills be executed in accordance with certain formalities. See § 3.1.
22 Reforming a will, it was feared, would often require inserting language that was not executed in
23 accordance with the statutory formalities. Section 11.2, however, authorizes inserting language to
24 resolve ambiguities in accordance with the donor's intention. As noted in § 11.2, Comment c,
25 modern authority is moving away from insistence on strict compliance with the statutory
26 formalities on the question of initial execution of wills. Section § 3.3 adopts the position a
27 harmless error in executing a will may be excused "if the proponent establishes by clear and
28 convincing evidence that the decedent adopted the document as his or her will." See also
29 Restatement Second, Property (Donative Transfers) § 33.1, Comment g. The Revised Uniform
30 Probate Code § 2-503 also adopts a harmless-error rule. Under the Revised UPC, a document or
31 writing on a document that was not executed in compliance with the statutory formalities is
32 treated as if it had been properly executed "if the proponent of the document or writing
33 establishes by clear-and-convincing evidence that the decedent intended the document or writing
34 to constitute . . . the decedent's will . . ."

35
36 The trend away from insisting on strict compliance with statutory formalities is based on
37 a growing acceptance of the broader principle that mistake, whether in execution or in
38 expression, should not be allowed to defeat intention. A common principle underlies the
39 movement to excuse defective execution: § 11.2, authorizing insertion of language to resolve
40 ambiguities in donative documents; and this section, authorizing reformation of unambiguous
41 donative documents (including wills) to correct mistakes.

42
43 The important difference between § 11.2 and this section is the burden of proof.
44 Ambiguity shows that the donative document contains an inadequate expression of the donor's
45 intention. Here, because there is no ambiguity, clear and convincing evidence is required to
46 establish that the document does not adequately express intention.

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

4
5 The general law of mistake, under which a mistake may be significant enough to justify
6 the conclusion that the donative transfer should be set aside or reformed, is incorporated
7 herein by reference and made applicable to both wills and other donative documents of
8 transfer.

9
10 This section carries forward the position of the Restatement Second by extending the
11 conventional reformation remedy for inter-vivos donative documents to wills, hence to all
12 donative documents.

13
14 *d. Plain meaning rule disapproved.* The so-called plain meaning rule is disapproved to
15 the extent that that rule purports to exclude extrinsic evidence of the donor's intention. The plain
16 meaning, Wigmore noted, "is simply the meaning of the people who did *not* write the
17 document." The objective of the plain meaning rule, to prevent giving effect to mistaken or
18 fraudulent testimony, is sufficiently preserved by subjecting extrinsic evidence that contradicts
19 what appears to be the plain meaning of the text to a higher than normal standard of proof, the
20 clear-and-convincing-evidence standard.

21
22 *e. Standard of proof — clear and convincing evidence.* There are two standards of proof
23 for civil cases—preponderance of the evidence and clear and convincing evidence. This section
24 imposes the clear-and-convincing-evidence standard of proof. Reformation is permissible only if
25 the elements stated in this section are established by clear and convincing evidence.

26
27 The normal standard of proof in civil cases is preponderance of the evidence. Under that
28 standard, the evidence must establish a probability that an assertion is true, *i.e.*, that it is more
29 probable than not that the assertion is true. A higher degree of probability is required under the
30 clear-and-convincing-evidence standard. Although this higher standard of proof defies
31 quantification, it is generally agreed that it requires an assertion to be established by a high
32 degree of probability, though not to an absolute or moral certainty or beyond a reasonable doubt.

33
34 The standard of proof serves various functions. It alerts potential plaintiffs to the strength
35 of evidence required in order to prevail, instructs the trier of fact regarding the level of
36 confidence needed to find for the plaintiff, and allocates the risk of an erroneous factual
37 determination.

38
39 The higher standard of proof under this section imposes a heightened sense of
40 responsibility upon the trier of fact. When the case is tried before a judge, the judge should
41 respond by rendering a thorough, reasoned set of findings that deal with the relevant contested
42 facts. A collateral benefit of requiring clear and convincing proof is that an appellate court will
43 rightly feel free to scrutinize the trial court's work more closely than in the typical
44 preponderance-of-the-evidence review. As a practical matter, this greater scrutiny pressures the
45 trial judge to do an especially careful job.

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

10
11 *f. Nature of reformation and constructive trust.* The grounds stated in this section, if
12 established by clear and convincing evidence, support an order of reformation and, if necessary,
13 other equitable relief such as the imposition of a constructive trust. An order of reformation alters
14 the text of a donative document so that it expresses the intention it was intended to express.
15 Thus, unless otherwise stated, a judicial order of reformation relates back and operates to alter
16 the text as of the date of execution rather than as of the date of the order or any other post-
17 execution date.

18
19 If property was previously distributed under the mistaken terms of the document, the
20 court may impose a constructive trust or take other remedial steps in addition to issuing an order
21 of reformation. A constructive trust is an equitable remedy that orders property in the hands of an
22 unintended recipient to be transferred to the intended beneficiary. Thus, the court imposes the
23 constructive trust in favor of the intended beneficiary. Unless otherwise stated, the constructive
24 trust imposed under this section presupposes that the order of reformation relates back and
25 operates to alter the text as of the date of the donor's execution of the document, as described
26 above.

27
28 *g. Grounds for reformation.* In order to support the equitable remedy of reformation, the
29 extrinsic evidence must establish, by clear and convincing evidence, (1) that a mistake of fact or
30 law affected the expression, inclusion, or omission of specific terms of the document and (2)
31 what the donor's actual intention was in a case of mistake in expression or what the donor's
32 actual intention would have been in a case of mistake in the inducement. A petition for
33 reformation can be brought under this section by any interested person, before or after the
34 donor's death.

35
36 *h. Limitations on the scope of reformation.* Reformation is a rule governing mistakes in
37 the content of a donative document, in a case in which the donative document does not say what
38 the transferor meant it to say. Accordingly, reformation is not available to correct a failure to
39 prepare and execute a document (Illustration 1). Nor is reformation available to modify a
40 document in order to give effect to the donor's post-execution change of mind (Illustration 2) or
41 to compensate for other changes in circumstances (Illustration 3).

42 **Illustrations:**

43
44
45 1. G decided to leave his estate to his niece, X. G orally communicated his intent
46 to X, mistakenly thinking that he could effectuate his intent in this manner. Thereafter G

1 died intestate, leaving his sister, A, as his sole heir.

2
3 Because G did not reduce his testamentary intent to writing and execute it as
4 required by the Statute of Wills, X cannot invoke the reformation doctrine to implement
5 G's true intent. G's mistake did not refer to specific terms in a donative document,
6 because G never executed a document. There is no document to reform.

7
8 2. G validly executed a will that devised his estate to his sister, A. After
9 execution, G formed an intent to alter the disposition in favor of A's daughter, X, in the
10 mistaken belief that he could substitute his new intent by communicating it to X orally.

11
12 G's oral communication to X does not support a reformation remedy. Although a
13 donative document exists that could be reformed by substituting "X" for "A", the remedy
14 does not lie because G's will was not the product of mistake. The will when executed
15 stated G's intent accurately. G's mistake was his subsequent failure to execute a codicil or
16 a new will to carry out his new intent. This is a mistake of the same sort that G made in
17 Illustration 1 in not making a valid will in the first place.

18
19 3. G's will devised his government bonds to his daughter, A, and the residue of
20 his estate to a friend. Evidence shows that the bonds are worth only half of what they
21 were worth at the time of execution of the will and that G would probably have left A
22 more had he known that the bonds would depreciate in value.

23
24 This evidence does not support a reformation remedy. G's mistake did not relate
25 to facts that existed when the will was executed.

26
27 *i. Mistake in expression or inducement.* If proved by clear and convincing evidence, a
28 mistake justifies an equitable remedy, whether the mistake is one of expression or inducement. A
29 mistake of expression arises when a donative document includes a term that misstates the
30 donor's intention (Illustration 4), fails to include a term that was intended to be included
31 (Illustration 5), or includes a term that was not intended to be included (Illustration 6). A mistake
32 in the inducement arises when a donative document includes a term that was intended to be
33 included or fails to include a term that was not intended to be included, but the intention to
34 include or not to include the term was the product of a mistake of fact or law (Illustrations 7 and
35 8).

36
37 **Illustrations:**

38
39 4. G's will devised "\$1,000 to A." Extrinsic evidence, including the testimony and
40 files of the drafting attorney, shows that there was a mistake in transcription and that G's
41 intention was to devise \$10,000 to A.

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

44 5. G created an inter-vivos trust. The trust document did not contain a clause
45 reserving to G a power to revoke the trust. Controlling law provides that a trust is
46 irrevocable in the absence of an expressly retained power to revoke. After G signed the

1 document, G's financial condition changed and G sought to revoke the trust.

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

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

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

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

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

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

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

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

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

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
37 j. Particularity of proof. In order to support an order of reformation or the imposition of a
38 constructive trust, the petitioner must prove, by clear and convincing evidence, both (1) that a
39 mistake of fact or law affected specific terms of the document and (2) what the donor's true
40 intention was. Both elements must be proved with particularity. For example, a claim that "if
41 only my aunt had known how much I loved her, she would have left me more" lacks sufficient
42 particularity to support a petition for remedy. Proof that the donor instructed his or her attorney to
43 "give me an estate plan that incurs the lowest possible tax liability" lacks sufficient particularity
44 to support a reformation remedy.

45
46 Notice, however, that the requirement of particularity does not require proof that the

1 donor personally made the mistake nor proof that the donor formulated the exact language
2 needed to carry out his or her intention. A remedy will lie if a mistake of the donor's advisor or
3 drafting agent has affected specific terms of the document by failing properly to formulate the
4 language necessary to carry out the donor's intention. Suppose, for example, that the petitioner
5 proves by clear and convincing evidence that the testator instructed his lawyer to draft a will that
6 devised certain property to child A. A remedy will lie if the lawyer drafted a will that
7 misdescribed the intended property or the intended devisee. The petitioner need not prove that
8 the testator formulated the exact language necessary to carry out his intention, which the
9 testator's lawyer mistakenly failed to include. The testator properly relies upon the lawyer to draft
10 the language necessary to carry out his intention.

11
12 *k. Statutory rules of construction.* Just as the requirement of particularity discussed in
13 Comment *j* does not require the petitioner to prove that the donor formulated the exact language
14 necessary to carry out intention, neither does the petitioner need to prove that the donor expressly
15 intended to overcome a statutory rule of construction. Statutes often provide that a particular rule
16 of construction prevails unless the donative document, another specified document, or one of a
17 list of specified documents expressly provides otherwise. See § 11.3. Such rules of construction
18 purport to govern when the document is silent. If the elements of this section are satisfied by
19 clear and convincing evidence, however, a petition for reformation can be sustained to insert
20 language into the document that rebuts the rule of construction. Suppose, for example, that the
21 petitioner proves by clear and convincing evidence that the donor instructed his or her lawyer to
22 draft a will that devised certain property to child, A, but not to A's children if A predeceased the
23 donor leaving children who survived the donor. A remedy will lie if the lawyer drafted a will that
24 failed to include language necessary to defeat the applicable antilapse statute. As reformed under
25 this section, the donor's will defeats the antilapse statute because it includes language expressly
26 contradicting that statutory rule of construction. As stated in Comment *j*, the petitioner need not
27 prove that the donor formulated the exact language necessary to carry out his or her intention and
28 that the donor's lawyer, by mistake, failed to include the donor's language; the donor properly
29 relies upon the lawyer to draft the language necessary to carry out his or her intention.

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

35
36 We have also considered whether any special significance ought to be given to
37 cases in which the will has been read over to the testator, perhaps with explanation, and
38 expressly approved by him before execution. In our view it should not. Some testators are
39 inattentive, some find it difficult to understand what their solicitors say and do not like to
40 confess it, and some make little or no attempt to understand. As long as they are assured
41 that the words used carry out their instructions, they are content. Others may follow every
42 word with meticulous attention. It is impossible to generalise, and our view is that reading
43 over is one of the many factors to which the court should pay attention, but that it should
44 have no conclusive effect.

45
46 Law Reform Committee, Nineteenth Report: Interpretation of Wills, Cmnd. No. 5301, at 12

1 (1973).

2
3 *m. Defenses: change of position by recipient; bona fide purchaser; laches; etc.* All
4 defenses generally available in equity to a suit to reform a donative document or to impose a
5 constructive trust upon the recipient of property distributed under a donative document are
6 available under this section. For example, a reformation order is ineffective and the imposition of
7 a constructive trust does not lie against a person regarding property that he or she received
8 without giving value therefor if, after receiving the property and without knowledge of the
9 circumstances justifying reformation under this section, the recipient changed position in a way
10 that makes it inequitable to require the recipient to return that property or its value. See
11 Restatement, Restitution §§ 69, 142. See also Restatement Second, Trusts §§ 292, 333;
12 Restatement Second, Contracts § 155 and Comment *f*.

13 A reformation order is ineffective and the imposition of a constructive trust does not lie
14 against a person regarding property that he or she has received if the recipient gave value therefor
15 without knowledge of the circumstances justifying reformation under this section. See
16 Restatement, Restitution §§ 13, 123, 141, 173, 174. See also Restatement Second, Trusts §§ 283-
17 320; Restatement Second, Contracts § 155 and Comment *f*.

18
19 A person otherwise entitled to reformation or to a constructive trust is barred from
20 recovery if the complainant has failed to bring, or, having brought, has failed to prosecute a suit
21 for so long a time and under such circumstances that it would be inequitable to permit the
22 complainant to prosecute the suit. A cause of action may also be barred by lapse of time because
23 of an applicable statute of limitations. See Restatement, Restitution § 148.

24
25 *n. Contractual transfers.* If a will, trust, beneficiary designation, or similar document is
26 made pursuant to a contract, such as a premarital or postmarital agreement, a divorce settlement,
27 or a will contract, ambiguities in the implementing document of transfer are presumptively
28 resolved in accordance with the transferor's contractual obligation. See § 11.2, Comments *g* and
29 *m*, § 11.3, Comment *k*. If, however, the implementing document of transfer is unambiguous and
30 clearly deviates from the transferor's contractual obligation, the remedy would normally lie in a
31 breach of contract action against the transferor or the transferor's estate. On the other hand, if
32 clear and convincing evidence establishes that the deviation was the product of mistake, the rule
33 of this section supplies an alternative means of curing the breach by reforming the document of
34 transfer to accord with the contract.

35 36 37 **SECTION 2-806. MODIFICATION TO ACHIEVE TRANSFEROR'S TAX**

38 **OBJECTIVES.** To achieve the transferor's tax objectives, the court may modify the terms of a
39 governing instrument in a manner that is not contrary to the transferor's probable intention. The
40 court may provide that the modification has retroactive effect.

41 **Comment**

1 Scope and rationale of new section. This new section is based on Section 416 of the
2 Uniform Trust Code, which in turn was based on Section 12.2 of the Restatement (Third) of
3 Property: Wills and Other Transfers (2003). Section 12.2 of the Restatement and accompanying
4 Comments are reproduced below. It is not intended that this section and Comments will be
5 reproduced in the final version of the Comment to Section 2-806. In the final version of this
6 Comment, the Reporter intends to merely cite to the Restatement. The Restatement is reproduced
7 below for the benefit of those who are not familiar with that Restatement section.

8
9 Restatement § 12.2. Modifying Donative Documents to Achieve Donor's Tax
10 Objectives

11 A donative document may be modified, in a manner that does not violate
12 the donor's probable intention, to achieve the donor's tax objectives.

13
14 **Restatement Comment:**

15
16 a. Scope note. This section authorizes modification of a donative document to achieve the
17 donor's tax objectives, to the extent that the proposed modification does not violate the donor's
18 probable intention. The term modification rather than reformation is used in this section to
19 distinguish the situation covered here from the situation, covered by § 12.1, in which the
20 donative document fails to express the donor's original, particularized intention.

21
22 b. Rationale. This section is based on probable intention (see Comment f). The rationale
23 for modifying a donative document is that the donor would have desired the modification to be
24 made if he or she had realized that the desired tax objectives would not be achieved. A similar
25 rationale underlies the cy pres doctrine for charitable trusts, the deviation doctrine for private
26 trusts, and the special-purpose reformation doctrine for curing perpetuity violations.

27
28 c. Establishing the donor's tax objectives. Modification under this section requires that
29 the donor's tax objectives be established by a preponderance of the evidence. The donor's tax
30 objectives can be established by the express terms of the donative document, by inference from
31 the donative document, or by extrinsic evidence. See § 10.2. The donor's tax objectives can be
32 specific, such as an objective to qualify a disposition for the federal estate tax charitable
33 deduction; or general, such as an objective to minimize taxes.

34
35 d. Achieving the donor's tax objectives. Achieving the donor's tax objectives by
36 modifying a donative document is straightforward if the donor's tax objectives concern state
37 taxes, unless controlling state law expressly disallows the governing effect of the modification
38 for state tax purposes.

39
40 Achieving the donor's tax objectives is more complicated if the donor's tax objectives
41 concern federal taxes, as they often do. Federal law controls the federal tax consequences of a
42 transaction. From time to time, however, federal law expressly recognizes specified
43 modifications of a donative document as controlling for certain federal tax purposes. Current
44 examples of federal statutory recognition include modifying split-interest charitable trusts in
45 certain cases to qualify the value of the charitable interest for the federal income, gift, or estate
46 tax charitable deduction, modifying trusts for noncitizen spouses in order to qualify them as

1 qualified domestic trusts, and dividing trusts for purposes of the federal generation-skipping
2 transfer tax. The primary purpose of this section is to authorize any modification that is clearly
3 effective under federal law if the donor's tax objectives relate to federal taxes, or that is clearly
4 effective under state law if the donor's tax objectives relate to state taxes, subject to the
5 requirement in either case that the modification not violate the donor's probable intention.

6
7 When federal tax law is unclear regarding the tax consequences of a proposed
8 modification, modification to achieve the donor's federal tax objectives is more problematic.
9 Courts should be cautious in granting a requested order of modification in such circumstances. In
10 addition to requiring that the modification not violate the donor's probable intention (see
11 Comment f), the proponent of modification bears the burden of showing a reasonable prospect
12 that the proposed modification will be effective for federal tax purposes.

13
14 *e. Failure to achieve tax objectives need not be related to post-execution change in tax*
15 *law.* Although failure to achieve the donor's tax objectives is often due to a change in the tax law
16 occurring after the document was executed, this section is not restricted to that situation. Federal
17 law sometimes accepts modification in situations in which the tax law did not change after
18 execution. It would be too restrictive, therefore, to limit this section to post-execution changes in
19 tax law.

20
21 *f. Modification not to violate the donor's probable intention.* To be authorized under this
22 section, the proposed modification must not violate the donor's probable intention. In many
23 cases, this requirement is easily satisfied. The modification necessary to achieve the donor's tax
24 objectives may consist merely of an order to divide a trust into two or more trusts, leaving the
25 combined interests of each beneficiary unaffected. Indeed, for some tax purposes, federal law
26 may accept a modification only if it does not change the quality, value, or timing of the interests
27 of the beneficiaries.

28
29 In other situations, the modification necessary to achieve the donor's tax objectives may
30 require an alteration of beneficial interests. Such an alteration is acceptable so long as it does not
31 violate the donor's probable intention. In determining the donor's probable intention, the donor's
32 non-tax as well as tax objectives are to be considered. The greater the proposed alteration, the
33 more rigorous the court should be in measuring the requested modification against the donor's
34 probable intention. One measure of the donor's probable intention is the donor's general
35 dispositive plan. Even if it is questionable whether the modification would be consistent with the
36 donor's general dispositive plan, however, the court can still find that it does not violate the
37 donor's probable intention if the detrimentally affected beneficiaries consent to the proposed
38 modification. Such consent makes it more likely that the donor would have approved of the
39 modification, whether or not the modification alters the donor's general dispositive plan.

40
41 *g. Time when modification becomes effective.* Unlike a court-ordered reformation under §
42 12.1, a court-ordered modification under this section does not necessarily relate back to the date
43 of execution. This is because modification, unlike reformation (see § 12.1), does not give effect
44 to original, particularized intention but to probable intention — to what the donor's intention
45 would probably have been had the donor known that his or her objectives could not be achieved
46 under the donative document as formulated. Under this section, a court-ordered modification

1 takes effect whenever necessary to achieve the purpose for which the modification is ordered.
2

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

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

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

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

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

19 (2) If the will is notarized pursuant to Section 2-502(a)(3)(B), but not self-proved, there is
20 a rebuttable presumption that the will complies with the requirements for execution upon filing
21 the will.

22 (3) If the will is witnessed pursuant to Section 2-502(a)(3)(A), but not notarized or self-
23 proved, the testimony of at least one of the attesting witnesses is required to establish proper
24 execution if the witness is within this state, competent, and able to testify. Proper execution may

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

4 **Comment**

5 [subject to further revision and elaboration]
6

7 **2008 Revisions.** ~~Model Probate Code section 76, combined with section 77, substantially~~
8 ~~unchanged. This section, which applies in a contested case in which the proper execution of a~~
9 ~~will is at issue, was substantially revised and clarified in 2008. The self-proved will is described~~
10 ~~in Article II. See Section 2-504.~~
11

12 **Self-Proved Wills:** Paragraph (1) provides that a will that is self-proved pursuant to
13 Section 2-504 is deemed to comply with the requirements for execution without the testimony of
14 any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or
15 attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or
16 affidavit. The “conclusive presumption” described here would foreclose questions like whether
17 the witnesses signed in the presence of the testator. Paragraph (1) does It would not preclude
18 proof evidence of undue influence, lack of testamentary capacity, revocation, or any relevant
19 proof evidence that the testator was unaware of the contents of the document. The balance of the
20 section is derived from Model Probate Code sections 76 and 77.
21

22 **Notarized Wills:** Paragraph (2) provides that if the will is notarized pursuant to Section
23 2-502(a)(3)(B), but not self-proved, there is a rebuttable presumption that the will complies with
24 the requirements for execution upon filing the will.
25

26 **Witnessed Wills:** Paragraph (3) provides that if the will is witnessed pursuant to Section
27 2-502(a)(3)(A), but not notarized or self-proved, the testimony of at least one of the attesting
28 witnesses is required to establish proper execution if the witness is within this state, competent,
29 and able to testify. Proper execution may be established by other evidence, including an affidavit
30 of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a
31 rebuttable presumption that the events recited in the clause occurred. For further explanation of
32 the effect of an attestation clause, see Restatement (Third) of Property: Wills and Other Donative
33 Transfers § 3.1 cmt. q (1999).
34

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