AMENDMENTS TO
UNIFORM PROBATE CODE

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
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AMENDMENTS TO THE UNIFORM PROBATE CODE

SECTION 1-109. COST OF LIVING ADJUSTMENT OF CERTAIN DOLLAR AMOUNTS.

(a) In this section:

(1) "CPI" means the Consumer Price Index (Annual Average) for All Urban Consumers (CPI-U): U.S. City Average — All items, reported by the Bureau of Labor Statistics, United States Department of Labor or its successor or, if the index is discontinued, an equivalent index reported by a federal authority. If no such index is reported, the term means the substitute index chosen by [insert appropriate state agency]; and

(2) "Reference base index" means the CPI for calendar year [insert year immediately preceding the year in which this section takes effect].

(b) The dollar amounts stated in Sections 2-102, [2-102A,] 2-202(b), 2-402, 2-403, and 2-405 apply to the estate of a decedent who died in or after [insert year in which this section takes effect], but for the estate of a decedent who died after [insert year after the year in which this section takes effect], these dollar amounts must be increased or decreased if the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. The amount of any increase or decrease is computed by multiplying each dollar amount by the percentage by which the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. If any increase or decrease produced by the computation is not a multiple of $100, the increase or decrease is rounded down, if an increase, or up, if a decrease, to the next multiple of $100, but for the purpose of Section 2-405, the periodic installment amount is the lump-sum amount divided by 12. If the CPI for [insert year immediately before the effective date of this section] is changed by the Bureau of Labor

Statistics, the reference base index must be revised using the rebasing factor reported by the Bureau of Labor Statistics, or other comparable data if a rebasing factor is not reported.

[(c) Before February 1, [insert year after the year in which this section takes effect], and before February 1 of each succeeding year, the [insert appropriate state agency] shall publish a cumulative list, beginning with the dollar amounts effective for the estate of a decedent who died in [insert year after the year in which this section takes effect], of each dollar amount as increased or decreased under this section.]

Legislative Note: *To establish and maintain uniformity among the states, an enacting state that enacted the sections listed in subsection (b) before 2008 should bring those dollar amounts up to date. To adjust for inflation, these amounts were revised in 2008. Between 1990 (when these amounts were previously adjusted for inflation) and 2008, the consumer price index (CPI) increased about 50 percent. As a result, the following increases in the UPC's specific dollar amounts were adopted in 2008 and should be adopted by a state that enacted these sections before 2008:*

Section 2-102(2) should be amended to change $200,000 to $300,000; Section 2-102(3) should be amended to change $150,000 to $225,000; and Section 2-102(4) should be amended to change $100,000 to $150,000. Section 2-102A, if enacted instead of Section 2-102, should be amended accordingly.

Section 2-201(b) should be amended to change $50,000 to $75,000.

Section 2-402 should be amended to change $15,000 to $22,500; Section 2-403 should be amended to change $10,000 to $15,000; and Section 2-405 should be amended to change $18,000 to $27,000 and to change $1,500 to $2,250.

A state enacting these sections after 2008 should adjust the dollar figures for changes in the cost of living that have occurred between 2008 and the effective date of the new enactment.

Comment

Automatic Adjustments for Inflation. Added in 2008, Section 1-109 operates in conjunction with the inflation adjustments of the dollar amounts listed in subsection (b) also adopted in 2008. Section 1-109 was added to make it unnecessary in the future for the ULC or individual enacting states to continue to amend the UPC periodically to adjust the dollar amounts for inflation. This section provides for an automatic adjustment of each of the above dollar amounts annually.

In each January, the Bureau of Labor Statistics of the U.S. Department of Labor reports

the CPI (annual average) for the preceding calendar year. The information can be obtained by telephone (202/691-5200) or on the Bureau's website <http://www.bls.gov/cpi>.

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

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

* * *

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

* * *

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

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

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

* * *

~~**PREFATORY NOTE**~~

ARTICLE II ~~REVISIONS~~

INTESTACY, WILLS, AND DONATIVE TRANSFERS

PREFATORY NOTE

The Uniform Probate Code was originally promulgated in 1969.

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

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

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

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

The proliferation of will substitutes and other inter-vivos transfers ~~is~~ was recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison. One aspect of this tendency ~~is~~ was reflected in the restructuring of the rules of construction. Rules of construction are rules that supply presumptive meaning to dispositive and similar provisions of governing instruments. See Restatement (Third) of Property: Wills and Other Donative Transfers § 11.3 (2003). Part 6 of the pre-1990 Code contained several rules of construction that applied only to wills. Some of those rules of construction appropriately applied

only to wills; provisions relating to lapse, testamentary exercise of a power of appointment, and ademption of a devise by satisfaction exemplify such rules of construction. Other rules of construction, however, properly apply to all governing instruments, not just wills; the provision relating to inclusion of adopted persons in class gift language exemplifies this type of rule of construction. The 1990 revisions divided pre-1990 Part 6 into two parts — Part 6, containing rules of construction for wills only; and Part 7, containing rules of construction for wills and other governing instruments. A few new rules of construction ~~are~~ were also added.

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

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

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

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

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

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

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

Reformation and Modification. New Sections 2-805 and 2-806 brought the reformation and modification sections now contained in the Uniform Trust Code into the Uniform Probate Code.

Historical Note. This Prefatory Note was revised in 2008.

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

States that do not recognize such relationships between unmarried individuals, or marriages between same-sex partners, are urged to consider whether to recognize the spousal-type rights that partners acquired under the law of another jurisdiction in which the relationship was formed but who die domiciled in this state. Doing so would not be the equivalent of recognizing such relationships in this state but simply allowing those who move to and die in this state to retain the rights they previously acquired elsewhere. See Christine A. Hammerle, Note, Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union, 104 Mich. L. Rev. 1763 (2006).

PART 1
INTESTATE SUCCESSION

GENERAL COMMENT

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 and 2008 revisions ~~are~~ were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships.

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. (To adjust for inflation, these dollar figures and other dollar figures in Article II were increased by fifty percent in 2008.)

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 (e), 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 from assisted reproductive technologies 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 affecting application of the judicial doctrine of equitable adoption.

Historical Note. This General Comment was revised in 2008.

SUBPART 1. GENERAL RULES.

* * *

SECTION 2-102. SHARE OF SPOUSE. The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(A) no descendant or parent of the decedent survives the decedent; or

(B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [~~$300,000~~ $300,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [~~$150,000~~ $225,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [~~$100,000~~ $150,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Comment

Purpose and Scope of 1990 Revisions. This section ~~is~~ was revised in 1990 to give the surviving spouse a larger share than the pre-1990 UPC. If the decedent leaves no surviving descendants and no surviving parent or if the decedent does leave surviving descendants but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent's intestate estate.

If the decedent leaves no surviving descendants but does leave a surviving parent, the decedent's surviving spouse receives the first ~~$200,000~~ $300,000 plus three-fourths of the balance of the intestate estate.

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent's descendants are unlikely to be the exclusive beneficiaries of the surviving spouse's estate, the surviving spouse receives the first ~~$150,000~~ $225,000 plus one-half of the balance of the intestate estate. The purpose is to assure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds ~~$150,000~~ $225,000.

If the decedent has other descendants, the surviving spouse receives ~~$100,000~~ $150,000 plus one-half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.

Note that in all the cases where the surviving spouse receives a lump sum plus a fraction of the balance, the lump sums must be understood to be in addition to the probate exemptions and allowances to which the surviving spouse is entitled under Part 4. These can add up to a minimum of ~~$43,000~~ $64,500.

Under the pre-1990 Code, the decedent's surviving spouse received the entire intestate estate only if there were neither surviving descendants nor parents. If there were surviving descendants, the descendants to one-half of the balance of the estate in excess of $50,000 (for example, $25,000 in a $100,000 estate). If there were no surviving descendants, but there was a surviving parent or parents, the parent or parents took that one-half of the balance in excess of $50,000.

2008 Cost-of-Living Adjustments. As revised in 1990, the dollar amount in paragraph (2) was $200,000, in paragraph (3) was $150,000, and in paragraph (4) was $100,000. To adjust for inflation, these amounts were increased in 2008 to $300,000, $225,000, and $150,000 respectively. The dollar amounts in these paragraphs are subject to annual cost-of-living adjustments under Section 1-109.

References. The theory of this section is discussed in Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code", 76 Iowa L. Rev. 223, 229-35 (1991).

Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their entire estates to their surviving spouses, even when the couple has children. See C. Shammas, M. Salmon & M. Bahlin, Inheritance in America from Colonial Times to the Present 184-85 (1987); M. Sussman, J. Cates & D. Smith, The Family and Inheritance (1970); Browder, "Recent Patterns of Testate Succession in the United States and England", 67 Mich. L. Rev. 1303, 1307-08 (1969); Dunham, "The Method, Process and Frequency of Wealth Transmission at Death", 30 U. Chi. L. Rev. 241, 252 (1963); Gibson, "Inheritance of Community Property in Texas—A Need for Reform", 47 Texas L. Rev. 359, 364-66 (1969); Price, "The Transmission of Wealth at Death in a Community Property Jurisdiction", 50 Wash. L. Rev. 277, 283, 311-17 (1975). See also Fellows, Simon & Rau, "Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States", 1978 Am. B. F. Research J. 319, 355-68; Note, "A Comparison of Iowans'

Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes", 63 Iowa L. Rev. 1041, 1091-92 (1978).

Cross Reference. See Section 2-802 for the definition of spouse, which controls for purposes of intestate succession.

Historical Note. This Comment was revised in 2008.

[ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES]

[SECTION 2-102A. SHARE OF SPOUSE.

(a) The intestate share of a surviving spouse in separate property is:

(1) the entire intestate estate if:

(A) no descendant or parent of the decedent survives the decedent; or

(B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [~~$200,000~~ $300,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [~~$150,000~~ $225,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [~~$100,000~~ $150,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

(b) The one-half of community property belonging to the decedent passes to the [surviving spouse] as the intestate share.]

Comment

The brackets around the term "surviving spouse" in subsection (b) indicate that states are free to adopt a different scheme for the distribution of the decedent's half of the community property, as some community property states have done.

2008 Cost-of-Living Adjustments. As revised in 1990, the dollar amount in subsection (a)(2) was $200,000, in (a)(3) was $150,000, and in (a)(4) was $100,000. To adjust for inflation, these amounts were increased in 2008 to $300,000, $225,000, and $150,000 respectively. The dollar amounts in these paragraphs are subject to annual cost-of-living adjustments under Section 1-109.

Historical Note. This Comment was revised in 2008.

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

(a) 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 individuals ~~designated below~~ who survive the decedent:

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

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

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

(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(A) half ~~of the estate passes~~ to the decedent's paternal grandparents equally if both survive, ~~or~~ to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and

(B) ~~the other~~ half ~~passes~~ to the decedent's maternal ~~relatives in the same manner~~ grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking by representation;

(5) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, ~~if there is no surviving~~

~~grandparent or descendant of a grandparent either the paternal or the maternal side, the entire estate passes~~ to the decedent's relatives on the ~~other~~ side with one or more surviving members in the ~~same~~ manner ~~as the half~~ described in paragraph (4).

(b) If there is no taker under subsection (a), but the decedent has:

(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation; or

(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.

Comment

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

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

The word "descendants" ~~replaces~~ replaced the word "issue" in this section and throughout the 1990 revisions of Article II. The term issue is a term of art having a biological connotation. Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.

2008 Revisions. In addition to making a few stylistic changes, which were not intended to change meaning, the 2008 revisions divided this section into two subsections. New subsection (b) grants inheritance rights to descendants of the intestate's deceased spouse(s) who are not also descendants of the intestate. The term deceased spouse refers to an individual to whom the intestate was married at the individual's death.

Historical Note. This Comment was revised in 2008.

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

(a) [Requirement of Survival by 120 Hours; Individual in Gestation.] For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (b), the following rules apply:

(1) An individual born before a decedent's death 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 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 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 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 Estate Would Pass to State.] This section does not apply if its application would cause the estate to pass to 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 the last eligible relative of the intestate who survives ~~him or her~~ for any period.

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

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

Historical Note. This Comment was revised in 2008.

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

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

SECTION 2-109. ADVANCEMENTS.

(a) If an individual dies intestate as to all or a portion of his [or her] estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or (ii) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(b) For purposes of subsection (a), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.

(c) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

Comment

Purpose of the 1990 Revisions. This section ~~is~~ was revised so that an advancement can be taken into account with respect to the intestate portion of a partially intestate estate.

Other than these revisions, and a few stylistic and clarifying amendments, the original content of the section is maintained, under which the common law relating to advancements is altered by requiring written evidence of the intent that an inter-vivos gift be an advancement.

The statute is phrased in terms of the donee being an heir "at the decedent's death." The donee need not be a prospective heir at the time of the gift. For example, if the intestate, G, made an inter-vivos gift intended to be an advancement to a grandchild at a time when the intestate's child who is the grandchild's parent is alive, the grandchild would not then be a prospective heir. Nevertheless, if G's intent that the gift be an advancement is contained in a written declaration or acknowledgment as provided in subsection (a), the gift is regarded as an advancement if G's child (who is the grandchild's parent) predeceases G, making the grandchild an heir.

To be an advancement, the gift need not be an outright gift; it can be in the form of a will

substitute, such as designating the donee as the beneficiary of the intestate's life-insurance policy or the beneficiary of the remainder interest in a revocable inter-vivos trust.

Most inter-vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during the donor's lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he or she intends to die intestate, charge the gift as an advance by a writing within the present section.

This section applies to advances to the decedent's spouse and collaterals (such as nephews and nieces) as well as to descendants.

Computation of Shares—Hotchpot Method. This section does not specify the method of taking an advancement into account in distributing the decedent's intestate estate. That process, called the hotchpot method, is provided by the common law. The hotchpot method is illustrated by the following example.

Example: G died intestate, survived by his wife (W) and his three children (A, B, and C) by a prior marriage. G's probate estate is valued at $190,000. During his lifetime, G had advanced A $50,000 and B $10,000. G memorialized both gifts in a writing declaring his intent that they be advancements.

Solution. The first step in the hotchpot method is to add the value of the advancements to the value of G's probate estate. This combined figure is called the hotchpot estate.

In this case, G's hotchpot estate preliminarily comes to $250,000 ($190,000 + $50,000 + $10,000). W's intestate share of a $250,000 estate under Section 2-102(4) is ~~$175,000 ($100,000 + 1/2 of $150,000)~~ $200,000 ($150,000 plus 1/2 of $100,000). The remaining ~~$75,000~~ $50,000 is divided equally among A, B, and C, or ~~$25,000~~ $16,667 each. This calculation reveals that A has received an advancement greater than the share to which he is entitled; A can retain the $50,000 advancement, but is not entitled to any additional amount. A and A's $50,000 advancement are therefore disregarded and the process is begun over.

Once A and A's $50,000 advancement are disregarded, G's revised hotchpot estate is $200,000 ($190,000 + $10,000). W's intestate share is ~~$150,000 ($100,000 + 1/2 of $100,000)~~ $175,000 ($150,000 plus 1/2 of $50,000). The remaining ~~$50,000~~ $25,000 is divided equally between B and C, or ~~$25,000~~ $12,500 each. From G's intestate estate, B receives ~~$15,000~~ $2,500 (B already having received $10,000 of his ultimate ~~$25,000~~ $12,500 share as an advancement); and C receives ~~$25,000~~ $12,500. The final division of G's probate estate is ~~$150,000~~ $175,000 to W, zero to A, ~~$15,000~~ $2,500 to B, and ~~$25,000~~ $12,500 to C.

Effect if Advancee Predeceases the Decedent; Disclaimer. If a decedent had made an advancement to a person who predeceased the decedent, the last sentence of Section 2-109 provides that the advancement is not taken into account in computing the intestate share of the recipient's descendants (unless the decedent's declaration provides otherwise). The rationale is that there is no guarantee that the recipient's descendants received the advanced property or its

value from the recipient's estate.

To illustrate the application of the last sentence of Section 2-109, consider this case: During her lifetime, G had advanced $10,000 to her son, A. G died intestate, leaving a probate estate of $50,000. G was survived by her daughter, B, and by A's child, X. A predeceased G.

G's advancement to A is disregarded. G's $50,000 intestate estate is divided into two equal shares, half ($25,000) going to B and the other half ($25,000) going to A's child, X.

Now, suppose that A survived G. In this situation, of course, the advancement to A is taken into account in the division of G's intestate estate. Under the hotchpot method, illustrated above, G's hotchpot estate is $60,000 (probate estate of $50,000 plus advancement to A of $10,000). A takes half of this $60,000 amount, or $30,000, but is charged with already having received $10,000 of it. Consequently, A takes only a 2/5 share ($20,000) of G's intestate estate, and B takes the remaining 3/5 share ($30,000).

Note that A cannot use a disclaimer under Section 2-1105 in effect to give his child, X, a larger share than A was entitled to. Under Section 2-1106(b)(3)(A), the effect of a disclaimer by A is that the disclaimant's "interest" devolves to A's descendants as if the disclaimant had predeceased the decedent. The "interest" that A renounced was a right to a 2/5 share of G's estate, not a 1/2 share. Consequently, A's 2/5 share ($20,000) passes to A's child, X.

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§ 2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). The statutory references in this Comment to former Section 2-801 have been replaced by appropriate references to Part 11. Updating these statutory references has not changed the substance of this Comment.

2008 Cost-of-Living Adjustment. As revised in 1990, the dollar amount in Section 2-102(a)(4) was $100,000. To adjust for inflation, that amount was increased in 2008 to $150,000. The Example in this Comment was revised in 2008 to reflect that increase.

Historical Note. This Comment was revised in 2002 and 2008.

SECTION 2-114. ~~PARENT AND CHILD RELATIONSHIP~~ PARENT BARRED FROM INHERITING IN CERTAIN CIRCUMSTANCES.

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

~~(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.~~

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

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

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

(2) the child died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of this state other than this [code] on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

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

Comment

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

Subsection (a)(1) recognizes that a parent whose parental rights have been terminated is no longer legally a parent.

Subsection (a)(2) addresses a situation in which a parent's parental rights were not actually terminated. Nevertheless, a parent can still be barred from inheriting from or through a child if the child died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of this state other than this [code], but only if those parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

Statutes providing the grounds for termination of parental rights include: Ariz. Rev. Stat. Ann. § 8-533; Conn. Gen. Stat. § 45a-717; Del. Code Ann. tit. 13 § 1103; Fla. Stat. Ann. § 39.806; Iowa Code § 600A.8; Kan. Stat. Ann. § 38-2269; Mich. Comp. L. Ann. § 712A.19b; Minn. Stat. Ann. § 260C.301; Miss. Code Ann. § 93-15-103; Mo. Rev. Stat. § 211.447; Tex. Fam. Code §§ 161.001 to .007.

SUBPART 2. PARENT-CHILD RELATIONSHIP

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

(1) "Adoptee" means an individual who is adopted.

(2) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse.

(3) "Divorce"includes an annulment, dissolution, and declaration of invalidity of a marriage.

(4) "Functioned as a parent of the child" means behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including 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 a regular member of that household.

(5) "Genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. If the father-child relationship is established under the presumption of paternity under [insert applicable state law], the term means only the man for whom that relationship is established.

(6) "Genetic mother" means the woman whose egg was fertilized by the sperm of a child's genetic father.

(7) "Genetic parent" means a child's genetic father or genetic mother.

(8) "Incapacity" means the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

(9) "Relative" means a grandparent or a descendant of a grandparent.

Legislative Note: *States that have enacted the Uniform Parentage Act (2000, as amended) should replace "applicable state law" in paragraph (5) with "Section 201(b)(1), (2), or (3) of the*

Uniform Parentage Act (2000), as amended". Two of the principal features of Articles 1 through 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(5). 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."

Comment

Scope. This section sets forth definitions that apply for purposes of the intestacy rules contained in Subpart 2 (Parent-Child Relationship).

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.

Definition of "Assisted Reproduction". The definition of "assisted reproduction" is copied from the Uniform Parentage Act § 102. Current 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. 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;

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

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

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

(g) providing moral and ethical guidance;

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

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

(a) providing economic support;

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

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

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

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

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

The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned as a parent of the child inherits from the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individual whom the child claims functioned as his or her parent.

Definition of "Genetic Father". The term "genetic father" means the man whose sperm

fertilized the egg of a child's genetic mother. If the father-child relationship is established under the presumption of paternity recognized by the law of this state, the term means only the man for whom that relationship is established. As stated in the Legislative Note, a state that has enacted the Uniform Parentage Act (2000, as amended) should insert a reference to Section 201(b)(1), (2), or (3) of that Act.

Definition of "Relative". The term "relative" does not include any relative no matter how remote but is limited to a grandparent or a descendant of a grandparent, as determined under this subpart 2.

SECTION 2-116. EFFECT OF PARENT-CHILD RELATIONSHIP. Except as otherwise provided in Section 2-119(b) through (e), if a parent-child relationship exists or is established under this [subpart], the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

Comment

Scope. This section provides that if a parent-child relationship exists or is established under any section in subpart 2, the consequence is that the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession by, from, or through the parent and the child. The exceptions in Section 2-119(b) through (e) refer to cases in which a parent-child relationship exists but only for the purpose of the right of an adoptee or a descendant of an adoptee to inherit from or through one or both genetic parents.

SECTION 2-117. NO DISTINCTION BASED ON MARITAL STATUS. Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.

Comment

Scope. This section, adopted in 2008, provides the general rule that a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status. Exceptions to this general rule are contained in Sections 2-114 (Parent Barred from Inheriting in Certain Circumstances), 2-119 (Adoptee and Adoptee's Genetic Parents), 2-120 (Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier), and 2-121(Child Born to Gestational Carrier).

This section replaces former Section 2-114(a), which provided: "(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference]."

Defined Terms. *Genetic parent* is defined in Section 2-115 as the child's genetic father or genetic mother. *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of a child's genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child's genetic mother.

SECTION 2-118. ADOPTEE AND ADOPTEE'S ADOPTIVE PARENT OR PARENTS.

(a) [Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents.] A parent-child relationship exists between an adoptee and the adoptee's adoptive parent or parents.

(b) [Individual in Process of Being Adopted by Married Couple; Stepchild in Process of Being Adopted by Stepparent.] For purposes of subsection (a):

(1) an individual who is in the process of being adopted by a married couple when one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent's surviving spouse; and

(2) a child of a genetic parent who is in the process of being adopted by a genetic parent's spouse when the spouse dies is treated as adopted by the deceased spouse if the genetic parent survives the deceased spouse by 120 hours.

(c) [Child of Assisted Reproduction or Gestational Child in Process of Being Adopted.] If, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2).

Comment

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 subsections (b)(2) and (c), which are 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 cited therein.

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. If the spouse who subsequently died had filed a legal proceeding to adopt the individual before the spouse died, the individual is "in the process of being adopted" by the deceased spouse when the spouse died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Subsection (b)(2): Stepchild in Process of Being Adopted by Stepparent. If the stepparent who subsequently died had filed a legal proceeding to adopt the stepchild before the stepparent died, the stepchild is "in the process of being adopted" by the deceased stepparent when the stepparent died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Subsection (c): Child of Assisted Reproduction or Gestational Child in Process of Being Adopted. Subsection (c) provides that if, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). An example would be a situation in which an unmarried mother or father is the parent of a child of assisted reproduction or a gestational child, and

subsequently marries an individual who then begins the process of adopting the child but who dies before the adoption becomes final. In such a case, subsection (c) provides that the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). The phrase "in the process of being adopted" carries the same meaning under subsection (c) as it does under subsection (b)(2).

SECTION 2-119. ADOPTEE AND ADOPTEE'S GENETIC PARENTS.

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

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

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

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

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

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

(e) [Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted.] If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents under Section 2-120 or between a gestational child and a parent or parents under Section 2-121, the child is adopted by another or others, the child's parent or parents under Section 2-120 or 2-121 are treated as the child's genetic parent or parents

for the purpose of this section.

Comment

2008 Revisions. In 2008, this section and Section 2-118 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. Section 2-118(a) 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. Subsections (a) and (b) of this section 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 subsections (c), (d), and (e), which are explained below.

Defined Terms. Section 2-119 uses terms that are defined in Section 2-115.

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.

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

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

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

Subsection (b): Stepchild Adopted by Stepparent. Subsection (b) continues the so-called "stepparent exception" contained in the Code since its original promulgation in 1969. When a stepparent adopts his or her stepchild, Section 2-118 provides that the adoption creates a parent-child relationship between the child and his or her adoptive stepparent. Section 2-119(b)(1) provides that a parent-child relationship continues to exist between the child and the

child's genetic parent whose spouse adopted the child. Section 2-119(b)(2) provides that a parent-child relationship also continues to exist between an adopted stepchild and his or her other genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that genetic parent, but not for purposes of inheritance by the other genetic parent and his or her relatives from or through the adopted stepchild.

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

Example 2—Post-Divorce Remarriage. A and B were married and had two children, X and Y. A and B got divorced, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B's children and under Section 2-118(a) as C's children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A's children for purposes of inheritance from and through A. On the other hand, neither A nor any of A's relatives can inherit from or through X or Y.

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

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

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

Example 4. F and M, a married couple with a four-year-old child, X, were involved in an automobile accident that killed F and M. Neither M's parents nor F's

father (F's mother had died before the accident) nor any other relative was in a position to take custody of X. X was adopted by F and M's close friends, A and B, a married couple approximately of the same ages as F and M. F's father, PGF, a widower, then died intestate. Under subsection (d), X is treated as PGF's grandchild (F's child). The result would be the same if F's or M's will appointed A and B as the guardians of the person of X, and A and B subsequently successfully petitioned to adopt X.

Subsection (e): Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted. Subsection (e) puts a child of assisted reproduction and a gestational child on the same footing as a genetic child for purposes of this section. The results in Examples 1 through 4 would have been the same had the child in question been a child of assisted reproduction or a gestational child.

SECTION 2-120. CHILD CONCEIVED BY ASSISTED REPRODUCTION OTHER THAN CHILD BORN TO GESTATIONAL CARRIER.

(a) [Definitions.] In this section:

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

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

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

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

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

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

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

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

(d) [Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime by His Wife for Assisted Reproduction.] Except as otherwise provided in subsections (i) and (j), a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that the birth mother used

during his lifetime for assisted reproduction.

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

(f) [Parent-Child Relationship with Another.] Except as otherwise provided in 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) before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent; 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 the purpose 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 [18] years of age.

(h) [Presumption: Birth Mother Is Married or Surviving Spouse.] For the purpose of subsection (f)(2), the following rules apply:

(1) If the birth mother is married and no divorce proceeding is pending, in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B).

(2) If the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

(i) [Divorce Before Placement of Eggs, Sperm, or Embryos.] If a married couple is 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 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). See Cal. Health & Safety Code § 1644.7 and .8 for a possible model for such a consent form.*

Comment

Data on Children of Assisted Reproduction. The Center for Disease Control (CDC) of the U.S. Department of Health and Human Services collects data on children of assisted reproduction (ART). See Center for Disease Control, 2004 Assisted Reproductive Technology Success Rates (Dec. 2006) (2004 CDC Report), available at http://www.cdc.gov/ART/ART2004. The data, however, is of limited use because the definition of ART used in the CDC Report excludes intrauterine (artificial) insemination (2004 CDC Report at 3), which is probably the 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 concerning artificial insemination by a known donor 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 (Issued June 1993; updated December 2004), available at http://www0.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc= policyfiles/HnE/E-2.0 (last visited October 16, 2008).

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 child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

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 uses 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.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including 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 a regular member 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 child's genetic mother.

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

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

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

Subsection (c): Parent-Child Relationship With Birth Mother. Subsection (c) is in accord with the Uniform Parentage Act § 201 in providing that a parent-child relationship exists between a child of assisted reproduction and the child's birth mother. The child's birth mother, defined in subsection (a) as the woman (other than a gestational carrier) who gave birth to the child, made the decision to undergo the procedure with intent to become pregnant and give birth to the child. Therefore, in order for a parent-child relationship to exist between her and the child, no proof that she consented to the procedure with intent to be treated as the parent of the child is necessary.

Subsection (d): Parent-Child Relationship with Husband Whose Sperm Were Used

During His Lifetime By His Wife for Assisted Reproduction. The principal application of subsection (d) is in the case of the assisted reproduction procedure known as intrauterine insemination husband (IIH), or, in older terminology, artificial insemination husband (AIH). Subsection (d) provides that, except as otherwise provided in subsection (i), a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that were used during his lifetime by her for assisted reproduction and the husband is the genetic father of the child. The exception contained in subsection (i) relates to the withdrawal of consent in a record before the placement of eggs, sperm, or embryos. Note that subsection (d) only applies if the husband's sperm were used during his lifetime by his wife to cause a pregnancy by assisted reproduction. Subsection (d) does not apply to posthumous conception.

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

Subsection (e) applies to the individual, if any, who is identified on the birth certificate as the child's other parent. Subsection (e) grants presumptive effect to a birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction. In the case of unmarried parents, federal law requires that states enact procedures under which "the name of the father shall be included on the record of birth," but only if the father and mother have signed a voluntary acknowledgment of paternity or a court of an administrative agency of competent jurisdiction has issued an adjudication of paternity. See 42 U.S.C. § 666(a)(5)(D). This federal statute is included as an appendix to the Uniform Parentage Act.

The federal statute applies only to unmarried opposite-sex parents. Section 2-120(e)'s presumption, however, could apply to a same-sex couple if state law permits a woman who is not the birth mother to be listed on the child's birth certificate as the child's other parent. Even if state law does not permit that listing, the woman who is not the birth mother could be the child's parent by adoption of the child (see Section 2-118) or under subsection (f) as a result of her consent to assisted reproduction by the birth mother "with intent to be treated as the other parent of the child," or by satisfying the "function as a parent" test in subsection (f)(2).

Section 2-120 does not apply to same-sex couples that use a gestational carrier. For same-sex couples using a gestational carrier, the parent-child relationship can be established by adoption (see Section 2-118 and Section 2-121(b)), or it can be established under subsection 2-121(d) if the couple enters into a gestational agreement with the gestational carrier under which the couple agrees to be the parents of the child born to the gestational carrier. It is irrelevant whether either intended parent is a genetic parent of the child. See Section 2-121(a)(4).

Subsection (f): Parent-Child Relationship with Another. In order for someone other than the birth mother to have a parent-child relationship with the child, there needs to be proof that the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. The other individual's genetic material might or might not have

been used to create the pregnancy. Except as otherwise provided in this section, merely depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with the child.

Subsection (f)(1): Signed Record Evidencing Consent, Considering All the Facts and Circumstances, to Assisted Reproduction with Intent to Be Treated as the Other Parent of the Child. Subsection (f)(1) provides that 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 with intent to be treated as the other parent of the child is established if the individual signed a record, before or after the child's birth, that considering all the facts and circumstances evidences the individual's consent. Recognizing consent in a record not only signed before the child's birth but also at any time after the child's birth is consistent with the Uniform Parentage Act §§ 703 and 704.

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

*Subsection (f)(2):*Ideally 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 will have signed a record that satisfies subsection (f)(1). If not, subsection (f)(2) recognizes that actions speak as loud as words. Under subsection (f)(2), 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 functioned as a parent of the child no later than two years after the child's birth. Under subsection (f)(2)(B), the same result applies if the evidence establishes that the individual had that intent but death, incapacity, or other circumstances prevented the individual from carrying out that intent. Finally, under subsection (f)(2)(C), the same result applies if it can be established by clear and convincing evidence that the individual intended to be treated as a parent of a posthumously conceived child.

Subsection (g): Record Signed More than Two Years after the Birth of the Child: Effect. Subsection (g) is designed to prevent an individual who has never functioned as a parent of the child from signing a record in order to inherit from or through the child or in order to make it possible for a relative of the individual to inherit from or through the child. Thus, subsection

(g) provides that, for purposes of subsection (f)(1), an individual who signed a record more than two years after the birth of the child, or a relative of that individual, does not inherit from or through the child unless the individual functioned as a parent of the child before the child reached the age of [18].

Subsection (h): Presumption: Birth Mother is Married or Surviving Spouse. Under subsection (h), if the birth mother is married and no divorce proceeding is pending, then in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B) or if the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, then in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

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

Subsection (j): Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos. Subsection (j) is derived from the Uniform Parentage Act § 706(a). Subsection (j) provides that 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).

Subsection (k): When Posthumously Conceived Gestational Child Treated as in Gestation. Subsection (k) 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 no later than 36 months after the individual's death or (ii) born no later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of all or part of the distribution of the estate.

The 36-month period in subsection (k) 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 36-month 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. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

SECTION 2-121. CHILD BORN TO GESTATIONAL CARRIER.

(a) [Definitions.] In this section:

(1) "Gestational agreement" means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (e).

(2) "Gestational carrier" means a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

(3) "Gestational child" means a child born to a gestational carrier under a gestational agreement.

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

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

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

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

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

(d) [Parent-Child Relationship with Intended Parent or Parents.] In the absence of a

court order under subsection (b), a parent-child relationship exists between a gestational child and an intended parent who:

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

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

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

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

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

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

(1) a record signed by the individual which considering all the facts and circumstances evidences the individual's intent; or

(2) other facts and circumstances establishing the individual's intent by clear and

convincing evidence.

(f) [Presumption: Gestational Agreement after Spouse's Death or Incapacity.] Except as otherwise provided in subsection (g), and unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if:

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

(2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and

(3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

(g) [Subsection (f) Presumption Inapplicable.] The presumption under subsection (f) does not apply if there is:

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

(2) a signed record that satisfies subsection (e)(1).

(h) [When Posthumously Conceived Gestational Child Treated as in Gestation.] 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:

(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.

(i) [No Effect on Other Law.] This section does not affect law of this state other than this [code] regarding the enforceability or validity of a gestational agreement.

Comment

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

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

Gestational carrier is defined as a woman who is not an intended parent and who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

Gestational child is defined as a child born to a gestational carrier under a gestational agreement.

Intended parent is defined as an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

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

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

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including 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 a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

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

Incapacity is defined in Section 2-115 as the inability of an individual to function as a

parent of a child because of the individual's physical or mental condition.

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

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

> UPA § 807. Parentage under Validated Gestational Agreement.
>
> (a) Upon birth of a child to a gestational carrier, the intended parents shall file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Thereupon, the court shall issue an order:
>
> (1) confirming that the intended parents are the parents of the child ;
>
> (2) if necessary, ordering that the child be surrendered to the intended parents; and
>
> (3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.
>
> (b) If the parentage of a child born to a gestational carrier is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the 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. Under subsection (c), the only way that a parent-child relationship exists between a gestational child and the child's gestational carrier is if she is (1) designated as a parent of the child in a court order described in subsection (b) or (2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

Subsection (d): Parent-Child Relationship With Intended Parent or Parents. Subsection (d) only applies in the absence of a court order under subsection (b). If there is no such court order, subsection (b) provides that a parent-child relationship exists between a gestational child and an intended parent who functioned as a parent of the child no later than two years after the child's birth. A parent-child also exists between a gestational child and an intended parent if the intended parent died while the gestational carrier was pregnant, but only if (A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth; (B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or (C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years

after the child's birth.

Subsection (e): Gestational Agreement After Death or Incapacity. Subsection (e)only applies in the absence of a court order under subsection (b). If there is no such court order, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by a record signed by the individual which considering all the facts and circumstances evidences the individual's intent or by other facts and circumstances establishing the individual's intent by clear and convincing evidence.

Subsections (f) and (g): Presumption: Gestational Agreement After Spouse's Death or Incapacity. Subsection (f) and (g) are connected. Subsection (f) provides that unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if (1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child, (2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and (3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

Subsection (g) provides, however, that the presumption under subsection (f) does not apply if there is a court order under subsection (b) or a signed record that satisfies subsection (e)(1).

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 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate.

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. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

SECTION 2-122. EQUITABLE ADOPTION. This [subpart] does not affect 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).

PART 2
ELECTIVE SHARE OF SURVIVING SPOUSE

General Comment

The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993 and 2008. The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both the common-law and community-property states when a marriage ends in divorce. When a marriage ends in death, that theory is also already implemented under the community-property system and under the system promulgated in the Model Marital Property Act. In the common-law states, however, elective-share law has not caught up to the partnership theory of marriage.

The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage (typically a post-widowhood remarriage) in which neither spouse contributed much, if anything, to the acquisition of the other's wealth, except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.

The Partnership Theory of Marriage

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." M. Glendon, The Transformation of Family Law 131 (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost." Id. See also American Law Institute, Principles of Family Dissolution § 4.09 Comment c (2002).

No matter how the rationale is expressed, the community-property system, including that version of community law promulgated in the Model Marital Property Act, recognizes the partnership theory, but it is sometimes thought that the common-law system denies it. In the

ongoing marriage, it is true that the basic principle in the common-law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse upon acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative.

The common-law states, however, also give effect or purport to give effect to the partnership theory when a marriage is dissolved by divorce. If the marriage ends in divorce, a spouse who sacrificed his or her financial-earning opportunities to contribute so-called domestic services to the marital enterprise (such as child rearing and homemaking) stands to be recompensed. All states now follow the equitable-distribution system upon divorce, under which "broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute–directly and indirectly, financially and nonfinancially–the fruits of which are distributable at divorce." J. Gregory, The Law of Equitable Distribution ¶ 1.03, at p. 1-6 (1989).

The other situation in which spousal property rights figure prominently is disinheritance at death. The original (pre-1990) Uniform Probate Code, along with almost all other non-UPC common-law states, treats this as one of the few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed. No matter what the decedent's intent, the original Uniform Probate Code and almost all of the non-UPC common-law states recognize that the surviving spouse does have some claim to a portion of the decedent's estate. These statutes provide the spouse a so-called forced share. The forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent's estate, hence in the UPC the forced share is termed the "elective" share.

Elective-share law in the common-law states, however, has not caught up to the partnership theory of marriage. Under typical American elective-share law, including the elective share provided by the original Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate—not the 50 percent share of the couple's combined assets that the partnership theory would imply.

Long-term Marriages. To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The original elective-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result depends on which spouse happens to die first and on how the property accumulated during the marriage was nominally titled.

Example 1—Long-term Marriage under Conventional Forced-share Law. Consider A

and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B.

Throughout their long life together, the couple managed to accumulate assets worth $600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, B's ultimate entitlement depends on the manner in which these $600,000 in assets were nominally titled as between them. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. The reason is that under conventional elective-share law, B has a claim to one-third of A's "estate."

Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets. If all the marital assets were titled in A's name, B's claim against A's estate would only be for $200,000—well below B's $300,000 entitlement produced by the partnership/marital-sharing principle.

If $500,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for $166,500 (1/3 of $500,000), which when combined with B's "own" $100,000 yields a $266,500 cut for B—still below the $300,000 figure produced by the partnership/marital-sharing principle.

Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share. If $300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for $100,000, which when combined with B's "own" $300,000 yields a $400,000 cut for B—well above the $300,000 amount to which the partnership/marital-sharing principle would lead.

Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion. If only $200,000 were titled in A's name, B would still have a claim against A's estate for $66,667 (1/3 of $200,000), even though B was already overcompensated as judged by the partnership/marital-sharing theory.

Short-term, Later-in-Life Marriages. Short-term marriages, particularly the post-widowhood remarriage occurring later in life, present different considerations. Because each spouse in this type of marriage typically comes into the marriage owning assets derived from a former marriage, the one-third fraction of the decedent's estate far exceeds a 50/50 division of assets acquired during the marriage.

Example 2—Short-term, Later-in-Life Marriage under Conventional Elective-share Law. Consider B and C. A year or so after A's death, B married C. Both B and C are in their seventies, and after five years of marriage, B dies survived by C. Both B and C have adult children and a few grandchildren by their prior marriages, and each naturally would prefer to leave most or all of his or her property to those children.

The value of the couple's combined assets is $600,000, $300,000 of which is titled in B's

name (the decedent) and $300,000 of which is titled in C's name (the survivor).

For reasons that are not immediately apparent, conventional elective-share law gives the survivor, C, a right to claim one-third of B's estate, thereby shrinking B's estate (and hence the share of B's children by B's prior marriage to A) by $100,000 (reducing it to $200,000) while supplementing C's assets (which will likely go to C's children by C's prior marriage) by $100,000 (increasing their value to $400,000).

Conventional elective-share law, in other words, basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the "loser's" estate. The "winning" spouse who chanced to survive gains a windfall, for this "winner" is unlikely to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

The Redesigned Elective Share

The redesigned elective share is intended to bring elective-share law into line with the partnership theory of marriage.

In the long-term marriage illustrated in Example 1, the effect of implementing a partnership theory is to increase the entitlement of the surviving spouse when the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of the surviving spouse when the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. Put differently, the effect is both to reward the surviving spouse who sacrificed his or her financial-earning opportunities in order to contribute so-called domestic services to the marital enterprise and to deny an additional windfall to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

In the short-term, later-in-life marriage illustrated in Example 2, the effect of implementing a partnership theory is to decrease or even eliminate the entitlement of the surviving spouse because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth. Put differently, the effect is to deny a windfall to the survivor who contributed little to the decedent's wealth, and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. Bear in mind that in such a marriage, which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a natural instinct to want to leave most or all of his or her property to the children of his or her former, long-term marriage. In hardship cases, however, as explained later, a special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support.

2008 Revisions. When first promulgated in the early 1990s, the statute provided that the "elective-share percentage" increased annually according to a graduated schedule. The "elective-share percentage" ranged from a low of 0 percent for a marriage of less than one year to a high of 50 percent for a marriage of fifteen years or more. The "elective-share percentage" did double duty. The system equated the "elective-share percentage" of the couple's combined assets with

50 percent of the marital-property portion of the couple's assets — the assets that are subject to equalization under the partnership theory of marriage. Consequently, the elective share effected the partnership theory rather indirectly. Although the schedule was designed to represent by approximation a constant fifty percent of the marital-property portion of the couple's assets (the augmented estate), it did not say so explicitly.

The 2008 revisions are designed to present the system in a more direct form, one that makes the system more transparent and therefore more understandable. The 2008 revisions disentangle the elective-share percentage from the system that approximates the marital-property portion of the augmented estate. As revised, the statute provides that the "elective-share percentage" is always 50 percent, but it is not 50 percent of the augmented estate but 50 percent of the "marital-property portion" of the augmented estate. The marital-property portion of the augmented estate is computed by approximation—by applying the percentages set forth in a graduated schedule that increases annually with the length of the marriage (each "marital-portion percentage" being double the percentage previously set forth in the "elective-share percentage" schedule). Thus, for example, under the former system, the elective-share amount in a marriage of ten years was 30 percent of the augmented estate. Under the revised system, the elective-share amount is 50 percent of the marital-property portion of the augmented estate, the marital-property portion of the augmented estate being 60 percent of the augmented estate.

The primary benefit of these changes is that the statute, as revised, presents the elective-share's implementation of the partnership theory of marriage in a direct rather than indirect form, adding clarity and transparency to the system. An important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that want to implement the partnership theory of marriage but prefer not to define the marital-property portion by approximation but by classification. Under the deferred marital-property approach, the marital-property portion consists of the value of the couple's property that was acquired during the marriage other than by gift or inheritance. (See below.)

The 2008 revisions are based on a proposal presented in Waggoner, "The Uniform Probate Code's Elective Share: Time for a Reassessment," 37 U. Mich. J. L. Reform 1 (2003), an article that gives a more extensive explanation of the rationale of the 2008 revisions.

Specific Features of the Redesigned Elective Share

Because ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-partnership theory by means of a mechanically determined approximation system. Under the redesigned elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance. For further discussion of the reasons for choosing this method, see Waggoner, "Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code," 26 Real Prop. Prob. & Tr. J. 683 (1992).

Section 2-202(a)—The "Elective-share Amount." Under Section 2-202(a), the elective-share amount is equal to 50 percent of the value of the "marital-property portion of the

augmented estate." The marital-property portion of the augmented estate, which is determined under Section 2-203(b), increases with the length of the marriage. The longer the marriage, the larger the "marital-property portion of the augmented estate." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of 15 years than in a marriage of 15 days. Specifically, the "marital-property portion of the augmented estate" starts low and increases annually according to a graduated schedule until it reaches 100 percent. After one year of marriage, the marital-property portion of the augmented estate is six percent of the augmented estate and it increases with each additional year of marriage until it reaches the maximum 100 percent level after 15 years of marriage.

Section 2-203(a)—the "Augmented Estate." The elective-share percentage of 50 percent is applied to the value of the "marital-property portion of the augmented estate." As defined in Section 2-203, the "augmented estate" equals the value of the couple's *combined* assets, not merely the value of the assets nominally titled in the decedent's name.

More specifically, the "augmented estate" is composed of the sum of four elements:

Section 2-204—the value of the decedent's net probate estate;
Section 2-205—the value of the decedent's nonprobate transfers to others, consisting of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse;
Section 2-206—the value of the decedent's nonprobate transfers to the surviving spouse, consisting of will-substitute-type inter-vivos transfers made by the decedent to the surviving spouse; and
Section 2-207—the value of the surviving spouse's net assets at the decedent's death, plus any property that would have been in the surviving spouse's nonprobate transfers to others under Section 2-205 had the surviving spouse been the decedent.

Section 2-203(b)—the "Marital-property portion" of the Augmented Estate. Section 2-203(b) defines the marital-property portion of the augmented estate.

Section 2-202(a)—the "Elective-share Amount." Section 2-202(a) requires the elective-share percentage of 50 percent to be applied to the value of the marital-property portion of the augmented estate. This calculation yields the "elective-share amount"—the amount to which the surviving spouse is entitled. If the elective-share percentage were to be applied only to the marital-property portion of the decedent's assets, a surviving spouse who has already been overcompensated in terms of the way the marital-property portion of the couple's assets have been nominally titled would receive a further windfall under the elective-share system. The marital-property portion of the couple's assets, in other words, would not be equalized. By applying the elective-share percentage of 50 percent to the marital-property portion of the augmented estate (the couple's combined assets), the redesigned system denies any significance to how the spouses took title to particular assets.

Section 2-209—Satisfying the Elective-share Amount. Section 2-209 determines how the elective-share amount is to be satisfied. Under Section 2-209, the decedent's net probate estate and nonprobate transfers to others are liable to contribute to the satisfaction of the elective-share

amount only to the extent the elective-share amount is not fully satisfied by the sum of the following amounts:

Subsection (a)(1)—amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent's nonprobate transfers to the surviving spouse; and

Subsection (a)(2)—the marital-property portion of amounts included in the augmented estate under Section 2-207.

If the combined value of these amounts equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from recipients of the decedent's net probate estate or nonprobate transfers to others, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-202(b).

Example 3—15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name. A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of $100,000 as defined in Section 2-205.

	Augmented Estate	Marital-Property Portion (100%)
A's net probate estate	$300,000	$300,000
A's nonprobate transfers to others	$100,000	$100,000
A's nonprobate transfers to B	$0	$0
B's net assets and nonprobate transfers to others	$200,000	$200,000
Augmented Estate	$600,000	$600,000

Elective-Share Amount (50 % of Marital-property portion)	$300,000
Less Amount Already Satisfied	$200,000
Unsatisfied Balance	$100,000

Under Section 2-209(a)(2), the full value of B's assets ($200,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received $200,000 of B's ultimate entitlement of $300,000. Section 2-209(c) makes A's net probate estate and nonprobate transfers to others liable for the unsatisfied balance of the elective-share amount, $100,000, which is the amount needed to bring B's own $200,000 up to $300,000.

Example 4—15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Survivor's Name. As in Example 3, A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and A made no

nonprobate transfers to B. A made nonprobate transfers to others in the amount of $50,000 as defined in Section 2-205.

	Augmented Estate	Marital-Property Portion (100%)
A's net probate estate	$150,000	$150,000
A's nonprobate transfers to others	$50,000	$50,000
A's nonprobate transfers to B	$0	$0
B's assets and nonprobate transfers to others	$400,000	$400,000
Augmented Estate	$600,000	$600,000

Elective-Share Amount (50% of Marital-property portion)	$300,000
Less Amount Already Satisfied	$400,000
Unsatisfied Balance	$0

Under Section 2-209(a)(2), the full value of B's assets ($400,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received more than B's ultimate entitlement of $300,000. B has no claim on A's net probate estate or nonprobate transfers to others.

In a marriage that has lasted less than 15 years, only a portion of the survivor's assets—not all—count toward making up the elective-share amount. This is because, in these shorter-term marriages, the marital-property portion of the survivor's assets under Section 2-203(b) is less than 100% and, under Section 2-209(a)(2), the portion of the survivor's assets that count toward making up the elective-share amount is limited to the marital-property portion of those assets.

To explain why this is appropriate requires further elaboration of the underlying theory of the redesigned system. The system avoids the classification and tracing-to-source problems in determining the marital-property portion of the couple's assets. This is accomplished under Section 2-203(b) by applying an ever-increasing percentage, as the length of the marriage increases, to the couple's combined assets without regard to when or how those assets were acquired. By approximation, the redesigned system equates the marital-property portion of the couple's combined assets with the couple's marital assets—assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage that has endured long enough for the marital-property portion of their assets to be 60% under Section 2-203(b), 60% of each spouse's assets are treated as marital assets. Section 2-209(a)(2) therefore counts only 60% of the survivor's assets toward making up the elective-share amount.

Example 5—Under 15-Year Marriage under the Redesigned Elective Share; Marital Assets

Disproportionately Titled in Decedent's Name. A and B were married to each other more than 5 but less than 6 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of $100,000 as defined in Section 2-205.

	Augmented Estate	Marital-Property Portion
A's net probate estate	$300,000	(30%) $90,000
A's nonprobate transfers to others	$100,000	$30,000
A's nonprobate transfers to B	$0	$0
B's assets and nonprobate transfers to others	$200,000	$60,000
Augmented Estate	$600,000	$180,000

Elective-Share Amount (50% of Marital-property portion)	$90,000
Less Amount Already Satisfied	$60,000
Unsatisfied Balance	$30,000

Under Section 2-209(a)(2), the marital-property portion of B's assets (30% of $200,000, or $60,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received $60,000 of B's ultimate entitlement of $90,000. Under Section 2-209(c), B has a claim on A's net probate estate and nonprobate transfers to others of $30,000.

Deferred Marital-Property Alternative

By making the elective share percentage a flat 50 percent of the marital-property portion of the augmented estate, the 2007 revision disentangles the elective share percentage from the approximation schedule, thus allowing the marital-property portion of the augmented estate to be defined either by the approximation schedule or by the deferred-marital-property approach. Although one of the benefits of the 2007 revision is added clarity, an important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that prefer a deferred marital-property approach. See Alan Newman, Incorporating the Partnership Theory of Marriage into Elective-Share Law: the Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative, 49 Emory L.J. 487 (2000).

The Support Theory

The partnership/marital-sharing theory is not the only driving force behind elective-share law. Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate. Current elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the

survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law. The redesigned elective share system implements the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

Section 2-202(b)—the "Supplemental Elective-share Amount." Section 2-202(b) is the provision that implements the support theory by providing a supplemental elective-share amount of ~~$50,000~~ $75,000. The ~~$50,000~~ $75,000 figure is bracketed to indicate that individual states may wish to select a higher or lower amount.

In satisfying this ~~$50,000~~ $75,000 amount, the surviving spouse's own titled-based ownership interests count first toward making up this supplemental amount; included in the survivor's assets for this purpose are amounts shifting to the survivor at the decedent's death and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above, but excluded are (1) amounts going to the survivor under the Code's probate exemptions and allowances and (2) the survivor's Social Security benefits (and other governmental benefits, such as Medicare insurance coverage). If the survivor's assets are less than the ~~$50,000~~ $75,000 minimum, then the survivor is entitled to whatever additional portion of the decedent's estate is necessary, up to 100 percent of it, to bring the survivor's assets up to that minimum level. In the case of a late marriage, in which the survivor is perhaps aged in the mid-seventies, the minimum figure plus the probate exemptions and allowances (which under the Code amount to a minimum of another ~~$43,000~~ $64,500) is pretty much on target — in conjunction with Social Security payments and other governmental benefits — to provide the survivor with a fairly adequate means of support.

Example 6—Supplemental Elective-share Amount. After A's death in Example 1, B married C. Five years later, B died, survived by C. B's will left nothing to C, and B made no nonprobate transfers to C. B made no nonprobate transfers to others as defined in Section 2-205.

	Augmented Estate	Marital-Property Portion (30%)
B's net probate estate	$90,000	$27,000
B's nonprobate transfers to others	$0	$0
B's nonprobate transfers to C	$0	$0
C's assets and nonprobate transfers to others	$10,000	$3,000
Augmented Estate	$100,000	$30,000

Elective-Share Amount (50% of Marital-property portion)	$15,000
Less Amount Already Satisfied	$3,000
Unsatisfied Balance	$12,000

Solution under Redesigned Elective Share. Under Section 2-209(a)(2), $3,000 (30%) of C's assets count first toward making up C's elective-share amount; under Section 2-209(c), the remaining $12,000 elective-share amount would come from B's net probate estate.

Application of Section 2-202(b) shows that C is entitled to a supplemental elective-share amount. The calculation of C's supplemental elective-share amount begins by determining the sum of the amounts described in sections:

2-207	$10,000
2-209(a)(1)	0
Elective-share amount payable from decedent's probate estate under Section 2-209(c)	$12,000
Total	$22,000

The above calculation shows that C is entitled to a supplemental elective-share amount under Section 2-202(b) of ~~$28,000~~ $53,000 (~~$50,000~~ $75,000 minus $22,000). The supplemental elective-share amount is payable entirely from B's net probate estate, as prescribed in Section 2-209(c).

The end result is that C is entitled to ~~$40,000~~ $65,000 ($12,000 + ~~$28,000~~ $53,000) by way of elective share from B's net probate estate (and nonprobate transfers to others, had there been any). ~~Forty thousand~~ Sixty-five thousand dollars is the amount necessary to bring C's $10,000 in assets up to ~~$50,000~~ $75,000.

Decedent's Nonprobate Transfers to Others

The original Code made great strides toward preventing "fraud on the spouse's share." The problem of "fraud on the spouse's share" arises when the decedent seeks to evade the spouse's elective share by engaging in various kinds of nominal inter-vivos transfers. To render

that type of behavior ineffective, the original Code adopted the augmented-estate concept, which extended the elective-share entitlement to property that was the subject of specified types of inter-vivos transfer, such as revocable inter-vivos trusts.

In the redesign of the elective share, the augmented-estate concept has been strengthened. The pre-1990 Code left several loopholes ajar in the augmented estate—a notable one being life insurance the decedent buys, naming someone other than his or her surviving spouse as the beneficiary. With appropriate protection for the insurance company that pays off before receiving notice of an elective-share claim, the redesigned elective-share system includes these types of insurance policies in the augmented estate as part of the decedent's nonprobate transfers to others under Section 2-205.

Historical Note. This General Comment was revised in 1993 and in 2008.

2008 Legislative Note. *States that have previously enacted the UPC elective share need not amend their enactment, except that (1) the supplemental elective-share amount under Section 2-202(b) should be increased to $75,000, (1 2) the amendment to Section 2-205(3) relating to gifts within two years of death should be adopted, and (2 3) Section 2-209(e) should be added so that the unsatisfied balance of the elective-share or supplemental elective-share amount is treated as a general pecuniary devise for purposes of Section 3-904.*

SECTION 2-202. ELECTIVE SHARE.

(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.

(b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections 2-207, 2-209(a)(1), and that part of the elective-share amount payable from the decedent's net probate estate and nonprobate transfers to others under Section 2-209(c) and (d) is less than [~~$50,000~~ $75,000], the surviving spouse is entitled to a supplemental elective-share amount equal to [~~$50,000~~ $75,000], minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's net probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in Section 2-209(c) and (d).

(c) [Effect of Election on Statutory Benefits.] If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

(d) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

Comment

Pre-1990 Provision. The pre-1990 provisions granted the surviving spouse a one-third share of the augmented estate. The one-third fraction was largely a carry over from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband's land.

Purpose and Scope of Revisions. The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up.

Subsection (a). Subsection (a) implements the partnership theory by providing that the elective-share amount is 50 percent of the value of the marital-property portion of the augmented estate. The augmented estate is defined in Section 2-203(a) and the marital-property portion of the augmented estate is defined in Section 2-203(b).

Subsection (b). Subsection (b) implements the support theory of the elective share by providing a [~~$50,000~~ $75,000] supplemental elective-share amount, in case the surviving spouse's assets and other entitlements are below this figure.

2008 Cost-of-Living Adjustments. As originally promulgated in 1990, the dollar amount in subsection (b) was $50,000. To adjust for inflation, this amount was increased in 2008 to $75,000. The dollar amount in this subsection is subject to annual cost-of-living adjustments under Section 1-109.

Subsection (c). The homestead, exempt property, and family allowances provided by Article II, Part 4, are not charged to the electing spouse as a part of the elective share. Consequently, these allowances may be distributed from the probate estate without reference to whether an elective share right is asserted.

Cross Reference. To have the right to an elective share under subsection (a), the decedent's spouse must survive the decedent. Under Section 2-702(a), the requirement of survivorship is satisfied only if it can be established that the spouse survived the decedent by 120 hours.

Historical Note. This Comment was revised in 2008.

SECTION 2-402. HOMESTEAD ALLOWANCE. A decedent's surviving spouse is entitled to a homestead allowance of [~~$15,000~~ $22,500]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [~~$15,000~~ $22,500] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.

Comment

As originally adopted in 1969, the bracketed dollar amount was $5,000. To adjust for inflation, the bracketed amount was increased to $15,000 in 1990 and to $22,500 in 2008. The dollar amount in this section is subject to annual cost-of-living adjustments under Section 1-109.

See Section 2-802 for the definition of "spouse", which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204. "Election" between a provision of a will and homestead is not required unless the will so provides.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-404. The "small estate" line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 12 of Article III dealing with small estates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his or her other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the decedent.

Historical Note. This Comment was revised in 2008.

SECTION 2-403. EXEMPT PROPERTY. In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding ~~$10,000~~ $15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt property, is less than ~~$10,000~~ $15,000, or if there is not ~~$10,000~~ $15,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the ~~$10,000~~ $15,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share.

Comment

As originally adopted in 1969, the dollar amount exempted was set at $3,500. To adjust for inflation, the amount was increased to $10,000 in 1990 and to $15,000 in 2008. The dollar amount in this section is subject to annual cost-of-living adjustments under Section 1-109.

Unlike the exempt amount described in Sections 2-402 and 2-404, the exempt amount described in this section is available in a case in which the decedent left no spouse but left only adult children. The provision in this section that establishes priorities is required because of possible difference between beneficiaries of the exemptions described in this section and those described in Sections 2-402 and 2-404.

Section 2-204 covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an election with reference to exemptions, but that no election is presumed to be required.

Historical Note. This Comment was revised in 2008.

SECTION 2-405. SOURCE, DETERMINATION, AND DOCUMENTATION.

(a) If the estate is otherwise sufficient, property specifically devised may not be use to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make those selections if the surviving spouse, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. The personal representative may determine the family allowance in a lump sum not exceeding ~~$18,000~~ $27,000 or periodic installments not exceeding ~~$1,500~~ $2,250 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may include a family allowance other than that which the personal representative determined or could have determined.

(b) If the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to the trust established under Section 2-212(b).

Comment

Scope and Purpose of 1990 Revision. As originally adopted in 1969, the maximum family allowance the personal representative was authorized to determine without court order was a lump sum of $6,000 or periodic installments of $500 per month for one year. To adjust for inflation, the amounts ~~are~~ were increased in 1990 to $18,000 and $1,500 respectively and in

20087 to $22,500 and $2,250. The dollar amount in this section is subject to annual cost-of-living adjustments under Section 1-109.

A new subsection (b) ~~is~~ was added to provide for the case where the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person. In that case, the personal representative is authorized to add any unexpended portions under the homestead allowance, exempt property, and family allowance to the custodial trust established by Section 2-212(b).

If Domiciliary Assets Insufficient. Note that a domiciliary personal representative can collect against out of state assets if domiciliary assets are insufficient.

Cross References. See Sections 3-902, 3-906, and 3-907.

Historical Note. This Comment was revised in 1993 and 2008. ~~For the prior version, see 8 U.L.A. 108 (Supp.1992).~~

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

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

(1) in writing;

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

(3) either:

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

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

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

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

Comment

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

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

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

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

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

There is no requirement that the testator's signature be at the end of the will; thus, if ~~he or she~~ the testator writes his or her name in the body of the will and intends it to be his or her signature, ~~this would satisfy~~ the statute is satisfied. See See Restatement (Third) of Property:

Wills and Other Donative Transfers § 3.1 cmts. j & k (1999). ~~Estate of Siegel, 214 N.J.Super. 586, 520 A.2d 798 (App.Div. 1987).~~

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

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

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

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

In addition, lay people (and, sad to say, some lawyers) think that a will is valid if notarized, which is not true under non-UPC law. See, e.g., Estate of Saueressig, 136 P.3d 201 (Cal. 2006). In Estate of Hall, 51 P.3d 1134 (Mont. 2002), a notarized but otherwise unwitnessed will was upheld, but not under the pre-2008 version of Section 2-502, which did not authorize notarized wills. The will was upheld under the harmless-error rule of Section 2-503. There are also cases in which a testator went to his or her bank to get the will executed, and the bank's notary notarized the document, mistakenly thinking that notarization made the will valid. Cf., e.g., Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985). Under non-UPC law, the will is usually held invalid in such cases, despite the lack of evidence raising any doubt that the will truly represented the decedent's wishes.

Other uniform acts affecting property or person do not require either attesting witnesses or notarization. See, e.g., Uniform Trust Code § 402(a)(2); Power of Attorney Act § 105; Uniform Health-Care Decisions Act § 2(f).

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

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

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

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

Subsection (c): Extrinsic Evidence. Under subsection (c), testamentary intent can be shown by extrinsic evidence, including for holographic wills the printed, typed, or stamped portions of the form or document. Handwritten alterations, if signed, of a validly executed nonhandwritten will can operate as a holographic codicil to the will. If necessary, the handwritten codicil can derive meaning, and hence validity as a holographic codicil, from nonhandwritten portions of the document. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 cmt. g (1999). This position intentionally contradicts Estate of Foxley, 575 N.W.2d 150 (Neb. 1998), a decision condemned in Reporter's Note No. 4 to the Restatement as a decision that "reached a manifestly unjust result".

2008 Revisions. In 2008, this section was amended by adding subsection (a)(3)(B). Subsection (a)(3)(B) and its rationale are discussed in Waggoner, The UPC Authorizes Notarized Wills, 34 ACTEC J. 58 (2008).

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
name
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~~ [18] 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
name name
sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as ~~[his][her]~~ (his)(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.

Comment

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

~~A new subsection~~ Subsection (c) ~~is~~ was added in 1990 to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit ~~has been~~ was held not to constitute a signature on the will, resulting in invalidity of the will in cases ~~where~~ in which the testator or witnesses got confused and only signed on the self-proving affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U. L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash.Ct.App.1989).

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

Historical Note. This Comment was revised in 2008.

SECTION 2-601. SCOPE. In the absence of a finding of a contrary intention, the rules of construction in this Part control the construction of a will.

Comment

Purpose and Scope of 1990 Revisions. Common-law rules of construction yield to a finding of a contrary intention. The pre-1990 version of this section provided that the rules of construction in Part 6 yielded only to a "contrary intention indicated by the will." To align the statutory rules of construction in Part 6 with those established at common law, this section ~~is~~ was revised in 1990 so that the rules of construction yield to a "finding of a contrary intention." As revised, evidence extrinsic to the will as well as the content of the will itself is admissible for the purpose of rebutting the rules of construction in Part 6.

As originally promulgated, this section began with the sentence: "The intention of a testator as expressed in his will controls the legal effect of his dispositions." This sentence ~~is~~ was removed primarily because it ~~is~~ was inappropriate and unnecessary in a part of the Code containing rules of construction. ~~The deletion of~~ Deleting this sentence ~~does~~ did not signify a retreat from the widely accepted proposition that a testator's intention controls the legal effect of his or her dispositions.

A further reason for deleting this sentence is that a possible, though unintended, reading of ~~this~~ the sentence might ~~be~~ have been that it ~~prevents~~ prevented the judicial adoption of a general reformation doctrine for wills, as approved by the American Law Institute in the Restatement ~~(Second) of Property § 34.7 & comment d, illustration 11~~ (Third) of Property: Wills and Other Donative Transfers § 12.1 (2003), and as advocated in Langbein & Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?", 130 U.Pa.L.Rev. 521 (1982). ~~The striking of~~ Striking this sentence ~~removes~~ removed that possible impediment to the judicial adoption of a general reformation doctrine for wills as approved by the American Law Institute, ~~and~~ as advocated in the Langbein-Waggoner article, and (as of 2008) codified in Section 2-805.

Cross Reference. See Section 8-101(b) for the application of the rules of construction in this Part to documents executed prior to the effective date of this Article.

Historical Note. This Comment was revised in 2008.

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

(a) [Definitions.] In this section:

(1) "Adoptee" has the meaning set forth in Section 2-115.

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

(3) "Distribution date" means the date when an immediate or postponed class gift takes effect in possession or enjoyment.

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

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

(6) "Genetic parent" has the meaning set forth in Section 2-115.

(7) "Gestational child" has the meaning set forth in Section 2-121.

(8) "Relative" has the meaning set forth in Section 2-115.

~~(a)~~ **(b) [Terms of Relationship.]** ~~Adopted individuals and individuals born out of wedlock~~ A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, ~~are included in class gifts and other terms of relationship~~ in accordance with the rules for intestate succession regarding parent-child relationships.

(c) [Relatives by Marriage.] Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by ~~affinity~~ marriage, such as ~~"uncles", "aunts",~~

~~"nieces", or "nephews"~~ uncles, aunts, nieces, or nephews, are construed to exclude relatives by ~~affinity~~ marriage, unless:

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

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

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

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

~~(c)~~ **(f) [Transferor Not Adoptive Parent.]** In ~~addition to the requirements of subsection (a), in~~ construing a dispositive provision of a transferor who is not the ~~adopting~~ adoptive parent, an ~~adopted individual~~ adoptee is not considered the child of the ~~adopting~~ adoptive parent unless:

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

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

(3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached [18] years of age ~~adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent~~.

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

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

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

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

Comment

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

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

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

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

Subsection (a): Definitions. With one exception, the definitions in subsection (a) rely on definitions contained in intestacy sections. The one exception is the definition of "distribution date," which is relevant to the class-closing rules contained in subsection (g). *Distribution date* is defined as the date when an immediate or postponed class gift takes effect in possession or enjoyment.

Subsection (b): Terms of Relationship. Subsection (b) provides that a class gift that uses a term of relationship to identify the takers includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of a child of assisted reproduction or a gestational child in a class is subject to the class-closing rules. See Examples 11 through 15.

Subsection (b) also provides that, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession regarding parent-child relationships. The subsection (e) exception relates to situations in which the transferor is not the genetic parent of the child. The subsection (f) exception relates to situations in which the transferor is not the adoptive parent of the adoptee. Consequently, if the transferor *is* the genetic or adoptive parent of the child, neither exception applies, and the class gift or other term of relationship is construed in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of an adoptee or a child born to parents who are not married to each other in a class is subject to the class-closing rules. See Examples 9 and 10.

Subsection (c): Relatives by Marriage. Subsection (c) provides that terms of relationship that do not differentiate relationships by blood from those by marriage, such as "uncles", "aunts", "nieces", or "nephews", are construed to exclude relatives by marriage, unless (i) when the governing instrument was executed, the class was then and foreseeably would be empty or (ii) the language or circumstances otherwise establish that relatives by marriage were intended to be included. The Restatement (Third) of Property: Wills and Other Donative Transfers § 14.9 adopts a similar rule of construction. As recognized in both subsection (c) and the Restatement, there are situations in which the circumstances would tend to include a relative by marriage. As provided in subsection (g), inclusion of a relative by marriage in a class is subject to the class-closing rules.

One situation in which the circumstances would tend to establish an intent to include a relative by marriage is the situation in which, looking at the facts existing when the governing instrument was executed, the class was then and foreseeably would be empty unless the transferor intended to include relatives by marriage.

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

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

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

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

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

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

Example 5. G's will devised property in trust, directing the trustee to pay the income in equal shares "to my nieces and nephews living on each income payment date until the death of the last survivor of my nieces and nephews, at which time the trust shall terminate and the trust property shall be distributed to the X Charity." G's wife W was deceased when G executed his will. W had one brother who predeceased her. G and W took the brother's children, the wife's nieces and nephews, into their home and raised them. G had one sister who predeceased him, and G and W were close to her children, G's nieces and nephews. Under these circumstances, the conclusion is justified that the disposition "to my nieces and nephews" includes the children of W's brother as well as the children of G's sister.

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

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

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

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

Subsection (d): Half Blood Relatives. In providing that terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as "brothers", "sisters", "nieces", or "nephews", are construed to include both types of relationships, subsection (d) is consistent with the rules for intestate succession regarding parent-child relationships. See Section 2-107 and the phrase "or either of them" in Section 2-103(3) and (4). As provided in subsection (g), inclusion of a half blood relative in a class is subject to the class-closing rules.

Subsection (e): Transferor Not Genetic Parent. The general theory of subsection (~~b~~ e) is that a transferor who is not the ~~natural (biological)~~ genetic parent of a child would want the child to be included in a class gift as a child of the~~ biological~~ genetic parent only if the genetic parent (or one or more of the specified relatives of the child's genetic parent functioned as a parent of the child before the child reached the age of [18] ~~lived while a minor as a regular member of the household of that biological parent (or of specified relatives of that biological~~

~~parent).~~ As provided in subsection (g), inclusion of a genetic child in a class is subject to the class-closing rules.

Example 9. G's will created a trust, income to G's son, A, for life, remainder in corpus to A's descendants who survive A, by representation. A fathered a child, X; A and X's mother, D, never married each other, and ~~X~~ A never ~~lived while a minor as a regular member of A's household or the household of A's parent, brother, sister, spouse, or surviving spouse~~ functioned as a parent of the child, nor did any of A's relatives or spouses or surviving spouses of any of A's relatives. D later married E; D and E raised X as a member of their household. ~~*Solution:* Never having X lived as a regular member of A's household or of the household of any of A's specified relatives,~~ Because neither A nor any of A's specified relatives ever functioned as a parent of X, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

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

Subsection (f): Transferor Not Adoptive Parent. The general theory of subsection (~~c~~ f) is that a transferor who is not the ~~adopting~~ adoptive parent of an ~~adopted child~~ adoptee would want the child to be included in a class gift as a child of the ~~adopting~~ adoptive parent only if ~~the child lived while a minor, either before or after the adoption, as a regular member of the household of that adopting parent~~ (i) the adoption took place before the adoptee reached the age of [18]; (ii) the adoptive parent was the adoptee's stepparent or foster parent; or (iii) the adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of [18]. As provided in subsection (g), inclusion of an adoptee in a class is subject to the class-closing rules.

Example 10. G's will created a trust, income to G's daughter, A, for life, remainder in corpus to A's descendants who survive A, by representation. A and A's husband adopted a 47-year old man, X. ~~, who never lived while a minor as a regular member of A's household *Solution:* Never having lived while a minor as a regular member of A's household,~~ Because the adoption did not take place before X reached the age of [18], A was not X's stepparent or foster parent, and A did not function as a parent of X before X reached the age of [18]. X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

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

Subsection (g): Class-Closing Rules. In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must (i) qualify as a class member under subsection (b), (c), (d), (e), or (f) and (ii) not be excluded by the class-closing rules. For an exposition of the class-closing rules, see Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1. Section 15.1 provides that, "unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution."

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

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

The 36-month period in subsection (g)(2) 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 36-month 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. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a normal period of pregnancy.

Example 11. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my wife W and 10 percent of my estate to my children." G also left frozen sperm at a sperm bank in case he should be killed in action. G consented to be treated as the parent of the child within the meaning of § 2-120(f). G was killed in action. After G's death, W 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 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.

Example 12. G, a member of the armed forces, executed a military will under 10

U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my husband H and 10 percent of my estate to my issue by representation." G also left frozen embryos in case she should be killed in action. G consented to be the parent of the child within the meaning of § 2-120(f). G was killed in action. After G's death, H arranged for the embryos to be implanted in the uterus of a gestational carrier. 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.

Example 13. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then to distribute the trust principal to G's children. When G's mother died, G was married but had no children. Shortly after being diagnosed with 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 Unless Child of Assisted Reproduction or Gestational Child is Conceived Posthumously and Distribution Date Arises At Deceased Parent's Death. Subsection (g)(2) only applies if a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date arises at the deceased parent's death. Subsection (g)(2) does not apply if a child of assisted reproduction or a gestational child is not conceived posthumously. It also does not apply if the distribution date arises before or after the deceased parent's death. In cases to which subsection (g)(2) does not apply, the ordinary class-closing rules apply. For purposes of the ordinary class-closing rules, subsection (g)(1) provides that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

This means, for example, that, with respect to a child of assisted reproduction or a gestational child, a class gift in which the distribution date arises after the deceased parent's death is not limited to a child who is 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. The ordinary 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).

A case that reached the same result that would be reached under this section is In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father's widow around three and five years after his death) were included in class gifts to the deceased father's "issue" or "descendants". The children would be included under this section because (i) the deceased father signed a record that would satisfy Section 2-120(f)(1), (ii) the distribution dates arose after the deceased father's death, and

(iii) the children were living on the distribution dates, thus satisfying subsection (g)(1).

Example 14. G created a revocable inter vivos trust shortly before his death. The trustee was directed to pay the income to G for life, then "to pay the income to my wife, W, for life, then to distribute the trust principal by representation to my descendants who survive W." When G died, G and W had no children. Shortly before G's death and after being diagnosed with 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, W decided to become inseminated with G's frozen sperm so that she could have his child. The child, X, was born five years after G's death. W raised X. Upon W's death many years later, X was a grown adult. X is entitled to receive the trust principal, because a parent-child relationship between G and X existed under § 2-120(f) and X was living on the distribution date.

Example 15. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then "to pay the income by representation to G's issue from time to time living, and at the death of G's last surviving child, to distribute the trust principal by representation to G descendants who survive G's last surviving child." When G's mother died, G was married but had no children. Shortly after being diagnosed with 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-gift of income under the rule of convenience. If G's widow later decides to use his frozen sperm to have another child or children, those children would be included in the class-gift of income (assuming they live 120 hours after birth) even if they were not in utero within 36 months after G's death or born within 45 months after the G's death. The reason is that an income interest in class-gift form is treated as creating separate class gifts in which the distribution date is the time of payment of each subsequent income payment. See Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 cmt. p. Regarding the remainder interest in principal that takes effect in possession on the death of G's last living child, the issue of the posthumously conceived children who are then living would take the trust principal.

Subsection (g)(3). For purposes of the class-closing rules, an individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted. An individual is "in the process of being adopted" if a legal proceeding to adopt the individual had been filed before the class closed. However, the phrase "in the process of being adopted" is not intended to be limited to the filing of a legal proceeding, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

~~**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).~~

PART 8

GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

General Comment

Part 8 contains ~~three~~ five general provisions that cut across probate and nonprobate transfers. Part 8 previously contained a ~~fourth~~ sixth provision, Section 2-801, which dealt with disclaimers. Section 2-801 was replaced in 2002 by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). To avoid renumbering the other sections in this Part, Section 2-801 is reserved for possible future use.

Section 2-802 deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share.

Section 2-803 spells out the legal consequence of intentional and felonious killing on the right of the killer to take as heir and under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Section 2-804 deals with the consequences of a divorce on the right of the former spouse (and relatives of the former spouse) to take under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Sections 2-805 and 2-806, added in 2008, bring the reformation provisions in the Uniform Trust Code into the UPC.

Application to Pre-Existing Governing Instruments. Under Section 8-101(b), for decedents dying after the effective date of enactment, the provisions of this Code apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature of the Code. The statement, titled "Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents", can be found at 17 ACTEC Notes 184 (1991) or can be obtained from the headquarters office of the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair St., Suite 1700, Chicago, IL 60611, Phone 312/915-0195, FAX 312/915-0187.

Historical Note. This General Comment was revised in 1993 and 2008. ~~For the prior version, see 8 U.L.A. 156 (Supp.1992).~~

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§ 2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). The statutory references in this Comment to former Section 2-801 have been replaced by appropriate references to Part

11. Updating these statutory references has not changed the substance of this Comment.

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

Added in 2008, Section 2-805 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 Donative Transfers (2003).

Section 2-805 is broader in scope than Section 415 of the Uniform Trust Code because Section 2-805 applies but is not limited to trusts.

Section 12.1, and hence Section 2-805, is explained and illustrated in the Comments to Section 12.1 of the Restatement and also, in the case of a trust, in the Comment to Section 415 of the Uniform Trust Code.

SECTION 2-806. MODIFICATION TO ACHIEVE TRANSFEROR'S TAX

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

Comment

Added in 2008, Section 2-806 is based on Section 416 of the Uniform Trust Code, which in turn was based on Section 12.2 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-806 is broader in scope than Section 416 of the Uniform Trust Code because Section 2-806 applies but is not limited to trusts.

Section 12.2, and hence Section 2-806, is explained and illustrated in the Comments to Section 12.2 of the Restatement and also, in the case of a trust, in the Comment to Section 416 of the Uniform Trust Code.

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

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

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

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

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

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

(3) If the will is witnessed pursuant to Section 2-502(a)(3)(A), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation

clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

Comment

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

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

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

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

Historical Note. This Comment was revised in 2008.

SECTION 8-101. TIME OF TAKING EFFECT; PROVISIONS FOR TRANSITION.

(a) This Code takes effect January 1, 19__ .

(b) Except as provided elsewhere in this Code, on the effective date of this Code:

(1) the Code applies to governing instruments executed by decedents dying thereafter;

(2) the Code applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;

(3) every personal representative or other fiduciary holding an appointment under this Code on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

(5) any rule of construction or presumption provided in this Code applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent.

(6) a person holding office as judge of the Court on the effective date of this Act may continue the office of judge of this Court and may be selected for additional terms after the

effective date of this Act even though he does not meet the qualifications of a judge as provided in Article I.

Legislative Note: *States that have previously enacted the Uniform Probate Code and are enacting an amendment or amendments to the Code are encouraged to include the following effective date provision in their enacting legislation. The purpose of this effective date provision, which is patterned after Section 8-101 of the original UPC, is to assure that the amendment or amendments will apply to instruments executed prior to the effective date, to court proceedings pending on the effective date, and to acts occurring prior to the effective date, to the same limited extent and in the same situations as the effective date provision of the original UPC.*

TIME OF TAKING EFFECT; PROVISIONS FOR TRANSITION.

(a) This [act] takes effect on January 1, 20__.

(b) On the effective date of this [act]:

(1) the [act] applies to governing instruments executed by decedents dying thereafter;

(2) the [act] applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code;

(3) an act done before the effective date of this [act] in any proceeding and any accrued right is not impaired by this [act]. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date of this [act], the provisions shall remain in force with respect to that right; and

(4) any rule of construction or presumption provided in this [act] applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent.