

D R A F T

FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
PASADENA, CALIFORNIA
JULY 27 - AUGUST 3, 2007

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

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM PROBATE CODE**

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

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

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

10 (A) if there is one deceased spouse who has one or more descendants who survive
11 the intestate decedent, the intestate estate passes by representation to those descendants.

12 (B) if there are more than one deceased spouses who have one or more
13 descendants who survive the intestate decedent, the intestate estate is divided into as many equal
14 shares as there are such deceased spouses, each share passing by representation to those
15 descendants.

16 **SECTION 2-104. REQUIREMENT THAT HEIR SURVIVE DECEDENT FOR**
17 **120 HOURS; AFTERBORN HEIRS.**

18 (a) An individual who was born before the decedent's death but who fails to survive the
19 decedent by 120 hours is deemed to have predeceased the decedent ~~for purposes of homestead~~
20 ~~allowance, exempt property, and intestate succession, and the decedent's heirs are determined~~
21 ~~accordingly.~~ If it is not established by clear and convincing evidence that an individual who was
22 born before the decedent's death ~~would otherwise be an heir~~ survived the decedent by 120 hours,

1 it is deemed that the individual failed to survive for the required period. ~~This section is not to be~~
2 ~~applied if its application would result in a taking of intestate estate by the state under Section 2-~~
3 ~~105.~~

4 (b) An individual who was in gestation at the decedent's death is treated as living at the
5 decedent's death if the individual lives 120 hours after birth. If it is not established by clear and
6 convincing evidence that an individual who was in gestation at the decedent's death lived 120
7 hours after birth, it is deemed that the individual failed to survive for the required period.

8 (c) This section applies for purposes of homestead allowance, exempt property, and
9 intestate succession, and the decedent's heirs are determined accordingly.

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

12 * * *

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

16 * * *

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

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

1 Statutes providing the grounds for termination of parental rights include Tex. Fam. Code
2 §§ 161.001 to .007; [more citations to be added]

3
4 [Comment to be continued]

5
6
7 **SECTION 2-115. PARENT AND CHILD RELATIONSHIP; MARITAL AND**
8 **NONMARITAL CHILDREN.**

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

11 (b) An individual is the child of the child’s genetic parents, regardless of their marital
12 status. The parent-child relationship may be established under [Articles 1 through 6 of the
13 Uniform Parentage Act (2000), as amended in 2002] [applicable state law] [insert appropriate
14 statutory reference].

15 *Legislative Note: States that have not enacted the Uniform Parentage Act (2000, as amended in*
16 *2002) should insert in subsection (b)(2) either “applicable state law” or an appropriate*
17 *statutory reference instead of the reference to the Uniform Parentage Act (2000, as amended in*
18 *2002). Two of the principal features of Articles 1 through 6 of the Uniform Parentage Act (2000,*
19 *as amended in 2002) are (i) the presumption of paternity and the procedure under which that*
20 *presumption can be disproved by adjudication and (ii) the acknowledgment of paternity and the*
21 *procedure under which that acknowledgment can be rescinded or challenged. States that have*
22 *not enacted similar provisions should consider whether such provisions should be added as part*
23 *of Section 2-115(b). States that have not enacted the Uniform Parentage Act (2000, as amended*
24 *in 2002) should also make sure that applicable state law authorizes parentage to be established*
25 *after the death of the alleged parent, as provided in the Uniform Parentage Act § 509 (2000, as*
26 *amended in 2002), which provides: “For good cause shown, the court may order genetic testing*
27 *of a deceased individual.”*

28
29 **Comment**

30
31 This Section replaces former Section 2-114(a), which provided: “(a) Except as provided
32 in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an
33 individual is the child of his [or her] natural parents, regardless of their marital status. The parent
34 and child relationship may be established under [the Uniform Parentage Act] [applicable state
35 law] [insert appropriate statutory reference].”

1 Subsection (b) provides that the parent-child relationship may be established under
2 [Articles 1 through 6 of the Uniform Parentage Act (2000, as amended in 2002)]. Section 203 of
3 the Uniform Parentage Act provides: “Unless parental rights are terminated, a parent-child
4 relationship established under this [Act] applies for all purposes, *except as otherwise specifically*
5 *provided by other law of this State.*” (emphasis added). The Official Comment to this section
6 specifically refers to the Uniform Probate Code. Consequently, in case of any conflict between
7 the Uniform Parentage Act and the Uniform Probate Code, the Uniform Probate Code takes
8 precedence.

9
10 [Comment to be continued]

11
12
13 **SECTION 2-116. PARENT AND CHILD RELATIONSHIP; ADOPTED**

14 **INDIVIDUAL.**

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

17 (b) In this section, “relative” means a grandparent or a descendant of a grandparent.

18 (c) An adopted individual is the child of the individual’s adopting parent or parents. An
19 individual who is in the process of being adopted by a married couple when one of the spouses
20 dies is treated as an individual who is adopted by the decedent spouse if the adoption is
21 subsequently granted to the decedent’s surviving spouse.

22 (d) Except as otherwise provided in subsections (e), (f), and (g), an adopted individual is
23 not the child of the individual’s genetic parents.

24 (e) An individual who is adopted by the spouse of either genetic parent continues to be
25 the child of:

26 (1) that genetic parent; and

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

1 (f) An individual who is adopted by a relative of a genetic parent, or by the spouse or
2 surviving spouse of a relative of a genetic parent, continues to be a child of both genetic parents,
3 but only for purposes of the right of the child or a descendant of the child to inherit from or
4 through either genetic parent.

5 (g) An individual who is adopted after the death of both genetic parents, but not by a
6 relative of a genetic parent, nor by the spouse or surviving spouse of a relative of a genetic
7 parent, continues to be a child of both genetic parents, but only for purposes of the right of the
8 child or a descendant of the child to inherit through either genetic parent.

9 (h) If a child was adopted more than once, the term “genetic parent” in subsections (e),
10 (f), and (g) includes a “previous adoptive parent.”

11 **Comment**

12
13 This Section replaces former Section 2-114(b), which provided: “(b) An adopted
14 individual is the child of his [or her] adopting parent or parents and not of his [or her] natural
15 parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the
16 relationship between the child and that natural parent or (ii) the right of the child or a descendant
17 of the child to inherit from or through the other natural parent.”

18
19 [Comment to be continued]

20
21
22 **SECTION 2-117. PARENT AND CHILD RELATIONSHIP; WHEN**

23 **UNADOPTED STEPCHILD TREATED AS ADOPTED.**

24 (a) In this section, “stepchild” means a child of an individual’s spouse, deceased spouse,
25 former spouse, or deceased former spouse.

26 (b) For purpose of the right of a stepchild to inherit from the stepchild’s stepparent, a
27 stepchild is treated as a child who has been adopted by the stepchild’s stepparent if:

1 (1) the relationship began during the stepchild’s minority and continued
2 throughout the lifetime of the stepparent; and
3 (2) the stepparent was in the process of adopting the stepchild when the stepparent
4 died; or
5 (3) it is established by clear and convincing evidence that the stepparent, during
6 the stepchild’s minority, attempted to adopt the stepchild and would have adopted the stepchild
7 but for (i) the refusal of a genetic parent to consent to the adoption or (ii) the existence of another
8 legal barrier.

9 *Legislative Note: States that recognize civil unions, domestic partnerships, or similar*
10 *relationships between unmarried individuals should add appropriate language after “stepchild”*
11 *and “stepparent.”*
12

13 **SECTION 2-118. PARENT AND CHILD RELATIONSHIP; CHILD**
14 **CONCEIVED BY ASSISTED REPRODUCTION OTHER THAN A CHILD BORN TO A**
15 **GESTATIONAL MOTHER.**

16 (a) This section applies for purposes of intestate succession by, through, or from a child
17 conceived by means of assisted reproduction by a woman other than a gestational mother as
18 defined in Section 2-119.

19 (b) In this section:
20 (1) “assisted reproduction” means a method of causing pregnancy other than
21 sexual intercourse. The term includes:

22 (A) intrauterine insemination;

23 (B) donation of eggs;

1 (C) donation of embryos;

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

3 (E) intracytoplasmic sperm injection.

4 (2) “functioned as a parent of the child” means behaving toward the child in a
5 manner consistent with being the child’s parent and performing functions that are customarily
6 performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or
7 holding out the child as the individual’s child, materially participating in the child’s upbringing,
8 bringing the child into the individual’s household as a regular member of that household, and
9 assuming custody of the child.

10 (3) “incapacity” means the inability of an individual to function as a parent of a
11 child because of the individual’s physical or mental condition.

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

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

16 (B) a woman who gives birth to a child by means of assisted reproduction
17 other than a gestational mother as defined in Section 2-119; or

18 (C) an individual who, under subsection (d), is determined to be the parent
19 of a child conceived by assisted reproduction.

20 (c) A third-party donor is not the parent of a child who is conceived by means of assisted
21 reproduction, nor is the child the child of a third-party donor.

22 (d) Except as otherwise provided in subsections (f) and (g), an individual is a parent of a

1 child who is conceived by means of assisted reproduction, and the child is a child of that
2 individual, if the individual:

3 (1) signed a record, before or after the child's birth, expressing consent to be
4 treated as the child's parent;

5 (2) functioned as a parent of the child; or

6 (3) intended to function as a parent of the child but was prevented from doing so
7 by an event such as death or incapacity.

8 (e) For purposes of subsection (d), if a child is born to a married woman and she and her
9 husband are not separated and no divorce or annulment proceedings are pending, then, in the
10 absence of clear and convincing evidence to the contrary, both spouses are presumed to have
11 consented to function as the child's parent.

12 (f) If a marriage is dissolved before placement of eggs, sperm, or embryos, the resulting
13 child is not a child of the former spouse unless the former spouse consented in a record that if
14 assisted reproduction were to occur after a dissolution of the marriage, the child would be the
15 child of the former spouse.

16 (g) If, in a record, an individual withdraws consent to assisted reproduction before
17 placement of eggs, sperm, or embryos, the resulting child is not a child of that individual, unless
18 the individual subsequently satisfies the requirements of subsection (d).

19 (h) If a parent of a child who is conceived posthumously by assisted reproduction dies
20 intestate, the child is treated as in gestation at the decedent's death for purposes of Section 2-
21 104(b) if the child is born within forty-five months after the decedent's death. If an individual
22 other than the parent of a child who is conceived posthumously by assisted reproduction dies

1 intestate, the child is treated as in gestation on the date that the child is in utero for purposes of
2 Section 2-104(b).

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

6
7 **SECTION XXX. DUTY OF GENETIC DEPOSITORIES TO PROVIDE**
8 **CONSENT FORM TO DEPOSITORS.**

9 (a) Any entity that receives genetic material of a human being that may be used for
10 conception shall provide to the person depositing genetic material a form for use by the depositor
11 that, if signed by the depositor, would satisfy the conditions set forth in Section 2-118(d)(1)
12 regarding the depositor’s consent to be treated as the child’s parent. The use of the form is not
13 mandatory, and the form is not the exclusive means of expressing a depositor’s consent. The
14 form shall include advisements in substantially the following form:

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

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

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

26 (b) Any entity that receives genetic material of a human being that may be used for
27 conception shall make available to the person depositing his or her genetic material a form that, if
28 signed by the depositor, would revoke any previous expression of consent satisfying the
29 conditions set forth in Section 2-118(g). The use of the form is not mandatory, and the form is
30 not the exclusive means of expressing a depositor’s intent with respect to revocation or
31 amendment of a prior expression of consent. The form shall include advisements in substantially
32 the following form:

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

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

38

39

40

41

Comment

This Section is largely consistent with the Restatement (Third) of Property: Wills and

1 Other Donative Transfers § 14.8 (2007). That section of the Restatement applies to the treatment
2 of a child conceived by means of assisted reproduction for class-gift purposes. Section 14.8
3 provides:

4
5 Restatement § 14.8. Child of Assisted Reproduction

6 Unless the language or circumstances indicate that the transferor had a
7 different intention, a child of assisted reproduction is treated for class-gift
8 purposes as a child of a person who consented to function as a parent of the child
9 and who functioned in that capacity or was prevented from doing so by an event
10 such as death or incapacity.

11
12 *Data on children of assisted reproduction.* The Center for Disease Control (CDC) of the
13 U.S. Department of Health and Human Services collects data on children of assisted
14 reproduction (ART). See Center for Disease Control, 2004 Assisted Reproductive Technology
15 Success Rates (Dec. 2006) (2004 CDC Report), available at <http://www.cdc.gov/ART/ART2004>.
16 The data, however, is of limited use because the definition of ART used in the CDC Report
17 excludes artificial insemination (2004 CDC Report at 3), which is probably the most common
18 form of assisted reproductive procedures. The CDC estimates that in 2004 ART procedures
19 (excluding artificial insemination) accounted for slightly more than one percent of total U.S.
20 births. 2004 CDC Report at 13. According to the Report: “The number of infants born who were
21 conceived using ART ... increased steadily between 1996 and 2004. In 2004, 49,458 infants were
22 born, which was more than double the 20,840 born in 1996.” 2004 CDC Report at 57. “The
23 average age of women using ART services in 2004 was 36. The largest group of women using
24 ART services were women younger than 35, representing 41% of all ART cycles carried out in
25 2004. Twenty-one percent of ART cycles were carried out among women aged 35-37, 19%
26 among women aged 38-40, 9% among women aged 41-42, and 9% among women older than
27 42.” 2004 CDC Report at 15. Updates of the 2004 CDC Report are to be posted at
28 <http://www.cdc.gov/ART/ART2004>.

29
30 *Functioned as a parent of the child.* The term “functioned as a parent of the child” is
31 derived from the Restatement (Third) of Property: Wills and Other Donative Transfers (2007).
32 The definition of that term in subsection (b)(2) is amplified in the Reporter’s Note No. 4 to
33 Section 14.5 of the Restatement as follows:

34
35 *Custodial responsibility* refers to physical custodianship and supervision of a
36 child. It usually includes, but does not necessarily require, residential or overnight
37 responsibility.

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

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

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

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

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

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

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

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

18 (g) providing moral and ethical guidance;

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

22 *Parenting functions* are tasks that serve the needs of the child or the child's
23 residential family. Parenting functions include caretaking functions, as defined in
24 Paragraph (5), and all of the following additional functions:

25 (a) providing economic support;

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

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

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

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

34
35 [Comment to be continued]

36
37
38 **SECTION 2-119. PARENT AND CHILD RELATIONSHIP; CHILD BORN TO A**
39 **GESTATIONAL MOTHER.**

40 (a) This section applies for purposes of intestate succession by, through, or from a child

1 who is conceived by means of assisted reproduction by a gestational mother.

2 (b) In this section:

3 (1) “functioned as a parent of the child” means behaving toward the child in a
4 manner consistent with being the child’s parent and performing functions that are customarily
5 performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or
6 holding out the child as the individual’s child, materially participating in the child’s upbringing,
7 bringing the child into the individual’s household as a regular member of that household, and
8 assuming custody of the child.

9 (2) “gestational agreement” means an agreement, whether enforceable or not, in
10 which a woman agrees to carry a child to birth for an intended parent or intended parents,
11 whether or not the woman is the genetic mother. A gestational agreement does not apply to the
12 birth of a child conceived by means of sexual intercourse.

13 (3) “gestational mother” means a woman who gives birth to a child under a
14 gestational agreement.

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

18 (c) A child who is born by means of assisted reproduction to a gestational mother is not
19 the child of the gestational mother unless she retained or gained physical possession of and
20 functioned as a parent of the child.

21 (d) A child who is born by means of assisted reproduction to a gestational mother is the
22 child of an intended parent who:

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

3 (2) “relative” means a grandparent or a descendant of a grandparent.

4 (3) “functioned as a parent of the child” means behaving toward the child in a
5 manner consistent with being the child’s parent and performing functions that are customarily
6 performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or
7 holding out the child as the individual’s child, materially participating in the child’s upbringing,
8 bringing the child into the individual’s household as a regular member of that household, and
9 assuming custody of the child.

10 ~~(a) (b)~~ An adopted individual, and a nonmarital individual ~~individuals born~~
11 ~~out of wedlock,~~ a child of assisted reproduction, and a child born to a gestational mother, and
12 their respective descendants if appropriate to the class, are included in class gifts and other terms
13 of relationship in accordance with the rules for intestate succession. Terms of relationship that do
14 not differentiate relationships by blood from those by affinity, such as “uncles,” “aunts,”
15 “nieces,” or “nephews,” are construed to exclude relatives by affinity. Terms of relationship that
16 do not differentiate relationships by the half blood from those by the whole blood, such as
17 “brothers,” “sisters,” “nieces,” or “nephews,” are construed to include both types of relationships.

18 ~~(b) (c)~~ In addition to the requirements of subsection (a b), in construing a dispositive
19 provision of a transferor who is not the natural genetic parent, an individual born to the natural
20 genetic parent is not considered the child of that parent unless the genetic parent, a relative of the
21 genetic parent, or the spouse or surviving spouse of a relative of the genetic parent functioned as
22 a parent of the child before the child reached the age of majority ~~individual lived while a minor~~

1 MISCELLANEOUS AMENDMENTS TO OTHER UPC SECTIONS

2
3 Supporting Memorandum
4

5 The following proposed amendments have been reviewed and endorsed by the Joint
6 Editorial Board for Uniform Trust and Estate Acts.
7

8 **New § 1-109: Cost-of-living Adjustment.** In addition to the cost-of-living adjustments
9 proposed to the Executive Committee as technical amendments, the proposed amendment adds a
10 new section that would automatically adjust each of the specific dollar amounts annually. See §
11 1-109, *infra* p. 22. The addition of this section would make it unnecessary for NCCUSL or
12 individual enacting states to amend the UPC periodically to adjust the dollar amounts for
13 inflation. The Michigan enactment of the UPC already contains such a provision.
14

15 **§ 2-213. Waiver of Right to Elect and of Other Rights.** This proposal amends § 2-213,
16 which deals with the validity of a premarital or marital agreement or waiver regarding the UPC
17 elective share of the decedent’s surviving spouse. See *infra* p. 24. Current § 2-213 is based on the
18 Uniform Premarital Agreement Act (1983). A more recent provision on marital and premarital
19 agreements was adopted by the American Law Institute in the new Restatement (Third) of
20 Property: Wills and Other Donative Transfers § 9.4 (2003).
21

22 Elective share systems and other statutory rights arising on death protect against unilateral
23 disinheritance of a spouse but do not interfere with genuinely consensual arrangements that
24 waive or reduce such spousal rights. Although protective in purpose, elective share law is default
25 law, which the parties may alter or abrogate. The parties may decline to have an economic
26 partnership of the kind characteristic of most first marriages. It is particularly common, for
27 example, for two previously married older persons contemplating marriage to wish to ensure that
28 on the first spouse’s death, all or most of the decedent’s property will go to the decedent’s
29 children rather than to the surviving spouse (and ultimately, perhaps, to the surviving spouse’s
30 children). Freedom to make an enforceable agreement or waiver of this character not only
31 facilitates the marriage of such a couple, but may also improve the quality of the marriage,
32 smoothing the spouses’ relationship to their respective children by providing assurance that the
33 new marriage will not interfere with the children’s expectations.
34

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

1 appreciate the consequences of such a premarital or a marital agreement or waiver.

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

8
9 **§ 2-502: Execution of Wills.** This proposal amends § 2-502, which sets forth the
10 formalities for executing a will, by adding notarization as an optional method of execution. See
11 *infra* p. 28.

12
13 The UPC, in § 2-503, has already adopted a harmless-error rule, which provides:

14
15 UPC § 2-503. Harmless Error. Although a document or writing added upon a
16 document was not executed in compliance with Section 2-502, the document or
17 writing is treated as if it had been executed in compliance with that section if the
18 proponent of the document or writing establishes by clear and convincing
19 evidence that the decedent intended the document or writing to constitute (i) the
20 decedent’s will, (ii) a partial or complete revocation of the will, (iii) an addition to
21 or an alteration of the will, or (iv) a partial or complete revival of his [or her]
22 formerly revoked will or of a formerly revoked portion of the will.

23
24 There is little doubt that a notarized will would almost always if not always be upheld under this
25 harmless-error rule. See *Estate of Hall*, 51 P.3d 1134 (Mont. 2002) (attorney assured client that
26 will was valid if he notarized it; will upheld under Montana’s enactment of UPC harmless-error
27 rule). Some UPC enacting states, however, have not adopted the harmless-error rule. Treating
28 notarized wills as validly executed under § 2-502 would allow such wills to be upheld without
29 the need to satisfy the clear and convincing standard of proof, and be beneficial in states that left
30 § 2-503 out of their enactment. The will-execution formalities are thought to serve several
31 functions — evidentiary, cautionary (ceremonial), channeling, and protective. A notarized will
32 would seem to serve all of these functions. The danger that a notarized will would not reliably
33 represent the decedent’s wishes seems minimal.

34
35 Also, the UPC authorizes holographic wills. One of the reasons why such wills are valid
36 is that the requirement that the material portions of the will be in the decedent’s handwriting
37 serves to give a larger writing sample than a mere signature. In the case of a notarized will, the
38 notarial seal serves the same function, because one of the notary’s principal duties is to verify the
39 identity of the person signing the document.

40
41 Of course, the conventional wisdom is that the American notary — as distinguished from
42 the quasi-judicial notary in the civil law countries — merely acts as a “rubber stamp.” But the
43 civil-law notary supervises an “authenticated will,” in which the notary determines whether the

1 testator has mental capacity and is not acting under duress or undue influence. Compliance with
2 the Anglo-American attestation formalities do no such thing: A validly executed will is subject to
3 contest on grounds of lack of capacity and undue influence, etc. Also, the UPC does not even
4 require that the attesting witnesses be disinterested, and this does not seem to have caused wills
5 that should be invalid to be upheld.

6

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

13

14 Cases have begun to emerge in which the supervising attorney, with the client and all
15 witnesses present, circulates one or more estate-planning documents for signature, and fails to
16 notice that the client or one of the witnesses has unintentionally neglected to sign one of the
17 documents. This often, but not always, arises when the attorney prepares multiple estate-planning
18 documents — a will, a durable power of attorney, a health-care power of attorney, and perhaps a
19 revocable trust.¹ It is common practice, and sometimes required by state law, that the documents
20 other than the will be notarized. It would reduce confusion and chance for error if all of these
21 documents could be executed with the same formality.

22

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

28

29 Other uniform acts affecting property or person do not require either attesting witnesses
30 or notarization. For example:

31

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

35

36 *Power of Attorney Act § 105* provides that a power of attorney must be signed by
37 the principal or in the principal’s conscious presence by another individual
38 directed by the principal to sign the principal’s name on the power of attorney. A
39 signature on a power of attorney is presumed to be genuine if the principal
40 acknowledges the signature before a notary public or other individual authorized

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

1 by law to take acknowledgments.

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

5
6 **§ 2-504: Self-Proved Will.** Adding an optional method of execution by having the will
7 notarized necessitates making a minor amendment to § 2-504, which provides that a will can be
8 made self-proved by attaching a notarized self-proving affidavit. Section 2-504 must be amended
9 so that it only applies to a will that is executed with attesting witnesses. See *infra* p. 30.

10
11 **§ 3-406: Formal Testacy Proceedings; Contested Cases.** Section 3-406 is the provision
12 in the UPC that states the effect of a self-proved will in contested cases. See *infra* p. 38. This
13 section, in its current form, is poorly drafted and unclear. The current version of § 3-406(b) and
14 the Comment contain several problems:

15
16 1. Under § 2-502, the witnesses do not have to sign “in the presence of” the testator, yet
17 the Comment incorrectly refers to that as a requirement.

18
19 2. Subsection (a) states that, if a will is self-proved, compliance with the “signature
20 requirements” is conclusively presumed but the “other requirements” are presumed subject to
21 rebuttal. It is not clear exactly which requirements are “signature requirements” and which are
22 “other requirements.”² Here are the “execution requirements” under § 2-502:

23
24 First, the will must be in writing;

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

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

32
33 The Comment to § 2-504 also suffers from the same imprecision. Here is the Comment
34 to 2-504:

35
36 A self-proved will may be admitted to probate as provided in Sections 3-
37 303, 3-405, and 3-406 without the testimony of any subscribing witness, but
38 otherwise it is treated no differently from a will not self proved. Thus, a
39 self-proved will may be contested (except in regard to signature requirements),

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

1 revoked, or amended by a codicil in exactly the same fashion as a will not self
2 proved. The procedural advantage of a self-proved will is limited to formal testacy
3 proceedings because Section 3-303, which deals with informal probate, dispenses
4 with the necessity of testimony of witnesses even though the instrument is not self
5 proved under this section.
6

7 Amending this section is desirable to make it clear that, in the case of a self-proved will,
8 compliance with all of the requirements for execution is conclusively presumed without the
9 testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits
10 annexed or attached thereto, unless there is proof of fraud or forgery affecting the
11 acknowledgment or affidavit.³ Adding a subsection regarding the effect of a notarized will
12 (assuming that the above proposed amendment is approved) is also desirable. Finally, it is also
13 desirable to amend the subsection dealing with proof of a will that is neither self-proved nor
14 notarized by relocating the original subsection dealing with this issue and also adding a sentence
15 regarding the evidentiary effect of an attestation clause.
16

17 **§ 2-502(c): Extrinsic Evidence to Establish Meaning of Holographic Will.** This
18 proposal amends § 2-502(c), which authorizes holographic wills. The proposed amendment adds
19 a sentence that provides that extrinsic evidence, including portions of the document that are not
20 in the testator’s handwriting, can be used to establish the meaning of a holographic will. See *infra*
21 p.28.
22

23 The added sentence is designed to conform the UPC to Restatement (Third) of Property:
24 Wills and Other Donative Transfers § 3.2, Comment c (1999), which provides:
25

26 *§ 3.2, Comment c. Testamentary intent — holographic wills.* Holographic
27 wills as well as attested wills must be executed with testamentary intent. . . .
28 Testamentary intent need not be shown from the face of the will, but can be
29 established by extrinsic evidence. Extrinsic evidence can also be used to establish
30 the meaning of a holographic will.
31

32 The added sentence would produce a more just result in cases like *Estate of Foxley*, 575
33 N.W.2d 150 (Neb. 1998), which was decided under a holographic will statute similar to the
34 former UPC’s holographic will statute. Neb. Rev. Stat. § 30-2328 provides: “An instrument
35 which purports to be testamentary in nature but does not comply with [the statute relating to
36 attested wills] is valid as a holographic will, whether or not witnessed, if the signature, the
37 material provisions, and an indication of the date of signing are in the handwriting of the
38 testator.”
39

40 Eileen C. Foxley executed a valid will on February 8, 1985. When she executed the will,
41 she had six daughters and two sons. The will divided the bulk of her estate among her six

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

1 daughters in equal shares. In December 1993, one of the daughters, Jane F. Jones, died and was
2 survived by her only son, Hogan. The evidence at trial indicated that Foxley did not want her
3 grandson, Hogan, to participate in her estate because she believed that he had abused his mother
4 (Foxley's daughter).

5

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

10

11 My only children are William C. Foxley, Sarah F. Gross, John C. Foxley,
12 Winifred F. Wells, Elizabeth F. Leach, Sheila F. Radford, Mary Ann Pirotte and
13 Jane F. Jones.

14

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

17

18 In its original form, Article III provided:

19

20 I hereby give, devise and bequeath all of the rest of my proper [*sic*] to my
21 six (6) daughters in equal shares.

22

23 Foxley had lined through "six," and written "5" below "(6)."

24

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

30

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

35

36 The statement "her share to be divided to between 5 daughters" does not express
37 testamentary intent and is not clear without a handwritten reference to which
38 daughter is to be excluded. Similarly, the line through "Jane F. Jones" is not
39 sufficient because that line has no meaning unless read in conjunction with the
40 typewritten names. Without the requisite testamentary intent, Foxley's
41 handwritten words cannot be deemed material provisions.

42

43 The result was that one-sixth of Mrs. Foxley's estate went to her grandson under the Nebraska

1 antilapse statute.

2

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

7

8 **New §§ 2-805 and 2-806: Reformation and modification of wills and other governing**
9 **instruments.** This proposal adds two new sections — §§ 2-805 and 2-806 — that incorporate
10 Uniform Trust Code §§ 415 and 416 into the UPC. See *infra* pp. 31 to 37. UTC § 415 authorizes
11 the reformation or modification of a trust, including a trust created in a will, if the transferor’s
12 intent and the terms of the governing instrument were affected by a mistake of fact or law,
13 whether in expression or inducement. UTC § 416 authorizes modification of a trust, including a
14 trust created in a will, if doing so would achieve the transferor’s tax objectives, in a manner that
15 is not contrary to the transferor’s probable intention. Both of the UTC sections are based on
16 comparable provisions adopted by the American Law Institute in the Restatement (Third) of
17 Property: Wills and Other Donative Transfers §§ 12.1, 12.2 (2003). The UTC sections have not
18 been controversial in the states, and the proposal incorporates them into the UPC.

19

20

21

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

22 **AMOUNTS.**

23 (a) In this section, "CPI for [a specified calendar year]" means the "Consumer Price Index
24 (Annual Average) for All Urban Consumers (CPI-U): U.S. city average — All items" for the
25 specified calendar year, reported by the U.S. Department of Labor or by a successor federal
26 reporter, or, if that index is discontinued, an equivalent index reported by a federal authority. If
27 no such index is issued, the term means the substitute index chosen by [insert appropriate state
28 agency or court] for the specified calendar year.

29 (b) The dollar amounts stated in Sections 2-102, 2-201(b), 2-402, 2-403, 2-405, and 3-

30 1201 apply to the estates of decedents who die in or after [insert year in which Act becomes

31 effective], except that, for the estates of decedents dying after [insert year after the year in which

1 Act becomes effective], these dollar amounts shall be increased if the CPI for the calendar year
2 next preceding the year of death exceeds the CPI for calendar year [insert year next preceding the
3 year in which Act becomes effective]. The amount of each increase, if any, shall be computed by
4 multiplying each dollar amount by the percentage by which the CPI for the calendar year next
5 preceding the year of death exceeds the CPI for the calendar year [insert year next preceding the
6 year in which Act becomes effective]. If any increase produced by this computation is not a
7 multiple of \$100, the increase shall be rounded down to the next lower multiple of \$100, except
8 that, for purposes of Section 2-405, the periodic installment amount shall not be rounded down
9 but shall be the lump sum amount divided by 12.

10 [(c) Not later than January 31 of [insert year after the year in which Act becomes
11 effective], and of each succeeding year, the [insert appropriate state agency] shall issue a
12 cumulative list, beginning with the dollar amounts effective for the estates of decedents dying in
13 [insert year after the year in which Act becomes effective], of each dollar amount as increased
14 under this section.]

15 Comment

16
17 By technical amendment in 2007, the dollar amounts stated in Sections 2-102 (Intestate
18 Share of Spouse), 2-201(b) (Supplemental Elective-Share Amount), 2-402 (Homestead
19 Allowance), 2-403 (Exempt Property), 2-405 (Source, Determination, and Documentation), and
20 3-1201 (Collection of Personal Property by Affidavit) were adjusted for inflation. In each January
21 issue of *CPI Detailed Report*, the Bureau of Labor Statistics of the U.S. Department of Labor
22 reports the CPI (annual average) for the preceding calendar year. The information can also be
23 obtained by telephone (202/691-5200) or on the internet at <<http://www.bls.gov/cpi>>. Because of
24 this one-year lag in reporting the CPI, the adjustment of the dollar amounts in these sections were
25 based on the CPI (annual average) for 2006.

26
27 An enacting state that has already enacted the above sections should bring those dollar
28 amounts up to date.

29

1 New Section 1-109 operates in conjunction with the inflation adjustments described in
2 the preceding paragraph. Section 1-109 is added to make it unnecessary in the future for
3 NCCUSL or individual enacting states to continue to amend the UPC periodically to adjust the
4 dollar amounts for inflation. This new section provides for an automatic adjustment of each of
5 the above dollar amounts annually.

6
7 Subsection (c) is bracketed because some enacting states might not have a state agency
8 that could appropriately be assigned the task of issuing updated amounts..

9
10 * * *

11
12 **SECTION 2-213. WAIVER OF RIGHT TO ELECT AND OF OTHER RIGHTS.**

13 (a) The right of election of a surviving spouse and the rights of the surviving spouse to
14 homestead allowance, exempt property, and family allowance, or any of them, may be waived,
15 wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed
16 by the surviving spouse.

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

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

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

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

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

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

1 **(b) For a premarital or a marital agreement or a waiver to be enforceable against the**
2 **surviving spouse, the enforcing party must show that the surviving spouse’s consent was**
3 **informed and was not obtained by undue influence or duress.**

4 **(c) A rebuttable presumption arises that the requirements of subsection (b) are satisfied,**
5 **shifting the burden of proof to the surviving spouse to show that his or her consent was not**
6 **informed or was obtained by undue influence or duress, if the enforcing party shows that:**

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

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

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

19 **(~~c~~)~~(d)~~ A premarital or a marital agreement or a waiver is unenforceable if it was**
20 **unconscionable when it was executed. An issue of unconscionability of an agreement or a waiver**
21 **is for decision by the court as a matter of law.**

22 **(~~d~~)~~(e)~~ Unless it provides to the contrary, a waiver of “all rights,” or equivalent language,**

1 in the property or estate of a present or prospective spouse or a complete property settlement
2 entered into after or in anticipation of separation or divorce is a waiver of all rights of elective
3 share, homestead allowance, exempt property, and family allowance by each spouse in the
4 property of the other and a renunciation by each of all benefits that would otherwise pass to him
5 [or her] from the other by intestate succession or by virtue of any will executed before the waiver
6 or property settlement.

7 **Comment**

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

This section applies to a premarital or marital agreement or unilateral waiver. A premarital agreement is one that was entered into before marriage. A marital agreement is one that was entered into during marriage. A unilateral waiver can be made before or after the marriage.

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

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

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

10
11 **Signed Writing.** To be enforceable, an agreement or waiver covered by this section must
12 be in writing, and must be signed by the surviving spouse. The agreement or waiver need not be
13 supported by consideration.

14
15 **Burden of Proof.** Because the parties to a premarital or a marital agreement or waiver are
16 in a relationship of trust and confidence, subsection (b) places the burden of proof on the
17 enforcing party (the party seeking to enforce the agreement or waiver against a surviving spouse
18 who claims the elective share or other statutory rights in violation of the agreement or waiver).
19 The enforcing party must show that the surviving spouse’s consent was informed and was not
20 obtained by undue influence or duress. The burden of proof shifts to the surviving spouse to
21 show the opposite, however, if the rebuttable presumption established in subsection (c) of this
22 section applies.

23
24 **Presumption That Surviving Spouse’s Consent Was Informed and Was Not**
25 **Obtained by Undue Influence or Duress.** If the enforcing party shows the existence of the
26 circumstances described in subsection (c) of this section, the enforcing party benefits from a
27 rebuttable presumption that the requirements of subsection (b) of this section are satisfied,
28 shifting the burden of proof to the surviving spouse.

29
30 The rebuttable presumption minimizes the risk of the agreement being found defective in
31 circumstances in which, before the agreement’s execution, the surviving spouse knew the
32 decedent’s financial situation, understood what legal rights or claims he or she might have as the
33 decedent’s surviving spouse, understood how the proposed agreement intended to alter those
34 rights, and had (or had a reasonable opportunity to have) independent legal representation in
35 negotiating the agreement. The rebuttable presumption is thus designed to increase the
36 predictability and enforceability of premarital and marital agreements by facilitating planning
37 that minimizes the risk of the agreement being found defective.

38
39 **Knowledge of the Decedent’s Financial Situation.** The surviving spouse must be
40 shown to have had knowledge of the decedent’s financial situation when the agreement was
41 executed in order for the rebuttable presumption provided in subsection (c) to arise. Such
42 knowledge is crucial to understanding the agreement’s significance, as the assets are themselves
43 the subject of the agreement.

1 To have the benefit of the rebuttable presumption under subsection (c), the enforcing
2 party must show that, before the execution of the agreement or waiver, (i) the surviving spouse
3 knew, at least approximately, the decedent's assets and asset values, income, and liabilities; or
4 (ii) the decedent or his or her representative provided in timely fashion to the surviving spouse a
5 written statement accurately disclosing the decedent's significant assets and asset values, income,
6 and liabilities. In circumstances in which the decedent's property consisted importantly of assets
7 for which an immediately ascertainable market price is not available, such as close corporation
8 shares or interests in real estate, the duty to disclose asset values requires the decedent to supply
9 suitable appraisals.

10
11 If the parties to the agreement were married or lived together for many years and
12 commingled their finances, or had been business partners, they may have had knowledge of each
13 other's financial situation before the contract negotiations were begun, and such a showing will
14 satisfy the requirements of subsection (c)(1) of this section. In the more typical case in which the
15 parties did not have such knowledge, written disclosure in connection with the agreement is
16 required.

17
18 **Representation by Independent Legal Counsel.** Showing that the surviving spouse had
19 knowledge of the decedent's financial situation when the agreement or waiver was executed is
20 essential but not sufficient to give rise to the rebuttable presumption provided in subsection (c) of
21 this section.

22
23 The surviving spouse must also have understood what legal rights or claims that he or she
24 might have as the decedent's surviving spouse and understood how the proposed agreement or
25 waiver intended to alter those rights. Under subsection (c)(2) of this section, that requirement can
26 be satisfied by showing that the surviving spouse was represented by independent legal counsel.
27 An independent counsel can be expected to provide advice that is customized to the client's
28 particular situation, explain the legal rights that would accrue to the client as surviving spouse,
29 and negotiate the terms of the agreement on behalf of the client.

30
31 **Reasonable Opportunity to Obtain Independent Legal Counsel and Clear**
32 **Explanation of the Import of the Agreement or Waiver.** If the surviving spouse was not
33 represented by independent legal counsel, the enforcing party can obtain the benefit of the
34 rebuttable presumption by making two further showings. First, the enforcing party must show
35 that the surviving spouse had a reasonable opportunity to obtain independent legal counsel in a
36 timely fashion. That is, the enforcing party must show that the decedent or the decedent's
37 representative advised the surviving spouse, in timely fashion, to obtain independent legal
38 counsel; and offered to pay for the reasonable costs of the surviving spouse's representation.

39
40 The enforcing party must also show that the agreement stated, in language easily
41 understandable by an adult of ordinary intelligence with no legal training, the nature of any rights
42 or claims otherwise arising at death that were altered by the agreement, and the nature of that
43 alteration.

1 To qualify under subsection (c)(3) of this section, the language must be explicit, concrete,
2 and reasonably complete, but need not address every detail of the agreement’s legal significance.
3 For example, the language need not ordinarily explain the tax consequences of the agreement’s
4 provisions (although such an explanation would be necessary if tax planning was a primary
5 purpose of the agreement and the tax impact on the surviving spouse is both significant and
6 adverse).

7
8 **Unconscionability.** A premarital or a marital agreement or a waiver is unenforceable if it
9 was unconscionable when it was executed. In accordance with general principles of contract law,
10 subsection (d) provides that an issue of unconscionability is for decision by the court as a matter
11 of law.

12
13 **Effect of Premarital Agreement or Waiver on ERISA Benefits.** As amended in 1984
14 by the Retirement Equity Act, ERISA requires each employee benefit plan subject to its
15 provisions to provide that an election of a waiver shall not take effect unless

- 16
17 (i) the spouse of the participant consents in writing to such election,
18 (ii) such election designates a beneficiary (or form of benefits) which may not be changed
19 without spousal consent (or the consent of the spouse expressly permits designation by
20 the participant without any requirement of further consent by the spouse), and
21 (iii) the spouse’s consent acknowledges the effect of such election and is witnessed by a
22 plan representative or a notary public.

23
24 See 29 U.S.C. § 1055(c) (1988); Int. Rev. Code § 417(a).

25
26 In *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir.1992), the court held that a premarital
27 agreement was not an effective waiver of a wife’s claims to spousal death benefits under a
28 qualified profit sharing plan in which the deceased husband was the sole participant. The
29 premarital agreement provided, in part, that “each party hereby waives and releases to the other
30 party and to the other party’s heirs, executor, administrators and assigns any and all rights and
31 causes of action which may arise by reason of the marriage between the parties ... with respect to
32 any property, real or personal, tangible or intangible ... now owned or hereafter acquired by the
33 other party, as fully as though the parties had never married...” The court held that the premarital
34 agreement was not an effective waiver because it “did not designate a beneficiary and did not
35 acknowledge the effect of the waiver as required by ERISA.” 982 F.2d at 781. Although the
36 district court had held that the premarital agreement was also ineffective because the wife was
37 not married to the participant when she signed the agreement, the Second Circuit “reserve[d]
38 judgment on whether the [premarital] agreement might have operated as an effective waiver if its
39 only deficiency were that it had been entered into before marriage.” *Id.* at 781 n. 3. The court did,
40 however, quote Treas. Reg. § 1.401(a)-20 (1991), which specifically states that “an agreement
41 entered into prior to marriage does not satisfy the applicable consent requirements...” *Id.* at 762.
42 Other cases involving the validity of premarital agreements on ERISA benefits include *Callahan*
43 *v. Hutsell, Callahan & Buchino*, 813 F.Supp. 541 (W.D.Ky.1992); *Zinn v. Donaldson Co., Inc.*,

1 799 F.Supp. 69 (D.Minn.1992); Estate of Hopkins, 574 N.E.2d 230 (Ill.App.Ct.1991); see also
2 Howard v. Branham & Baker Coal Co., 1992 U.S.App. LEXIS 16247 (6th Cir.1992).

3

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

5

6

* * *

7

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

9 **HOLOGRAPHIC WILLS.**

10 (a) Except as provided in subsection (b) and in Sections 2-503, 2-506, and 2-513, a will
11 must be:

12 (1) in writing;

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

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

18 or

19 (B) acknowledged by the testator before a notary public [or other
20 individual authorized to take acknowledgments].

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

24 (c) Intent that the document constitute the testator's will can be established by extrinsic
25 evidence, including, for holographic wills, portions of the document that are not in the testator's

1 handwriting. Extrinsic evidence, including portions of the document that are not in the testator's
2 handwriting, can also be used to establish the meaning of a holographic will.

3 **Comment**

4
5 ~~**Scope and Purpose of Revision.** Section 2-502 and pre-1990 Section 2-503 are~~
6 ~~combined to make room for new Section 2-503. Also, a cross reference to new Section 2-503 is~~
7 ~~added, and fairly minor clarifying revisions are made.~~
8

9 **Subsection (a).** Three formalities for execution of a witnessed will are imposed.
10 Subsection (a)(1) requires the will to be in writing. Any reasonably permanent record is
11 sufficient. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. i
12 (1999). A tape-recorded will has been held not to be “in writing.” Estate of Reed, 672 P.2d 829
13 (Wyo. 1983).
14

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

31 Under subsection (a)(3), at least two individuals must sign the will, each of whom
32 witnessed at least one of the following: the signing of the will; the testator's acknowledgment of
33 the signature; or the testator's acknowledgment of the will.
34

35 Signing may be by mark, nickname, or initials, subject to the general rules relating to that
36 which constitutes a “signature.” There is no requirement that the testator “publish” the document
37 as his or her will, or that he or she request the witnesses to sign, or that the witnesses sign in the
38 presence of the testator or of each other. The testator may sign the will outside the presence of
39 the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or
40 that his or her name was signed by another) or that the document is his or her will. An
41 acknowledgment need not be expressly stated, but can be inferred from the testator's conduct.

1 Norton v. Georgia Railroad Bank & Tr. Co., 248 Ga. 847, 285 S.E.2d 910 (1982). The witnesses
2 must sign as witnesses (see, e.g., Mossler v. Johnson, 565 S.W.2d 952 (Tex. Civ.App. 1978)),
3 and must sign within a reasonable time after having witnessed the signing or acknowledgment.
4 There is, however, no requirement that the witnesses sign before the testator’s death; in a given
5 case, the reasonable-time requirement could be satisfied even if the witnesses sign after the
6 testator’s death.

7
8 There is no requirement that the testator’s signature be at the end of the will; thus, if he or
9 she writes his or her name in the body of the will and intends it to be his or her signature, this
10 would satisfy the statute. See Estate of Siegel, 214 N.J.Super. 586, 520 A.2d 798 (App.Div.
11 1987).

12
13 A will that does not meet these requirements may be valid under subsection (b) as a
14 holograph or under Section 2-503.

15
16 **Subsection (b).** This subsection authorizes holographic wills. It enables a testator to write
17 his or her own will in handwriting. There need be no witnesses. The only requirement is that the
18 signature and the material portions of the document be in the testator’s handwriting.

19
20 By requiring only the “material portions of the document” to be in the testator’s
21 handwriting (rather than requiring, as some existing statutes do, that the will be “entirely” in the
22 decedent’s handwriting), a holograph may be valid even though immaterial parts such as date or
23 introductory wording are printed, typed, or stamped.

24
25 A valid holograph can also be executed on a printed will form if the material portions of
26 the document are handwritten. The fact, for example, that the will form contains printed language
27 such as “I give, devise, and bequeath to _____” does not disqualify the document as a
28 holographic will, as long as the testator fills out the remaining portion of the dispositive
29 provision in his or her own hand.

30
31 Under subsection (c), testamentary intent can be shown by extrinsic evidence, including
32 for holographic wills the printed, typed, or stamped portions of the form or document.

33
34 * * *

35
36 **SECTION 2-504. SELF-PROVED WILL.**

37 (a) A will that is executed with attesting witnesses may be simultaneously executed,
38 attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the
39 witnesses, each made before an officer authorized to administer oaths under the laws of the state

1 in which execution occurs and evidenced by the officer's certificate, under official seal, in
2 substantially the following form:

3 * * *

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

9 [subsection continues without change]

10 * * *

11 **Comment**

12
13 A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405, and
14 3-406 without the testimony of any subscribing witness, but otherwise it is treated no differently
15 from a will not self proved. Thus, a self-proved will may be contested (except in regard to
16 ~~signature requirements~~ questions of proper execution), revoked, or amended by a codicil in
17 exactly the same fashion as a will not self proved. The procedural advantage of a self-proved will
18 is limited to formal testacy proceedings because Section 3-303, which deals with informal
19 probate, dispenses with the necessity of testimony of witnesses even though the instrument is not
20 self proved under this section.

21
22 A new subsection (c) is added to counteract an unfortunate judicial interpretation of
23 similar self-proving will provisions in a few states, under which a signature on the self-proving
24 affidavit has been held not to constitute a signature on the will, resulting in invalidity of the will
25 in cases where the testator or witnesses got confused and only signed on the self-proving
26 affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U.
27 L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash.Ct.App.1989).

28
29 * * *

30 **SECTION 2-805. REFORMATION TO CORRECT MISTAKES.** The court may
31 reform the terms of a governing instrument, even if unambiguous, to conform the terms to the

1 transferor's intention if it is proved by clear and convincing evidence that the transferor's intent
2 and the terms of the governing instrument were affected by a mistake of fact or law, whether in
3 expression or inducement.

4 Comment

5
6 *Scope and rationale of new section.* This new section is based on Section 415 of the
7 Uniform Trust Code, which in turn was based on Section 12.1 of the Restatement (Third) of
8 Property: Wills and Other Transfers (2003). Section 12.1 of the Restatement and accompanying
9 Comments are reproduced below. It is not intended that this section and Comments will be
10 reproduced in the final version of the Comment to Section 2-805. In the final version of this
11 Comment, the Reporter intends to merely cite to the Restatement. The Restatement is
12 reproduced below for the benefit of those who are not familiar with that Restatement section.

13 14 Restatement § 12.1. Reforming Donative Documents to Correct Mistakes

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

22 23 Comment:

24
25 *a. Scope note.* This section only addresses reformation as a method of correcting mistakes
26 in donative documents. It does not address the full range of equitable remedies for correcting
27 mistakes in donative transfers. For example, this section does not address situations such as
28 those in which a donor is entitled to restitution or rescission in equity because the donor was
29 induced by a mistake of fact or law to make a gift that the donor would not have made if the
30 donor had known the truth. Nor does this section address denial of probate or partial denial of
31 probate as a possible remedy for correcting mistakes in wills in appropriate circumstances.

32
33 *b. Rationale.* When a donative document is unambiguous, evidence suggesting that the
34 terms of the document vary from intention is inherently suspect but possibly correct. The law
35 deals with situations of inherently suspicious but possibly correct evidence in either of two ways.
36 One is to exclude the evidence altogether, in effect denying a remedy in cases in which the
37 evidence is genuine and persuasive. The other is to consider the evidence, but guard against
38 giving effect to fraudulent or mistaken evidence by imposing an above-normal standard of proof.
39 In choosing between exclusion and high-safeguard allowance of extrinsic evidence, this
40 Restatement adopts the latter. Only high-safeguard allowance of extrinsic evidence achieves the

1 primary objective of giving effect to the donor’s intention. To this end, the full range of direct
2 and circumstantial evidence relevant to the donor’s intention described in § 10.2 may be
3 considered in a reformation action.
4

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

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

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

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

42 The important difference between § 11.2 and this section is the burden of proof.
43 Ambiguity shows that the donative document contains an inadequate expression of the donor’s

1 intention. Here, because there is no ambiguity, clear and convincing evidence is required to
2 establish that the document does not adequately express intention.

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

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

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

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

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

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

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

41
42 The higher standard of proof under this section imposes a heightened sense of
43 responsibility upon the trier of fact. When the case is tried before a judge, the judge should

1 respond by rendering a thorough, reasoned set of findings that deal with the relevant contested
2 facts. A collateral benefit of requiring clear and convincing proof is that an appellate court will
3 rightly feel free to scrutinize the trial court’s work more closely than in the typical
4 preponderance-of-the-evidence review. As a practical matter, this greater scrutiny pressures the
5 trial judge to do an especially careful job.

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

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

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

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

42
43 *h. Limitations on the scope of reformation.* Reformation is a rule governing mistakes in

1 the content of a donative document, in a case in which the donative document does not say what
2 the transferor meant it to say. Accordingly, reformation is not available to correct a failure to
3 prepare and execute a document (Illustration 1). Nor is reformation available to modify a
4 document in order to give effect to the donor's post-execution change of mind (Illustration 2) or
5 to compensate for other changes in circumstances (Illustration 3).

6
7 **Illustrations:**

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

11
12 Because G did not reduce his testamentary intent to writing and execute it as
13 required by the Statute of Wills, X cannot invoke the reformation doctrine to implement
14 G's true intent. G's mistake did not refer to specific terms in a donative document,
15 because G never executed a document. There is no document to reform.

16
17 2. G validly executed a will that devised his estate to his sister, A. After
18 execution, G formed an intent to alter the disposition in favor of A's daughter, X, in the
19 mistaken belief that he could substitute his new intent by communicating it to X orally.

20
21 G's oral communication to X does not support a reformation remedy. Although a
22 donative document exists that could be reformed by substituting "X" for "A," the remedy
23 does not lie because G's will was not the product of mistake. The will when executed
24 stated G's intent accurately. G's mistake was his subsequent failure to execute a codicil
25 or a new will to carry out his new intent. This is a mistake of the same sort that G made
26 in Illustration 1 in not making a valid will in the first place.

27
28 3. G's will devised his government bonds to his daughter, A, and the residue of
29 his estate to a friend. Evidence shows that the bonds are worth only half of what they
30 were worth at the time of execution of the will and that G would probably have left A
31 more had he known that the bonds would depreciate in value.

32
33 This evidence does not support a reformation remedy. G's mistake did not relate
34 to facts that existed when the will was executed.

35
36 *i. Mistake in expression or inducement.* If proved by clear and convincing evidence, a
37 mistake justifies an equitable remedy, whether the mistake is one of expression or inducement.
38 A mistake of expression arises when a donative document includes a term that misstates the
39 donor's intention (Illustration 4), fails to include a term that was intended to be included
40 (Illustration 5), or includes a term that was not intended to be included (Illustration 6). A mistake
41 in the inducement arises when a donative document includes a term that was intended to be
42 included or fails to include a term that was not intended to be included, but the intention to
43 include or not to include the term was the product of a mistake of fact or law (Illustrations 7 and

1 8).

2
3 **Illustrations:**
4

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

8
9 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
10 will is reformed to substitute “\$10,000” for “\$1,000.”
11

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

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

20
21 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
22 trust document is reformed to insert the mistakenly omitted power to revoke.
23

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

30
31 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
32 will is reformed to delete the devise to A.
33

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

38
39 Extrinsic evidence shows that G intended to create a revocable trust and did not
40 understand the need for a revocation clause.

41
42 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
43 trust document is reformed to insert a power to revoke.

1 8. G created an inter-vivos trust of the bulk of his assets. The trust document did
2 not contain a clause reserving to G a power to revoke the trust. Controlling law provides
3 that a trust is irrevocable in the absence of an expressly retained power to revoke. After
4 G signed the document, G sought to revoke the trust.
5

6 Extrinsic evidence shows that G established the trust when he was in line for a
7 high-level position in the federal government. From the press reports he had read, he
8 mistakenly believed that he had to place all of his assets into an irrevocable trust in order
9 to comply with federal policies on public service conflicts of interest. G liquidated much
10 of his property, and placed the bulk of his assets into the irrevocable trust. Subsequently,
11 G learned that federal policies did not require him to transfer his assets to an irrevocable
12 trust.
13

14 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the
15 trust document is reformed to insert a power to revoke.
16

17 *j. Particularity of proof.* In order to support an order of reformation or the imposition of a
18 constructive trust, the petitioner must prove, by clear and convincing evidence, both (1) that a
19 mistake of fact or law affected specific terms of the document and (2) what the donor’s true
20 intention was. Both elements must be proved with particularity. For example, a claim that “if
21 only my aunt had known how much I loved her, she would have left me more” lacks sufficient
22 particularity to support a petition for remedy. Proof that the donor instructed his or her attorney
23 to “give me an estate plan that incurs the lowest possible tax liability” lacks sufficient
24 particularity to support a reformation remedy.
25

26 Notice, however, that the requirement of particularity does not require proof that the
27 donor personally made the mistake nor proof that the donor formulated the exact language
28 needed to carry out his or her intention. A remedy will lie if a mistake of the donor’s advisor or
29 drafting agent has affected specific terms of the document by failing properly to formulate the
30 language necessary to carry out the donor’s intention. Suppose, for example, that the petitioner
31 proves by clear and convincing evidence that the testator instructed his lawyer to draft a will that
32 devised certain property to child A. A remedy will lie if the lawyer drafted a will that
33 misdescribed the intended property or the intended devisee. The petitioner need not prove that
34 the testator formulated the exact language necessary to carry out his intention, which the
35 testator’s lawyer mistakenly failed to include. The testator properly relies upon the lawyer to draft
36 the language necessary to carry out his intention.
37

38 *k. Statutory rules of construction.* Just as the requirement of particularity discussed in
39 Comment *j* does not require the petitioner to prove that the donor formulated the exact language
40 necessary to carry out intention, neither does the petitioner need to prove that the donor expressly
41 intended to overcome a statutory rule of construction. Statutes often provide that a particular rule
42 of construction prevails unless the donative document, another specified document, or one of a
43 list of specified documents expressly provides otherwise. See § 11.3. Such rules of construction

1 purport to govern when the document is silent. If the elements of this section are satisfied by
2 clear and convincing evidence, however, a petition for reformation can be sustained to insert
3 language into the document that rebuts the rule of construction. Suppose, for example, that the
4 petitioner proves by clear and convincing evidence that the donor instructed his or her lawyer to
5 draft a will that devised certain property to child, A, but not to A's children if A predeceased the
6 donor leaving children who survived the donor. A remedy will lie if the lawyer drafted a will
7 that failed to include language necessary to defeat the applicable antilapse statute. As reformed
8 under this section, the donor's will defeats the antilapse statute because it includes language
9 expressly contradicting that statutory rule of construction. As stated in Comment j, the petitioner
10 need not prove that the donor formulated the exact language necessary to carry out his or her
11 intention and that the donor's lawyer, by mistake, failed to include the donor's language; the
12 donor properly relies upon the lawyer to draft the language necessary to carry out his or her
13 intention.

14
15 *l. Donor's signature after having read document does not bar remedy.* Proof that the
16 donor read the document or had the opportunity to read the document before signing it does not
17 preclude an order of reformation or the imposition of a constructive trust. The English Law
18 Reform Committee, in recommending the adoption of a reformation doctrine for wills, stated
19 well the rationale for this position:

20
21 We have also considered whether any special significance ought to be given to
22 cases in which the will has been read over to the testator, perhaps with explanation, and
23 expressly approved by him before execution. In our view it should not. Some testators
24 are inattentive, some find it difficult to understand what their solicitors say and do not
25 like to confess it, and some make little or no attempt to understand. As long as they are
26 assured that the words used carry out their instructions, they are content. Others may
27 follow every word with meticulous attention. It is impossible to generalise, and our view
28 is that reading over is one of the many factors to which the court should pay attention, but
29 that it should have no conclusive effect.

30
31 Law Reform Committee, Nineteenth Report: Interpretation of Wills, Cmnd. No. 5301, at 12
32 (1973).

33
34 *m. Defenses: change of position by recipient; bona fide purchaser; laches; etc.* All
35 defenses generally available in equity to a suit to reform a donative document or to impose a
36 constructive trust upon the recipient of property distributed under a donative document are
37 available under this section. For example, a reformation order is ineffective and the imposition
38 of a constructive trust does not lie against a person regarding property that he or she received
39 without giving value therefor if, after receiving the property and without knowledge of the
40 circumstances justifying reformation under this section, the recipient changed position in a way
41 that makes it inequitable to require the recipient to return that property or its value. See
42 Restatement, Restitution §§ 69, 142. See also Restatement Second, Trusts §§ 292, 333;
43 Restatement Second, Contracts § 155 and Comment f.

1 A reformation order is ineffective and the imposition of a constructive trust does not lie
2 against a person regarding property that he or she has received if the recipient gave value therefor
3 without knowledge of the circumstances justifying reformation under this section. See
4 Restatement, Restitution §§ 13, 123, 141, 173, 174. See also Restatement Second, Trusts §§
5 283-320; Restatement Second, Contracts § 155 and Comment f.

6
7 A person otherwise entitled to reformation or to a constructive trust is barred from
8 recovery if the complainant has failed to bring, or, having brought, has failed to prosecute a suit
9 for so long a time and under such circumstances that it would be inequitable to permit the
10 complainant to prosecute the suit. A cause of action may also be barred by lapse of time because
11 of an applicable statute of limitations. See Restatement, Restitution § 148.

12
13 *n. Contractual transfers.* If a will, trust, beneficiary designation, or similar document is
14 made pursuant to a contract, such as a premarital or postmarital agreement, a divorce settlement,
15 or a will contract, ambiguities in the implementing document of transfer are presumptively
16 resolved in accordance with the transferor's contractual obligation. See § 11.2, Comments g and
17 m, § 11.3, Comment k. If, however, the implementing document of transfer is unambiguous and
18 clearly deviates from the transferor's contractual obligation, the remedy would normally lie in a
19 breach of contract action against the transferor or the transferor's estate. On the other hand, if
20 clear and convincing evidence establishes that the deviation was the product of mistake, the rule
21 of this section supplies an alternative means of curing the breach by reforming the document of
22 transfer to accord with the contract.

23
24 * * *

25
26 **SECTION 2-806. MODIFICATION TO ACHIEVE TRANSFEROR'S TAX**

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

30 **Comment**

31
32 *Scope and rationale of new section.* This new section is based on Section 416 of the
33 Uniform Trust Code, which in turn was based on Section 12.2 of the Restatement (Third) of
34 Property: Wills and Other Transfers (2003). Section 12.2 of the Restatement and accompanying
35 Comments are reproduced below. It is not intended that this section and Comments will be
36 reproduced in the final version of the Comment to Section 2-806. In the final version of this
37 Comment, the Reporter intends to merely cite to the Restatement. The Restatement is
38 reproduced below for the benefit of those who are not familiar with that Restatement section.

1 Restatement § 12.2. Modifying Donative Documents to Achieve Donor's Tax
2 Objectives

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

5
6 **Comment:**

7
8 a. *Scope note.* This section authorizes modification of a donative document to achieve
9 the donor's tax objectives, to the extent that the proposed modification does not violate the
10 donor's probable intention. The term modification rather than reformation is used in this section
11 to distinguish the situation covered here from the situation, covered by § 12.1, in which the
12 donative document fails to express the donor's original, particularized intention.

13
14 b. *Rationale.* This section is based on probable intention (see Comment f). The rationale
15 for modifying a donative document is that the donor would have desired the modification to be
16 made if he or she had realized that the desired tax objectives would not be achieved. A similar
17 rationale underlies the cy pres doctrine for charitable trusts, the deviation doctrine for private
18 trusts, and the special-purpose reformation doctrine for curing perpetuity violations.

19
20 c. *Establishing the donor's tax objectives.* Modification under this section requires that
21 the donor's tax objectives be established by a preponderance of the evidence. The donor's tax
22 objectives can be established by the express terms of the donative document, by inference from
23 the donative document, or by extrinsic evidence. See § 10.2. The donor's tax objectives can be
24 specific, such as an objective to qualify a disposition for the federal estate tax charitable
25 deduction; or general, such as an objective to minimize taxes.

26
27 d. *Achieving the donor's tax objectives.* Achieving the donor's tax objectives by
28 modifying a donative document is straightforward if the donor's tax objectives concern state
29 taxes, unless controlling state law expressly disallows the governing effect of the modification
30 for state tax purposes.

31
32 Achieving the donor's tax objectives is more complicated if the donor's tax objectives
33 concern federal taxes, as they often do. Federal law controls the federal tax consequences of a
34 transaction. From time to time, however, federal law expressly recognizes specified
35 modifications of a donative document as controlling for certain federal tax purposes. Current
36 examples of federal statutory recognition include modifying split-interest charitable trusts in
37 certain cases to qualify the value of the charitable interest for the federal income, gift, or estate
38 tax charitable deduction, modifying trusts for noncitizen spouses in order to qualify them as
39 qualified domestic trusts, and dividing trusts for purposes of the federal generation-skipping
40 transfer tax. The primary purpose of this section is to authorize any modification that is clearly
41 effective under federal law if the donor's tax objectives relate to federal taxes, or that is clearly
42 effective under state law if the donor's tax objectives relate to state taxes, subject to the
43 requirement in either case that the modification not violate the donor's probable intention.

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

7
8 *e. Failure to achieve tax objectives need not be related to post-execution change in tax*
9 *law.* Although failure to achieve the donor’s tax objectives is often due to a change in the tax
10 law occurring after the document was executed, this section is not restricted to that situation.
11 Federal law sometimes accepts modification in situations in which the tax law did not change
12 after execution. It would be too restrictive, therefore, to limit this section to post-execution
13 changes in tax law.

14
15 *f. Modification not to violate the donor’s probable intention.* To be authorized under this
16 section, the proposed modification must not violate the donor’s probable intention. In many
17 cases, this requirement is easily satisfied. The modification necessary to achieve the donor’s tax
18 objectives may consist merely of an order to divide a trust into two or more trusts, leaving the
19 combined interests of each beneficiary unaffected. Indeed, for some tax purposes, federal law
20 may accept a modification only if it does not change the quality, value, or timing of the interests
21 of the beneficiaries.

22
23 In other situations, the modification necessary to achieve the donor’s tax objectives may
24 require an alteration of beneficial interests. Such an alteration is acceptable so long as it does not
25 violate the donor’s probable intention. In determining the donor’s probable intention, the
26 donor’s non-tax as well as tax objectives are to be considered. The greater the proposed
27 alteration, the more rigorous the court should be in measuring the requested modification against
28 the donor’s probable intention. One measure of the donor’s probable intention is the donor’s
29 general dispositive plan. Even if it is questionable whether the modification would be consistent
30 with the donor’s general dispositive plan, however, the court can still find that it does not violate
31 the donor’s probable intention if the detrimentally affected beneficiaries consent to the proposed
32 modification. Such consent makes it more likely that the donor would have approved of the
33 modification, whether or not the modification alters the donor’s general dispositive plan.

34
35 *g. Time when modification becomes effective.* Unlike a court-ordered reformation under §
36 12.1, a court-ordered modification under this section does not necessarily relate back to the date
37 of execution. This is because modification, unlike reformation (see § 12.1), does not give effect
38 to original, particularized intention but to probable intention — to what the donor’s intention
39 would probably have been had the donor known that his or her objectives could not be achieved
40 under the donative document as formulated. Under this section, a court-ordered modification
41 takes effect whenever necessary to achieve the purpose for which the modification is ordered.

42
43 * * *

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

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

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

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

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

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

22 (3) If the will is witnessed pursuant to Section 2-502(a)(2)(A), but not notarized or self-

1 proved, the testimony of at least one of the attesting witnesses, if within the state, competent and
2 able to testify, is required. Due execution may be proved by other evidence. An attestation clause
3 that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in
4 the clause occurred.

5 **Comment**

6 [Comment to be further revised if above amendments are approved]
7

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

15

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