

DRAFT UPC AMENDMENTS OF UPC INTESTACY PROVISIONS

TO: Drafting Committee to Amend Intestacy Provisions of the Uniform Probate Code

FROM: Larry Waggoner, Reporter

SUBJECT: Draft UPC Amendments for Discussion at the October 2006 Meeting

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EXECUTIVE SUMMARY

Background. Article II of the Uniform Probate Code was extensively revised in the early 1990s. When those provisions were revised, it was understood that the UPC sections dealing with the parent-child relationship were in need of further revision, but time constraints prevented a thorough consideration of what exactly was needed. Since then, the problem of children of assisted reproduction, especially posthumous conception, has become an issue that has come to the fore.

Scope of Project. Assisted reproduction and posthumous conception are not the only topics that are to be considered. The following table lists the specific sections of the UPC that are in need of revision or are to be added, and the tentative action needed. A separate handout sets forth all of the current UPC sections on intestacy (Article II, Part 1), with those sections to be revised in boldface.

TABLE SHOWING SECTIONS TO BE REVISED OR ADDED

UPC Section	Needed Action (Tentative)
2-103 (Share of Heirs Other than the Surviving Spouse)	Perhaps revise to qualify certain unadopted stepchildren to inherit if the decedent is not survived by a surviving spouse, descendants, parents, or descendants of parents.
2-104 (Requirement that Heir Survive Decedent by 120 Hours)	Revise so that it clearly applies to an individual born before the decedent's death.
2-107 (Kindred of Half Blood)	Perhaps revise to exclude half blood relatives who are unknown or did not grow up in household of same biological parent.
2-108 (Afterborn Heirs)	Revise so that it clearly applies to an individual in gestation at the decedent's death.
2-113 (Individual Related to Decedent Through Two Lines)	Revise so that it applies to an individual who is related to the decedent in two different categories rather than in two different lines (e.g., an adopted grandchild would become a child).
2-114 (Parent and Child Relationship)	2-114 is a confusing section that inadequately addresses different questions of status. The better course is to replace this section with a series of new sections, each one cleanly targeted to a different category, as follows:
	New 2-114 (Parent Barred from Inheriting in Certain Circumstances). This new section would bar a parent from inheriting if parental rights terminated, if parent abandoned child, etc.

	New 2-115 (Marital and Nonmarital Children). This new section would provide that nonmarital child inherits same as marital child (current 2-114 already so provides, so this is not a change in substance).
	New 2-116 (Adopted Individual). This new section would provide that adopted individual inherits from adopting parent(s) and adopting family, and also from biological parent in limited circumstances, such as adoption by stepparent, members of one side of family after death or incapacity of parent, by nominated guardian, etc. (similar to but more comprehensive than current 2-114).
	New 2-117 (When Unadopted Stepchild Treated as Adopted). This new section would provide that an unadopted stepchild is treated as adopted if the stepparent attempted to adopt the child and if certain other requirements are satisfied.
	New 2-118 (Child of Assisted Reproduction). This new section would provide that a child of assisted reproduction inherits from parent who consented in a record to be parent of child or who functioned as parent of child (similar to but less restrictive than the requirement of UPA 707); if child conceived posthumously, impose three year limit on birth or conception.
	New 2-119 (Child Born to a Surrogate or Gestational Mother). This new section would provide that a child born to a gestational (surrogate) mother is child of intended parent (consistent with UPA).
	Add New Bracketed section that would require any entity receiving human genetic material that could be used for conception to provide consent form that would satisfy requirements of new 2-118. (This new section, copied substantially from new California statute, is extremely important because the JEB-UTEA's Director of Research collected forms currently used by fertility clinics, and none of the forms would satisfy new 2-118 or UPA 707.)
	New 3-916 would authorize the decedent's personal representative to delay distribution of decedent's estate upon notice that decedent's surviving spouse [or legally recognized unmarried partner] intends to use genetic material of decedent for pregnancy, but limit the possible delay in distribution to cases in which the posthumous birth of the child would make a difference in the distribution of the decedent's estate.

2-705 (Class Gifts Construed to Accord with Intestate Succession)	Revise to deal with status of children of assisted reproduction for purposes of a class gift; subsection codifying class-closing rules also to be added.
UPA 707 (Parental Status of Deceased Individual)	A conforming amendment would align this section with the UPC provisions.

CURRENT UPC SECTIONS TO BE AMENDED OR REPLACED

§ 2-103. Share of Heirs other than Surviving Spouse. Any part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

- (1) to the decedent's descendants by representation;
- (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- (3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
- (4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

§ 2-104. Requirement that Heir Survive Decedent for 120 Hours. An individual who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If it is not established by clear and convincing evidence that an individual who would otherwise be an heir survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state under Section 2-105.

§ 2-107. Kindred of Half Blood. Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

§ 2-108. Afterborn Heirs. An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.

§ 2-113. Individuals Related to Decedent Through Two Lines. An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

§ 2-114. Parent and Child Relationship.

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

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

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

§ 2-705. Class Gifts Construed to Accord With Intestate Succession.

(a) Adopted individuals and individuals born out of wedlock, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. Terms of relationship that do not differentiate relationships by blood from those by affinity, such as "uncles," "aunts," "nieces," or "nephews," are construed to exclude relatives by affinity. Terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as "brothers," "sisters," "nieces," or "nephews," are construed to include both types of relationships.

(b) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the household of that natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse.

(c) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.

UNDERLINE/STRIKEOUT VERSION

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

- (1) to the decedent's descendants by representation;
 - (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or, subject to Section 2-107, either of them by representation;

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

(5) if there is no surviving descendant, parent, descendant of a parent, grandparent, or descendant
a grandparent, to the decedent's stepchildren who, while minors, shared a common household
with the decedent and the descendants of such deceased stepchildren by representation.

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

2 **AFTERBORN HEIRS.**

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

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

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

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

20

1 **§ 2-107. KINDRED RELATIVES OF HALF BLOOD.** Relatives of the half blood inherit the
2 same share they would inherit if they were of the whole blood.
3

4 **NOTE TO DRAFTING COMMITTEE:** Consider the following example: A and B were married
5 and had two children, X and Y. A and B got divorced and B was awarded custody of X and Y. B married C.
6 A married D. B and C had a child, Z. A and D had a child, V.

7 X died intestate, survived by V, Y, and Z. A, B, C, and D predeceased X. Under current UPC §§ 2-103
8 and -107, X's heirs are V, Y, and Z. If C had adopted X and Y, however, current UPC § 2-114 (and proposed
9 § 2-116(d)(2), infra page 16), V would not take.

10 [space to draw chart]
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12
13
14

15 The problem is whether V should inherit from X. Why should whether C adopted X and Y make a
16 difference?

17 Ralph C. Brashier, Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law:
18 Reshaping Half-blood Statutes to Reflect the Evolving Family, 58 SMU L. Rev. 137 (2005), looks at cases
19 like the above and other cases, and argues that 2-107 should be revised.

20 Note that the UPC 2-103(3), supra page 2, would also have to be amended if we decide to change our
21 rule on half-blood relatives. Section 2-103(3) provides that intestate rights go "to the descendants of the
22 decedent's parents *or either of them* by representation" if the intestate is not survived by a spouse,
23 descendant, or parent.

24 Here is an excerpt from the Brashier article (footnotes omitted):
25

26 What kinds of objective evidence would indicate that a decedent considered his half-blood sibling
27 to be a member of his family who should inherit from his intestate estate? Some of the considerations
28 that scholars have proposed for evaluating committed unmarried partner relationships could be
29 instructive in the sibling context. Cohabitation of adult siblings at the time one dies is objective evidence
30 that the two considered themselves family. If they pooled their financial resources in bank accounts, real
31 estate, or other investments, this too is some evidence of the survivor's status as a "true" sibling. On the
32 other hand, clear evidence that the decedent was unaware of a half-blood sibling's existence certainly
33 indicates that no close family relationship existed between the two. Of course, drawing conclusions from
34 these examples is simple, because they lie at the extremes.

35 The harder cases are those in the middle, in which the decedent knew his half-blood siblings but
36 failed to leave unequivocal evidence of his ties to them. One objective inquiry that a probate court might
37 consider in determining whether the decedent would want such half-blood siblings (or their issue) as
38 heirs is whether the decedent had a "shared upbringing" with the half-blood siblings during a significant
39 part of her childhood. The "shared upbringing" inquiry would often exclude the half-blood sibling if a
40 wide age gap exists between the decedent and him, because either the decedent or he will be grown and
41 out of the household before the other is born. Yet if shared upbringing fosters sibling relationships, then
42 perhaps the typical decedent would not want the much younger or much older half-blood sibling to share

1 his estate.

2 Legislatures would have to define "shared upbringing" carefully to use that criterion as an objective
3 standard. Presumably two half-blood siblings who shared a principal residence with the common parent
4 would have a shared upbringing. To further refine the determination by objective parameters, the
5 legislature could place time considerations in the definition. For example, "shared upbringing" could
6 provide that the half-blood sibling is to be treated as a whole-blood sibling if the decedent and the
7 half-blood sibling are reared in the same household for at least forty-five days of the year in at least three
8 years of the decedent's childhood. Thus if two half-blood siblings spent at least three school years
9 together in the home of their mother, they would have a shared upbringing. If one of the children also
10 spent most of a summer, several long holidays, or numerous weekends with his father and paternal
11 half-blood siblings, that child could also have a shared upbringing with his paternal half-blood siblings.
12 Nonetheless, strict adherence to these requirements could unfairly exclude some half-blood siblings
13 whom the decedent considered family. To account for such problems, state legislatures could include
14 limited judicial discretion in the statutory scheme as a safety valve. For example, the statute could afford
15 those half-blood siblings who cannot satisfy the shared upbringing test the alternative of proving
16 "significant family interaction" with the decedent.

17 Although a limited objective approach to half-blood relationships might provide better results than
18 existing pure objective probate schemes, convincing state legislatures to take this path would probably
19 be difficult. To date, even when states have extended probate's default rules to acknowledge society's
20 broadening view of family, they have continued to rely primarily on cut-and-dried rules. For example,
21 states that have extended the default rules of intestate succession to unmarried surviving partners have
22 generally placed severe restrictions on eligibility, requiring a public filing or registration to verify the
23 existence of the relationship. In light of states' dogged adherence to fixed, box-like rules, perhaps our
24 best hope concerning half-bloods and inheritance rules is that more states will begin to provide pure
25 objective solutions that reflect the need for compromise.

26 Professor Brashier suggests the following statute:

27 (1) A relative of the half-blood does not inherit from the decedent unless the relative proves,
28 (a) by a preponderance of the evidence, the existence of a shared upbringing
29 (i) between the half-blood relative and the decedent; or
30 (ii) between a predeceased ancestor of the half-blood relative and the decedent; or
31 (iii) between a predeceased ancestor of the half-blood relative and a predeceased ancestor of the
32 decedent; or,

33 (b) by clear and convincing evidence, the existence of significant interaction between the half-blood
34 relative and the decedent demonstrating that the decedent considered the half-blood relative to be a member
35 of the decedent's family.

36 (2) "Shared upbringing" means cohabitation with the decedent or the decedent's predeceased ancestor
37 for at least forty-five days in each of three years during the minority of the decedent or the decedent's
38 predeceased ancestor. The forty-five days of cohabitation may be satisfied by continuous cohabitation or by
39 combining multiple shorter periods of cohabitation including holidays, weekends, and overnight stays.

40 (3) "Significant interaction" means acts or events sufficient to indicate that the decedent acknowledged
41 and considered the half-blood claimant as family.

42 (4) "Ancestor of the half-blood relative" means lineal ancestors of the claimant whose relationship with
43 the decedent or the decedent's predeceased ancestors was also of the half-blood.

44 (5) "Ancestor of the decedent" means lineal ancestors of the decedent whose relationship with the
45 claimant or the predeceased ancestors of the claimant was also of the half-blood.

(6) A relative of the half-blood who satisfies the requirements of paragraph (1) inherits as though he or she were a relative of the whole-blood.

Comment

The current majority approach to half-bloods and inheritance includes half-blood relatives without inquiry. This draft statute includes half-blood relatives who satisfy either (a) the minimal requirements for "shared upbringing" or (b) the more demanding requirements for establishing a family connection directly with the decedent by "significant interaction." The statute would exclude the claims of previously unknown half-blood survivors such as those in *In re Griswold*, 24 P.3d 1191, 1192 (Cal. 2001) (recognizing a right of half-siblings to inherit from an intestate decedent and thus reducing the inheritance of his wife, even though the decedent had never met half-blood siblings, was apparently unaware of their existence, and the half-siblings were unaware of the decedent until after his death).

To further limit the probate determination to objective facts, a state legislature may specify acts or events that indicate "significant interaction." These might include, for example, cohabitation, intermingling of finances, frequent visits and phone calls, the regular exchange of holiday or birthday cards and gifts, and so forth. Alternatively, a legislature troubled by this prong of the statute may simply limit the inheritance rights of half-bloods to scenarios involving a shared upbringing. Paragraph (1)(a) applies primarily to the claimant who is a half-sibling of the decedent. It is not limited to that scenario, however, and thus other half-blood relatives who had a shared upbringing with the decedent could be entitled to inherit under this paragraph. Paragraph (1)(b) applies primarily when the claimant's predeceased ancestor was the half-sibling of the decedent. Paragraph (1)(c) permits inheritance by distant half-blood relations when the family half-blood division began before the generation in which the decedent was born. For example, if the decedent's predeceased mother and the claimant's predeceased grandmother were half-sisters who had a shared upbringing, the claimant could satisfy the statute. Legislatures troubled by the potential tracing problems presented when the half-blood relationship originated with an ancestor of the decedent may simply limit the inheritance rights of surviving half-bloods to those in which the claimants or their ancestors had a shared upbringing with the decedent.

Although the term "lineal" before "ancestor" in the definition of ancestors in paragraphs (4) and (5) may seem obvious or even redundant, its placement prevents a claimant from asserting the occasionally-encountered usage in which an ancestor refers to collaterals of preceding generations. See, e.g., Black's Law Dictionary 84 (6th ed. 1990). The seventh edition of Black's makes it perfectly clear that using the term ascendant (or ancestor) to refer to collateral forbears is "loose" usage. Black's Law Dictionary 108 (7th ed. 1999).

"Ancestor of the half-blood relative" and "ancestor of the decedent" are further defined to indicate that tracing the relationship in question cannot go beyond the generation in which the half-blood family division first occurred. Since all half-blood relationships begin at the sibling level, tracing back to the source of the half-blood split must end there.

NOTE TO DRAFTING COMMITTEE: One problem that I see in the above statute is that, in the example on page 9, Z might not inherit from X if X had reached adulthood when Z was born. Instead of “shared a common upbringing,” would a term like “brought up in the household of the same genetic parent” or something like that produce a better result?

1 **NOTE TO DRAFTING COMMITTEE: Section 2-108 is not deleted, but has been moved to**
2 **section 2-104(b).**

3
4 **SECTION 2-108. [RESERVED.] AFTERBORN HEIRS.** An individual in gestation at a particular
5 time is treated as living at that time death if the individual lives 120 hours or more after birth.
6
7

8 **SECTION 2-113. INDIVIDUALS RELATED TO DECEDENT THROUGH TWO OR MORE**
9 **LINES OR CATEGORIES OF RELATIONSHIP.** An individual who is related to the decedent
10 through two or more lines or categories of relationship is entitled to only a single share based on the
11 relationship that would entitle the individual to the larger share.
12
13

1 [Current Section 2-114 (following) is deleted]

2 **§ 2-114. PARENT AND CHILD RELATIONSHIP.**

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

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

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

14

1 **Current Section 2-114 (preceding page) is replaced by the following new sections:**

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

3 **CIRCUMSTANCES.** A parent who has refused to acknowledge or has abandoned his or her child,

4 or a person whose parental rights have been terminated, is barred from inheriting from or through

5 the child. For purposes of intestate succession by, from, or through the deceased child, a parent who

6 is barred from inheriting under this section is treated as if he [or she] predeceased the child.

7 **NOTE TO DRAFTING COMMITTEE:** A recent law review article argues that barring
8 inheritance for termination of parental rights is too broad. I have not read the full article, but the
9 author argues for granting the judge discretion whether to bar inheritance. The article is Richard Lewis
10 Brown, Undeserving Heirs?--the Case of the "Terminated" Parent, University of Richmond Law Review
11 (January, 2006).

12 I doubt that we would want to inject judicial discretion into the UPC intestacy statute, but perhaps we should
13 distinguish among the various grounds for terminating parental rights. For example, suppose the mother and
14 child were involved in an automobile accident, and both survived but the mother was so physically disabled
15 that she could not fulfill parental duties. I'm not sure whether that would be grounds for terminating her
16 parental rights, but if so, she probably should not be barred from inheriting. It might be different if she were
17 drunk and her drunken condition were the cause of the accident.

18

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

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

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

9

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

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

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

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

7 (d) An individual who is adopted by the spouse [or by the legally recognized domestic partner]
8 of either genetic parent continues to be the child of:

9 (1) that genetic parent; and

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

12 (e) An individual who, after the death or incapacity of, or after the abandonment or ceasing or
13 failure to discharge parental responsibilities or functions by, either genetic parent, is adopted by any
14 of the following continues to be the child of both genetic parents:

15 (1) a relative of either genetic parent or the spouse or surviving spouse of such a relative;

16 (2) an individual nominated by either genetic parent to be the child's guardian; or

17 (3) [an individual who is acquainted with either genetic parent]

18 **[NOTE TO DRAFTING COMMITTEE:** We need a better formulation here, such as maintained
19 a continuing family relationship or something like that, and also should the child be the child of both
20 genetic parents or of the genetic parent of a family in which the continguing family relationship
21 continues? On this latter point, see how Restatement § 14.6 treats this situation, *infra* page 27.]
22

23 (f) If a child was adopted more than once, the term "genetic parent" in subsections (d) and (e)
24 includes a "previous adoptive parent."

1 **SECTION 2-117. PARENT AND CHILD RELATIONSHIP; WHEN UNADOPTED**

2 **STEPCHILD TREATED AS ADOPTED.**

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

5 (b) A stepchild is treated as a child who has been adopted by his [or her] stepparent if:

6 (1) the relationship began during the child's minority and continued throughout the lifetime
7 of the stepparent; and

8 (2) it is established by clear and convincing evidence that the stepparent would, during the
9 child's minority, have adopted the child but for a legal barrier.

10 (c) This section does not affect or limit application of the judicial doctrine of equitable adoption.

11

12

1 **SECTION 2-118. PARENT AND CHILD RELATIONSHIP; CHILD OF ASSISTED**
2 **REPRODUCTION.**

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

5 (b) In this section:

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

8 (A) intrauterine insemination;

9 (B) donation of eggs;

10 (C) donation of embryos;

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

12 (E) intracytoplasmic sperm injection.

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

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

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

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

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

22 (c) A child who is conceived by means of assisted reproduction is not the child of a [third-party]

1 donor.

2 (d) Except as provided in subsections (e) and (f), a child who is conceived by means of assisted
3 reproduction is a child of:

4 (1) a person who consented in a record to be the child's parent; or
5 (2) in the absence of consent in a record to be the child's parent, a person who functioned as
6 the child's parent or was prevented from doing so by an event such as death or incapacity. If the
7 child is produced for a married person [or for a person in a legally recognized domestic
8 partnership], and the couple are not separated and no divorce or annulment proceedings or
9 dissolution are pending, it is presumed that both spouses [or partners] consented to be the child's
10 parent.

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

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

18 **[NOTE TO DRAFTING COMMITTEE: Do we want to require the storage facility and/or
19 other partner to be notified of the withdrawal of consent ??]**

20
21 (g) If the intestate decedent is the child's deceased parent, the decedent's child produced
22 posthumously by assisted reproduction is treated as in gestation at the decedent's death for purposes
23 of Section 2-104(b), if the child was [born] [conceived] within three years after the decedent's death.

1 If the intestate decedent is someone other than the child's parent, a child produced posthumously by
2 assisted reproduction is in gestation on the date of conception for purposes of Section 2-104(b).

3 **NOTE TO DRAFTING COMMITTEE:** Three years is chosen because that is the period allowed
4 by Section 3-1006 for an after-discovered heir to recover property from any distributee.

5
6 (h) A child of assisted reproduction is a marital child if the child is produced for a married
7 couple, before or after the decedent-spouse's death.

8 **NOTE TO DRAFTING COMMITTEE:** Do we want to require that a child must be produced by
9 genetic material of the decedent deposited before death? I can think of cases in which this restriction
10 would be too restrictive, such as where husband and wife arranged for the wife to be inseminated
11 by a third party donor, but the husband dies before the procedure is commenced or is successful. Or,
12 arranged for a surrogate mother, but the decedent dies before the surrogate mother become pregnant.
13 Other cases should also come to mind, such as cases in which a widow arranges to have her deceased
14 husband's sperm "harvested" after death so she can become pregnant with his child.

15
16 **COMMENT**

17 To produce a baby by assisted reproduction, you need sperm, eggs, and a womb. [To be
18 continued.]

1 **SECTION 2-119. PARENT AND CHILD RELATIONSHIP; CHILD BORN TO A**
2 **GESTATIONAL OR SURROGATE MOTHER.**

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

5 (b) In this section:

6 (1) "gestational or surrogate mother" means a woman who gives birth to a child under a
7 [valid] gestational or surrogacy agreement [under the Uniform Parentage Act].

8 (2) "intended parent" is an individual who entered into an agreement providing that he [or
9 she] will be the parent of a child born to a gestational or surrogate mother by means of assisted
10 reproduction, whether or not he [or she] has a genetic relationship with the child.

11 (c) A child who is born by means of assisted reproduction to a gestational or surrogate mother
12 is the child of an intended parent and not of the gestational or surrogate mother for purposes of
13 intestate succession by, through, or from an intended parent.

14

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

3 The personal representative [shall] [may] delay distribution of the decedent's estate if:
4 (a) the personal representative has received notice or has knowledge that the decedent's surviving
5 spouse [or legally recognized domestic partner] intends to use genetic material to produce a child
6 after the decedent's death; and
7 (b) the posthumous birth of a child of assisted reproduction will have an effect on the distribution
8 of the decedent's estate.

9

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

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

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

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

22 (e) For purposes of the class closing rules, an individual in gestation at a particular time is treated

1 as living at that time if the individual lives 120 hours after birth. If the distribution date is the
2 deceased parent's death, a child produced posthumously by assisted reproduction is treated as living
3 at the decedent's death, if the child was conceived within [3 years after the deceased parent's death]
4 [the period allowed by Section 3-1006 for an heir to recover property from any distributee]. If the
5 distribution date arises after the deceased parent's death, a child produced posthumously by assisted
6 reproduction is living on the date of conception.

7 (f) For purposes of the class closing rules, an individual who is in the process of being adopted
8 is treated as an adopted child during the period the adoption is in process.

9
10 **NOTE TO DRAFTING COMMITTEE:** Section 3-1006, reference in subsection (e), above,
11 provides:

12
13 **§ 3-1006. Limitations on Actions and Proceedings Against Distributees.** Unless previously
14 adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal
15 representative or otherwise barred, the claim of a claimant to recover from a distributee who is
16 liable to pay the claim, and the right of an heir or devisee, or of a successor personal
17 representative acting in their behalf, to recover property improperly distributed or its value from
18 any distributee is forever barred at the later of three years after the decedent's death or one year
19 after the time of its distribution thereof, but all claims of creditors of the decedent, are barred one
20 year after the decedent's death. This section does not bar an action to recover property or value
21 received as a result of fraud.

1 **NOTE TO DRAFTING COMMITTEE** about the following bracketed section: I'm not sure what
2 the "record" should say, or whether we can put such a requirement into a probate code. I put this
3 section in just to get something down on paper for us to look at. This section is copied from Cal.
4 Health & Safety Code 1644.7 and .8, except that I changed the word "heir" to "child."

5

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

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

14

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

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

22 You should consider how having a child conceived during your life or after your death affects
23 your estate planning (including your will, trust, and other beneficiary designations for retirement
24 benefits, life insurance, financial accounts, etc.) These issues can be complex, and you should

1 discuss them with your attorney.”

2

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

10

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

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

15

Restatement (Third) of Property

[the strikeout and underlined versions are under review and are not finalized]

§ 14.5 Adopted Child as Child of Adopting Parent

Unless the language or circumstances establish that the transferor had a different intention, an adopted child is treated as follows for class-gift purposes:

- (1) In construing a class gift created by the adopting parent, the adopted child is a child of the adopting parent.

(2) In construing a class gift created by someone other than the adopting parent, the adopted child is treated as a child of the adopting parent, but only if:

 - (i) the adoption took place before the child reached the age of majority;
 - (ii) the adopting parent was the child's stepparent or foster parent; or
 - (iii) the adopting parent functioned as a parent to the child before the adoption and before the child reached the age of majority.

§ 14.6 Adopted Child as Child of Genetic Parent

Unless the language or circumstances establish that the transferor had a different intention, an adopted child is not treated for class-gift purposes as a child of either genetic parent, except that:

- (1) If the adoption is by the spouse or domestic partner of a either genetic parent, the child remains a child of both genetic parents the genetic parent who is married to or the domestic partner of the adopting parent.

(2) If the adoption is by a relative of either genetic parent, or by the spouse or surviving spouse or domestic partner or surviving domestic partner of such a relative, the child remains a child of both genetic parents.

(3) If the adoption occurs after the death or incapacity of either genetic parent; (i) the child remains a child of both genetic parents if the adoption is by someone nominated by a genetic parent to be the child's guardian; or and (ii) the child remains a child of a genetic parent if the child does not subsequently become estranged from the genetic families family of that genetic parent.

§ 14.7 Child of Parents Not Married to Each Other

Unless the language or circumstances establish that the transferor had a different intention, a child of parents not married to each other (a nonmarital child) is treated as follows for class-gift purposes:

- (1) In construing a class gift created by the child's genetic parent, the nonmarital child is a child of the genetic parent.

(2) In construing a class gift created by someone other than the child's genetic parent, the nonmarital child is a child of the genetic parent, but only if:

(A) any of the following functioned as a parent to the child before the child reached the age of majority: (i) the genetic parent; (ii) the genetic parent's parent, grandparent, uncle, aunt, brother, sister, niece, or nephew; or (iii) the spouse,

1 surviving spouse, domestic partner, or surviving domestic partner of any of the
2 foregoing; or

3 (B) the genetic parent intended to function as a parent to the child before the
4 child reached the age of majority, but an event, such as death or incapacity,
5 intervened to prevent the genetic parent from functioning in that capacity.

6

7 **§ 14.8 Child of Assisted Reproduction**

8 Unless the language or circumstances establish that the transferor had a different
9 intention, a child of assisted reproduction is treated for class-gift purposes as a child
10 of a person who consented to function as a parent to the child and who functioned in
11 that capacity or was prevented from doing so by an event such as death or incapacity.
12

UNIFORM PARENTAGE ACT

§ 701. Scope of Article. This [article] does not apply to the birth of a child conceived by means of sexual intercourse [, or as the result of a gestational agreement as provided in [Article] 8].

§ 702. Parental Status of Donor. A donor is not a parent of a child conceived by means of assisted reproduction.

§ 102. Definitions. In this [Act]:

• • • •

(8) "Donor" means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

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

(B) a woman who gives birth to a child by means of assisted reproduction [, except as otherwise provided in [Article] 8]: or

(C) a parent under Article 7 [or an intended parent under Article 8].

§ 703. Paternity of Child of Assisted Reproduction. A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.

§ 704. Consent to Assisted Reproduction.

(a) Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.

(b) Failure to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child's life, resided together in the same household with the child and held out the child as their own.

Enactments (with variations)

Delaware

Del. Code Ann. tit. 13 § 8-704 Consent to assisted reproduction.

(a) Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.

(b) Failure to sign a consent required by subsection (a) of this section, before or after birth of the child, does not preclude a finding of paternity if the woman and man, during the first 2 years of the child's life, resided together in the same household with the child and openly held out the child as their own.

Texas

1 Tex. Fam. Code Ann. § 160.704. Consent to Assisted Reproduction

2 (a) Consent by a married woman to assisted reproduction must be in a record signed by the
3 woman and her husband. This requirement does not apply to the donation of eggs by a married
4 woman for assisted reproduction by another woman.

5 (b) Failure by the husband to sign a consent required by Subsection (a) before or after the birth
6 of the child does not preclude a finding that the husband is the father of a child born to his wife if
7 the wife and husband openly treated the child as their own.

8

9 Washington

10 Wash. Rev. Code § 26.26.715. Consent to assisted reproduction

11 (1) A consent to assisted reproduction by a married woman must be in a record signed by the
12 woman and her husband. This requirement does not apply to the donation of eggs for assisted
13 reproduction by another woman.

14 (2) Failure of the husband to sign a consent required by subsection (1) of this section, before or
15 after birth of the child, does not preclude a finding that the husband is the father of a child born to
16 his wife if the wife and husband openly treated the child as their own.

17

18 Wyoming

19 Wyo. Stat. Ann. § 14-2-904 Consent to assisted reproduction.

20 (a) Consent by a woman and a man who intends to be the parent of a child born to the woman
21 by assisted reproduction shall be in a record signed by the woman and the man. This requirement
22 shall not apply to a donor.

23 (b) Failure to sign a consent required by subsection (a) of this section, before or after birth of the
24 child, does not preclude a finding of paternity if the woman and the man, during the first two (2)
25 years of the child's life resided together in the same household with the child and openly held out the
26 child as their own.

27

28 § 705. Limitation on Husband's Dispute of Paternity.

29 (a) Except as otherwise provided in subsection (b), the husband of a wife who gives birth to a
30 child by means of assisted reproduction may not challenge his paternity of the child unless:

31 (1) within two years after learning of the birth of the child he commences a proceeding to
32 adjudicate his paternity; and

33 (2) the court finds that he did not consent to the assisted reproduction, before or after birth
34 of the child.

35 (b) A proceeding to adjudicate paternity may be maintained at any time if the court determines
36 that:

37 (1) the husband did not provide sperm for, or before or after the birth of the child consent to,
38 assisted reproduction by his wife;

39 (2) the husband and the mother of the child have not cohabited since the probable time of
40 assisted reproduction; and

41 (3) the husband never openly treated the child as his own.

42 (c) The limitation provided in this section applies to a marriage declared invalid after assisted
43 reproduction.

§ 706. Effect of Dissolution of Marriage or Withdrawal of Consent.

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

(b) The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.

§ 707. Parental Status of Deceased Individual. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

NOTE

I have sample consent forms that my research assistant had gathered from fertility clinics around the country. *None* of those forms had any check-off box or any other matter that would provide a consent that would be sufficient under UPA § 707.

Enactments (showing variations)

Delaware

Del. Code Ann. tit. 13 § 8-707 Parental status of deceased individual. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Texas

Tex. Fam. Code Ann. § 160.707. Parental Status of Deceased Spouse. If a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child.

Washington

Wash. Rev. Code § 26.26.730. Child of assisted reproduction—Parental status of deceased spouse. If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

Wyoming

Wyo. Stat. Ann. § 14-2-907 Parental status of deceased individual. If an individual who consented

1 in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos,
2 the deceased individual is not a parent of the resulting child unless the deceased individual consented
3 in a record that if assisted reproduction were to occur after death, the deceased individual would be
4 a parent of the child.

5

6 **§ 801. Gestational Agreement Authorized.**

7 (a) A prospective gestational mother, her husband if she is married, a donor or the donors, and
8 the intended parents may enter into a written agreement providing that:

- 9 (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;
10 (2) the prospective gestational mother, her husband if she is married, and the donors
11 relinquish all rights and duties as the parents of a child conceived through assisted reproduction;
12 and
13 (3) the intended parents become the parents of the child.

14 (b) The man and the woman who are the intended parents must both be parties to the gestational
15 agreement.

16 (c) A gestational agreement is enforceable only if validated as provided in Section 803.

17 (d) A gestational agreement does not apply to the birth of a child conceived by means of sexual
18 intercourse.

19 (e) A gestational agreement may provide for payment of consideration.

20 (f) A gestational agreement may not limit the right of the gestational mother to make decisions
21 to safeguard her health or that of the embryos or fetus.

22

23 **§ 802. Requirements of Petition.**

24 (a) The intended parents and the prospective gestational mother may commence a proceeding in
25 the [appropriate court] to validate a gestational agreement.

26 (b) A proceeding to validate a gestational agreement may not be maintained unless:

- 27 (1) the mother or the intended parents have been residents of this State for at least 90 days;
28 (2) the prospective gestational mother's husband, if she is married, is joined in the
29 proceeding; and

30 (3) a copy of the gestational agreement is attached to the [petition].

31

32 **§ 803. Hearing to Validate Gestational Agreement.**

33 (a) If the requirements of subsection (b) are satisfied, a court may issue an order validating the
34 gestational agreement and declaring that the intended parents will be the parents of a child born
35 during the term of the of the agreement.

36 (b) The court may issue an order under subsection (a) only on finding that:

37 (1) the residence requirements of Section 802 have been satisfied and the parties have
38 submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];

39 (2) unless waived by the court, the [relevant child-welfare agency] has made a home study
40 of the intended parents and the intended parents meet the standards of suitability applicable to
41 adoptive parents;

42 (3) all parties have voluntarily entered into the agreement and understand its terms;

43 (4) adequate provision has been made for all reasonable health-care expense associated with

1 the gestational agreement until the birth of the child, including responsibility for those expenses
2 if the agreement is terminated; and

3 (5) the consideration, if any, paid to the prospective gestational mother is reasonable.

4

5 **§ 804. Inspection of Records.** The proceedings, records, and identities of the individual parties to
6 a gestational agreement under this [article] are subject to inspection under the standards of
7 confidentiality applicable to adoptions as provided under other law of this State.

8

9 **§ 805. Exclusive, Continuing Jurisdiction.** Subject to the jurisdictional standards of [Section 201
10 of the Uniform Child Custody Jurisdiction and Enforcement Act], the court conducting a proceeding
11 under this [article] has exclusive, continuing jurisdiction of all matters arising out of the gestational
12 agreement until a child born to the gestational mother during the period governed by the agreement
13 attains the age of 180 days.

14

15 **§ 806. Termination of Gestational Agreement.**

16 (a) After issuance of an order under this [article], but before the prospective gestational mother
17 becomes pregnant by means of assisted reproduction, the prospective gestational mother, her
18 husband, or either of the intended parents may terminate the gestational agreement by giving written
19 notice of termination to all other parties.

20 (b) The court for good cause shown may terminate the gestational agreement.

21 (c) An individual who terminates a gestational agreement shall file notice of the termination with
22 the court. On receipt of the notice, the court shall vacate the order issued under this [article]. An
23 individual who does not notify the court of the termination of the agreement is subject to appropriate
24 sanctions.

25 (d) Neither a prospective gestational mother nor her husband, if any, is liable to the intended
26 parents for terminating a gestational agreement pursuant to this section.

27

28 **§ 807. Parentage under Validated Gestational Agreement.**

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

32 (1) confirming that the intended parents are the parents of the child;
33 (2) if necessary, ordering that the child be surrendered to the intended parents; and
34 (3) directing the [agency maintaining birth records] to issue a birth certificate naming the
35 intended parents as parents of the child.

36 (b) If the parentage of a child born to a gestational mother is alleged not to be the result of
37 assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

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

1 **§ 808. Gestational Agreement: Effect of Subsequent Marriage.** After the issuance of an order
2 under this [article], subsequent marriage of the gestational mother does not affect the validity of a
3 gestational agreement, her husband's consent to the agreement is not required, and her husband is
4 not a presumed father of the resulting child.
5

6 **§ 809. Effect of Nonvalidated Gestational Agreement.**

7 (a) A gestational agreement, whether in a record or not, that is not judicially validated is not
8 enforceable.

9 (b) If a birth results under a gestational agreement that is not judicially validated as provided in
10 this [article], the parent-child relationship is determined as provided in [Article] 2.

11 (c) Individuals who are parties to a nonvalidated gestational agreement as intended parents may
12 be held liable for support of the resulting child, even if the agreement is otherwise unenforceable.
13 The liability under this subsection includes assessing all expenses and fees as provided in Section
14 636.]
15

1 **CALIFORNIA STATUTES ON ASSISTED REPRODUCTION**
2

3 **DIVISION 2. GENERAL PROVISIONS**
4

5 **Part 6. Distribution among Heirs or Beneficiaries**
6

7 **Chapter 3. Identity of Heirs**
8

9 **Cal. Prob. Code § 249.5. Conditions requisite for determination that child was born in the
10 lifetime of decedent; Notice of availability of genetic material for posthumous conception.** For
11 purposes of determining rights to property to be distributed upon the death of a decedent, a child of
12 the decedent conceived and born after the death of the decedent shall be deemed to have been born
13 in the lifetime of the decedent, and after the execution of all of the decedent's testamentary
14 instruments, if the child or his or her representative proves by clear and convincing evidence that all
15 of the following conditions are satisfied:

16 (a) The decedent, in writing, specifies that his or her genetic material shall be used for the
17 posthumous conception of a child of the decedent, subject to the following:
18

- 19 (1) The specification shall be signed by the decedent and dated.
20 (2) The specification may be revoked or amended only by a writing, signed by the
21 decedent and at least one competent witness.
22 (3) A person is designated by the decedent to control the use of the genetic material.
23

24 (b) The person designated by the decedent to control the use of the genetic material has given
25 written notice by certified mail, return receipt requested, that the decedent's genetic material was
26 available for the purpose of posthumous conception. The notice shall have been given to a person
27 who has the power to control the distribution of either the decedent's property or death benefits
28 payable by reason of the decedent's death, within four months of the date of issuance of a certificate
29 of the decedent's death or entry of a judgment determining the fact of the decedent's death,
30 whichever event occurs first.
31

32 (c) The child was in utero using the decedent's genetic material and was in utero within two years
33 of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the
34 fact of the decedent's death, whichever event occurs first. This subdivision does not apply to a child
35 who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result
36 of the application of somatic nuclear transfer technology commonly known as human cloning.
37

38 [2005 Amendment: (1) Added "and born" after "conceived" in the first paragraph;
39 (2) substituted "dated" for "and at least one competent witness" in subd (a)(1);
40 (3) substituted "dated" for "and at least one competent witness" in subd (a)(2);
41 (4) substituted subd (a)(3) for the former subd (a)(3) which read: "(3) The person designated by the decedent to use the
42 genetic material shall be either of the following:
43

44 "(A) The spouse or registered domestic partner of the decedent, as of the decedent's date of death.
45 "(B) Some other person named in the specification as approved by the decedent to be the person designated by the
46 decedent to use the genetic material for posthumous conception."; and
47 (5) substituted "The person designated by the decedent to control the use of the genetic material has" for "The child
48 or the child's representative has" in the first sentence of subd (b).]

49 **Cal. Prob. Code § 249.6. Receipt of notice; Effect of determination whether child born in
50 decedent's lifetime on distribution of decedent's property or benefits.**

1 (a) Upon timely receipt of the notice required by Section 249.5 or actual knowledge by a person
2 who has the power to control the distribution of either the decedent's property or death benefits
3 payable by reason of the decedent's death, that person may not make a distribution of property or pay
4 death benefits payable by reason of the decedent's death before two years following the date of
5 issuance of a certificate of the decedent's death or entry of a judgment determining the fact of
6 decedent's death, whichever event occurs first.

7 (b) Subdivision (a) does not apply to, and the distribution of property or the payment of benefits
8 may proceed in a timely manner as provided by law with respect to, any property if the birth of a
9 child or children of the decedent conceived after the death of the decedent will not have an effect on
10 any of the following:

- 11 (1) The proposed distribution of the decedent's property.
- 12 (2) The payment of death benefits payable by reason of the decedent's death.
- 13 (3) The determination of rights to property to be distributed upon the death of the decedent.
- 14 (4) The right of any person to claim a probate homestead or probate family allowance.

15 (c) Subdivision (a) does not apply to, and the distribution of property or the payment of benefits
16 may proceed in a timely manner as provided by law with respect to, any property if the person named
17 in subdivision (a) of Section 249.5 sends written notice by certified mail, return receipt requested,
18 that the person does not intend to use the genetic material for the posthumous conception of a child
19 of a decedent. This notice shall be signed by the person named in paragraph (3) of subdivision (a)
20 of Section 249.5 and at least one competent witness, and dated.

21 (d) A person who has the power to control the distribution of either the decedent's property or
22 death benefits payable by reason of the decedent's death, shall incur no liability for making a
23 distribution of property or paying death benefits if that person made a distribution of property or paid
24 death benefits prior to receiving notice or acquiring actual knowledge of the existence of genetic
25 material available for posthumous conception purposes or the written notice required by subdivision
26 (b) of Section 249.5.

27 (e) Each person to whom payment, delivery, or transfer of the decedent's property is made is
28 personally liable to a person who, pursuant to Section 249.5, has a superior right to the payment,
29 delivery, or transfer of the decedent's property. The aggregate of the personal liability of a person
30 shall not exceed the fair market value, valued as of the time of the transfer, of the property paid,
31 delivered, or transferred to the person under this section, less the amount of any liens and
32 encumbrances on that property at that time.

33 (f) In addition to any other liability a person may have pursuant to this section, any person who
34 fraudulently secures the payment, delivery, or transfer of the decedent's property pursuant to this
35 section shall be liable to the person having a superior right for three times the fair market value of
36 the property.

37 (g) An action to impose liability under this section shall be barred three years after the
38 distribution to the holder of the decedent's property, or three years after the discovery of fraud,
39 whichever is later. The three-year period specified in this subdivision may not be tolled for any
40 reason.

41

42 [2005 Amendment: (1) Added "or children" after "a child" in the introductory clause of subd (b); (2) deleted
43 "subparagraph (A) or (B) of paragraph (3) of" before "subdivision (a)" in first sentence of subd (c); (3) amended the last
44 sentence of subd (c) by (a) deleted "subparagraph (A) or (B)" before "paragraph (3) of"; and (b) added ", and dated" after

1 "competent witness" at the end; and (4) added subds (e)-(g).]

2

3 **Cal. Prob. Code § 249.7. Failure to give timely notice of genetic material available for**
4 **posthumous conception; distribution of property or payment of death benefits not delayed;**
5 **bar of claim for wrongful distribution.** If the written notice required pursuant to Section 249.5 is
6 not given in a timely manner to any person who has the power to control the distribution of either
7 the decedent's property or death benefits payable by reason of the decedent's death, that person may
8 make the distribution in the manner provided by law as if any child of the decedent conceived after
9 the death of the decedent had predeceased the decedent without heirs. Any child of a decedent
10 conceived after the death of the decedent, or that child's representative, shall be barred from making
11 a claim against either the person making the distribution or the recipient of the distribution when the
12 claim is based on wrongful distribution and written notice has not been given in a timely manner
13 pursuant to Section 249.5 to the person making that distribution.

14

15 **Cal. Prob. Code § 249.8. Petition by interested person requesting distribution of property or**
16 **death benefits subject to delay; hearing and order.** Notwithstanding Section 249.6, any interested
17 person may file a petition in the manner prescribed in Section 248 or 17200 requesting a distribution
18 of property of the decedent or death benefits payable by reason of decedent's death that are subject
19 to the delayed distribution provisions of Section 249.6. The court may order distribution of all, or
20 a portion of, the property or death benefits, if at the hearing it appears that distribution can be made
21 without any loss to any interested person, including any loss, either actual or contingent, to a
22 decedent's child who is conceived after the death of the decedent. The order for distribution shall
23 be stayed until any bond required by the court is filed.

24

25 [2005 Amendment: Substituted "in Section 248 or 17200" for "under Section 248" in the first sentence.]

26

CALIFORNIA FAMILY CODE

DIVISION 12. PARENT AND CHILD RELATIONSHIP

Part 2. Presumption Concerning Child of Marriage and Blood Tests to Determine Paternity

Chapter 1. Child of Wife Cohabiting With Husband

33 **Cal. Fam. Code § 7540. Conclusive presumption as child of marriage; exceptions.** Except as
34 provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or
35 sterile, is conclusively presumed to be a child of the marriage.

36

37 **Cal. Fam. Code § 7541. Resolution of question of paternity upon finding of court based upon**
38 **blood test that husband is not father of child; notice of motion for blood tests.**

39 (a) Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as
40 disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with
41 Section 7550), are that the husband is not the father of the child, the question of paternity of the
42 husband shall be resolved accordingly.

43 (b) The notice of motion for blood tests under this section may be filed not later than two years
44 from the child's date of birth by the husband, or for the purposes of establishing paternity by the

1 presumed father or the child through or by the child's guardian ad litem. As used in this subdivision,
2 "presumed father" has the meaning given in Sections 7611 and 7612.

3 (c) The notice of motion for blood tests under this section may be filed by the mother of the child
4 not later than two years from the child's date of birth if the child's biological father has filed an
5 affidavit with the court acknowledging paternity of the child.

6 (d) The notice of motion for blood tests pursuant to this section shall be supported by a
7 declaration under oath submitted by the moving party stating the factual basis for placing the issue
8 of paternity before the court.

9 (e) Subdivision (a) does not apply, and blood tests may not be used to challenge paternity, in any
10 of the following cases:

11 (1) A case that reached final judgment of paternity on or before September 30, 1980.

12 (2) A case coming within Section 7613.

13 (3) A case in which the wife, with the consent of the husband, conceived by means of a
14 surgical procedure.