

D R A F T

FOR DISCUSSION ONLY

AMENDMENTS TO THE UNIFORM PROBATE CODE

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

Draft of September 17, 2007

WITH PARTIAL COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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AMENDMENTS TO THE UNIFORM PROBATE CODE

PREFATORY NOTE

ARTICLE II REVISIONS

{Partially Revised}

The Uniform Probate Code was originally promulgated in 1969.

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

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

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

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

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

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

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

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

Inflation Adjustments. Between 1990 and 2008, the Consumer Price Index rose by about 50 percent. By technical amendment, all of the dollar amounts in the following sections were raised by 50 percent: Sections 2-102, 2-201, 2-402,

1 2-403, 2-405, and 3-1201. In addition, a new cost of living adjustment section — Section 1-109 — was added.
2

3 {more TBA}

4 ***Legislative Note:*** *The word “spouse” appears throughout Article II. States that recognize civil unions, domestic*
5 *partnerships, or similar relationships between unmarried individuals should add appropriate language after*
6 *“spouse” wherever that word appears in Article II. States that do not recognize such relationships between*
7 *unmarried individuals, or marriages between same-sex partners, should also consider whether to recognize the*
8 *spousal-type rights that partners acquired under the law of another jurisdiction in which the relationship was*
9 *formed but who die domiciled in this state. Doing so would not be the equivalent of recognizing such relationships in*
10 *this state but simply allowing those who move to and die in this state to retain the rights they previously acquired*
11 *elsewhere.*
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PART 1
INTESTATE SUCCESSION
General Comment
{to be revised}

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

The principal features of the 1990 revisions are:

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

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

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

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

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

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 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, the following rules apply:

(A) half of the intestate 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;

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

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

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

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

COMMENT

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

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

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

2008 Revisions. In addition to making a few stylistic changes, the 2008 revisions added paragraph (5), granting inheritance rights to descendants of the intestate's deceased spouse(s). The term deceased spouse refers to an individual to whom the intestate was married at the spouse's death.

Historical Note. This Comment was revised in 2008.

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

3 (a) An individual who was born before the decedent's death but who fails to survive the
4 decedent by 120 hours is deemed to have predeceased the decedent ~~for purposes of homestead~~
5 ~~allowance, exempt property, and intestate succession, and the decedent's heirs are determined~~
6 ~~accordingly.~~ If it is not established by clear and convincing evidence that an individual who was
7 born before the decedent's death ~~would otherwise be an heir~~ survived the decedent by 120 hours,
8 it is deemed that the individual failed to survive for the required period. ~~This section is not to be~~
9 ~~applied if its application would result in a taking of intestate estate by the state under Section 2-~~
10 ~~105.~~

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

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

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

19 **{??? SHOULD THE INTRO TO SUBSECTION (d) BE REVISED TO SAY THAT THE 120**
20 **HOUR REQUIREMENT OF SURVIVAL IS NOT TO BE APPLIED IF?? IN THE**
21 **CURRENT CODE, THIS PROVISION ONLY APPLIES TO WHAT IS NOW SUB (a) AND**
22 **(c), NOT TO SUB (b). FORMER 2-108 (NOW SUB (b)) DID NOT HAVE SUCH A**
23 **QUALIFICATION.}**

24
25 **COMMENT**

26 ~~This section is a limited version of the type of clause frequently found in wills to take care of the common~~
27 ~~accident situation, in which several members of the same family are injured and die within a few days of one~~

1 another. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no
2 proof that the parties died otherwise than simultaneously. (Section 2-702 recommends revision of the Uniform
3 Simultaneous Death Act.)

4 This section requires an heir to survive by five days in order to succeed to the decedent's intestate property; for
5 a comparable provision as to wills and other governing instruments, see Section 2-702. This section avoids multiple
6 administrations and in some instances prevents the property from passing to persons not desired by the decedent.
7 The 120-hour period will not delay the administration of a decedent's estate because Sections 3-302 and 3-307
8 prevent informal issuance of letters for a period of five days from death. ~~The last sentence~~ Subsection (d) prevents
9 the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives him
10 or her for any period.

11 In the case of a surviving spouse who survives the 120-hour period, the 120-hour requirement of survivorship
12 does not disqualify the spouse's intestate share for the federal estate-tax marital deduction. See Int.Rev.Code §
13 2056(b)(3).

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

22 **Historical Note.** This Comment was revised in 2008.
23
24
25

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

1 **SECTION 2-113. INDIVIDUALS RELATED TO DECEDENT THROUGH TWO LINES**

2 **NOT ENTITLED TO MORE THAN ONE SHARE.** An individual who is related to the
3 decedent ~~through two lines of relationship~~ in such a manner as would entitle the individual to
4 more than one share is entitled to only a ~~single~~ one share based on the relationship that would
5 entitle the individual to the larger or largest share.

6 **Comment**

7 This section prevents double inheritance. It has potential application in a case in which a deceased person's
8 brother or sister marries the spouse of the decedent and adopts a child of the former marriage; if the adopting parent
9 died thereafter leaving the child as a natural and adopted grandchild of its grandparents, this section prevents the
10 child from taking as an heir from the grandparents in both capacities.

11 **2008 Revisions.** As originally promulgated, this section was limited to a case in which an individual was related
12 to the decedent through two lines of relationship. In 2008, this section was revised so that it applies whenever an
13 individual is related to the decedent in such a manner as would entitle the individual to more than one share. As
14 revised, this section applies, for example, to a situation in which a grandparent adopts a grandchild.

15 **Historical Note.** This Comment was revised in 2008.
16
17

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

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

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

27 (c) ~~Inheritance from or through a child by either natural parent or his [or her] kindred is~~
28 ~~precluded unless that natural parent has openly treated the child as his [or hers], and has not~~
29 ~~refused to support the child.~~
30
31

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

3 (a) A parent is barred from inheriting from or through a child of the parent if (i) the parent's
4 parental rights have been terminated and the parent-child relationship has not been judicially
5 reestablished or (ii) it is established by clear and convincing evidence that the parent has
6 engaged in conduct that would have been grounds for termination of parental rights.

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

9 **COMMENT**

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

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

15 {Comment to be continued}

16
17 **BELOW IS THE NY STATUTE, AS REVISED IN 2006. WOULD IT BE A BETTER**
18 **APPROACH TO SUBSTITUTE THE IDEA OF (a)(1) FOR OUR (a)(ii)??**

19
20 NY EPTL § 4-1.4 Disqualification of parent to take intestate share

21 (a) No distributive share in the estate of a deceased child shall be allowed to a parent if the
22 parent, while such child is under the age of twenty-one years:

23 (1) has failed or refused to provide for the child or has abandoned such child, whether or
24 not such child dies before having attained the age of twenty-one years, unless the parental
25 relationship and duties are subsequently resumed and continue until the death of the child; or

26 (2) has been the subject of a proceeding pursuant to section three hundred eighty-four-b
27 of the social services law which:

28 (A) resulted in an order terminating parental rights, or

29 (B) resulted in an order suspending judgment, in which event the surrogate's court
30 shall make a determination disqualifying the parent on the grounds adjudicated by the family
31 court, if the surrogate's court finds, by a preponderance of the evidence, that the parent, during
32 the period of suspension, failed to comply with the family court order to restore the parent-child
33 relationship.

34 (b) Subject to the provisions of subdivision eight of section two hundred thirteen of the civil
35 practice law and rules, the provisions of subparagraph one of paragraph (a) of this section shall
36 not apply to a biological parent who places the child for adoption based upon:

37 (1) a fraudulent promise, not kept, to arrange for and complete the adoption of such child,

38 or

1 (2) other fraud or deceit by the person or agency where, before the death of the child, the
2 person or agency fails to arrange for the adoptive placement or petition for the adoption of the
3 child, and fails to comply timely with conditions imposed by the court for the adoption to
4 proceed.

5 (c) In the event that a parent or spouse is disqualified from taking a distributive share in the
6 estate of a decedent under this section or 5-1.2, the estate of such decedent shall be distributed in
7 accordance with 4-1.1 as though such spouse or parent had predeceased the decedent.
8

9 **HERE IS A POSSIBLE REWRITE OF 2-114(a)(ii), based on the NY statute:**

10
11 **SECTION 2-114. PARENT BARRED FROM INHERITING IN CERTAIN**
12 **CIRCUMSTANCES.**

13 (a) A parent is barred from inheriting from or through a child of the parent if (i) the parent's
14 parental rights were terminated and the parent-child relationship was not judicially reestablished
15 or (ii) it is established by clear and convincing evidence that the parent, before the child reached
16 the age of majority, {??? failed or ???} refused to provide for the child or abandoned the child,
17 whether or not the child died before having attained the age of majority, unless the parental
18 relationship and duties were subsequently resumed and continued until the earlier of the child's
19 death or majority.

20 (b) For purposes of intestate succession from or through the deceased child, a parent who is
21 barred from inheriting under this section is treated as if the parent predeceased the child.
22

23 **AT THE ANNUAL MEETING, THE VIEW WAS EXPRESSED THAT (a)(ii) SHOULD**
24 **BE DELETED ENTIRELY, BECAUSE IT WOULD GENERATE LITIGATION AND**
25 **PROOF OF BEHAVIOR YEARS EARLIER MIGHT BE HARD TO OBTAIN AND**
26 **MURKY. PERHAPS WE COULD ANSWER THIS POINT BY STRESSING THE HIGH**
27 **BURDEN OF PROOF ON THE HEIR WHO WOULD BENEFIT BY DENIAL OF**
28 **INHERITANCE RIGHTS TO THE PARENT.**

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
4 child under [this Part] [the laws of intestate succession].

5 (b) Except as otherwise provided in [this Part] [the laws of intestate succession], an
6 individual is the child of the child's genetic parents, regardless of their marital status. The
7 parent-child relationship may {??? shall ???} be established under [Articles 1 through 6 of the
8 Uniform Parentage Act (2000), as amended in 2002] [applicable state law] [insert appropriate
9 statutory reference].

10 **I ADDED TO SUB (b) THE INTRODUCTORY PHRASE “EXCEPT AS OTHERWISE**
11 **PROVIDED IN [THIS PART] [THE LAWS OF INTESTATE SUCCESSION]” BECAUSE**
12 **AN ADOPTED CHILD IS NOT THE CHILD OF THE CHILD’S GENETIC PARENTS**
13 **IF NO EXCEPTION APPLIES AND ALSO BECAUSE THIRD-PARTY EGG AND**
14 **SPERM DONORS ARE NOT THE DONOR’S CHILD.**

15
16 **Possible Alternative subsection (b)**

17 *Alternative subsection (b) for States that have not enacted the*
18 *Uniform Parentage Act (2000, as amended in 2002)*
19

20 (b) Except as otherwise provided in [this Part] [the laws of intestate succession], an
21 individual is the child of the child's genetic parents, regardless of their marital status. A
22 married man is treated as the genetic father of a child if he is presumed to be the child's
23 father under [applicable state law] [insert appropriate statutory reference] and his
24 paternity has not been disproved by adjudication {??? within two years of the child's birth
25 ???} {??? before his death ???} {??? We could say “within the earlier of two years of the
26 child's birth or the presumed father's death”, but note that that that would preclude

1 **adjudication disproving paternity after the presumed father’s death ???**.

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

14 **COMMENT**

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

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

25
26 {Comment to be continued}
27
28
29

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

5 (c) An adopted individual is the child of the individual’s adopting parent or parents. An
6 individual who is in the process of being adopted by a married couple when one of the spouses
7 dies is treated as an individual who is adopted by the decedent spouse if the adoption is
8 subsequently granted to the decedent’s surviving spouse. {??? SHOULD WE ADD: An

9 individual who is in the process of being adopted by the spouse of a genetic parent when
10 that spouse dies is treated as an individual who is adopted by that deceased spouse if the
11 genetic parent survives the deceased spouse ??? IF WE DO DECIDE TO INCLUDE THIS
12 IDEA, WE MIGHT CARVE OUT THE LAST TWO SENTENCES AS A SEPARATE
13 SUBSECTION, AS FOLLOWS:

14 (d) For purposes of subsection (c), an individual is treated as an individual who is
15 adopted by the deceased spouse if the individual is in the process of being adopted by:

16 (1) a married couple when one of the spouses dies and the adoption is subsequently
17 granted to the decedent’s surviving spouse; or

18 (2) the spouse of a genetic parent when that spouse dies {??? and the genetic parent
19 survives the deceased spouse ???}.}

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

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

(1) that genetic parent; and

(2) the other genetic parent, but only for purposes of the right of the child or a descendant

of the child to inherit from or through that other genetic parent.

(f) An individual who is adopted by a relative of a genetic parent, or by the spouse or

surviving spouse of a relative of a genetic parent, continues to be a child of both genetic parents,

but only for purposes of the right of the child or a descendant of the child to inherit from or

through either genetic parent.

(g) An individual who is adopted after the death of both genetic parents, but not by a relative

of a genetic parent, nor by the spouse or surviving spouse of a relative of a genetic parent,

continues to be a child of both genetic parents, but only for purposes of the right of the child or a

descendant of the child to inherit through either genetic parent.

(h) If an individual was adopted more than once, the term “genetic parent” in subsections (e),

(f), and (g) includes a previous adoptive parent.

IN SUBSECTION (h), DO WE MEAN “INCLUDES” OR DO WE MEAN “MEANS” ???

THIS SUBSECTION IS COPIED FROM A CALIFORNIA STATUTE, AND THAT

STATUTE SAYS “INCLUDED.”

COMMENT

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

{Comment to be continued}

1 **SECTION 2-117. PARENT AND CHILD RELATIONSHIP; WHEN UNADOPTED**
2 **STEPCHILD TREATED AS ADOPTED.**

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

5 (b) For purpose of the right of a stepchild to inherit from {??? OR THROUGH ???} the
6 stepchild’s stepparent, a stepchild is treated as a child who has been adopted by the stepchild’s
7 stepparent if:

8 (1) the relationship began during the stepchild’s minority and continued throughout the
9 lifetime of the stepparent; and

10 (2) the stepparent was in the process of adopting the stepchild when the stepparent died;
11 or

12 (3) it is established by clear and convincing evidence that the stepparent, during the
13 stepchild’s minority, attempted to adopt the stepchild and would have adopted the stepchild but
14 for (i) the refusal of a genetic parent to consent to the adoption or (ii) the existence of another
15 legal barrier.

16 **Legislative Note:** States that recognize civil unions, domestic partnerships, or similar relationships between
17 unmarried individuals should add appropriate language after “stepchild” and “stepparent.”
18

19 **IF WE ARE UNEASY ABOUT THIS SECTION, WE COULD DELETE IT AND RELY**
20 **ON THE DOCTRINE OF EQUITABLE ADOPTION AND ON THE ADDED SENTENCE**
21 **TO 2-116(c). NOTE, THOUGH, THAT THAT SENTENCE ALLOWS INHERITANCE**
22 **FROM THE CHILD AS WELL AS BY {??? OR THROUGH ???} THE CHILD.**

23
24 **IF WE KEEP THIS SECTION, SHOULD WE RETHINK THE PHRASE “DURING THE**
25 **CHILD’S MINORITY” IN VIEW OF THE FACT THAT IN SOME STATES ADULT**
26 **ADOPTIONS ARE NOT ALLOWED ??**
27

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

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

(b) In this section:

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

(A) intrauterine insemination;

(B) donation of eggs;

(C) donation of embryos;

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

(E) intracytoplasmic sperm injection.

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

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

(4) “third-party donor” means an individual who produces eggs or sperm used for

assisted reproduction, whether or not for consideration. The term does not include:

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

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

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

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

(d) Except as otherwise provided in subsections (f) and (g), an individual is a parent of a child who is conceived by means of assisted reproduction, and the child is a child of that individual, if the individual:

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

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

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

HOW DOES THIS SECTION APPLY TO ARTIFICIAL INSEMINATION HUSBAND, WHERE THE CHILD IS THE GENETIC CHILD OF BOTH HUSBAND AND WIFE ??? THIS HAS BEEN THE SITUATION IN MOST OF THE CASES OF POSTHUMOUS CONCEPTION.

IN THE CASE OF TRUST OF MARTIN B., -- N.Y.S.2d ----, 2007 WL 2177221 (N.Y.Sur. Ct. 2007), 2007 N.Y. Slip Op. 27306, , set forth at the end of this draft at page 58, THE NY SURROGATE'S COURT HELD THAT A CHILD OF POSTHUMOUS CONCEPTION WAS INCLUDED IN A CLASS GIFT IN A CASE IN WHICH THE DECEASED FATHER HAD SIGNED A FORM THAT STATED "IN THE EVENT OF MY DEATH I

1 **AGREE THAT MY SPOUSE SHALL HAVE THE SOLE RIGHT TO MAKE**
2 **DECISIONS REGARDING THE DISPOSITION OF MY SEMEN SAMPLES. I**
3 **AUTHORIZE REPRO LAB TO RELEASE MY SPECIMENS TO MY LEGAL SPOUSE**
4 **[NAMING HER].” ANOTHER FORM HE SIGNED STATED “I, [NAMING HIM],**
5 **HEREBY CERTIFY THAT I AM MARRIED OR INTIMATELY INVOLVED WITH**
6 **[NAMING HER] AND THE CRYOPRESERVED SPECIMENS STORED AT REPRO**
7 **LAB WILL BE USED FOR FUTURE INSEMINATIONS OF MY WIFE/INTIMATE**
8 **PARTNER.” WOULD THESE FORMS SATISFY SUBSECTION (d), AND IF NOT,**
9 **HOW SHOULD WE REVISE SUB (d) ???**

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

16 **I PROPOSE EITHER DELETING SUBSECTION (e) OR MODIFYING IT, BECAUSE IT**
17 **DOES NOT COORDINATE WITH (d). SUB (e) NOW SAYS THAT BOTH SPOUSES**
18 **ARE PRESUMED TO HAVE CONSENTED TO FUNCTION AS THE PARENT OF THE**
19 **CHILD. THE PROBLEM IS THAT (d) REQUIRES CONSENT IN A RECORD. WE**
20 **CAN’T “PRESUME” THAT. I DON’T THINK WE WANT TO CHANGE (d)(1) TO**
21 **TAKE OUT THE REQUIREMENT OF A CONSENT IN A RECORD.**

23 **CONVERSELY, WE COULD MODIFY (d) TO PRESUME THAT BOTH SPOUSES**
24 **FUNCTIONED AS A PARENT OF THE CHILD OR INTENDED TO DO SO BUT WERE**
25 **PREVENTED FROM DOING SO BY AN EVENT SUCH AS DEATH OR INCAPACITY,**
26 **AS FOLLOWS:**

28 (e) For purposes of subsection (d), if a child is born to a married woman and she and
29 her husband are not separated and no divorce or annulment proceedings are pending,
30 then, in the absence of clear and convincing evidence to the contrary, and in the absence of
31 a consent in a record that satisfies subsection (d)(1), both spouses are presumed to have
32 functioned as a parent of the child or, if an event such as death or incapacity prevented one
33 or both from doing so, to have intended to function as a parent of the child.

34 (f) If a marriage is dissolved before placement of eggs, sperm, or embryos, the resulting child

1 is not a child of the former spouse unless the former spouse consented in a record that if assisted
2 reproduction were to occur after a dissolution of the marriage, the child would be the child of the
3 former spouse.

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

7 (h) If a parent of a child who is conceived posthumously by assisted reproduction dies
8 intestate, the child is treated as in gestation at the decedent's death for purposes of Section 2-
9 104(b) if the child is born within forty-five months after the decedent's death. If an individual
10 other than the parent of a child who is conceived posthumously by assisted reproduction dies
11 intestate, the child is treated as in gestation on the date that the child is in utero for purposes of
12 Section 2-104(b).

13 **SHOULD WE SWITCH FROM BIRTH WITHIN 45 MONTHS TO IN UTERO WITHIN**
14 **36 MONTHS? IN UTERO SHOULD BE EASY TO DETERMINE EXCEPT FOR**
15 **ARTIFICIAL INSEMINATION. SO, MAYBE WE SHOULD SAY THE LATER OF THE**
16 **TWO?**
17

18 **Legislative Note:** States are encouraged to enact a provision requiring genetic depositories to provide a consent
19 form that would satisfy subsection (d)(1). The following provision is adapted from Cal. Health & Safety Code §
20 1644.7 and .8."
21

22 **SECTION XXX. DUTY OF GENETIC DEPOSITORIES TO PROVIDE CONSENT FORM TO**
23 **DEPOSITORS.**

24 (a) Any entity that receives genetic material of a human being that may be used for conception shall provide to
25 the person depositing genetic material a form for use by the depositor that, if signed by the depositor, would satisfy
26 the conditions set forth in Section 2-118(d)(1) regarding the depositor's consent to be treated as the child's parent.
27 The use of the form is not mandatory, and the form is not the exclusive means of expressing a depositor's consent.
28 The form shall include advisements in substantially the following form:
29

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

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

1 You should consider how being treated as a parent of a child conceived during your life or after your death
2 affects your estate planning (including your will, trust, and other beneficiary designations for retirement benefits, life
3 insurance, financial accounts, etc.) These issues can be complex, and you should discuss them with your attorney.”
4

5 (b) Any entity that receives genetic material of a human being that may be used for conception shall make
6 available to the person depositing his or her genetic material a form that, if signed by the depositor, would revoke
7 any previous expression of consent satisfying the conditions set forth in Section 2-118(g). The use of the form is not
8 mandatory, and the form is not the exclusive means of expressing a depositor’s intent with respect to revocation or
9 amendment of a prior expression of consent. The form shall include advisements in substantially the following form:
10

11 “The use of this form to revoke or amend a previous form for designating whether you consent to be treated as a
12 parent of a child conceived during your life or after your death is not mandatory. This specification can be revoked
13 or amended only in a writing signed by you (and not by spoken words).
14

15 These issues can be complex, and you should discuss them with your attorney.”
16

16 **COMMENT**

17 This Section is largely consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers
18 § 14.8 (2007). That section of the Restatement applies to the treatment of a child conceived by means of assisted
19 reproduction for class-gift purposes. Section 14.8 provides:
20

21 Restatement § 14.8. Child of Assisted Reproduction

22 Unless the language or circumstances indicate that the transferor had a different intention, a child of
23 assisted reproduction is treated for class-gift purposes as a child of a person who consented to function as a
24 parent of the child and who functioned in that capacity or was prevented from doing so by an event such as
25 death or incapacity.
26

27 *Data on children of assisted reproduction.* The Center for Disease Control (CDC) of the U.S. Department of
28 Health and Human Services collects data on children of assisted reproduction (ART). See Center for Disease
29 Control, 2004 Assisted Reproductive Technology Success Rates (Dec. 2006) (2004 CDC Report), available at
30 <http://www.cdc.gov/ART/ART2004>. The data, however, is of limited use because the definition of ART used in the
31 CDC Report excludes artificial insemination (2004 CDC Report at 3), which is probably the most common form of
32 assisted reproductive procedures. The CDC estimates that in 2004 ART procedures (excluding artificial
33 insemination) accounted for slightly more than one percent of total U.S. births. 2004 CDC Report at 13. According
34 to the Report: “The number of infants born who were conceived using ART ... increased steadily between 1996 and
35 2004. In 2004, 49,458 infants were born, which was more than double the 20,840 born in 1996.” 2004 CDC Report
36 at 57. “The average age of women using ART services in 2004 was 36. The largest group of women using ART
37 services were women younger than 35, representing 41% of all ART cycles carried out in 2004. Twenty-one percent
38 of ART cycles were carried out among women aged 35-37, 19% among women aged 38-40, 9% among women aged
39 41-42, and 9% among women older than 42.” 2004 CDC Report at 15. Updates of the 2004 CDC Report are to be
40 posted at <http://www.cdc.gov/ART/ART2004>.
41

42 *Functioned as a parent of the child.* The term “functioned as a parent of the child” is derived from the
43 Restatement (Third) of Property: Wills and Other Donative Transfers (2007). The definition of that term in
44 subsection (b)(2) is amplified in the Reporter’s Note No. 4 to Section 14.5 of the Restatement as follows:
45

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

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

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

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

1 physical safety, and providing transportation;

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

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

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

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

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

11 (g) providing moral and ethical guidance;

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

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

16 (a) providing economic support;

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

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

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

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

24
25 {Comment to be continued}
26
27
28

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

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

(b) In this section:

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

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

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

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

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

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

(1) gained physical possession of and functioned as a parent of the child; or

(2) died while the gestational mother was pregnant if (i) there were two intended parents {??? who were married to each other ???} and (ii) the surviving intended parent gained physical possession of and functioned as a parent of the child.

SHOULD WE REPLACE THE PHRASE “GAINED PHYSICAL POSSESSION OF” WITH “GAINED PHYSICAL CUSTODY OF”? I’M ALSO WORRIED ABOUT SOMEONE ILLEGALLY ABDUCTING THE CHILD AND NOT BEING CAUGHT. HOW DO WE HANDLE THAT TYPE OF SITUATION? IN THE CASE OF AN ILLEGAL ABDUCTION, WOULD IT MAKE SENSE TO SAY THAT THE CHILD HAS A RIGHT TO INHERIT FROM AND THROUGH THE PARENT BUT THE PARENT HAS NO RIGHT TO INHERIT FROM AND THROUGH THE CHILD ??

The Uniform Adoption Act defines “legal custody” and “physical custody.”

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

“Physical custody’ means the physical care and supervision of a minor.”

SHOULD WE ALSO ADD TO (d) LANGUAGE THAT WOULD PROVIDE THAT THE CHILD IS A CHILD OF AN INTENDED PARENT IF THERE IS ONLY ONE INTENDED PARENT AND THAT INTENDED PARENT DIED WHILE THE GESTATIONAL MOTHER WAS PREGNANT AND A RELATIVE (OR SPOUSE OR SURVIVING SPOUSE) OF THE INTENDED PARENT GAINED PHYSICAL POSSESSION OF AND FUNCTIONED AS A PARENT OF THE CHILD?

SAME IF THERE ARE TWO INTENDED PARENTS AND BOTH DIED WHILE THE GESTATIONAL MOTHER WAS PREGNANT, AND A RELATIVE (OR SPOUSE OR SURVIVING SPOUSE) OF EITHER INTENDED PARENT GAINED PHYSICAL POSSESSION OF AND FUNCTIONED AS A PARENT OF THE CHILD?

HERE IS POSSIBLE LANGUAGE THAT WOULD REPLACE SUB (d) AND ACHIEVE BOTH OF THE ABOVE:

1
2 (d) A child who is born by means of assisted reproduction to a gestational mother is the
3 child of an intended parent who:

4 (1) gained physical possession of and functioned as a parent of the child; or

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

6 (A) (i) there were two intended parents {??? who were married to each other
7 ???} and (ii) the other intended parent survived the birth of the child and gained physical
8 possession of and functioned as a parent of the child;

9 (B) (i) there were two intended parents {??? who were married to each other
10 ???}, (ii) the other intended parent also died while the gestational mother was pregnant,
11 and (iii) a relative of either deceased intended parent or the spouse or surviving spouse of a
12 relative of either deceased intended parent gained physical possession of and functioned as
13 a parent of the child; or

14 (C) (i) there was no other intended parent and (ii) a relative of or the spouse or
15 surviving spouse of a relative of the deceased intended parent gained physical possession of
16 and functioned as a parent of the child.

17
18 **NOTE THAT IF WE ADOPT THE ABOVE, WE WILL NEED TO ADD A DEFINITION**
19 **OF “RELATIVE,” AS WE HAVE DONE IN 2-705, INFRA.**
20

21 **COMMENT**

22 *Definition of gestational agreement.* The definition of gestational agreement is based on the Comment to Article
23 8 of the Uniform Parentage Act, which states that the term “gestational mother” “applies to both a woman who, through
24 assisted reproduction, performs the gestational function without being genetically related to a child, and a woman who
25 is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by
26 the intended parents.” The Comment also points out that “The [practice in which the woman is both the gestational and
27 genetic mother] has elicited disfavor in the ART community, which has concluded that the gestational mother’s genetic
28 link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.”

29 *Functioned as a parent of the child.* See the Comment to Section 2-118 for additional explanation of this term.
30 {Comment to be continued}
31
32
33

1 **SECTION 2-120. EQUITABLE ADOPTION.**

2 Nothing in this [Part] precludes, limits, or affects application of the judicial doctrine of equitable
3 adoption.

4 **COMMENT**

5 On the doctrine of equitable adoption, see Restatement (Third) of Property: Wills and Other Donative Transfers §
6 2.5, cmt. k & Reporter's Note No. 7 (1999).

7

8

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

(a) In this section:

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

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

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

~~(a)(b)~~ An adopted individual, ~~and a nonmarital individual~~ ~~individuals born out of wedlock~~, a child of assisted reproduction, and a child born to a gestational mother, 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)(c)~~ In addition to the requirements of subsection ~~(a b)~~, in construing a dispositive provision of a transferor who is not the ~~natural~~ genetic parent, an individual born to the ~~natural~~ genetic parent is not considered the child of that parent unless the genetic parent, a relative of the genetic parent,

or the spouse or surviving spouse of a relative of the genetic parent functioned as a parent of the child before the child reached the age of majority 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)~~ (d) In addition to the requirements of subsection ~~(a)~~ (b), 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 (i) the adoption took place before the adopted individual reached the age of majority; (ii) the adopting parent was the adopted individual's stepparent or foster parent; or (iii) the adopting parent functioned as a parent of the adopted individual before the adopted individual reached the age of majority adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.

(e) For purposes of the class closing rules, an individual in utero at a particular time is treated as living at that time if the individual lives 120 hours after birth. If the distribution date is the deceased parent's death, a child produced posthumously by assisted reproduction is treated as living on the distribution date if the child was born within 45 months after the deceased parent's death and if the child lives 120 hours after birth. If the distribution date arises after the deceased parent's death, a child produced posthumously by assisted reproduction is living on the distribution date if the child is then in utero and if the child lives 120 hours after birth.

(f) For purposes of the class closing rules, an individual who is in the process of being adopted when the class closes is treated as an adopted child when the class closes if the adoption is subsequently granted.

COMMENT

This Section is largely consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.5, 14.6, 14.7 (2007). These sections of the Restatement apply to the treatment of an adopted child and a nonmarital

1 child for class-gift purposes.

2 Subsection (b): Relatives by affinity. Subsection (b) provides that “Terms of relationship that do not differentiate
3 relationships by blood from those by affinity, such as “uncles,” “aunts,” “nieces,” or “nephews,” are construed to exclude
4 relatives by affinity.” This is a rule of construction that, under Section 2-701, yields to a finding of a contrary intention.
5 The Restatement (Third) of Property: Wills and Other Donative Transfers § 14.9 (2007) adopts a similar rule of
6 construction, but notes in Comment that there are some situations in which the circumstances would tend to rebut the
7 presumption, resulting in inclusion of a relative by marriage. One is the situation in which, looking at the facts existing
8 when the donative document was executed, the class was then and foreseeably would be empty unless the transferor
9 intended to include relatives by marriage. Another is the case of reciprocal wills. Suppose that a husband’s will devises
10 his entire estate “to my wife if she survives me, but if not, to my nieces and nephews,” and his wife’s will devises her
11 entire estate “to my husband if he survives me, but if not, to my nieces and nephews.” Both husband and wife have
12 nieces and nephews. The husband dies first. All of his property passes to his widow. On her subsequent death, the term
13 “my nieces and nephews” is presumptively construed to include her nieces and nephews by marriage (her husband’s
14 nieces and nephews). Were it otherwise, the combined estates of husband and wife would pass only to the nieces and
15 nephews of the spouse who happened to survive.

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

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

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

30
31 {Comment to be continued}
32
33
34

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

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

(a) the personal representative has received notice or has knowledge that there is an intention

to use genetic material to create a child after the decedent's death; and

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

COMMENT

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

{Comment to be continued}

**SUPPLEMENTAL PROVISIONS PROPOSING MISCELLANEOUS UPC
AMENDMENTS**

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

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

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

[(c) Not later than January 31 of [insert year after the year in which Act becomes effective], and

1 of each succeeding year, the [insert appropriate state agency] shall issue a cumulative list, beginning
2 with the dollar amounts effective for the estates of decedents dying in [insert year after the year in
3 which Act becomes effective], of each dollar amount as increased under this section.]

4 **Supporting Memorandum**

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

10 **COMMENT**

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

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

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

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

25
26
27 **AT THE ANNUAL MEETING, SOMEONE SUGGESTED THAT THIS SECTION**
28 **PROVIDE FOR DECREASE AS WELL AS INCREASE.**
29

1 **SHOULD WE MAKE THE WAIVER PROSPECTIVE ONLY ??? OR, PUT IT IN**
2 **BRACKETS AS AN ALTERNATIVE SECTION FOR ENACTING STATES THAT WISH**
3 **TO ENACT THE RESTATEMENT APPROACH??? OR, MAYBE THE MOST WE CAN DO**
4 **IS TO ADD A REFERENCE TO THE RESTATEMENT IN THE COMMENT**
5

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

7 (a) The right of election of a surviving spouse and the rights of the surviving spouse to
8 homestead allowance, exempt property, and family allowance, or any of them, may be waived,
9 wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by
10 the surviving spouse {??? change to a record ??}.

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

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

13 ~~(2) the waiver was unconscionable when it was executed and, before execution of the waiver,~~

14 ~~he [or she]:~~

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

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

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

21 (b) For a premarital or a marital agreement or a waiver to be enforceable against the surviving
22 spouse, the enforcing party must show that the surviving spouse's consent was informed and was
23 not obtained by undue influence or duress.

24 (c) A rebuttable presumption arises that the requirements of subsection (b) are satisfied, shifting
25 the burden of proof to the surviving spouse to show that his or her consent was not informed or was

1 obtained by undue influence or duress, if the enforcing party shows that:

2 (1) before the agreement or waiver was executed, (i) the surviving spouse knew, at least
3 approximately, the decedent's assets and asset values, income, and liabilities; or (ii) the decedent
4 or his or her representative provided in timely fashion to the surviving spouse a written
5 statement accurately disclosing the decedent's significant assets and asset values, income, and
6 liabilities; and either

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

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

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

17 **(d e)** Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the
18 property or estate of a present or prospective spouse or a complete property settlement entered into
19 after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead
20 allowance, exempt property, and family allowance by each spouse in the property of the other and
21 a renunciation by each of all benefits that would otherwise pass to him [or her] from the other by
22 intestate succession or by virtue of any will executed before the waiver or property settlement.

23 **Supporting Memorandum**

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

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 or waiver 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.

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

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

COMMENT

~~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.

While there are good reasons to respect such contracts, the relationship between parties contracting in anticipation of marriage, or in the midst of an ongoing marriage, requires legal standards different from ordinary commercial settings. A party negotiating a commercial contract can engage in arms-length dealings to maximize partisan advantage. Parties to a premarital or a marital agreement or waiver are in a relationship of trust and confidence. Entering into or operating

1 within a marriage, an individual may have expectations about his or her partner that may impair the capacity for self-
2 protective judgment, or the inclination to exercise it. The law reasonably requires greater assurance that the parties
3 understand and appreciate the consequences of such a premarital or a marital agreement or waiver.

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

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

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

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

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

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

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

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

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

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

54 The enforcing party must also show that the agreement stated, in language easily understandable by an adult of

1 ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at death that were altered
2 by the agreement, and the nature of that alteration.

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

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

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

14 (i) the spouse of the participant consents in writing to such election,

15 (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or
16 the consent of the spouse expressly permits designation by the participant without any requirement of further
17 consent by the spouse), and

18 (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary
19 public.

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

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

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

1 **SECTION 2-302. OMITTED CHILDREN.**

2 (a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any
3 of his [or her] children born or adopted after the execution of the will, the omitted after-born or
4 after-adopted child receives a share in the estate as follows:

5 (1) If the testator had no child living when he [or she] executed the will, an omitted
6 after-born or after-adopted child receives a share in the estate equal in value to that which the
7 child would have received had the testator died intestate, without a surviving spouse, as to that
8 portion of the testator's estate, if any, that is neither devised nor otherwise passes to the
9 testator's surviving spouse or other parent of the omitted child,~~unless the will devised all or~~
10 ~~substantially all of the estate to the other parent of the omitted child and that other parent~~
11 ~~survives the testator and is entitled to take under the will.~~

12 (2) If the testator had one or more children living when he [or she] executed the will, and the
13 will devised property or an interest in property to one or more of the then-living children, an
14 omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

15 (i) The portion of the testator's estate in which the omitted after-born or after-adopted
16 child is entitled to share is limited to devises made to the testator's then-living children under
17 the will.

18 (ii) The omitted after-born or after-adopted child is entitled to receive the share of the
19 testator's estate, as limited in subparagraph (i), that the child would have received had the
20 testator included all omitted after-born and after-adopted children with the children to whom
21 devises were made under the will and had given an equal share of the estate to each child.

22 (iii) To the extent feasible, the interest granted and omitted after-born or after-adopted
23 child under this section must be of the same character, whether equitable or legal, present

1 or future, as that devised to the testator's then-living children under the will.

2 (iv) In satisfying a share provided by this paragraph, devises to the testator's children
3 who were living when the will was executed abate ratably. In abating the devises of the
4 then-living children, the court shall preserve to the maximum extent possible the character
5 of the testamentary plan adopted by the testator.

6 (b) Neither subsection (a)(1) nor subsection (a)(2) applies if:

7 (1) it appears from the will that the omission was intentional; or

8 (2) the testator provided for the omitted after-born or after-adopted child by transfer outside
9 the will and the intent that the transfer be in lieu of a testamentary provision is shown by the
10 testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

11 (c) If at the time of execution of the will the testator fails to provide in his [or her] will for a
12 living child solely because he [or she] believes the child to be dead, the child is entitled to share in
13 the estate as if the child were an omitted after-born or after-adopted child.

14 (d) In satisfying a share provided by subsection (a)(1), devises made by the will abate under
15 Section 3-902.

16
17 **{add to Comment—in subsection (a)(1), the phrase “otherwise passes” refers to the surviving**
18 **spouse taking an elective share, an omitted spouse's share under 2-301, by probate exemption**
19 **or allowance, or by premarital or marital agreement or waiver}**

20
21 **Supporting Memorandum**

22 The above revision is intended to rectify a case such as the following. G executed a will devising all of her property
23 to her husband (H) if he survives her, but if not to a charity. G and H then had a child. H predeceased G. G then
24 remarried. G died survived by H-2. H-2 takes as an omitted spouse under 2-301. H-2's share under 2-301 is the first
25 \$150,000 plus 50 % of the excess. G's probate estate is worth \$1 million. H-2 takes \$575,000. Under the original
26 version, the charity takes the remaining \$425,000 and G's child takes nothing. The revision would give G's child the
27 remaining \$425,000 and the charity nothing. {additional explanation to be supplied}

28
29 **Comment**
30 {not revised}

1 This section provides for both the case where a child was born or adopted after the execution of the will and not
2 foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his or her
3 children because of the mistaken belief that the child is dead.

4 **Basic Purposes and Scope of Revisions.** This section is substantially revised. The revisions have two basic
5 objectives. The first basic objective is to provide that a will that devised, under trust or not, all or substantially all of the
6 testator's estate to the other parent of the omitted child prevents an after-born or after-adopted child from taking an
7 intestate share if none of the testator's children was living when he or she executed the will. (Under this rule, the other
8 parent must survive the testator and be entitled to take under the will.)

9 Under the pre-1990 Code, such a will prevented the omitted child's entitlement only if the testator had one or more
10 children living when he or she executed the will. The rationale for the revised rule is found in the empirical evidence
11 (cited in the Comment to Section 2-102) that suggests that even testators with children tend to devise their entire estates
12 to their surviving spouses, especially in smaller estates. The testator's purpose is not to disinherit the children; rather,
13 such a will evidences a purpose to trust the surviving parent to use the property for the benefit of the children, as
14 appropriate. This attitude of trust of the surviving parent carries over to the case where none of the children have been
15 born when the will is executed.

16 The second basic objective of the revisions is to provide that if the testator had children when he or she executed
17 the will, and if the will made provision for one or more of the then-living children, an omitted after-born or after-adopted
18 child does not take a full intestate share (which might be substantially larger or substantially smaller than given to the
19 living children). Rather, the omitted after-born or after-adopted child participates on a pro rata basis in the property
20 devised, under trust or not, to the then-living children.

21 A more detailed description of the revised rules follows.

22 **No Child Living When Will Executed.** If the testator had no child living when he or she executed the will,
23 subsection (a)(1) provides that an omitted after-born or after-adopted child receives the share he or she would have
24 received had the testator died intestate, unless the will devised, under trust or not, all or substantially all of the estate to
25 the other parent of the omitted child. If the will did devise, under trust or not, all or substantially all of the estate to the
26 other parent of the omitted child, and if that other parent survives the testator and is entitled to take under the will, the
27 omitted after-born or after-adopted child receives no share of the estate. In the case of an after-adopted child, the term
28 "other parent" refers to the other adopting parent. (The other parent of the omitted child might survive the testator, but
29 not be entitled to take under the will because, for example, that devise, under trust or not, to the other parent was revoked
30 under Section 2-803 or 2-804.)

31 **One or More Children Living When Will Executed.** If the testator had one or more children living when the will
32 was executed, subsection (a)(2), which implements the second basic objective stated above, provides that an omitted
33 after-born or after-adopted child only receives a share of the testator's estate if the testator's will devised property or an
34 equitable or legal interest in property to one or more of the children living at the time the will was executed; if not, the
35 omitted after-born or after-adopted child receives nothing.

36 Subsection (a)(2) is modelled on N.Y. Est. Powers & Trusts Law § 5-3.2. Subsection (a)(2) is illustrated by the
37 following example.

38
39 *Example.* When G executed her will, she had two living children, A and B. Her will devised \$7,500 to each child.
40 After G executed her will, she had another child, C.

41 C is entitled to \$5,000. \$2,500 (1/3 of \$7,500) of C's entitlement comes from A's \$7,500 devise (reducing it to
42 \$5,000); and \$2,500 (1/3 of \$7,500) comes from B's \$7,500 devise (reducing it to \$5,000).

43 *Variation.* If G's will had devised \$10,000 to A and \$5,000 to B, C would be entitled to \$5,000. \$3,333 (1/3 of
44 \$10,000) of C's entitlement comes from A's \$10,000 devise (reducing it to \$6,667); and \$1,667 (1/3 of \$5,000) comes
45 from B's \$5,000 devise (reducing it to \$3,333).

46
47 **Subsection (b) Exceptions.** To preclude operation of subsection (a)(1) or (a)(2), the testator's will need not make
48 any provision, even nominal in amount, for a testator's present or future children; under subsection (b)(1), a simple
49 recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may
50 have would be sufficient.

51 For a case applying the language of subsection (b)(2), in the context of the omitted spouse provision, see *Estate of*
52 *Bartell*, 776 P.2d 885 (Utah 1989).

53 The moving party has the burden of proof on the elements of subsections (b)(1) and (b)(2).

54 **Subsection (c).** Subsection (c) addresses the problem that arises if at the time of execution of the will the testator

1 fails to provide in his or her will for a living child solely because he or she believes the child to be dead. Extrinsic
2 evidence is admissible to determine whether the testator omitted the living child solely because he or she believed the
3 child to be dead. Cf. Section 2-601, Comment. If the child was omitted solely because of that belief, the child is entitled
4 to share in the estate as if the child were an omitted after-born or after-adopted child.

5 **Abatement Under Subsection (d).** Under subsection (d) and Section 3-902, any intestate estate would first be
6 applied to satisfy the intestate share of an omitted after-born or after-adopted child under subsection (a)(1).

7 **Historical Note.** This Comment was revised in 1993. For the prior version, see 8 U.L.A. 103 (Supp.1992).
8

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

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

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

19 In conjunction with adding notarization as an optional method of execution, this proposal adds a subsection to § 3-
20 406, which is the section of the UPC that provides for the effect of various methods of execution in contested cases. The
21 amendment proposes that a notarized will be rebuttably presumed to have been executed properly, subject to rebuttal
22 by any contrary evidence, including proof of fraud or forgery affecting the acknowledgment. See below, under the title
23 “§ 3-406: Formal Testacy Proceedings; Contested Cases.”

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

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

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

37
38 *Uniform Trust Code* § 402(a)(2) provides that a trust is created if the settlor “indicates an intention to create
39 the trust.” Such a trust can be a revocable inter-vivos trust, which in many respects is the equivalent of a will.

40
41 *Power of Attorney Act* § 105 provides that a power of attorney must be signed by the principal or in the
42 principal’s conscious presence by another individual directed by the principal to sign the principal’s name on
43 the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal
44 acknowledges the signature before a notary public or other individual authorized by law to take
45 acknowledgments.

46
47 *Uniform Health-care Decisions Act* § 2(f) provides that a health-care power must be in writing and signed by
48 the principal.

49
50 **§ 2-502(c): Extrinsic Evidence to Establish Meaning of Holographic Will.** This proposal amends § 2-502(c),

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 which authorizes holographic wills. The proposed amendment adds a sentence that provides that extrinsic evidence,
2 including portions of the document that are not in the testator's handwriting, can be used to establish the meaning of a
3 holographic will.

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

6
7 § 3.2, Comment c. *Testamentary intent — holographic wills.* Holographic wills as well as attested wills
8 must be executed with testamentary intent. . . . Testamentary intent need not be shown from the face of the will,
9 but can be established by extrinsic evidence. Extrinsic evidence can also be used to establish the meaning of
10 a holographic will.

11
12 The added sentence would produce a more just result in cases like *Estate of Foxley*, 575 N.W.2d 150 (Neb. 1998),
13 which was decided under a holographic will statute similar to the former UPC's holographic will statute. Neb. Rev. Stat.
14 § 30-2328 provides: "An instrument which purports to be testamentary in nature but does not comply with [the statute
15 relating to attested wills] is valid as a holographic will, whether or not witnessed, if the signature, the material provisions,
16 and an indication of the date of signing are in the handwriting of the testator."

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

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

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

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

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

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

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

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

45
46 The result was that one-sixth of Mrs. Foxley's estate went to her grandson under the Nebraska antilapse statute.

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

50
51 **Comment**

52 {partially revised}

53 ~~Scope and Purpose of Revision. Section 2-502 and pre-1990 Section 2-503 are combined to make room for new~~

1 Section 2-503. Also, a cross reference to new Section 2-503 is added, and fairly minor clarifying revisions are made.

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

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

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

22 Signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a
23 “signature.” There is no requirement that the testator “publish” the document as his or her will, or that he or she request
24 the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the
25 will outside the presence of the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers
26 (or that his or her name was signed by another) or that the document is his or her will. An acknowledgment need not be
27 expressly stated, but can be inferred from the testator’s conduct. *Norton v. Georgia Railroad Bank & Tr. Co.*, 248 Ga.
28 847, 285 S.E.2d 910 (1982). The witnesses must sign as witnesses (see, e.g., *Mossler v. Johnson*, 565 S.W.2d 952 (Tex.
29 Civ.App. 1978)), and must sign within a reasonable time after having witnessed the signing or acknowledgment. There
30 is, however, no requirement that the witnesses sign before the testator’s death; in a given case, the reasonable-time
31 requirement could be satisfied even if the witnesses sign after the testator’s death.

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

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

37 Signature Guarantee. A signature guarantee does not satisfy subsection (a)(2)(B). A signature guarantee is not an
38 acknowledgment before a notary public or other person authorized to take acknowledgments. The signature guarantee
39 program is regulated by federal law and is designed to facilitate transactions relating to securities. See 17 C.F.R. §
40 240.17Ad-15.

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

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

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

51 Under subsection (c), testamentary intent can be shown by extrinsic evidence, including for holographic wills the

- 1 printed, typed, or stamped portions of the form or document.
- 2

1 **SECTION 2-504. SELF-PROVED WILL.**

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

7 [subsection continues without change]

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

13 [subsection continues without change]

14 **Supporting Memorandum**

15 **§ 2-504: Self-Proved Will.** Adding an optional method of execution by having the will notarized necessitates
16 making a minor amendment to § 2-504, which provides that a will can be made self-proved by attaching a notarized self-
17 proving affidavit. Section 2-504 must be amended so that it only applies to a will that is executed with attesting
18 witnesses.

19 **COMMENT**

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

26 A new subsection (c) is added to counteract an unfortunate judicial interpretation of similar self-proving will
27 provisions in a few states, under which a signature on the self-proving affidavit has been held not to constitute a signature
28 on the will, resulting in invalidity of the will in cases where the testator or witnesses got confused and only signed on
29 the self-proving affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U. L.Q.
30 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash.Ct.App.1989).

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

Supporting Memorandum

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

COMMENT

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

Restatement § 12.1. Reforming Donative Documents to Correct Mistakes

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

Comment:

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

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

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

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

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

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

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

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

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

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

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

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

The normal standard of proof in civil cases is preponderance of the evidence. Under that standard, the evidence must establish a probability that an assertion is true, *i.e.*, that it is more probable than not that the assertion is true. A higher degree of probability is required under the clear-and-convincing-evidence standard. Although this higher standard of proof defies quantification, it is generally agreed that it requires an assertion to be established by a high degree of

1 probability, though not to an absolute or moral certainty or beyond a reasonable doubt.

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

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

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

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

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

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

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

40 **Illustrations:**

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

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

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

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

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

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

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

14
15 **Illustrations:**

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

18 If this evidence satisfies the clear-and-convincing-evidence standard of proof, the will is reformed to substitute
19 "\$10,000" for "\$1,000."

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

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

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

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

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

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

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

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

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

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

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

50
51 *j. Particularity of proof.* In order to support an order of reformation or the imposition of a constructive trust, the
52 petitioner must prove, by clear and convincing evidence, both (1) that a mistake of fact or law affected specific terms
53 of the document and (2) what the donor's true intention was. Both elements must be proved with particularity. For
54 example, a claim that "if only my aunt had known how much I loved her, she would have left me more" lacks sufficient

1 particularity to support a petition for remedy. Proof that the donor instructed his or her attorney to “give me an estate
2 plan that incurs the lowest possible tax liability” lacks sufficient particularity to support a reformation remedy.

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

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

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

31
32 We have also considered whether any special significance ought to be given to cases in which the will has been
33 read over to the testator, perhaps with explanation, and expressly approved by him before execution. In our view
34 it should not. Some testators are inattentive, some find it difficult to understand what their solicitors say and do not
35 like to confess it, and some make little or no attempt to understand. As long as they are assured that the words used
36 carry out their instructions, they are content. Others may follow every word with meticulous attention. It is
37 impossible to generalise, and our view is that reading over is one of the many factors to which the court should pay
38 attention, but that it should have no conclusive effect.
39

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

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

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

53 A person otherwise entitled to reformation or to a constructive trust is barred from recovery if the complainant has
54 failed to bring, or, having brought, has failed to prosecute a suit for so long a time and under such circumstances that

1 it would be inequitable to permit the complainant to prosecute the suit. A cause of action may also be barred by lapse
2 of time because of an applicable statute of limitations. See Restatement, Restitution § 148.

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

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

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

5
6 **COMMENT**

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

13
14 Restatement § 12.2. Modifying Donative Documents to Achieve Donor's Tax Objectives

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

17
18 **Restatement Comment:**

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

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

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

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

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

45 When federal tax law is unclear regarding the tax consequences of a proposed modification, modification to achieve
46 the donor's federal tax objectives is more problematic. Courts should be cautious in granting a requested order of
47 modification in such circumstances. In addition to requiring that the modification not violate the donor's probable
48 intention (see Comment f), the proponent of modification bears the burden of showing a reasonable prospect that the

1 proposed modification will be effective for federal tax purposes.

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

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

12 In other situations, the modification necessary to achieve the donor's tax objectives may require an alteration of
13 beneficial interests. Such an alteration is acceptable so long as it does not violate the donor's probable intention. In
14 determining the donor's probable intention, the donor's non-tax as well as tax objectives are to be considered. The
15 greater the proposed alteration, the more rigorous the court should be in measuring the requested modification against
16 the donor's probable intention. One measure of the donor's probable intention is the donor's general dispositive plan.
17 Even if it is questionable whether the modification would be consistent with the donor's general dispositive plan,
18 however, the court can still find that it does not violate the donor's probable intention if the detrimentally affected
19 beneficiaries consent to the proposed modification. Such consent makes it more likely that the donor would have
20 approved of the modification, whether or not the modification alters the donor's general dispositive plan.

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

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

3 ~~—(a) If evidence concerning execution of an attested will which is not self-proved is necessary in~~
4 ~~contested cases, the testimony of at least one of the attesting witnesses, if within the state, competent~~
5 ~~and able to testify, is required. Due execution of an attested or unattested will may be proved by~~
6 ~~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 without~~
9 ~~the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed~~
10 ~~or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or~~
11 ~~affidavit.~~

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

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

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

20 (3) If the will is witnessed pursuant to Section 2-502(a)(2)(A), but not notarized or self-proved,
21 the testimony of at least one of the attesting witnesses, if within the state, competent and able to
22 testify, is required. Due execution may be proved by other evidence. An attestation clause that is
23 signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause

1 occurred.

2 **Supporting Memorandum**

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

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

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

11 First, the will must be in writing;

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

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

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

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

27
28 Amending this section is desirable to make it clear that, in the case of a self-proved will, compliance with all of the
29 requirements for execution is conclusively presumed without the testimony of any attesting witness, upon filing the will
30 and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting
31 the acknowledgment or affidavit.³ Adding a subsection regarding the effect of a notarized will (assuming that the above
32 proposed amendment is approved) is also desirable. Finally, it is also desirable to amend the subsection dealing with
33 proof of a will that is neither self-proved nor notarized by relocating the original subsection dealing with this issue and
34 also adding a sentence regarding the evidentiary effect of an attestation clause.

35
36 **COMMENT**

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

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

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

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.”

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

2
3 Surrogate's Court, New York County, New York.

4 **In the Matter of an APPLICATION TO CONSTRUE the TERMS “ISSUE” AND**
5 **“DESCENDANTS” UNDER AGREEMENTS DATED DECEMBER 31, 1969, among Martin B., as**
6 **Grantor, and Martin B., et al., as Trustees.**

7 No. 1558/06.

8 July 30, 2007

9
10 Milbank Tweed Hadley & McCloy (New York), by Jonathan Blattmachr, Esq., for the Trustees.
11 Mario M. Cuomo, Esq., as guardian ad litem for James Mitchell B. and Warren B, infants.

12
13 RENEE R. ROTH, J.

14 This uncontested application for advice and direction in connection with seven trust agreements executed
15 on December 31, 1969, by Martin B. (the Grantor) illustrates one of the new challenges that the law of trusts
16 must address as a result of advances in biotechnology. Specifically, the novel question posed is whether, for
17 these instruments, the terms “issue” and “descendants” include children conceived by means of in vitro
18 fertilization with the cryopreserved semen of the Grantor's son who had died several years prior to such
19 conception.

20 The relevant facts are briefly stated. Grantor (who was a life income beneficiary of the trusts) died on July
21 9, 2001, survived by his wife Abigail and their son Lindsay (who has two adult children), but predeceased
22 by his son James, who died of Hodgkins Lymphoma on January 13, 2001. James, however, after learning of
23 his illness, deposited a sample of his semen at a laboratory with instructions that it be cryopreserved and that,
24 in the event of his death, it be held subject to the directions of his wife Nancy. Although at his death James
25 had no children, three years later Nancy underwent in vitro fertilization with his cryopreserved semen and
26 gave birth on October 15, 2004, to a boy (James Mitchell). Almost two years later, on August 14, 2006, after
27 using the same procedure, she gave birth to another boy (Warren). It is undisputed that these infants, although
28 conceived after the death of James, are the products of his semen.

29 Although the trust instruments addressed in this proceeding are not entirely identical, for present purposes
30 the differences among them are in all but one respect immaterial. The only relevant difference is that one is
31 expressly governed by the law of New York while the others are governed by the law of the District of
32 Columbia. As a practical matter, however, such difference is not material since neither jurisdiction provides
33 any statutory authority or judicial comment on the question before the court.

34 All seven instruments give the trustees discretion to sprinkle principal to, and among, Grantor's “issue”
35 during Abigail's life. The instruments also provide that at Abigail's death the principal is to be distributed as
36 she directs under her special testamentary power to appoint to Grantor's “issue” or “descendants” (or to
37 certain other “eligible” appointees). In the absence of such exercise, the principal is to be distributed to or for
38 the benefit of “issue” surviving at the time of such disposition (James's issue, in the case of certain trusts, and
39 Grantor's issue, in the case of certain other trusts). The trustees have brought this proceeding because under
40 such instruments they are authorized to sprinkle principal to decedent's “issue” and “descendants” and thus
41 need to know whether James's children qualify as members of such classes.

42 The question thus raised is whether the two infant boys are “descendants” and “issue” for purposes of
43 such provisions although they were conceived several years after the death of James.

44 Although the particular question presented here arises from recent scientific advances in biotechnology,
45 this is not the first time that the Surrogate's Court has been called upon to consider an issue involving a child
46 conceived through artificial means.

47 Over three decades ago, Surrogate Nathan R. Sobel addressed one of the earliest legal problems created
48 by the use of artificial insemination as a technique for human reproduction (Matter of Anonymous, 74
49 Misc.2d 99, 345 N.Y.S.2d 430). In that case, the petitioner sought to adopt a child that his wife had

1 conceived, during her prior marriage, through artificial insemination with the sperm of a third-party donor
2 (heterologous insemination). The question before Surrogate Sobel was whether the former husband had
3 standing to object to the adoption. In the course of his analysis, the learned Surrogate predicted that artificial
4 insemination would become increasingly common and would inevitably also complicate the legal landscape
5 in areas other than adoption. Indeed, he specifically forecast that, as a result of such technological advances,
6 “[legal] issues ... will multiply [in relation to matters such as] intestate succession and will construction” (*id.*,
7 at 100, 345 N.Y.S.2d 430). Surrogate Sobel noted, however, that there was at that point a dearth of
8 statutory or decisional guidance on questions such as the one before him.

9 The following year New York enacted Domestic Relations Law 73, which recognized the status of a child
10 born to a married couple as a result of heterologous artificial insemination provided that both spouses
11 consented in writing to the procedure, to be performed by a physician. Such statute reflected the evolution
12 of the State's public policy toward eliminating the distinction between marital and non-marital children in
13 determining family rights. Thus, where a husband executes a written consent (or even in some instances
14 where he has expressed oral consent) to artificial insemination the child is treated as his natural child for all
15 purposes despite the absence of a biological connection between the two (see e.g. Scheinkman, Practice
16 Commentaries, McKinney's Con Laws of NY, Book 14, Domestic Relations Law 73, at 309-10).

17 Surrogate Sobel's predictions in Anonymous proved to be prophetic. Some thirty years later, the novel
18 issues generated by scientific developments in the area of assisted human reproduction are perplexing
19 legislators and legal scholars (see Scott, A Look at the Rights and Entitlements of Posthumously Conceived
20 Children: No Surefire Way to Tame the Reproductive Wild West, 52 Emory LJ 963, 995; Elliott, Tales of
21 Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child, 39 Real Prop Prob &
22 Tr J 47, 50; Mika & Hurst, One Way to be Born? Legislative Inaction and the Posthumous Child, 79 Marq
23 L Rev 993).

24 Compounding the problem, as the authors of the foregoing studies have observed, decisions and
25 enactments from earlier times-when human reproduction was in all cases a natural and uniform process-do
26 not fit the needs of this more complex era. These new issues, however, are being discussed and in some
27 jurisdictions have been the subject of legislation or judicial decisions. But, as will be discussed below, neither
28 New York nor the District of Columbia, the governing jurisdictions, has a statute directly considering the
29 rights of post-conceived children. In this case legislative action has not kept pace with the progress of science.
30 In the absence of binding authority, courts must turn to less immediate sources for a reflection of the public's
31 evolving attitude toward assisted reproduction-including statutes in other jurisdictions, model codes, scholarly
32 discussions and Restatements of the law.

33 We turn first to the laws of the governing jurisdictions. At present, the right of a posthumous child to
34 inherit (EPTL 4-1.1[c] [in intestacy]) or as an after-born child under a will (EPTL 5-3.2 [under a will]) is
35 limited to a child conceived during the decedent's lifetime. Indeed, a recent amendment to section 5-3.2
36 (effective July 26, 2006) was specifically intended to make it clear that a post-conceived child is excluded
37 from sharing in the parent's estate as an “after-born” (absent some provision in the will to the contrary, EPTL
38 5-3.2[b]). Such limitation was intended to ensure certainty in identifying persons interested in an estate and
39 finality in its distribution (see Sponsor's Mem, Bill Jacket L 2006, ch 249). It, however, is by its terms
40 applicable only to wills and to “after-borns” who are children of the testators themselves and not children of
41 third parties (see Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 5-3.2,
42 at 275). Moreover, the concerns related to winding up a decedent's estate differ from those related to
43 identifying whether a class disposition to a grantor's issue includes a child conceived after the father's death
44 but before the disposition became effective.

45 With respect to future interests, both the District of Columbia and New York have statutes which
46 ostensibly bear upon the status of a post-conceived child. In the D.C.Code, the one statutory reference to
47 posthumous children appears in section 704 of title 42 which in relevant part provides that, “[w]here a future
48 estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same
49 manner as if living at the death of their parent....” New York has a very similar statute, which provides in

1 relevant part that, “[w]here a future estate is limited to children, distributees, heirs or issue, posthumous
2 children are entitled to take in the same manner as if living at the death of their ancestors” (EPTL 6.5-7). In
3 addition, EPTL 2-1.3(2) provides that a posthumous child may share as a member of a class if such child was
4 conceived before the disposition became effective.

5 Each of the above statutes read literally would allow post-conceived children—who are indisputably
6 “posthumous”—to claim benefits as biological offspring. But such statutes were enacted long before anyone
7 anticipated that children could be conceived after the death of the biological parent. In other words, the
8 respective legislatures presumably contemplated that such provisions would apply only to children *en ventre*
9 *sa mere* (see e.g. Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 6-5.7,
10 at 176).

11 We turn now to the jurisdictions in which the inheritance rights of a post-conceived child have been
12 directly addressed by the legislatures, namely, Louisiana, California and Florida and to the seven States that
13 have adopted, in part, the Uniform Parentage Act (2000, as amended in 2002)(UPA, discussed below),
14 namely, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming. Although we are
15 concerned here with a male donor, the legislation also covers the use of a woman's eggs (UPA 707).

16 In Louisiana, a post-conceived child may inherit from his or her father if the father consented in writing
17 to his wife's use of his semen and the child was born within three years of the father's death. But it is noted
18 parenthetically that the statute also allows a person adversely affected to challenge paternity within one year
19 of such child's birth (LA Civil Code 9:391.1).

20 In order for a post-conceived child to inherit in the State of California, the parent must have consented
21 in writing to the posthumous use of genetic material and designated a person to control its use. Such designee
22 must be given written notice of the designation and the child must have been conceived within two years of
23 decedent's death (CA Probate Code 249.5).

24 Florida, by contrast, requires a written agreement by the couple and the treating physician for the
25 disposition of their eggs or semen in the event of divorce or death. A post-conceived child may inherit only
26 if the parent explicitly provided for such child under his or her will (FL Stat Ann 742.17).

27 Under the UPA, a man who provides semen, or consents to assisted reproduction by a woman as provided
28 under section 704, with the intent to become a father is the parent of the child who is born as a result (UPA
29 § 703). Under section 704 of the UPA, both the man and the woman must consent in writing to the
30 recognition of the man as the father. The UPA has also addressed the situation where the potential parent dies
31 before the act of assisted reproduction has been performed. In such situation, decedent is the parent of the
32 child if decedent agreed to the use of assisted reproduction after his death (UPA 707).

33 On a related question, the courts of three States have held that a post-conceived child is entitled to
34 benefits under the Social Security Act: Massachusetts (Woodward v. Commissioner of Soc. Sec., 435 Mass.
35 536 [2001]), New Jersey (Matter of Kolacy, 332 N.J.Super. 593, 753 A.2d 1257[NJ Super. Ct. Ch.Div.2000
36 (which had enacted an earlier version of the UPA), and Arizona (Gillett-Netting v. Barnhart, 371 F.3d 593).
37 All three courts concluded that post-conceived children qualified for such benefits.

38 As can clearly be seen from all the above, the legislatures and the courts have tried to balance competing
39 interests. On the one hand, certainty and finality are critical to the public interests in the orderly
40 administration of estates. On the other hand, the human desire to have children, albeit by biotechnology,
41 deserves respect, as do the rights of the children born as a result of such scientific advances. To achieve such
42 balance, the statutes, for example, require written consent to the use of genetic material after death and
43 establish a cut-off date by which the child must be conceived. It is noted parenthetically that in this regard
44 an affidavit has been submitted here stating that all of James's cryopreserved sperm has been destroyed,
45 thereby closing the class of his children.

46 Finally, we turn to the instruments presently before the court. Although it cannot be said that in 1969 the
47 Grantor contemplated that his “issue” or “descendants” would include children who were conceived after his
48 son's death, the absence of specific intent should not necessarily preclude a determination that such children
49 are members of the class of issue. Indeed, it is noted that the Restatement of Property suggests that “[u]nless

1 the language or circumstances indicate that the transferor had a different intention, a child of assisted
2 reproduction [be] treated for class-gift purposes as a child of a person who consented to function as a parent
3 to the child and who functioned in that capacity or was prevented from doing so by an event such as death
4 or incapacity” (Restatement [Third] of Property [Wills and Other Donative Transfers] 14.8 [Tentative Draft
5 No. 4 204]).

6 The rationale of the Restatement, Matter of Anonymous and section 73 of the Domestic Relations Law
7 should be applied here, namely, if an individual considers a child to be his or her own, society through its
8 laws should do so as well. It is noted that a similar rationale was endorsed by our State's highest court with
9 respect to the beneficial interests of adopted children (Matter of Park, 15 N.Y.2d 413, 260 N.Y.S.2d 169, 207
10 N.E.2d 859). Accordingly, in the instant case, these post-conceived infants should be treated as part of their
11 father's family for all purposes. Simply put, where a governing instrument is silent, children born of this new
12 biotechnology with the consent of their parent are entitled to the same rights “for all purposes as those of a
13 natural child” (id., at 418, 260 N.Y.S.2d 169, 207 N.E.2d 859).

14 Although James probably assumed that any children born as a result of the use of his preserved semen
15 would share in his family's trusts, his intention is not controlling here. For purposes of determining the
16 beneficiaries of these trusts, the controlling factor is the Grantor's intent as gleaned from a reading of the trust
17 agreements (see, Matter of Fabbri, 2 N.Y.2d 236, 159 N.Y.S.2d 184, 140 N.E.2d 269; Matter of Larkin, 9
18 N.Y.2d 88, 211 N.Y.S.2d 175, 172 N.E.2d 555; Jewell v. Graham, 24 F.2d 257, 57 App D.C. 391; O'Connell
19 v. Riggs National Bank, 475 A.2d 405). Such instruments provide that, upon the death of the Grantor's wife,
20 the trust fund would benefit his sons and their families equally. In view of such overall dispositive scheme,
21 a sympathetic reading of these instruments warrants the conclusion that the Grantor intended all members of
22 his bloodline to receive their share.

23 Based upon all of the foregoing, it is concluded that James Mitchell and Warren are “issue” and
24 “descendants” for all purposes of these trusts.

25 As can be seen from all of the above, there is a need for comprehensive legislation to resolve the issues
26 raised by advances in biotechnology. Accordingly, copies of this decision are being sent to the respective
27 Chairs of the Judiciary Committees of the New York State Senate and Assembly.

28 Decree signed.
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