

AMENDMENTS TO UNIFORM PROBATE CODE

Approved by the Executive Committee of the National Conference of Commissioners
on Uniform State Laws, January 12, 2008

Elective Share

PART 2 ELECTIVE SHARE OF SURVIVING SPOUSE

General Comment

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

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

The Partnership Theory of Marriage

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." M. Glendon, *The Transformation of Family Law* 131 (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally

acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as “a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost.” *Id.* See also American Law Institute, Principles of Family Dissolution § 4.09 Comment c (2002).

No matter how the rationale is expressed, the community-property system, including that version of community law promulgated in the Uniform Model Marital Property Act, recognizes the partnership theory, but it is sometimes thought that the common-law system denies it. In the ongoing marriage, it is true that the basic principle in the common-law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse upon acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple’s enterprise is in essence collaborative.

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

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

Elective-share law in the common-law states, however, has not caught up to the partnership theory of marriage. Under typical American elective-share law, including the elective share provided by the ~~pre-1990~~ original Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate—not the 50 percent share of the couple's combined assets that the partnership theory would imply.

Long-term Marriages. To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The ~~pre-1990~~ original elective-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result depends on which spouse happens to die first and on how the property accumulated during the marriage was nominally titled.

Example 1—Long-term Marriage under Conventional Forced-share Law. Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B.

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

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

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

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

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

Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-

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

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

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

The value of the couple's combined assets is \$600,000, \$300,000 of which is titled in B's name (the decedent) and \$300,000 of which is titled in C's name (the survivor).

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

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

The Redesigned Elective Share

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

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

to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

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

2008 Revisions. When first promulgated in the early 1990s, the statute provided that the "elective-share percentage" increased annually according to a graduated schedule. The "elective-share percentage" ranged from a low of 0 percent for a marriage of less than one year to a high of 50 percent for a marriage of fifteen years or more. The "elective-share percentage" did double duty. The system equated the "elective-share percentage" of the couple's combined assets with 50 percent of the marital-property portion of the couple's assets—the assets that are subject to equalization under the partnership theory of marriage. Consequently, the elective share effected the partnership theory rather indirectly. Although the schedule was designed to represent by approximation a constant fifty percent of the marital-property portion of the couple's assets (the augmented estate), it did not say so explicitly.

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

The primary benefit of these changes is that the statute, as revised, presents the elective-share's implementation of the partnership theory of marriage in a direct rather than indirect form, adding clarity and transparency to the system. An important byproduct of the revision is that it

facilitates the inclusion of an alternative provision for enacting states that want to implement the partnership theory of marriage but prefer not to define the marital-property portion by approximation but by classification. Under the deferred marital-property approach, the marital-property portion consists of the value of the couple's property that was acquired during the marriage other than by gift or inheritance. (See below.)

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

Specific Features of the Redesigned Elective Share

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

Section 2-202(a)—The "Elective-share Percentage Amount." Under Section 2-202(a) establishes the first step in the overall redesign of the elective share, the elective-share amount is equal to 50 percent of the value of the "marital-property portion of the augmented estate." The marital-property portion of the augmented estate, which is determined under Section 2-203(b), increases with Section 2-202(a) implements the accrual-type elective share by adjusting the surviving spouse's ultimate entitlement to the length of the marriage. The longer the marriage, the larger the "marital-property portion of the augmented estate elective-share percentage." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of 15 years than in a marriage of 15 days. Specifically, the "elective-share percentage marital-property portion of the augmented estate" starts low and increases annually according to a graduated schedule until it ~~levels off at fifty percent~~ reaches 100 percent. ~~The schedule established in Section 2-202(a) starts by providing the surviving spouse, during the first year of marriage, a right to elect the "supplemental elective-share amount" only. (The supplemental elective-share amount is explained later.) After one year of marriage, the surviving spouse's "elective-share percentage" marital-property portion of the augmented estate is three six percent of the augmented estate and it increases with each additional year of marriage until it reaches the maximum 50~~ 100 percent level after 15 years of marriage.

Section 2-203(a)—the "Augmented Estate." The elective-share percentage of 50 percent determined under Section 2-202(a) is applied to the value of the "marital-property portion of the augmented estate." As defined in Section 2-203, the "augmented estate" equals the value of the

couple's *combined* assets, not merely to the value of the assets nominally titled in the decedent's name, as described in Sections 2-204 through 2-207.

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

Section 2-204—the value of the decedent's net probate estate;

Section 2-205—the value of the decedent's nonprobate transfers to others, consisting of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse;

Section 2-206—the value of the decedent's nonprobate transfers to the surviving spouse, consisting of will-substitute-type inter-vivos transfers made by the decedent to the surviving spouse; and

Section 2-207—the value of the surviving spouse's net assets at the decedent's death, plus any property that would have been in the surviving spouse's nonprobate transfers to others under Section 2-205 had the surviving spouse been the decedent.

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

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

Section 2-209—Satisfying the Elective-share Amount. Section 2-209 determines how the elective-share amount is to be satisfied. Under Section 2-209, the decedent's net probate estate and nonprobate transfers to others are liable to contribute to the satisfaction of the elective-share amount only to the extent the elective-share amount is not fully satisfied by the sum of the following amounts:

Subsection (a)(1)—amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under

Section 2-206, i.e., the value of the decedent's nonprobate transfers to the surviving spouse; and

Subsection (a)(2)— ~~twice the elective-share percentage, under Section 2-202(a), of the survivor's owned assets and nonprobate transfers to others, as determined under Section 2-207 the marital-property portion of amounts included in the augmented estate under Section 2-207.~~

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

Note that under Section 2-209(a)(2), ~~the portion of the surviving spouse's assets that counts toward making up the elective-share amount is derived by applying a percentage to the survivor's assets equal to double the elective-share percentage. In a long-term marriage, the elective-share percentage will be 50%; thus, in such a marriage, all of the survivor's assets are counted toward making up the spouse's elective-share amount.~~

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

~~The augmented estate is the sum of the amounts described in Sections 2-204 through 2-207:~~

	<u>Augmented Estate</u>	<u>Marital-Property Portion (100%)</u>
(1) A's net probate estate	\$400,000 300,000	\$300,000
(2) A's nonprobate transfers to others	0 \$100,000	\$100,000
(3) A's nonprobate transfers to B	\$0	\$0
(4) B's <u>net</u> assets and nonprobate transfers to others	\$200,000	\$200,000
Augmented Estate	\$600,000	\$600,000
Elective-Share Amount (50 % of Marital-property portion)		\$300,000
Less Amount Already Satisfied		\$200,000
Unsatisfied Balance		\$100,000

The elective-share percentage for a 15-year or longer marriage is 50%. This means that B's elective-share amount is \$300,000 (50% of \$600,000).

Under Section 2-209(a)(2), the percentage full value of B's assets that (\$200,000) counts first toward making up satisfying B's entitlement is ~~(twice the elective-share percentage of 50%), or \$200,000~~. B, therefore, is treated as already having received \$200,000 of B's ultimate entitlement of \$300,000. Section ~~2-209(b)~~ 2-209(c) makes A's net probate estate and nonprobate transfers to others liable for the unsatisfied balance of the elective-share amount, \$100,000, which is the amount needed to bring B's own \$200,000 up to ~~the~~ \$300,000 level.

Example 4—15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Survivor's Name. As in Example 3, A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made ~~no~~ nonprobate transfers to others in the amount of \$50,000 as defined in Section 2-205.

~~The augmented estate is the sum of the amounts described in Sections 2-204 through 2-207:~~

	<u>Augmented Estate</u>	<u>Marital- Property Portion (100%)</u>
(1) A's net probate estate	\$200,000 150,000	\$150,000
(2) A's nonprobate transfers to others	0 \$50,000	\$50,000
(3) A's nonprobate transfers to B	\$0	\$0
(4) B's assets and nonprobate transfers to others	\$400,000	\$400,000
Augmented Estate	<u>\$600,000</u>	<u>\$600,000</u>
<u>Elective-Share Amount (50% of Marital-property portion)</u>		\$300,000
<u>Less Amount Already Satisfied</u>		\$400,000
<u>Unsatisfied Balance</u>		\$0

The elective-share percentage for a 15-year or longer marriage is 50%. This means that B's elective-share amount is \$300,000 (50% of \$600,000).

Under Section 2-209(a)(2), the percentage full value of B's assets that (\$400,000) counts first toward making up satisfying B's entitlement is ~~100% (twice the elective-share percentage of 50%), or \$400,000~~. B, therefore, is treated as already having received more than B's ultimate entitlement of \$300,000. B has no claim on A's net probate estate or nonprobate transfers to others.

In a marriage that has lasted less than 15 years, only a portion of the survivor's

assets—not all—count toward making up the elective-share amount. This is because, in these shorter-term marriages, the elective-share percentage marital-property portion of the survivor’s assets under Section 2-203(b) in these shorter-term marriages is less than 50% 100% and, under Section 2-209(a)(2), the portion of the survivor’s assets that count toward making up the elective-share amount is double the elective-share percentage limited to the marital-property portion of those assets.

To explain why this is appropriate requires further elaboration of the underlying theory of the redesigned system. The system avoids the classification and tracing-to-source problems by applying an ever-increasing percentage to the couple’s combined assets in determining the marital-property portion of the couple’s assets. This is accomplished under Section 2-203(b) by applying an ever-increasing percentage, as the length of the marriage increases, to the couple’s combined assets without regard to when or how those assets were acquired, rather than applying a constant percentage (50%) to an ever-growing accumulation of assets. By approximation, the redesigned system equates the elective-share percentage marital-property portion of the couple’s combined assets with 50% of the couple’s marital assets—assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage that has endured long enough for the elective-share percentage to be 30% marital-property portion of their assets to be 60% under Section 2-203(b), 60% of each spouse’s assets are treated as marital assets. Section 2-209(a)(2) therefore counts only 60% of the survivor’s assets toward making up the elective-share amount in effect equates 30% of the couple’s combined assets with 50% of the couple’s marital assets. In the aggregate, Section 2-209(a)(2) equates 60% of the couple’s combined assets with the assets subject to equalization.

Example 5—Under 15-Year Marriage under the Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent’s Name. A and B were married to each other more than 5 but less than 6 years. A died, survived by B. A’s will left nothing to B, and A made no nonprobate transfers to B. A made ~~no~~ nonprobate transfers to others in the amount of \$100,000 as defined in Section 2-205.

~~The augmented estate is the sum of the amounts described in Sections 2-204 through 2-207:~~

	<u>Augmented Estate</u>	<u>Marital-Property Portion (30%)</u>
(1) A’s net probate estate	\$400,000 <u>300,000</u>	<u>\$90,000</u>
(2) A’s nonprobate transfers to others	0 <u>\$100,000</u>	<u>\$30,000</u>
(3) A’s nonprobate transfers to B	<u>\$0</u>	<u>\$0</u>
(4) B’s assets and nonprobate transfers to others	<u>\$200,000</u>	<u>\$60,000</u>
Augmented Estate	<u>\$600,000</u>	<u>\$180,000</u>

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

——— Under Section 2-202(a), the elective-share percentage for a 5-year marriage is 15%. This means that B’s elective-share amount is \$90,000 (15% of \$600,000).

——— To say that B’s entitlement is \$90,000 presupposes (by approximation) that \$180,000 of their \$600,000 are marital assets—assets subject to equalization. Hence, B’s entitlement is half of that amount, or \$90,000. Exempted from equalization is the other \$420,000 of their combined assets, some of which would have been A’s individual or exempted property and the rest of which would have been B’s individual or exempted property.

——— The redesigned system applies the same ratio to the asset mix of each spouse as it does to the couple’s combined assets. To say that the elective-share percentage is 15% means that the combined assets are treated as being in a 30/70 ratio (30% marital, subject to equalization; 70% individual, exempted from equalization). This same ratio, in turn, governs the approximation of each spouse’s mix of marital and individual property. Consequently, the redesigned system attributes 30% of A’s \$400,000 (\$120,000) to marital property and the other 70% (\$280,000) to individual property. And, the system does the same for B’s \$200,000, i.e., it treats 30% (\$60,000) as marital property and 70% (\$140,000) as individual property.

——— Accordingly, B is treated as already owning \$60,000 of the \$180,000 of marital property. Under Section 2-209(a)(2), \$60,000 of B’s \$90,000 elective-share amount comes from B’s owns assets. Section 2-209(b) makes A’s net probate estate liable for the unsatisfied balance—\$30,000. (Remember that \$120,000 of A’s assets are attributed to marital property; thus, removing \$30,000 of those \$120,000 from A and adding that \$30,000 to B’s \$60,000 in marital assets equalizes the aggregate \$180,000 marital assets in a 50/50 split for C \$90,000 for A and \$90,000 for B.)

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

Deferred Marital-Property Alternative

By making the elective share percentage a flat 50 percent of the marital-property portion of the augmented estate, the 2008 revision disentangles the elective share percentage from the approximation schedule, thus allowing the marital-property portion of the augmented estate to be defined either by the approximation schedule or by the deferred-marital-property approach. Although one of the benefits of the 2008 revision is added clarity, an important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that prefer

a deferred marital-property approach. See Alan Newman, Incorporating the Partnership Theory of Marriage into Elective-Share Law: the Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative, 49 Emory L.J. 487 (2000).

The Support Theory

The partnership/marital-sharing theory is not the only driving force behind elective-share law. Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate. Current elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law. The redesigned elective share system implements the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

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

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

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

The augmented estate is the sum of the amounts described in Sections 2-204 through 2-207:

	<u>Augmented Estate</u>	<u>Marital-Property Portion (30%)</u>
(1) B's net probate estate	\$ 90,000	\$27,000
(2) B's nonprobate transfers to others	\$0	\$0
(3) B's nonprobate transfers to C	\$0	\$0
(4) C's assets and nonprobate transfers to others	\$10,000	\$3,000
Augmented Estate	\$100,000	\$30,000
<hr/>		
<u>Elective-Share Amount (50% of Marital-property portion).</u>		<u>\$15,000</u>
<u>Less Amount Already Satisfied.</u>		<u>\$3,000</u>
<u>Unsatisfied Balance.</u>		<u>\$12,000</u>

~~The elective-share percentage for a 5-year marriage is 15%. This means that C's elective-share amount is \$15,000 (15% of \$100,000).~~

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

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

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

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

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

Decedent's Nonprobate Transfers to Others

The ~~pre-1990~~ original Code made great strides toward preventing “fraud on the spouse’s share.” The problem of “fraud on the spouse’s share” arises when the decedent seeks to evade the spouse’s elective share by engaging in various kinds of nominal inter-vivos transfers. To render that type of behavior ineffective, the ~~pre-1990~~ original Code adopted the augmented-estate concept, which extended the elective-share entitlement to property that was the subject of specified types of inter-vivos transfer, such as revocable inter-vivos trusts.

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

Historical Note. This General Comment was revised in 1993 and in 2008. ~~For the prior versions, see 8 U.L.A. 82 (Supp.1992).~~

Legislative Note. *States that have previously enacted the UPC elective share need not amend their enactment, except that (1) the supplemental elective-share amount should be increased to \$75,000, (2) the amendment to Section 2-205(3) relating to gifts within two years of death should be adopted, (3) Section 2-209(e) should be added so that the unsatisfied balance of the elective-share or supplemental elective-share amount is treated as a general pecuniary devise for purposes of Section 3-904, and (4) the amendments to Section 2-213 relating to spousal waiver should be adopted.*

SECTION 2-201. DEFINITIONS. In this Part:

(1) As used in sections other than Section 2-205, “decedent’s nonprobate transfers to others” means the amounts that are included in the augmented estate under Section 2-205.

(2) “Fractional interest in property held in joint tenancy with the right of survivorship”, whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint

tenant, is the number of joint tenants.

(3) “Marriage”, as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent’s surviving spouse.

(4) “Nonadverse party” means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he [or she] possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

(5) “Power” or “power of appointment” includes a power to designate the beneficiary of a beneficiary designation.

(6) “Presently exercisable general power of appointment” means a power of appointment under which, at the time in question, the decedent, whether or not he [or she] then had the capacity to exercise the power, held a power to create a present or future interest in himself [or herself], his [or her] creditors, his [or her] estate, or creditors of his [or her] estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.

~~(7) “Probate estate” means property that would pass by intestate succession if the decedent died without a valid will.~~

(8 ~~7~~) “Property” includes values subject to a beneficiary designation.

(9 ~~8~~) “Right to income” includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.

(10 ~~9~~) “Transfer”, as it relates to a transfer by or of the decedent, includes (i) an exercise or release of a presently exercisable general power of appointment held by the decedent, (ii) a

lapse at death of a presently exercisable general power of appointment held by the decedent, and (iii) an exercise, release, or lapse of a general power of appointment that the decedent created in himself [or herself] and of a power described in Section 2-205(2)(B) that the decedent conferred on a nonadverse party.

SECTION 2-202. ELECTIVE SHARE.

(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to ~~the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:~~ 50 percent of the value of the marital-property portion of the augmented estate.

If the decedent and the spouse _____ **The elective-share percentage is:**
were married to each other: _____

Less than 1 year..	Supplemental Amount Only.
1 year but less than 2 years..	3 % of the augmented estate.
2 years but less than 3 years..	6 % of the augmented estate.
3 years but less than 4 years..	9 % of the augmented estate.
4 years but less than 5 years..	12 % of the augmented estate.
5 years but less than 6 years..	15 % of the augmented estate.
6 years but less than 7 years..	18 % of the augmented estate.

7 years but less than 8 years.	21 % of the augmented estate.
8 years but less than 9 years.	24 % of the augmented estate.
9 years but less than 10 years.	27 % of the augmented estate.
10 years but less than 11 years.	30 % of the augmented estate.
11 years but less than 12 years.	34 % of the augmented estate.
12 years but less than 13 years.	38 % of the augmented estate.
13 years but less than 14 years.	42 % of the augmented estate.
14 years but less than 15 years.	46 % of the augmented estate.
15 years or more.	50 % of the augmented estate.

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

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

(d) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies

domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

Comment

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

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

Subsection (a). Subsection (a) implements the partnership theory by ~~increasing the maximum elective-share percentage of the augmented estate to fifty percent, but by phrasing that ultimate entitlement in so that it does not reach the maximum fifty-percent level until the marriage has lasted at least 15 years. If the decedent and the surviving spouse were married to each other more than once, all periods of marriage to each other are added together for purposes of subsection (a); periods between marriages are not counted~~ providing that the elective-share amount is 50 percent of the value of the marital-property portion of the augmented estate. The augmented estate is defined in Section 2-203(a) and the marital-property portion of the augmented estate is defined in Section 2-203(b).

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

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

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

Historical Note. This Comment was revised in 1993 and 2008. ~~For the prior version, see 8 U.L.A. 89 (Supp.1992).~~

SECTION 2-203. COMPOSITION OF THE AUGMENTED ESTATE; MARITAL-PROPERTY PORTION.

(a) Subject to Section 2-208, the value of the augmented estate, to the extent provided in Sections 2-204, 2-205, 2-206, and 2-207, consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute:

- (1) the decedent's net probate estate; ;
- (2) the decedent's nonprobate transfers to others; ;
- (3) the decedent's nonprobate transfers to the surviving spouse; ; and
- (4) the surviving spouse's property and nonprobate transfers to others.

(b) The value of the marital-property portion of the augmented estate consists of the sum of the values of the four components of the augmented estate as determined under subsection (a) multiplied by the following percentage:

<u>If the decedent and the spouse</u>	<u>The percentage is:</u>
<u>were married to each other:</u>	
<u>Less than 1 year.</u>	<u>3%</u>
<u>1 year but less than 2 years.</u>	<u>6%</u>
<u>2 years but less than 3 years.</u>	<u>12%</u>
<u>3 years but less than 4 years.</u>	<u>18%</u>
<u>4 years but less than 5 years.</u>	<u>24%</u>
<u>5 years but less than 6 years.</u>	<u>30%</u>

<u>6 years but less than 7 years.</u>	<u>36%</u>
<u>7 years but less than 8 years.</u>	<u>42%</u>
<u>8 years but less than 9 years.</u>	<u>48%</u>
<u>9 years but less than 10 years.</u>	<u>54%</u>
<u>10 years but less than 11 years.</u>	<u>60%</u>
<u>11 years but less than 12 years.</u>	<u>68%</u>
<u>12 years but less than 13 years.</u>	<u>76%</u>
<u>13 years but less than 14 years.</u>	<u>84%</u>
<u>14 years but less than 15 years.</u>	<u>92%</u>
<u>15 years or more.</u>	<u>100%</u>

[Alternative Subsection (b) for States Preferring a Deferred-Marital-Property System]

[(b) The value of the marital-property portion of the augmented estate equals the value of that portion of the augmented estate that would be marital property at the decedent’s death under [the Model Marital Property Act] [copy in definition from Model Marital Property Act, including the presumption that all property is marital property] [copy in other definition chosen by the enacting state].

Comment

~~The elective-share percentage, determined by the length of the marriage under Section 2-202, is applied to the augmented estate. This section, added in 1993 as part of the reorganization and clarification of the elective-share provisions, Subsection (a) operates as an umbrella section identifying the augmented estate as consisting of the sum of the values of four components. On the decedent’s side are the values of (1) the decedent’s net probate estate (Section 2-204) and (2)~~

the decedent's nonprobate transfers to others (Section 2-205). Straddling between the decedent's side and the surviving spouse's side is the value of (3) the decedent's nonprobate transfers to the surviving spouse (Section 2-206). On the surviving spouse's side are the values of (4) the surviving spouse's net assets and the surviving spouse's nonprobate transfers to others (Section 2-207).

Under Section 2-202(a), the elective-share percentage is 50 percent of the value of the marital-property portion of the augmented estate. Section 2-203(b) provides the schedule for determining the marital-property portion of the value of the four components of the augmented estate. The schedule deems by approximation that 100 percent of the components of the augmented estate is marital property after 15 years of marriage. Government data indicate that the median length of a first marriage that does not end in divorce is 46.3 years, the median length of a post-divorce remarriage that does not end in divorce is 35.1 years, and the median length of a post-widowhood remarriage that does not end in divorce is 14.4 years. Enacting states may determine that this data supports lengthening the schedule in subsection (b) to 20 or even 25 years. See Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. Mich. J. L. Reform 1, 11-29 (2003).

Alternative subsection (b) is provided for states that decide not to define the marital-property portion of the augmented estate by approximation, but rather in terms of property actually acquired during the marriage other than by gift or inheritance. See Waggoner, *supra*, at 30-32.

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

SECTION 2-205. DECEDENT'S NONPROBATE TRANSFERS TO OTHERS.

The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under Section 2-204, of any of the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

(i A) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by

exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii B) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(iii C) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iv D) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(2) Property transferred in any of the following forms by the decedent during marriage:

(i A) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the

fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii B) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(i A) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1)(i A), (ii B), or (iii C), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the

right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph, "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(i A), "termination" occurs when the power terminated by exercise or release, but not otherwise.

(ii B) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under paragraph (1)(iv D) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iii C) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in either of the two years exceeded ~~\$10,000~~ [\$12,000] [the amount excludable from taxable gifts under 26 U.S.C. Section 2503(b) [or its successor] on the date next preceding the date of the decedent's death].

Legislative Note: *In paragraph (3)(C), use the first alternative in the brackets if the second alternative is considered an unlawful delegation of legislative power.*

[Comment to Section 2-207 to be revised to add at the end of the first paragraph: "Property owned by the decedent's surviving spouse does not include the value of enhancements to the

surviving spouse's earning capacity (e.g., the value of a law, medical, or business degree).”]

SECTION 2-208. EXCLUSIONS, VALUATION, AND OVERLAPPING APPLICATION.

(a) [Exclusions.] The value of any property is excluded from the decedent's nonprobate transfers to others (i) to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property or (ii) if the property was transferred with the written joinder of, or if the transfer was consented to in writing before or after the transfer by, the surviving spouse.

(b) [Valuation.] The value of property:

(1) included in the augmented estate under Section 2-205, 2-206, or 2-207 is reduced in each category by enforceable claims against the included property; and

(2) includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system.

(c) [Overlapping Application; No Double Inclusion.] In case of overlapping application to the same property of the paragraphs or subparagraphs of Section 2-205, 2-206, or 2-207, the property is included in the augmented estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value.

Comment

Subsection (a). This subsection excludes from the decedent's nonprobate transfers to others the value of any property (i) to the extent that the decedent received adequate and full

consideration in money or money's worth for a transfer of the property or (ii) if the property was transferred with the written joinder of, or if the transfer was consented to in writing before or after the transfer by, the surviving spouse.

Consenting to Split-Gift Treatment Not Consent to the Transfer. Spousal consent to split-gift treatment under I.R.C. § 2513 does not constitute written joinder of or consent to the transfer by the spouse for purposes of subsection (a).

Obtaining the Charitable Deduction for Transfers Coming Within Section 2-205(2) or (3). Because, under Section 2-201(10), the term "right to income" includes a right to payments under an annuity trust or a unitrust, the value of a charitable remainder trust established by a married grantor without written spousal consent or joinder would be included in the decedent's nonprobate transfers to others under Section 2-205(2)(i A). Consequently, a married grantor planning to establish a charitable remainder trust is advised to obtain the written consent of his or her spouse to the transfer, as provided in Section 2-208(a), in order to be assured of qualifying for the charitable deduction.

Similarly, outright gifts made by a married donor within two years preceding death are included in the augmented estate under Section 2-205(3)(iii C) to the extent that the aggregate gifts to any one donee exceed ~~\$10,000~~ the amount excludable from taxable gifts under 26 U.S.C. Section 2503(b) [or its successor] on the date next preceding the date of the decedent's death (or, if referring to federal law is considered an unlawful delegation of legislative power, \$12,000) in either of the two years. Consequently, a married donor planning to donate more than ~~\$10,000~~ that amount to any charitable organization within a twelve-month period is advised to obtain the written consent of his or her spouse to the transfer, as provided in Section 2-208(a), in order to be assured of qualifying for the charitable deduction.

Spousal Waiver of ERISA Benefits. Under the Employee Retirement Income Security Act (ERISA), death benefits under an employee benefit plan subject to ERISA must be paid in the form of an annuity to the surviving spouse. A married employee wishing to designate someone other than the spouse must obtain a waiver from the spouse. As amended in 1984 by the Retirement Equity Act, ERISA requires each employee benefit plan subject to its provisions to provide that an election of a waiver shall not take effect unless

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

See 29 U.S.C. § 1055(c) (1988); Int.Rev.Code § 417(a). Any spousal waiver that complies with these requirements would satisfy Section 2-208(a) and would serve to exclude the value of the

death benefits from the decedent's nonprobate transfers to others.

Cross Reference. See also Section 2-213 and Comment.

Subsection (c). The application of subsection (c) is illustrated in Example 32 in the Comment to Section 2-207.

Historical Note. This Comment was added in 1993. Subsection (a) was amended in 2008 by adding the phrase "before or after the transfer."

SECTION 2-209. SOURCES FROM WHICH ELECTIVE SHARE PAYABLE.

(a) [Elective-Share Amount Only.] In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's net probate estate and recipients of the decedent's nonprobate transfers to others:

(1) amounts included in the augmented estate under Section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206; and

(2) the marital-property portion of amounts included in the augmented estate under Section 2-207, ~~up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in Section 2-202(a) appropriate to the length of time the spouse and the decedent were married to each other~~

(b) [Marital Property Portion.] The marital-property portion under subsection (a)(2) is computed by multiplying the value of the amounts included in the augmented estate under Section 2-207 by the percentage of the augmented estate set forth in the schedule in Section 2-

203(b) appropriate to the length of time the spouse and the decedent were married to each other.

(b c) [Unsatisfied Balance of Elective-Share Amount; Supplemental Elective-Share Amount.] If, after the application of subsection (a), the elective-share amount is not fully satisfied, or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's net probate estate, other than assets passing to the surviving spouse by testate or intestate succession, and in the decedent's nonprobate transfers to others, ~~other than amounts included under Section 2-205(3)(i) or (iii), under Section 2-205(1), (2), and (3)(B) are~~ applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's net probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is ~~equitably~~ apportioned among the recipients of the decedent's net probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(c d) [Unsatisfied Balance of Elective-Share and Supplemental Elective-Share Amounts.] If, after the application of subsections (a) and (b c), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is ~~equitably~~ apportioned among the recipients of the remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(e) [Unsatisfied Balance Treated as General Pecuniary Devise.] The unsatisfied balance of the elective-share or supplemental elective-share amount as determined under

subsection (c) or (d) is treated as a general pecuniary devise for purposes of Section 3-904.

Comment

Purpose and Scope of Revisions. Section 2-209, ~~as revised,~~ is an integral part of the overall redesign of the elective share. It establishes the priority to be used in determining the sources from which the elective-share amount is payable.

Subsection (a). Subsection (a) applies only to the elective-share amount determined under Section 2-202(a), not to the supplemental elective-share amount determined under Section 2-202(b). Under subsection (a), the following are counted first toward satisfying the elective-share amount (to the extent they are included in the augmented estate):

- (1) amounts included in the augmented estate under Section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent's nonprobate transfers to the surviving spouse, including the proceeds of insurance (including accidental death benefits) on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, but excluding property passing under the Federal Social Security system; and
- (2) ~~the marital-property portion of amounts included in the augmented estate under Section 2-207, up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in Section 2-202(a) appropriate to the length of time the spouse and the decedent were married to each other~~

Under subsection (b), the marital-property portion of amounts included in the augmented estate under Section 2-207 is computed by multiplying the value of the amounts included in the augmented estate under Section 2-207 by the percentage of the augmented estate set forth in the schedule in Section 2-203(b) appropriate to the length of time the spouse and the decedent were married to each other.

If the combined value of ~~these amounts~~ the amounts described in subsection (a)(1) and (2) equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from the decedent's probate estate or recipients of the decedent's nonprobate transfers to others, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-202(b).

Subsections (b c) and (c d). Subsections (b c) and (c d) apply to both the elective-share amount and the supplemental elective-share amount, if any. As to the elective-share amount determined under Section 2-202(a), the decedent's probate estate and nonprobate transfers to others become liable only if and to the extent that the amounts described in subsection (a) are

insufficient to satisfy the elective-share amount. The decedent's probate estate and nonprobate transfers to others are fully liable for the supplemental elective-share amount determined under Section 2-202(b), if any.

Subsections (b c) and (e d) establish a layer of priority within the decedent's net probate estate (other than assets passing to the surviving spouse by testate or intestate succession) and nonprobate transfers to others. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others that was not included in the augmented estate under Section ~~2-205(3)(i) or (iii)~~ 2-205(1), (2), and 3(B) are liable first. Only if and to the extent that those amounts are insufficient does the remaining portion of the decedent's nonprobate transfers to others become liable.

Note that the exempt property and allowances provided by Sections 2-401, 2-402, and 2-403 are not charged against, but are in addition to, the elective-share and supplemental elective-share amounts.

The provision that the spouse is charged with amounts that would have passed to the spouse but were disclaimed was deleted in 1993. That provision was introduced into the Code in 1975, prior to the addition of the QTIP provisions in the marital deduction of the federal estate tax. At that time, most devises to the surviving spouse were outright devises and did not require actuarial computation. Now, many if not most devises to the surviving spouse are in the form of an income interest that qualifies for the marital deduction under the QTIP provisions, and these devises require actuarial computations that should be avoided whenever possible.

The word "equitably" is eliminated from subsections (c) and (d) because it has caused confusion about whether it grants discretion to the court to apportion liability for the unsatisfied balance among the recipients of the decedent's net probate estate and of that portion of the decedent's nonprobate transfers to others in some proportion other than in proportion to the value of their interests therein. The intent of including that word in the earlier version was merely to describe the prescribed apportionment as "equitable," not to grant authority to vary the prescribed apportionment.

Historical Note. This Comment was revised in 1993 and 2008. ~~For the prior version, see 8 U.L.A. 99 (Supp.1992).~~

SECTION 2-212. RIGHT OF ELECTION PERSONAL TO SURVIVING SPOUSE; INCAPACITATED SURVIVING SPOUSE.

(a) [Surviving Spouse Must Be Living at Time of Election.] The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is

filed in the court under Section 2-211(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his [or her] conservator, guardian, or agent under the authority of a power of attorney.

(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section ~~2-209(b) and (c)~~ 2-209(c) and (d) must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. For purposes of the custodial trust established by this subsection, (i) the electing guardian, conservator, or agent is the custodial trustee, (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust is deemed to have been created by the decedent spouse by written transfer that takes effect at the decedent spouse's death and that directs the custodial trustee to administer the custodial trust as for an incapacitated beneficiary.

(c) [Custodial Trust.] For the purposes of subsection (b), the [Enacting state] Uniform Custodial Trust Act must be applied as if Section 6(b) thereof were repealed and Sections 2(e), 9(b), and 17(a) were amended to read as follows:

(1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by

delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order but with regard to other support, income, and property of the beneficiary [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need.

(3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial trust property in the following order: (i) under the residuary clause, if any, of the will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the beneficiary; or (ii) to that predeceased spouse's heirs under Section 2-711 of [this State's] Uniform Probate Code.

**[STATES THAT HAVE NOT ADOPTED THE UNIFORM CUSTODIAL TRUST ACT
SHOULD ADOPT THE FOLLOWING ALTERNATIVE SUBSECTION (b) AND NOT
ADOPT SUBSECTION (b) OR (c) ABOVE]**

[(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a

surviving spouse who is an incapacitated person, the court must set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section ~~2-209(b) and (c)~~ 2-209(c) and (d) and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:

(1) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.

(2) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.

(3) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse

died immediately after the surviving spouse; or (ii) to the predeceased spouse's heirs under Section 2-711.]

Comment

Subsection (a). Subsection (a) is revised to make it clear that the right of election may be exercised only by or on behalf of a living surviving spouse. If the election is not made by the surviving spouse personally, it can be made on behalf of the surviving spouse by the spouse's conservator, guardian, or agent. In any case, the surviving spouse must be alive when the election is made. The election cannot be made on behalf of a deceased surviving spouse.

Subsections (b) and (c). If the election is made on behalf of a surviving spouse who is an "incapacitated person", as defined in section 5-103(7), that portion of the elective-share and supplemental elective-share amounts which, under Section ~~2-209(b) and (c)~~ 2-209(c) and (d), are payable from the decedent's probate estate and nonprobate transfers to others must go into a custodial trust under the Uniform Custodial Trust Act, as adjusted in subsection (c).

If the election is made on behalf of the surviving spouse by his or her guardian or conservator, the surviving spouse is by definition an "incapacitated person." If the election is made by the surviving spouse's agent under a durable power of attorney, the surviving spouse is presumed to be an "incapacitated person"; the presumption is rebuttable.

The terms of the custodial trust are governed by the Uniform Custodial Trust Act, except as adjusted in subsection (c).

The custodial trustee is authorized to expend the custodial trust property for the use and benefit of the surviving spouse to the extent the custodial trustee considers it advisable. In determining the amounts, if any, to be expended for the spouse's benefit, the custodial trustee is directed to take into account the spouse's other support, income, and property; these items would include governmental benefits such as Social Security and Medicare.

Bracketed language in subsection (c)(2) (and in Alternative subsection (b)(1)) gives enacting states a choice as to whether governmental benefits for which the spouse must qualify on the basis of need, such as Medicaid, are also to be considered. If so, the enacting state should include the bracketed word "and" but not the bracketed phrase "exclusive of" in its enactment; if not, the enacting state should include the bracketed phrase "exclusive of" and not include the bracketed word "and" in its enactment.

At the surviving spouse's death, the remaining custodial trust property does not go to the surviving spouse's estate, but rather under the residuary clause of the will of the predeceased spouse whose probate estate and nonprobate transfers to others were the source of the property in the custodial trust, as if the predeceased spouse died immediately after the surviving spouse. In

the absence of a residuary clause, the property goes to the predeceased spouse's heirs. See Section 2-711.

Alternative Subsection (b). For states that have not enacted the Uniform Custodial Trust Act, an Alternative subsection (b) is provided under which the court must set aside that portion of the elective-share and supplemental elective-share amounts which, under Section ~~2-209(b)~~ and ~~(c)~~ 2-209(c) and (d), are due from the decedent's probate estate and nonprobate transfers to others and must appoint a trustee to administer that property for the support of the surviving spouse, in accordance with the terms set forth in Alternative subsection (b).

Planning for an Incapacitated Surviving Spouse Not Disrupted. Note that the portion of the elective-share or supplemental elective-share amounts that go into the custodial or support trust is that portion due from the decedent's probate estate and nonprobate transfers to others under Section ~~2-209(b)~~ and ~~(c)~~ 2-209(c) and (d). These amounts constitute the involuntary transfers to the surviving spouse under the elective-share system.

Amounts voluntarily transferred to the surviving spouse under the decedent's will, by intestacy, or by nonprobate transfer, if any, do not go into the custodial or support trust. Thus, estate planning measures deliberately established for a surviving spouse who is incapacitated are not disrupted. For example, the decedent's will might establish a trust that qualifies for or that can be elected as qualifying for the federal estate tax marital deduction. Although the value of the surviving spouse's interests in such a trust count toward satisfying the elective-share amount under Section 2-209(a)(1), the trust itself is not dismantled by virtue of Section 2-212(b) in order to force that property into the nonqualifying custodial or support trust.

Rationale. The approach of this section is based on a general expectation that most surviving spouses are, at the least, generally aware of and accept their decedents' overall estate plans and are not antagonistic to them. Consequently, to elect the elective share, and not have the disposition of that part of it that is payable from the decedent's probate estate and nonprobate transfers to others under Section ~~2-209(b)~~ and ~~(c)~~ 2-209(c) and (d) governed by subsections (b) and (c), the surviving spouse must not be an incapacitated person. When the election is made by or on behalf of a surviving spouse who is not an incapacitated person, the surviving spouse has personally signified his or her opposition to the decedent's overall estate plan.

If the election is made on behalf of a surviving spouse who is an incapacitated person, subsections (b) and (c) control the disposition of that part of the elective-share amount or supplemental elective-share amount payable under Section ~~2-209(b)~~ and ~~(c)~~ 2-209(c) and (d) from the decedent's probate estate and nonprobate transfers to others. The purpose of subsections (b) and (c), generally speaking, is to assure that that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse's heirs or devisees.

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

SECTION 2-603. ANTILAPSE; DECEASED DEVISEE; CLASS GIFTS.

(a) [Definitions.] In this section:

(1) “Alternative devise” means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(2) “Class member” includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he [or she] survived the testator.

(3) “Descendant of a grandparent”, as used in subsection (b), means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under the (i) rules of construction applicable to a class gift created in the testators will if the devise or exercise of the power is in the form of a class gift or (ii) rules for intestate succession if the devise or exercise of the power is not in the form of a class gift.

(4) “Descendants”, as used in the phrase “surviving descendants” of a deceased devisee or class member in subsections (b)(1) and (2), mean the descendants of a deceased devisee or class member who would take under a class gift created in the testator’s will.

(3 5) “Devise” includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(4 6) “Devisee” includes (i) a class member if the devise is in the form of a class gift, (ii) an individual or class member who was deceased at the time the testator executed his [or her] will as well as an individual or class member who was then living but who failed to survive the testator, and (iii) an appointee under a power of appointment exercised by the testator’s will.

(5 7) “Stepchild” means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

(6 8) ~~“Surviving devisee” or “surviving descendant”~~ “Surviving”, in the phrase “surviving devisees” or “surviving descendants”, means a devisees or a descendants who neither predeceased the testator nor ~~is~~ are deemed to have predeceased the testator under Section 2-702.

(7 9) “Testator” includes the donee of a power of appointment if the power is exercised in the testator’s will.

(b) [Substitute Gift.] If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator’s will, the following apply:

(1) Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee’s surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.

(2) Except as provided in paragraph (4), if the devise is in the form of a class gift, other than a devise to “issue,” “descendants,” “heirs of the body,” “heirs,” “next to kin,” “relatives,” or “family,” or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees

would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he [or she] would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(3) For the purposes of Section 2-601, words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative devise ~~only if: an expressly designated devisee of the alternative devise~~

(A) the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or

(B) the alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will.

(5) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the devised property passes under the primary substitute gift.

(2) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i A) “Primary devise” means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

(ii B) “Primary substitute gift” means the substitute gift created with respect to the primary devise.

(iii C) “Younger-generation devise” means a devise that (A i) is to a descendant of a devisee of the primary devise, (B ii) is an alternative devise with respect to the primary devise, (C iii) is a devise for which a substitute gift is created, and (D iv) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(iv D) “Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation devise.

Comment

Purpose and Scope of Revised Section. Revised Section 2-603 is a comprehensive antilapse statute that resolves a variety of interpretive questions that have arisen under standard antilapse statutes, including the antilapse statute of the pre-1990 Code.

Theory of Lapse. ~~A will transfers property at the testator's death, not when the will was executed.~~ As explained in Restatement (Third) of Property: Wills and Other Donative Transfers § 1.2 (1999), the common-law rule of lapse is predicated on this the principle that a will transfers property at the testator's death, not when the will was executed, and on the notion principle that property cannot be transferred to a deceased individual. Under the rule of lapse, all devises are automatically and by law conditioned on survivorship of the testator. A devise to a devisee who predeceases the testator fails (lapses); the devised property does not pass to the devisee's estate, to be distributed according to the devisee's will or pass by intestate succession from the devisee. (Section 2-702 modifies the rule of lapse by presumptively conditioning devises on a 120-hour period of survival.)

“Antilapse” Statutes—Rationale of Section 2-603. Statutes such as Section 2-603 are commonly called “antilapse” statutes. An antilapse statute is remedial in nature, tending to preserve equality of treatment among different lines of succession. Although Section 2-603 is a rule of construction, and hence under Section 2-601 yields to a finding of a contrary intention, the remedial character of the statute means that it should be given the widest possible latitude to operate in considering whether the testator had formed a contrary intent. See Restatement (Third) of Property: Wills and Other Donative Transfers § 5.5 cmt. f (1999).

The 120-hour Survivorship Period. In effect, the requirement of survival of the testator's death means survival of the 120-hour period following the testator's death. This is because, under Section 2-702(a), “an individual who is not established to have survived an event ... by 120 hours is deemed to have predeceased the event”. As made clear by subsection (a)(6 ~~8~~), for the purposes of Section ~~2-707~~ 2-603, the “event” to which Section 2-702(a) relates is the testator's death.

General Rule of Section 2-603—Subsection (b). Subsection (b) states the general rule of Section 2-603. Subsection (b)(1) applies to individual devises; subsection (b)(2) applies to devises in class gift form. For the distinction between an individual devise and a devise in class gift form, see Restatement (Third) of Property: Wills and Other Donative Transfers §§ 13.1, 13.2 (2008). Together, ~~they~~ subsections (b)(1) and (b)(2) show that the “antilapse” label is somewhat misleading. Strictly speaking, these subsections do not reverse the common-law rule of lapse. They do not abrogate the law-imposed condition of survivorship, so that devised property passes to the estates of predeceasing devisees. Subsections (b)(1) and (b)(2) leave the law-imposed condition of survivorship intact, but modify the devolution of lapsed devises by providing a statutory substitute gift in the case of specified relatives. The statutory substitute gift is to the devisee's descendants who survive the testator by 120 hours; they take the property to which the devisee would have been entitled had the devisee survived the testator by 120 hours.

Class Gifts. In line with modern policy, subsection (b)(2) continues the pre-1990 Code's approach of expressly extending the antilapse protection to class gifts. Subsection (b)(2) applies to single-generation class gifts (see Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.1, 14.2 (2008)) in which one or more class members fail to survive the testator (by 120 hours) leaving descendants who survive the testator (by 120 hours); in order for the subsection to apply, it is not necessary that any of the class members survive the testator (by 120 hours). Multiple-generation class gifts, i.e., class gifts to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", "family", or a class described by language of similar import, are excluded, however, because antilapse protection is unnecessary in class gifts of these types. They already contain within themselves the idea of representation, under which a deceased class member's descendants are substituted for him or her. See Sections 2-708, 2-709, 2-711; Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.3, 14.4 (2008).

"Void" Gifts. By virtue of subsection (a)(4), subsection (b) applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. Though contrary to some decisions, it seems likely that the testator would want the descendants of a person included, for example, in a class term but dead when the will is made to be treated like the descendants of another member of the class who was alive at the time the will was executed but who dies before the testator.

Protected Relatives. The specified relatives whose devises are protected by this section are the testator's grandparents and their descendants and the testator's stepchildren or, in the case of a testamentary exercise of a power of appointment, the testator's (donee's) or donor's grandparents and their descendants and the testator's or donor's stepchildren. Subsection (a)(3), added by technical amendment in 2008, defines "descendant of a grandparent" as an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under the (i) rules of construction applicable to a class gift created in the testator's will if the devise or exercise of the power is in the form of a class gift or (ii) rules for intestate succession if the devise or exercise of the power is not in the form of a class gift.

Section 2-603 extends the "antilapse" protection to devises to the testator's own stepchildren. The term "stepchild" is defined in subsection (a)(5). Antilapse protection is not extended to devises to descendants of the testator's stepchildren or to stepchildren of any of the testator's relatives. As to the testator's own stepchildren, note that under Section 2-804 a devise to a stepchild might be revoked if the testator and the stepchild's adoptive or biological genetic parent become divorced; the antilapse statute does not, of course, apply to a deceased stepchild's devise if it was revoked by Section 2-804. Subsections (b)(1) and (b)(2) give this result by providing that the substituted descendants take the property to which the deceased devisee or deceased class member would have been entitled if he or she had survived the testator. If a deceased stepchild whose devise was revoked by Section 2-804 had survived the testator, that stepchild would not have been entitled to his or her devise, and so his or her descendants take nothing, either.

Other than stepchildren, devisees related to the testator by affinity are not protected by this section.

Section 2-603 Applicable to Testamentary Exercise of a Power of Appointment Where Appointee Fails to Survive the Testator. Subsections (a)(~~3~~ 5), (~~4~~ 6), (~~5~~ 7), (~~7~~ 9), and (b)(5) extend the protection of this section to appointees under a power of appointment exercised by the testator's will. The extension of the antilapse statute to powers of appointment is a step long overdue. The extension ~~brings the statute into line with~~ is supported by the Restatement (Second) of Property (Donative Transfers) § 18.6 (1986) (Third) of Property: Wills and Other Donative Transfers § 19.12 (2008).

Substituted Gifts. The substitute gifts provided for by subsections (b)(1) and (b)(2) are to the deceased devisee's descendants. ~~They include adopted persons and children of unmarried parents to the extent they would inherit from the devisee; see Sections 1-201 and 2-114.~~ Subsection (a)(4), added by technical amendment in 2008, defines "descendants" as the descendants of a deceased devisee or class member who would take under a class gift created in the testator's will. As such, the rules of construction in Section 2-705 are applicable. The rules of construction in Section 2-705 are subject to a finding of a contrary intent as described in Section 2-701. A contrary intent to the rules of construction in Section 2-705 could be found, for example, in the definitions section of the testator's will.

The 120-hour survival requirement stated in Section 2-702 does not require descendants who would be substituted for their parent by this section to survive their parent by any set period. Thus, if a devisee who is a protected relative survives the testator by less than 120 hours, the substitute gift is to the devisee's descendants who survive the testator by 120 hours; survival of the devisee by 120 hours is not required.

The statutory substitute gift is divided among the devisee's descendants "by representation", a term phrase defined in Section 2-709(b).

Section 2-603 Restricted to Wills. Section 2-603 is applicable only when a devisee of a will predeceases the testator. It does not apply to beneficiary designations in life-insurance policies, retirement plans, or transfer-on-death accounts, nor does it apply to inter-vivos trusts, whether revocable or irrevocable. See, however, Sections 2-706 and 2-707 for rules of construction applicable when the beneficiary of a life-insurance policy, a retirement plan, or a transfer-on-death account predeceases the decedent or when the beneficiary of a future interest is not living when the interest is to take effect in possession or enjoyment.

Contrary Intention—the Rationale of Subsection (b)(3). An antilapse statute is a rule of construction, designed to carry out presumed intention. In effect, Section 2-603 declares that when a testator devises property "to A (a specified relative)", the testator (if he or she had thought further about it) is presumed to have wanted to add: "but if A is not alive (120 hours after my death), I devise the property in A's stead to A's descendants (who survive me by 120

hours)”).

Under Section 2-601, the rule of Section 2-603 yields to a finding of a contrary intention. A foolproof means of expressing a contrary intention is to add to a devise the phrase “and not to [the devisee’s] descendants”. See Restatement (Third) of Property: Wills and Other Donative Transfers § 5.5 cmt. i (1999). In the case of a power of appointment, the phrase “and not to an appointee’s descendants” can be added by the donor of the power in the document creating the power of appointment, if the donor does not want the antilapse statute to apply to an appointment under a power. See Restatement (Third) of Property: Wills and Other Donative Transfers § 19.12 cmts. c & g (2008). In addition, adding to the residuary clause a phrase such as “including all lapsed or failed devises”, adding to a nonresiduary devise a phrase such as “if the devisee does not survive me, the devise is to pass under the residuary clause”, or adding a separate clause providing generally that “if the devisee of any nonresiduary devise does not survive me, the devise is to pass under the residuary clause” makes the residuary clause an “alternative devise”. Under subsection (b)(4), as clarified by technical amendment in 2008, an alternative devise supersedes a substitute gift created by subsection (b)(1) or (b)(2) if: one or more expressly designated devisees of the alternative devise is entitled to take under the will (A) the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or (B) the alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will. See *infra* Example 3.

A much-litigated question is whether mere words of survivorship—such as in a devise “to my daughter, A, if A survives me” or “to my surviving children”—automatically defeat the antilapse statute. Lawyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute are mistaken. The very fact that the question is litigated so frequently is itself proof that the use of mere words of survivorship is far from foolproof. In addition, the results of the litigated cases are divided on the question. To be sure, many cases hold that mere words of survivorship do automatically defeat the antilapse statute. E.g., *Estate of Stroble*, 636 P.2d 236 (Kan.Ct.App.1981); Annot., 63 A.L.R.2d 1172, 1186 (1959); Annot., 92 A.L.R. 846, 857 (1934). Other cases, however, and the Restatement (Third) of Property: Wills and Other Donative Transfers § 5.5 cmt. h (1999), reach the opposite conclusion. E.g., *Ruotolo v. Tietjen*, 890 A.2d 166 (Conn. App. Ct. 2006), *aff’d per curiam*, 916 A.2d 1 (Conn. 2007) (residuary devise of half of the residue to testator’s stepdaughter “if she survives me”; stepdaughter predeceased testator leaving a daughter who survived testator; citing this section and the Restatement, court held that the survival language did not defeat the antilapse statute); *Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980) (residuary devise to testator’s brother Melvin and sister Rodine, and “in the event that either one of them shall predecease me, then to the other surviving brother or sister”; Melvin and Rodine predeceased testator, Melvin but not Rodine leaving descendants who survived testator; court held residue passed to Melvin’s descendants under antilapse statute); *Detzel v. Nieberding*, 219 N.E.2d 327 (Ohio P. Ct. 1966) (devise of \$5,000 to sister “provided she be living at the time of my death”; sister predeceased testator; court held \$5,000 devise passed under antilapse statute to sister’s descendants);

Henderson v. Parker, 728 S.W.2d 768 (Tex. 1987) (devise of all of testator's property "unto our surviving children of this marriage"; two of testator's children survived testator, but one child, William, predeceased testator leaving descendants who survived testator; court held that share William would have taken passed to William's descendants under antilapse statute; words of survivorship found ineffective to counteract antilapse statute because court interpreted those words as merely restricting the devisees to those living at the time the will was executed); ~~see also Restatement (Second) of Property (Donative Transfers) § 27.2 comment f, illustration 5; cf. id. § 27.1 comment e, illustration 6.~~ It may also be noted that the antilapse statutes in some other common-law countries expressly provide that words of survivorship do not defeat the statute. See, e.g., Queensland Succession Act 1981, § 33(2) ("A general requirement or condition that [protected relatives] survive the testator or attain a specified age is not a contrary intention for the purposes of this section").

Subsection (b)(3) adopts the position that mere words of survivorship do not—by themselves, in the absence of additional evidence—lead to automatic defeat of the antilapse statute. As noted in French, "Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform", 37 Hastings L. J. 335, 369 (1985) "courts have tended to accord too much significance to survival requirements when deciding whether to apply antilapse statutes".

A formalistic argument sometimes employed by courts adopting the view that words of survivorship automatically defeat the antilapse statute is that, when words of survivorship are used, there is nothing upon which the antilapse statute can operate; the devise itself, it is said, is eliminated by the devisee's having predeceased the testator. The language of subsection (b)(1) and (b)(2), however, nullify this formalistic argument by providing that the predeceased devisee's descendants take the property to which the devisee would have been entitled had the devisee survived the testator.

Another objection to applying the antilapse statute is that mere words of survivorship somehow establish a contrary intention. The argument is that attaching words of survivorship indicates that the testator thought about the matter and intentionally did not provide a substitute gift to the devisee's descendants. At best, this is an inference only, which may or may not accurately reflect the testator's actual intention. An equally plausible inference is that the words of survivorship are in the testator's will merely because the testator's lawyer used a will form with words of survivorship. The testator who went to lawyer X and ended up with a will containing devises with a survivorship requirement could by chance have gone to lawyer Y and ended up with a will containing devises with no survivorship requirement—with no different intent on the testator's part from one case to the other.

Even a lawyer's deliberate use of mere words of survivorship to defeat the antilapse statute does not guarantee that the lawyer's intention represents the client's intention. Any linkage between the lawyer's intention and the client's intention is speculative unless the lawyer discussed the matter with the client. Especially in the case of younger-generation devisees, such as the client's children or nieces and nephews, it cannot be assumed that all clients, on their own,

have anticipated the possibility that the devisee will predecease the client and will have thought through who should take the devised property in case the never-anticipated event happens.

If, however, evidence establishes that the lawyer did discuss the question with the client, and that the client decided that, for example, if the client's child predeceases the client, the deceased child's children (the client's grandchildren) should not take the devise in place of the deceased child, then the combination of the words of survivorship and the extrinsic evidence of the client's intention would support a finding of a contrary intention under Section 2-601. See Example 1, below. For this reason, Sections 2-601 and 2-603 will not expose lawyers to malpractice liability for the amount that, in the absence of the finding of the contrary intention, would have passed under the antilapse statute to a deceased devisee's descendants. The success of a malpractice claim depends upon sufficient evidence of a client's intention and the lawyer's failure to carry out that intention. In a case in which there is evidence that the client did not want the antilapse statute to apply, that evidence would support a finding of a contrary intention under Section 2-601, thus preventing the client's intention from being defeated by Section 2-603 and protecting the lawyer from liability for the amount that, in the absence of the finding of a contrary intention, would have passed under the antilapse statute to a deceased devisee's descendants.

Any inference about actual intention to be drawn from mere words of survivorship is especially problematic in the case of will substitutes such as life insurance, where it is less likely that the insured had the assistance of a lawyer in drafting the beneficiary designation. Although Section 2-603 only applies to wills, a companion provision is Section 2-706, which applies to will substitutes, including life insurance. Section 2-706 also contains language similar to that in subsection (b)(3), directing that words of survivorship do not, in the absence of additional evidence, indicate an intent contrary to the application of this section. It would be anomalous to provide one rule for wills and a different rule for will substitutes.

The basic operation of Section 2-603 is illustrated in the following example:

Example 1. G's will devised "\$10,000 to my surviving children". G had two children, A and B. A predeceased G, leaving a child, X, who survived G by 120 hours. B also survived G by 120 hours.

Solution: Under subsection (b)(2), X takes \$5,000 and B takes \$5,000. The substitute gift to A's descendant, X, is not defeated by the fact that the devise is a class gift nor, under subsection (b)(3), is it automatically defeated by the fact that the word "surviving" is used.

Note that subsection (b)(3) provides that words of survivorship are not by themselves to be taken as expressing a contrary intention for purposes of Section 2-601. Under Section 2-601, a finding of a contrary intention could appropriately be based on affirmative evidence that G deliberately used the words of survivorship to defeat the antilapse statute. In the case of such a finding, B would take the full \$10,000 devise. Relevant evidence tending to support such a finding might be a pre-execution letter or memorandum to G from G's attorney stating that G's

attorney used the word “surviving” for the purpose of assuring that if one of G’s children were to predecease G, that child’s descendants would not take the predeceased child’s share under any statute or rule of law.

In the absence of persuasive evidence of a contrary intent, however, the antilapse statute, being remedial in nature, and tending to preserve equality among different lines of succession, should be given the widest possible chance to operate and should be defeated only by a finding of intention that directly contradicts the substitute gift created by the statute. Mere words of survivorship—by themselves—do not directly contradict the statutory substitute gift to the descendants of a deceased devisee. The common law of lapse already conditions all devises on survivorship (and Section 2-702 presumptively conditions all devises on survivorship by 120 hours). As noted above, the antilapse statute does not reverse the law-imposed requirement of survivorship in any strict sense; it merely alters the devolution of lapsed devises by substituting the deceased devisee’s descendants in place of those who would otherwise take. Thus, mere words of survivorship merely duplicate the law-imposed survivorship requirement deriving from the rule of lapse, and do not contradict the statutory substitute gift created by subsection (b)(1) or (b)(2).

Subsection (b)(4). Under subsection (b)(4), as clarified by technical amendment in 2008, a statutory substitute gift is superseded if the testator’s will expressly provides for its own alternative devisee and if: that alternative devisee is entitled to take under the will (A) the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or (B) the alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will. For example, the statute’s substitute gift would be superseded in the case of a devise “to A if A survives me; if not, to B”, where B survived the testator but A predeceased the testator leaving descendants who survived the testator. Under subsection (b)(4), B, not A’s descendants, would take. In the same example, however, it should be noted that A’s descendants would take under the statute if B as well as A predeceased the testator, for in that case B (the “expressly designated devisee of the alternative devise”) ~~(B)~~ would not be entitled to take under the will. This would be true, even if B left descendants who survived the testator; B’s descendants are not “expressly designated devisees of the alternative devise”. ~~(For an illustration of the meaning of “expressly designated devisee” when the alternative devise is in the form of a class gift, see Example 6, below.)~~

It should also be noted that, for purposes of Section 2-601, an alternative devise might indicate a contrary intention even if subsection (b)(4) is inapplicable. To illustrate this point, consider a variation of Example 1. Suppose that in Example 1, G’s will devised “\$10,000 to my surviving children, but *if none of my children survives me*, to the descendants of deceased children”. The alternative devise to the descendants of deceased children would not cause the substitute gift to X to be superseded under subsection (b)(4) because the condition precedent to the alternative devise—“if none of my children survives me”—was not satisfied; one of G’s children, B, survived G. Hence the alternative devisees would not be entitled to take under the

will. Nevertheless, the italicized language would indicate that G did not intend to substitute descendants of deceased children unless all of G's children failed to survive G. Thus, although A predeceased G leaving a child, X₂ who survived G by 120 hours, X would not be substituted for A. B, G's surviving child, would take the whole \$10,000 devise.

The above variation of Example 1 is to be distinguished from other variations, such as one in which G's will devised "\$10,000 to my surviving children, *but if none of my children survives me*, to my brothers and sisters". The italicized language in this variation would not indicate that G did not intend to substitute descendants of deceased children unless all of G's children failed to survive G. In addition, even if one or more of G's brothers and sisters survived G, the alternative devise would not cause the substitute gift to X to be superseded under subsection (b)(4); the alternative devisees would not be entitled to take under the will because the alternative devise is expressly conditioned on none of G's children surviving G. Thus X would be substituted for A, allowing X and B to divide the \$10,000 equally (as in the original version of Example 1).

Subsection (b)(4) is further illustrated by the following examples:

Example 2. G's will devised "\$10,000 to my sister, S" and devised "the rest, residue, and remainder of my estate to X-Charity". S predeceased G, leaving a child, N, who survived G by 120 hours.

Solution: S's \$10,000 devise goes to N, not to X-Charity. The residuary clause does not create an "alternative devise", as defined in subsection (a)(1), because neither it nor any other language in the will specifically provides that S's \$10,000 devise or lapsed or failed devises in general pass under the residuary clause.

Example 3. Same facts as Example 2, except that G's residuary clause devised "the rest, residue, and remainder of my estate, including all failed and lapsed devises, to X-Charity".

Solution: S's \$10,000 devise goes to X-Charity, not to N. Under subsection (b)(4), the substitute gift to N created by subsection (b)(1) is superseded. The residuary clause expressly creates an "alternative devise", as defined in subsection (a)(1), in favor of X-Charity and that alternative devisee, X-Charity, is entitled to take under the will.

Example 4. G's will devised "\$10,000 to my two children, A and B, or to the survivor of them". A predeceased G, leaving a child, X, who survived G by 120 hours. B also survived G by 120 hours.

Solution: B takes the full \$10,000. Because the takers of the \$10,000 devise are both named and numbered ("my two children, A and B"), the devise is not in the form of a class gift. See Restatement (Third) of Property: Wills and Other Donative Transfers § 13.2 (2008). The substance of the devise is as if it read "half of \$10,000 to A, but if A predeceases me, that half to

B if B survives me and the other half of \$10,000 to B, but if B predeceases me, that other half to A if A survives me”. With respect to each half, A and B have alternative devises, one to the other. Subsection (b)(1) creates a substitute gift to A’s descendant, X, with respect to A’s alternative devise in each half. Under subsection (b)(4), however, that substitute gift to X with respect to each half is superseded by the alternative devise to B because the alternative devisee, B, survived G by 120 hours and is entitled to take under G’s will.

Example 5. G’s will devised “\$10,000 to my two children, A and B, or to the survivor of them”. A and B predeceased G. A left a child, X, who survived G by 120 hours; B died childless.

Solution: X takes the full \$10,000. Because the devise itself is in the same form as the one in Example 4, the substance of the devise is as if it read “half of \$10,000 to A, but if A predeceases me, that half to B if B survives me and the other half of \$10,000 to B, but if B predeceases me, that other half to A if A survives me”. With respect to each half, A and B have alternative devises, one to the other. As in Example 4, subsection (b)(1) creates a substitute gift to A’s descendant, X, with respect to A’s alternative devise in each half. Unlike the situation in Example 4, however, neither substitute gift to X is superseded under subsection (b)(4) by the alternative devise to B because, in this case, the alternative devisee, B, failed to survive G by 120 hours and is therefore not entitled to take either half under G’s will.

Note that the order of deaths as between A and B is irrelevant. The phrase “or to the survivor” does not mean the survivor as between them if they both predecease G; it refers to the one who survives G if one but not the other survives G.

Example 6. G’s will devised “\$10,000 to my son, A, if he is living at my death; if not, to A’s children”. A predeceased G. A’s child, X, also predeceased G. A’s other child, Y and X’s children, M and N, survived G by 120 hours.

Solution: Half of the devise (\$5,000) goes to Y. The other half (\$5,000) goes to M and N.

Because A failed to survive G by 120 hours and left descendants who survived G by 120 hours, subsection (b)(1) substitutes A’s descendants who survived G by 120 hours for A. But that substitute gift is superseded under subsection (b)(4) by the alternative devise to A’s children. Under subsection (b)(4), as clarified by technical amendment in 2008, an alternative devise supersedes a substitute gift “if an expressly designated devisee of the alternative devise is entitled to take under the will”. In this case, Y is an expressly designated devisee of the alternative devise who is entitled to take under the will. Note that a devisee of an alternative devise can be expressly designated by class designation, as here, as well as by name. Note also that only one member of the class needs to be entitled to take under the will in order for an alternative devise to supersede a substitute gift if the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will. Because the alternative devise is in the form of a class gift (see Restatement (Third) of Property: Wills and Other Donative Transfers § 13.1 (2008), and because one member of the class, Y, survived the testator and is entitled to take,

the substitute gift under subsection (b)(1) is superseded.

Because the alternative devise to A's children is in the form of a class gift, however, and because one of the class members, X, failed to survive G by 120 hours and left descendants who survived G by 120 hours, subsection (b)(2) applies and substitutes M and N for X.

Subsection (c). Subsection (c) is necessary because there can be cases in which subsections (b)(1) or (b)(2) create substitute gifts with respect to two or more alternative devisees of the same property, and those substitute gifts are not superseded under the terms of subsection (b)(4). Subsection (c) provides the tie-breaking mechanism for such situations.

The initial step is to determine which of the alternative devisees would take effect had all the devisees themselves survived the testator (by 120 hours). In subsection (c), this devise is called the "primary devise". Unless subsection (c)(2) applies, subsection (c)(1) provides that the devised property passes under substitute gift created with respect to the primary devise. This substitute gift is called the "primary substitute gift". Thus, the devised property goes to the descendants of the devisee or devisees of the primary devise.

Subsection (c)(2) provides an exception to this rule. Under subsection (c)(2), the devised property does not pass under the primary substitute gift if there is a "younger-generation devise"—defined as a devise that (A i) is to a descendant of a devisee of the primary devise, (B ii) is an alternative devise with respect to the primary devise, (C iii) is a devise for which a substitute gift is created, and (D iv) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise. If there is a younger-generation devise, the devised property passes under the "younger-generation substitute gift"—defined as the substitute gift created with respect to the younger-generation devise.

Subsection (c) is illustrated by the following examples:

Example 7. G's will devised "\$5,000 to my son, A, if he is living at my death; if not, to my daughter, B" and devised "\$7,500 to my daughter, B, if she is living at my death; if not, to my son, A". A and B predeceased G, both leaving descendants who survived G by 120 hours.

Solution: A's descendants take the \$5,000 devise as substitute takers for A, and B's descendants take the \$7,500 devise as substitute takers for B. In the absence of a finding based on affirmative evidence such as described in the solution to Example 1, the mere words of survivorship do not by themselves indicate a contrary intent.

Both devises require application of subsection (c). In the case of both devises, the statute produces a substitute gift for the devise to A and for the devise to B, each devise being an alternative devise, one to the other. The question of which of the substitute gifts takes effect is resolved by determining which of the devisees themselves would take the devised property if

both A and B had survived G by 120 hours.

With respect to the devise of \$5,000, the primary devise is to A because A would have taken the devised property had both A and B survived G by 120 hours. Consequently, the primary substitute gift is to A's descendants and that substitute gift prevails over the substitute gift to B's descendants.

With respect to the devise of \$7,500, the primary devise is to B because B would have taken the devised property had both A and B survived G by 120 hours, and so the substitute gift to B's descendants is the primary substitute gift and it prevails over the substitute gift to A's descendants.

Subsection (c)(2) is inapplicable because there is no younger-generation devise. Neither A nor B is a descendant of the other.

Example 8. G's will devised "\$10,000 to my son, A, if he is living at my death; if not, to A's children, X and Y". A and X predeceased G. A's child, Y, and X's children, M and N, survived G by 120 hours.

Solution: Half of the devise (\$5,000) goes to Y. The other half (\$5,000) goes to M and N. The disposition of the latter half requires application of subsection (c).

Subsection (b)(1) produces substitute gifts as to that half for the devise of that half to A and for the devise of that half to X, each of these devises being alternative devises, one to the other. The primary devise is to A. But there is also a younger-generation devise, the alternative devise to X. X is a descendant of A, X would take if X but not A survived G by 120 hours, and the devise is one for which a substitute gift is created by subsection (b)(1). So, the younger-generation substitute gift, which is to X's descendants (M and N), prevails over the primary substitute gift, which is to A's descendants (Y, M, and N).

Note that the outcome of this example is the same as in Example 6.

Example 9. Same facts as Example 5, except that both A and B predeceased the testator and both left descendants who survived the testator by 120 hours.

Solution: A's descendants take half (\$5,000) and B's descendants take half (\$5,000).

As to the half devised to A, subsection (b)(1) produces a substitute gift to A's descendants and a substitute gift to B's descendants (because the language "or to the survivor of them" created an alternative devise in B of A's half). As to the half devised to B, subsection (b)(1) produces a substitute gift to B's descendants and a substitute gift to A's descendants (because the language "or to the survivor of them" created an alternative devise in A of B's half). Thus, with respect to each half, resort must be had to subsection (c) to determine which substitute

gift prevails.

Under subsection (c)(1), each half passes under the primary substitute gift. The primary devise as to A's half is to A and the primary devise as to B's half is to B because, if both A and B had survived G by 120 hours, A would have taken half (\$5,000) and B would have taken half (\$5,000). Neither A nor B is a descendant of the other, so subsection (c)(2) does not apply. Only if one were a descendant of the other would the other's descendant take it all, under the rule of subsection (c)(2).

Technical Amendments. Technical amendments in 2008 added definitions of “descendant of a grandparent” and “descendants” as used in subsections (b)(1) and (2) and clarified subsection (b)(4). The two new definitions resolve questions of status previously unanswered. The technical amendment of subsection (b)(4) makes that subsection easier to understand but does not change its substance.

Reference. This section is discussed in Halbach & Waggoner, “The UPC’s New Survivorship and Antilapse Provisions”, 55 Alb.L.Rev. 1091 (1992).

Historical Note. This Comment was revised in 1993 and 2008. ~~For the prior version, see 8 U.L.A. 127 (Supp.1992).~~

**SECTION 2-706. LIFE INSURANCE; RETIREMENT PLAN; ACCOUNT WITH
POD DESIGNATION; TRANSFER-ON-DEATH REGISTRATION; DECEASED
BENEFICIARY.**

(a) [Definitions.] In this section:

(1) “Alternative beneficiary designation” means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

(2) “Beneficiary” means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes (i) a class member if the beneficiary

designation is in the form of a class gift and (ii) an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

(3) “Beneficiary designation” includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

(4) “Class member” includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had he [or she] survived the decedent.

(5) “Descendant of a grandparent”, as used in subsection (b), means an individual who qualifies as a descendant of a grandparent of the decedent under the (i) rules of construction applicable to a class gift created in the decedent’s beneficiary designation if the beneficiary designation is in the form of a class gift or (ii) rules for intestate succession if the beneficiary designation is not in the form of a class gift.

(6) “Descendants”, as used in the phrase “surviving descendants” of a deceased beneficiary or class member in subsections (b)(1) and (2), mean the descendants of a deceased beneficiary or class member who would take under a class gift created in the beneficiary designation.

(5 7) “Stepchild” means a child of the decedent’s surviving, deceased, or former spouse, and not of the decedent.

(6 8) ~~“Surviving beneficiary” or “surviving descendant”~~ “Surviving”, in the phrase “surviving beneficiaries” or “surviving descendants”, means a beneficiary ~~beneficiaries or~~

a descendants who neither predeceased the decedent nor is are deemed to have predeceased the decedent under Section 2-702.

(b) [Substitute Gift.] If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:

(1) Except as provided in paragraph (4), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(2) Except as provided in paragraph (4), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship, such as in a beneficiary designation to an individual "if he survives me," or in a beneficiary designation to

“my surviving children,” are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative beneficiary designation ~~only if an~~:

~~(A) expressly designated beneficiary of the alternative beneficiary designation~~ the alternative beneficiary designation is in the form of a class gift and one or more members of the class is entitled to take; or

~~(B) the alternative beneficiary designation is not in the form of a class gift and the expressly designated beneficiary of the alternative beneficiary designation~~ is entitled to take.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one beneficiary designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i) A “Primary beneficiary designation” means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary

designations who left surviving descendants survived the decedent.

(~~ii~~ B) “Primary substitute gift” means the substitute gift created with respect to the primary beneficiary designation.

(~~iii~~ C) “Younger-generation beneficiary designation” means a beneficiary designation that (~~A~~ i) is to a descendant of a beneficiary of the primary beneficiary designation, (~~B~~ ii) is an alternative beneficiary designation with respect to the primary beneficiary designation, (~~C~~ iii) is a beneficiary designation for which a substitute gift is created, and (~~D~~ iv) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(~~iv~~ D) “Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation beneficiary designation.

(d) [Protection of Payors.]

(1) A payor is protected from liability in making payments under the terms of the beneficiary designation until the payor has received written notice of a claim to a substitute gift under this section. Payment made before the receipt of written notice of a claim to a substitute gift under this section discharges the payor, but not the recipient, from all claims for the amounts paid. A payor is liable for a payment made after the payor has received written notice of the claim. A recipient is liable for a payment received, whether or not written notice of the claim is given.

(2) The written notice of the claim must be mailed to the payor’s main office or home by registered or certified mail, return receipt requested, or served upon the payor in the

same manner as a summons in a civil action. Upon receipt of written notice of the claim, a payor may pay any amount owed by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds and, upon its determination under this section, shall order disbursement in accordance with the determination. Payment made to the court discharges the payor from all claims for the amounts paid.

(e) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this

section not preempted.

Comment

Purpose of New Section. This ~~new~~ section provides an antilapse statute for “beneficiary designations” under which the beneficiary must survive the decedent. The term “beneficiary designation” is defined in Section 1-201 as “a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death”. ~~Technical amendments in 1993 added language specifically excluding joint and survivorship accounts and joint tenancies with the right of survivorship; this amendment is consistent with the original purpose of the section.~~

The terms of this section parallel those of Section 2-603, except that the provisions relating to payor protection and personal liability of recipients have been added. The Comment to Section 2-603 contains an elaborate exposition of Section 2-603, together with ~~the~~ examples illustrating its application. That Comment, in addition to the examples given below, should aid understanding of Section 2-706. For a discussion of the reasons why Section 2-706 should not be preempted by federal law with respect to retirement plans covered by ERISA, see the Comment to Section 2-804. See also Rayho, Note, 106 Mich. L. Rev. 373 (2007).

Example 1. G is the owner of a life-insurance policy. When the policy was taken out, G was married to S; G and S had two young children. A and B. G died 45 years after the policy was taken out. S predeceased G, A survived G by 120 hours and B predeceased G leaving three children (X, Y, and Z) who survived G by 120 hours. G’s policy names S as the primary beneficiary of the policy, but because S predeceased G, the secondary (contingent) beneficiary designation became operative. The secondary (contingent) beneficiary designation of G’s policy states: “equally to the then living children born of the marriage of G and S”.

The printed terms of G’s policy provide:

“If two or more persons are designated as beneficiary, the beneficiary will be the designated person or persons who survive the Insured, and if more than one survive, they will share equally”.

Solution: The printed clause constitutes an “alternative beneficiary designation” for purposes of subsection (b)(4), which supersedes the substitute gift to B’s descendants created by subsection (b)(2). A is entitled to all of the proceeds of the policy.

Example 2. The facts are the same as in Example 1, except that G’s policy names “A and B” as secondary (contingent) beneficiaries. The printed terms of the policy provide:

“If any designated Beneficiary predeceases the Insured, the interest of such Beneficiary

will terminate and shall be shared equally by such of the Beneficiaries as survive the Insured”.

Solution: The printed clause constitutes an “alternative beneficiary designation” for purposes of subsection (b)(4), which supersedes the substitute gift to B’s descendants created by subsection (b)(1). A is entitled to all of the proceeds of the policy.

Example 3. The facts are the same as Examples 1 or 2, except that the printed terms of the policy do not contain either quoted clause or a similar one.

Solution: Under Section 2-706, A would be entitled to half of the policy proceeds and X, Y, and Z would divide the other half equally.

Example 4. The facts are the same as Example 3, except that the policy has a beneficiary designation that provides that, if the adjacent box is checked, the share of any deceased beneficiary shall be paid “in one sum and in equal shares to the children of that beneficiary who survive”. G did not check the box adjacent to this option.

Solution: G’s deliberate decision not to check the box providing for the share of any deceased beneficiary to go to that beneficiary’s children constitutes a clear indication of a contrary intention for purposes of Section 2-701. A would be entitled to all of the proceeds of the policy.

Example 5. G’s life-insurance policy names her niece, A, as primary beneficiary, and provides that if A does not survive her, the proceeds are to go to her niece B, as contingent beneficiary. A predeceased G, leaving children who survived G by 120 hours, B survived G by 120 hours.

Solution: The contingent beneficiary designation constitutes an “alternative beneficiary designation” for purposes of subsection (b)(4), which supersedes the substitute gift to A’s descendants created by subsection (b)(1). The proceeds go to B, not to A’s children.

Example 6. G’s life-insurance policy names her niece, A, as primary beneficiary, and provides that if A does not survive her, the proceeds are to go to her niece B, as contingent beneficiary. The printed terms of the policy specifically state that if neither the primary nor secondary beneficiaries survive the policyholder, the proceeds are payable to the policyholder’s estate. A predeceased G, leaving children who survived G by 120 hours, B also predeceased G, leaving children who survived G by 120 hours.

Solution: The second contingent beneficiary designation to G’s estate constitutes an “alternative beneficiary designation” for purposes of subsection (b)(4), which supersedes the substitute gifts to A’s and B’s descendants created by subsection (b)(1). The proceeds go to G’s estate, not to A’s children or to B’s children.

References. This section is discussed in Halbach & Waggoner, “The UPC’s New Survivorship and Antilapse Provisions”, 55 Alb.L.Rev. 1091 (1992). See also Restatement (Third) of Property: Wills and Other Donative Transfers § 5.5 cmt. p (1999); § 7.2 cmt. k (2003); Lebolt, “Making the Best of *Egelhoff*: Federal Common Law for ERISA-Preempted Beneficiary Designations”, 28 J. Pension Planning & Compliance 29 (Fall 2002); Gallanis, “ERISA and the Law of Succession”, 60 Ohio St. L.J. 185 (2004); Rayho, Note, 106 Mich. L. Rev. 373 (2007).

Technical Amendments. Technical amendments in 1993 added language specifically excluding joint and survivorship accounts and joint tenancies with the right of survivorship; this amendment is consistent with the original purpose of the section. Technical amendments in 2008 added definitions of “descendant of a grandparent” and “descendants” as used in subsections (b)(1) and (2) and clarified subsection (b)(4). The two new definitions resolve questions of status previously unanswered. The technical amendment of subsection (b)(4) makes that subsection easier to understand but does not change its substance.

Historical Note. This Comment was revised in 1993 and 2008. ~~For the prior version, see 8 U.L.A. 146 (Supp.1992).~~

SECTION 2-707. SURVIVORSHIP WITH RESPECT TO FUTURE INTERESTS UNDER TERMS OF TRUST; SUBSTITUTE TAKERS.

(a) [Definitions.] In this section:

(1) “Alternative future interest” means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

(2) “Beneficiary” means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(3) “Class member” includes an individual who fails to survive the distribution

date but who would have taken under a future interest in the form of a glass gift had he [or she] survived the distribution date.

(4) “Descendants”, in the phrase “surviving descendants” of a deceased beneficiary or class member in subsections (b)(1) and (b)(2), mean the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

~~(4~~ 5) “Distribution date,” with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

~~(5~~ 6) “Future interest” includes an alternative future interest and a future interest in the form of a class gift.

~~(6~~ 7) “Future interest under the terms of a trust” means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

~~(7~~ 8) ~~“Surviving devisee” or “surviving descendant”~~ “Surviving”, in the phrase “surviving beneficiaries” or “surviving descendants”, means a beneficiary beneficiaries or a descendants who neither predeceased the distribution date nor is are deemed to have predeceased the distribution date under Section 2-702.

(b) [Survivorship Required; Substitute Gift.] A future interest under the terms of a trust is contingent on the beneficiary’s surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(1) Except as provided in paragraph (4), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

(2) Except as provided in paragraph (4), if the future interest is in the form of a class gift, other than a future interest to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.

(4) If the governing instrument creates an alternative future interest with respect to

a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest ~~only if an expressly designated beneficiary of the alternative future interest~~ :

(A) the alternative future interest is in the form of a class gift and one or more members of the class is entitled to take in possession or enjoyment; or

(B) the alternative future interest is not in the form of a class gift and the expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i A) “Primary future interest” means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

(ii B) “Primary substitute gift” means the substitute gift created with respect to the primary future interest.

(iii C) “Younger-generation future interest” means a future interest that (A i) is to a descendant of a beneficiary of the primary future interest, (B ii) is an alternative future interest with respect to the primary future interest, (C iii) is a future interest for which a substitute gift is created, and (D iv) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

(iv D) “Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation future interest.

(d) [If No Other Takers, Property Passes Under Residuary Clause or to Transferor’s Heirs.] Except as provided in subsection (e), if, after the application of subsections (b) and (c), there is no surviving taker, the property passes in the following order:

(1) if the trust was created in a nonresiduary devise in the transferor’s will or in a codicil to the transferor’s will, the property passes under the residuary clause in the transferor’s will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(2) if no taker is produced by the application of paragraph (1), the property passes to the transferor’s heirs under Section 2-711.

(e) [If No Other Takers and If Future Interest Created by Exercise of Power of Appointment.] If, after the application of subsections (b) and (c), there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

(1) the property passes under the donor’s gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and

(2) if no taker is produced by the application of paragraph (1), the property passes as provided in subsection (d). For purposes of subsection (d), “transferor” means the donor if the power was a nongeneral power and means the donee if the power was a general power.

Comment

~~**Rationale of New Section.** This new section applies only to future interests under the terms of a trust. For shorthand purposes, references in this Comment to the term “future interest” refer to a future interest under the terms of a trust.~~

~~**Rationale.** The objective of this section is to project the antilapse idea into the area of future interests, thus preventing disinheritance of a descending line that has one or more members living on the distribution date and preventing a share from passing down a descending line that has died out by the distribution date. The structure of this section substantially parallels the structure of the regular antilapse statute, Section 2-603, and the antilapse-type statute relating to beneficiary designations, Section 2-706.~~

~~**Scope.** This section applies only to future interests under the terms of a trust. For shorthand purposes, references in this Comment to the term “future interest” refer to a future interest under the terms of a trust. The rationale for restricting this section to future interests under the terms of a trust is that legal life estates in land, followed by indefeasibly vested remainder interests, are still created in some localities, often with respect to farmland. In such cases, the legal life tenant and the person holding the remainder interest can, together, give good title in the sale of the land. If the antilapse idea were injected into this type of situation, the ability of the parties to sell the land would be impaired if not destroyed because the antilapse idea would, in effect, create a contingent substitute remainder interest in the present and future descendants of the person holding the remainder interest.~~

~~**Structure.** The structure of this section substantially parallels the structure of the regular antilapse statute, Section 2-603, and the antilapse-type statute relating to beneficiary designations, Section 2-706.~~

~~**Common-law Background.** At common law, conditions of survivorship are not implied with respect to future interests ~~(whether in trust or otherwise)~~. The rule against implying a condition of survivorship applies whether the future interest is created in trust or otherwise and whether the future interest is or is not in the form of a class gift. The only exception, where a condition of survivorship is implied at common law, is in the case of a multiple-generation class gift. See Restatement (Third) of Property: Wills and Other Donative Transfers §§ 15.3, 15.4 (2008). For example, in the simple case of a trust, “income to husband, A, for life, remainder to daughter, B”, B’s interest is not defeated at common law if she predeceases A; B’s interest would pass through her estate to her successors in interest (probably either her residuary legatees or~~

heirs: see Waggoner, “The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts”, 94 Mich. L. Rev. 2309, 2331-32 (1996)), who would become entitled to possession when A died. If any of B’s successors in interest died before A, the interest held by that deceased successor in interest would likewise pass through his or her estate to his or her successors in interest; and so on. Thus, a benefit of ~~The rationale for adopting~~ a statutory provision reversing the common-law rule and providing substitute takers is to prevent that it prevents cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests, who may have died long before the distribution date.

Subsection (b): Subsection (b) imposes a condition of survivorship on future interests to the distribution date—defined as the time when the future interest is to take effect in possession or enjoyment. The requirement of survivorship imposed by subsection (b) applies whether or not the deceased beneficiary leaves descendants who survive the distribution date and are takers of a substitute gift provided by subsections (b)(1) or (b)(2). Imposing a condition of survivorship on a future interest when the deceased beneficiary did not leave descendants who survive the distribution date prevents a share from passing down a descending line that has died out by the distribution date. Imposing a condition of survivorship on a future interest when the deceased beneficiary did leave descendants who survive the distribution date, and providing a substitute gift to those descendants, prevents disinheritance of a descending line that has one or more living members on the distribution date.

The 120-hour Survivorship Period. In effect, the requirement of survival of the distribution date means survival of the 120-hour period following the distribution date. This is because, under Section 2-702(a), “an individual who is not established to have survived an event ... by 120 hours is deemed to have predeceased the event”. As made clear by subsection (a)(7 8), for the purposes of section 2-707, the “event” to which section 2-702(a) relates is the distribution date.

Note that the “distribution date” need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day, such as the time of death of an income beneficiary.

References in Section 2-707 and in this Comment to survival of the distribution date should be understood as referring to survival of the distribution date by 120 hours.

Ambiguous Survivorship Language. Subsection (b) serves another purpose. It resolves a frequently litigated question arising from ambiguous language of survivorship, such as in a trust, “income to A for life, remainder in corpus to my surviving children”. Although some case law interprets the word “surviving” as merely requiring survival of the testator (e.g., Nass’ Estate, 182 A. 401 (Pa.1936)), the predominant position at common law interprets “surviving” as requiring survival of the life tenant, A. Hawke v. Lodge, 77 A. 1090 (Del.Ch.1910); Restatement of Property § 251 (1940) (Third) of Property: Wills and Other Donative Transfers §§ 15.3 cmt. f; 15.4 cmt. g (2008). The first sentence of subsection (b), in conjunction with paragraph (3),

codifies the predominant common-law/Restatement position that survival relates to the distribution date.

The first sentence of subsection (b), in combination with paragraph (3), imposes a condition of survivorship to the distribution date (the time of possession or enjoyment) even when an express condition of survivorship to an earlier time has been imposed. Thus, in a trust like “income to A for life, remainder in corpus to B, but if B predeceases A, to B’s children who survive B”, the first sentence of subsection (b) combined with paragraph (3) requires B’s children to survive (by 120 hours) the death of the income beneficiary, A.

Rule of Construction. Note that Section 2-707 is a rule of construction. It is qualified by the rule set forth in Section 2-701, and thus it yields to a finding of a contrary intention. Consequently, in trusts like “income to A for life, remainder in corpus to B whether or not B survives A”, or “income to A for life, remainder in corpus to B or B’s estate”, this section would not apply and, should B predecease A, B’s future interest would pass through B’s estate to B’s successors in interest, who would become entitled to possession or enjoyment at A’s death.

Classification. Subsection (b) renders a future interest “contingent” on the beneficiary’s survival of the distribution date. As a result, future interests are “nonvested” and subject to the Rule Against Perpetuities. To prevent an injustice from resulting because of this, the Uniform Statutory Rule Against Perpetuities, which has a wait-and-see element, is incorporated into the Code as Part 9.

Substitute Gifts. Section 2-707 not only imposes a condition of survivorship to the distribution date; like its antilapse counterparts, Sections 2-603 and 2-706, it provides substitute takers in cases of a beneficiary’s failure to survive the distribution date.

The statutory substitute gift is divided among the devisee’s descendants “by representation”, a term phrase defined in Section 2-709(b). A technical amendment adopted in 2008 added subsection (a)(4), defining the term “descendants”.

Subsection (b)(1)—Future Interests Not in the Form of a Class Gift. Subsection (b)(1) applies to non-class gifts, such as the “income to A for life, remainder in corpus to B” trust discussed above. If B predeceases A, subsection (b)(1) creates a substitute gift with respect to B’s future interest; the substitute gift is to B’s descendants who survive A (by 120 hours).

Subsection (b)(2)—Class Gift Future Interests. Subsection (b)(2) applies to single-generation class gifts, such as in a trust “income to A for life, remainder in corpus to A’s children”. See Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.1, 14.2 (2008). Suppose that A had two children, X and Y. X predeceases A; Y survives A. Subsection (b)(2) creates a substitute gift with respect to any of A’s children who predecease fail to survive A (by 120 hours) leaving descendants who survive A (by 120 hours). Thus, if X left descendants who survived A (by 120 hours), X’s those descendants would take X’s share; if X

left no descendants ~~living at A's death~~ who survived A (by 120 hours), Y would take it all.

Subsection (b)(2) does not apply to future interests to multiple-generation classes such as “issue”, “descendants”, “heirs of the body”, “heirs”, “next of kin”, “distributees”, “relatives”, “family”, or the like. The reason is that these types of class gifts have their own internal systems of representation, and so the substitute gift provided by subsection (b)(1) would be out of place with respect to these types of future interests. See Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.3, 14.4, 15.3 (2008). The first sentence of subsection (b) and subsection (d) do apply, however. For example, suppose a nonresiduary devise “to A for life, remainder to A’s issue, by representation”. If A leaves issue surviving him (by 120 hours), they take. But if A leaves no issue surviving him (by 120 hours), the testator’s residuary devisees are the takers.

Subsection (b)(4). Subsection (b)(4), as clarified by technical amendment in 2008, provides that, if a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest ~~only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment if:~~ (A) the alternative future interest is in the form of a class gift and one or more members of the class is entitled to take in possession or enjoyment; or (B) the alternative future interest is not in the form of a class gift and the expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment. Consider, for example, a trust under which the income is to be paid to A for life, remainder in corpus to B if B survives A, but if not to C if C survives A. If B predeceases A, leaving descendants who survive A (by 120 hours), subsection (b)(1) creates a substitute gift to B’s those descendants. But, if C survives A (by 120 hours), the alternative future interest in C supersedes the substitute gift to B’s descendants. Upon A’s death, the trust corpus passes to C.

Subsection (c). Subsection (c) is necessary because there can be cases in which subsections (b)(1) or (b)(2) create substitute gifts with respect to two or more alternative future interests, and those substitute gifts are not superseded under the terms of subsection (b)(4). Subsection (c) provides the tie-breaking mechanism for such situations.

The initial step is to determine which of the alternative future interests would take effect had all the beneficiaries themselves survived the distribution date (by 120 hours). In subsection (c), this future interest is called the “primary future interest”. Unless subsection (c)(2) applies, subsection (c)(1) provides that the property passes under substitute gift created with respect to the primary future interest. This substitute gift is called the “primary substitute gift”. Thus, the property goes to the descendants of the beneficiary or beneficiaries of the primary future interest.

Subsection (c)(2) provides an exception to this rule. Under subsection (c)(2), the property does not pass under the primary substitute gift if there is a “younger-generation future interest”—defined as a future interest that ~~(A)~~ i is to a descendant of a beneficiary of the primary

future interest, (B ii) is an alternative future interest with respect to the primary future interest, (C iii) is a future interest for which a substitute gift is created, and (D iv) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest. If there is a younger-generation future interest, the property passes under the “younger-generation substitute gift”—defined as the substitute gift created with respect to the younger-generation future interest.

Subsection (d). Since it is possible that, after the application of subsections (b) and (c), there are no substitute gifts, a back-stop set of substitute takers is provided in subsection (d)—the transferor’s residuary devisees or heirs. Note that the transferor’s residuary clause is treated as creating a future interest and, as such, is subject to this section. Note also that the meaning of the back-stop gift to the transferor’s heirs is governed by Section 2-711, under which the gift is to the transferor’s heirs determined as if the transferor died when A died. Thus there will always be a set of substitute takers, even if it turns out to be the State. If the transferor’s surviving spouse has remarried after the transferor’s death but before A’s death, he or she would not be a taker under this provision.

Examples. The application of Section 2-707 is illustrated by the following examples. Note that, in each example, the “distribution date” is the time of the income beneficiary’s death. Assume, in each example, that an individual who is described as having “survived” the income beneficiary’s death survived the income beneficiary’s death by 120 hours or more.

Example 1. A nonresiduary devise in G’s will created a trust, income to A for life, remainder in corpus to B if B survives A. G devised the residue of her estate to a charity. B predeceased A. At A’s death, B’s child, X, is living.

Solution: On A’s death, the trust property goes to X, not to the charity. Because B’s future interest is not in the form of a class gift, subsection (b)(1) applies, not (b)(2). Subsection (b)(1) creates a substitute gift with respect to B’s future interest; the substitute gift is to B’s child, X. Under subsection (b)(3), the words of survivorship attached to B’s future interest (“to B if B survives A”) do not indicate an intent contrary to the creation of that substitute gift. Nor, under subsection (b)(4), is that substitute gift superseded by an alternative future interest because, as defined in subsection (a)(1), G’s residuary clause does not create an alternative future interest. In the normal lapse situation, a residuary clause does not supersede the substitute gift created by the antilapse statute, and the same analysis applies to this situation as well.

Example 2. Same as Example 1, except that B left no descendants who survived A.

Solution: Subsection (b)(1) does not create a substitute gift with respect to B’s future interest because B left no descendants who survived A. This brings subsection (d) into operation, under which the trust property passes to the charity under G’s residuary clause.

Example 3. G created an irrevocable inter-vivos trust, income to A for life, remainder in

corpus to B if B survives A. B predeceased A. At A's death, G and X, B's child, are living.

Solution: X takes the trust property. Because B's future interest is not in the form of a class gift, subsection (b)(1) applies, not (b)(2). Subsection (b)(1) creates a substitute gift with respect to B's future interest; the substitute gift is to B's child, X. Under subsection (b)(3), the words of survivorship ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. Nor, under subsection (b)(4), is the substitute gift superseded by an alternative future interest; G's reversion is not an alternative future interest as defined in subsection (a)(1) because it was not expressly created.

Example 4. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to B if B survives A; if not, to C. B predeceased A. At A's death, C and B's child are living.

Solution: C takes the trust property. Because B's future interest is not in the form of a class gift, subsection (b)(1) applies, not (b)(2). Subsection (b)(1) creates a substitute gift with respect to B's future interest; the substitute gift is to B's child, X. Under subsection (b)(3), the words of survivorship ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. But, under subsection (b)(4), the substitute gift to B's child is superseded by the alternative future interest held by C because C, having survived A (by 120 hours), is entitled to take in possession or enjoyment.

Example 5. G created an irrevocable inter-vivos trust income to A for life, remainder in corpus to B, but if B predeceases A, to the person B appoints by will. B predeceased A. B's will exercised his power of appointment in favor of C. C survives A. B's child, X, also survives A.

Solution: B's appointee, C, takes the trust property, not B's child, X. Because B's future interest is not in the form of a class gift, subsection (b)(1) applies, not (b)(2). Subsection (b)(1) creates a substitute gift with respect to B's future interest; the substitute gift is to B's child, X. Under subsection (b)(3), the words of survivorship ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. But, under subsection (b)(4), the substitute gift to B's child is superseded by the alternative future interest held by C because C, having survived A (by 120 hours), is entitled to take in possession or enjoyment. Because C's future interest was created in "a" governing instrument (B's will), it counts as an "alternative future interest".

Example 6. G creates an irrevocable inter-vivos trust, income to A for life, remainder in corpus to A's children who survive A; if none, to B. A's children predecease A, leaving descendants, X and Y, who survive A. B also survives A.

Solution: On A's death, the trust property goes to B, not to X and Y. Because the future interest in A's children is in the form of a class gift (see Restatement (Third) of Property: Wills and Other Donative Transfers § 13.1 (2008)), subsection (b)(2) applies, not (b)(1). Subsection

(b)(2) creates a substitute gift with respect to the future interest in A's children; the substitute gift is to the descendants of A's children, X and Y. Under subsection (b)(3), the words of survivorship ("to A's children who survive A") do not indicate an intent contrary to the creation of that substitute gift. But, under subsection (b)(4), the alternative future interest to B supersedes the substitute gift to the descendants of A's children because B survived A.

Alternative Facts: One of A's children, J, survives A; A's other child, K, predeceases A, leaving descendants, X and Y, who survive A. B also survives A.

Solution: J takes half the trust property and X and Y split the other half. Although there is an alternative future interest (in B) and although B did survive A, the alternative future interest was conditioned on none of A's children surviving A. Because that condition was not satisfied, the expressly designated beneficiary of that alternative future interest, B, is not entitled to take in possession or enjoyment. Thus, the alternative future interest in B does not supersede the substitute gift to K's descendants, X and Y.

Example 7. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to B if B survives A; if not, to C. B and C predecease A. At A's death, B's child and C's child are living.

Solution: Subsection (b)(1) produces substitute gifts with respect to B's future interest and with respect to C's future interest. B's future interest and C's future interest are alternative future interests, one to the other. B's future interest is expressly conditioned on B's surviving A. C's future interest is conditioned on B's predeceasing A and C's surviving A. The condition that C survive A does not arise from express language in G's trust but from the first sentence of subsection (b); that sentence makes C's future interest contingent on C's surviving A. Thus, because neither B nor C survived A, neither B nor C is entitled to take in possession or enjoyment. So, under subsection (b)(4), neither substitute gift, created with respect to the future interests in B and C, is superseded by an alternative future interest. Consequently, resort must be had to subsection (c) to break the tie to determine which substitute gift takes effect.

Under subsection (c), B is the beneficiary of the "primary future interest" because B would have been entitled to the trust property had both B and C survived A. Unless subsection (c)(2) applies, the trust property passes to B's child as the taker under the "primary substitute gift".

Subsection (c)(2) would only apply if C's future interest qualifies as a "younger-generation future interest". This depends upon whether C is a descendant of B, for C's future interest satisfies the other requirements necessary to make it a younger-generation future interest. If C was a descendant of B, the substitute gift to C's child would be a "younger-generation substitute gift" and would become effective instead of the "primary substitute gift" to B's descendants. But if C was not a descendant of B, the property would pass under the "primary substitute gift" to B's descendants.

Example 8. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to A's children who survive A; if none, to B. All of A's children predecease A. X and Y, who are descendants of one or more of A's children, survive A. B predeceases A, leaving descendants, M and N, who survive A.

Solution: On A's death, the trust property passes to X and Y under the "primary substitute gift", unless B was a descendant of any of A's children.

Subsection (b)(2) produces substitute gifts with respect to A's children who predeceased A leaving descendants who survived A. Subsection (b)(1) creates a substitute gift with respect to B's future interest. A's children's future interest and B's future interest are alternative future interests, one to the other. A's children's future interest is expressly conditioned on surviving A. B's future interest is conditioned on none of A's children surviving A and on B's surviving A. The condition of survivorship as to B's future interest does not arise because of express language in G's trust but because of the first sentence of subsection (b); that sentence makes B's future interest contingent on B's surviving A. Thus, because none of A's children survived A, and because B did not survive A, none of A's children nor B is entitled to take in possession or enjoyment. So, under subsection (b)(4), neither substitute gift—i.e., neither the one created with respect to the future interest in A's children nor the one created with respect to the future interest in B—is superseded by an alternative future interest. Consequently, resort must be had to subsection (c) to break the tie to determine which substitute gift takes effect.

Under subsection (c), A's children are the beneficiaries of the "primary future interest" because they would have been entitled to the trust property had all of them and B survived A. Unless subsection (c)(2) applies, the trust property passes to X and Y as the takers under the "primary substitute gift". Subsection (c)(2) would only apply if B's future interest qualifies as a "younger-generation future interest". This depends upon whether B is a descendant of any of A's children, for B's future interest satisfies the other requirements necessary to make it a "younger-generation future interest". If B was a descendant of one of A's children, the substitute gift to B's children, M and N, would be a "younger-generation substitute gift" and would become effective instead of the "primary substitute gift" to X and Y. But if B was not a descendant of any of A's children, the property would pass under the "primary substitute gift" to X and Y.

Example 9. G's will devised property in trust, income to niece Lilly for life, corpus on Lilly's death to her children; should Lilly die without leaving children, the corpus shall be equally divided among my nephews and nieces then living, the child or children of nieces who may be deceased to take the share their mother would have been entitled to if living.

Lilly never had any children. G had 3 nephews and 2 nieces in addition to Lilly. All 3 nephews and both nieces predeceased Lilly. A child of one of the nephews survived Lilly. One of the nieces had 8 children, 7 of whom survived Lilly. The other niece had one child, who did not survive Lilly. (This example is based on the facts of Bomberger's Estate, 32 A.2d 729 (Pa.1943).)

Solution: The trust property goes to the 7 children of the nieces who survived Lilly. The substitute gifts created by subsection (b)(2) to the nephew's son or to the nieces' children are superseded under subsection (b)(4) because there is an alternative future interest (the "child or children of nieces who may be deceased") and expressly designated beneficiaries of that alternative future interest (the 7 children of the nieces) are living at Lilly's death and are entitled to take in possession or enjoyment.

Example 10. G devised the residue of his estate in trust, income to his wife, W, for life, remainder in corpus to their children, John and Florence; if either John or Florence should predecease W, leaving descendants, such descendants shall take the share their parent would have taken if living.

G's son, John, survived W. G's daughter, Florence, predeceased W. Florence never had any children. Florence's husband survived W. (This example is based on the facts of *Matter of Kroos*, 99 N.E.2d 222 (N.Y.1951).)

Solution: John, of course, takes his half of the trust property. Because Florence left no descendants who survived W, subsection (b)(1) does not create a substitute gift with respect to Florence's future interest in her half. Subsection (d)(1) is inapplicable because G's trust was not created in a nonresiduary devise or in a codicil to G's will. Subsection (d)(2) therefore becomes applicable, under which Florence's half goes to G's heirs determined as if G died when W died, i.e., John. See Section 2-711.

Subsection (e). Subsection (e) was added in 1993 to clarify the passing of the property in cases in which the future interest is created by the exercise of a power of appointment.

Technical Amendments. Technical amendments in 2008 added a definition of "descendants" as used in subsections (b)(1) and (2) and clarified subsection (b)(4). The new definition resolves questions of status previously unanswered. The technical amendment of subsection (b)(4) makes that subsection easier to understand but does not change its substance.

Reference. This section is discussed in Halbach & Waggoner, "The UPC's New Survivorship and Antilapse Provisions", 55 Alb.L.Rev. 1091 (1992).

Historical Note. This Comment was revised in 1993 and 2008. ~~For the prior version, see 8 U.L.A. 148 (Supp.1992).~~