D R A F T

FOR APPROVAL

REVISED UNIFORM PROBATE CODE (2019)

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June 6, 2019

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REVISED UNIFORM PROBATE CODE (2019)

ARTICLE I

GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

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PART 2. DEFINITIONS

SECTION 1-201. GENERAL DEFINITIONS

* * *

(5) "Child" ~~includes an individual entitled to take as a child under this [code] by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant~~ means an individual of any age whose parentage is established under [Uniform Parentage Act (2017)][applicable state law].

* * *

(32) "Parent" ~~includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this [code] by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent~~ means an individual who has established a parent-child relationship under [Uniform Parentage Act (2017)][applicable state law].

* * *

(51) "Survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event under Section 2-104, 2-113, 2-114, or 2-702. The term includes its derivatives, such as "survives", "survived", "survivor", or "surviving."

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ARTICLE II

INTESTACY, WILLS, AND DONATIVE TRANSFERS

Prefatory Note

The Uniform Probate Code was originally promulgated in 1969.

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

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

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

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

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

construction. The 1990 revisions divided pre-1990 Part 6 into two parts — Part 6, containing rules of construction for wills only; and Part 7, containing rules of construction for wills and other governing instruments. A few new rules of construction were also added.

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

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

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

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

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

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

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

2019 Revisions. The promulgation of the Uniform Parentage Act (2017) [UPA (2017)] necessitated a further round of revisions to the Uniform Probate Code's intestacy and class-gift provisions. In part, the UPA (2017) enables the simplification of the Code. This is because the UPA (2017) contains detailed provisions on the creation of parent-child relationships, including by assisted reproduction; many of these provisions are now incorporated by reference into the UPC, thereby simplifying the Code, especially Sections 2-120 and 2-121. The UPA (2017) also embraces a functional approach to parentage—the doctrine of de facto parentage—which is now incorporated into the Code's intestacy and class-gift provisions. The UPA (2017) also opens the door to the possibility that a child may have more than two parents, hence more than two sets of grandparents.

The 2019 revisions achieve five principal objectives:

(1) Blended families are taken into account not only in Section 2-102, as in the 1990 revisions, but also in Section 2-103.

(2) The per-capita-at-each-generation system of representation is incorporated throughout Section 2-103. Heirs in a generation closer to the decedent are favored compared to heirs in a more remote generation; heirs in a given generation are treated equally.

(3) Outdated terms are removed. Examples include the references to a decedent's "maternal" and "paternal" grandparents in the pre-2019 version of Section 2-103, references to relatives of the "half blood" or "whole blood" in the pre-2019 version of Section 2-107, and references to "genetic" parents in the pre-2019 versions of Sections 2-117 through 2-119.

(4) The rules in the UPA (2017) governing parent-child relationships created by assisted reproduction are incorporated by reference.

(5) The intestacy and class-gift provisions are restructured to incorporate the innovations in the UPA (2017), such as the codification of the doctrine of de facto parentage and the recognition that a child may have more than two parents, hence more than two sets of grandparents.

Historical Note. This Prefatory Note was revised in 2008 and 2019.

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

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

Honoring the existing relationships formed by unmarried individuals is relevant not only for the individuals but also for their children. See, e.g., Sections 2-119(b) and 2-705(e).

PART 1. INTESTATE SUCCESSION

Subpart 1. General Rules

SECTION 2-101. INTESTATE ESTATE.

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this [code], except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed ~~his [or her]~~ the intestate share.

Comment

* * *

2019 Technical Amendment. A technical amendment was made to this section in 2019 to remove gendered language ("his [or her]").

*** * ***

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

~~(a) Any part of the intestate estate not passing to a decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:~~

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

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

~~(3) if there is no surviving descendant or parent, to the descendants of the~~

~~decedent's parents or either of them by representation;~~

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

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

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

~~(5) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner described in paragraph (4).~~

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

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

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

(a) **[Definitions.]** In this section:

(1) "Deceased parent", "deceased grandparent", or "deceased spouse" means a parent, grandparent, or spouse who either predeceased the decedent or is deemed to have predeceased the decedent under Section 2-104, 2-113, or 2-114.

(2) "Surviving spouse," "surviving descendant", "surviving parent", or "surviving grandparent" means a spouse, descendant, parent, or grandparent who neither predeceased the decedent nor is deemed to have predeceased the decedent under Section 2-104, 2-113, or 2-114.

(b) **[Heirs Other Than Surviving Spouse.]** Any part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or the entire estate if there is no surviving spouse, passes to the decedent's heirs as provided in subsections (c)-(j).

(c) **[Surviving Descendants.]** If the decedent is survived by one or more descendants, the intestate estate or part thereof passes by representation to the decedent's surviving descendants.

(d) **[Surviving Parents.]** If the decedent is not survived by a descendant but is survived by one or more parents, the intestate estate or part thereof is distributed as follows:

(1) The intestate estate or part thereof is divided into as many equal shares as there are

(A) surviving parents; and

(B) subject to subsection (i) which applies when two or more of the decedent's parents have the same surviving descendants, deceased parents with one or more surviving descendants, if any.

(2) One share passes to each surviving parent.

(3) Subject to subsection (i) which applies when two or more of the decedent's parents have the same surviving descendants, the balance of the intestate estate or part thereof, if any, passes by representation to the surviving descendants of the decedent's deceased parents.

(e) **[Surviving Descendants of Deceased Parents.]** If the decedent is not survived by a descendant or parent but is survived by one or more descendants of a parent, the intestate estate passes by representation to the surviving descendants of the decedent's deceased parent or parents.

(f) **[Surviving Grandparents.]** If the decedent is not survived by a descendant, parent, or descendant of a parent but is survived by one or more grandparents, the intestate estate is distributed as follows:

(1) The intestate estate is divided into as many equal shares as there are

(A) surviving grandparents; and

(B) subject to subsection (j) which applies when two or more of the decedent's grandparents have the same surviving descendants, deceased grandparents with one or more surviving descendants, if any.

(2) One share passes to each surviving grandparent.

(3) Subject to subsection (j) which applies when two or more of the decedent's grandparents have the same surviving descendants, the balance of the intestate estate, if any, passes by representation to the surviving descendants of the decedent's deceased grandparents.

(g) **[Surviving Descendants of Deceased Grandparents.]** If the decedent is not survived by a descendant, parent, descendant of a parent, or grandparent but is survived by one or more descendants of a grandparent, the intestate estate passes by representation to the surviving descendants of the decedent's deceased grandparent or grandparents.

(h) **[Surviving Descendants of Deceased Spouses.]** If the decedent is not survived by a descendant, parent, descendant of a parent, grandparent, or descendant of a grandparent but is survived by one or more descendants of one or more deceased spouses, the intestate estate passes

by representation to the surviving descendants of the decedent's deceased spouse or spouses.

(i) **[When a Parent Survives: Computation of Shares of Surviving Descendants of One or More Deceased Parents.]** For purposes of determining if, under subsection (d) which applies when the decedent has one or more surviving parents, the decedent's deceased parent or parents are treated as having surviving descendants, the following rules apply:

(1) If all the surviving descendants of one or more deceased parents are also descendants of one or more surviving parents and none of those surviving parents has any other surviving descendant, those descendants are deemed to have predeceased the decedent.

(2) If two or more deceased parents have the same surviving descendants and none of those deceased parents has any other surviving descendant, those deceased parents are deemed to be one deceased parent with surviving descendants.

(j) **[When a Grandparent Survives: Computation of Shares of Surviving Descendants of One or More Deceased Grandparents.]** For purposes of determining if, under subsection (f) which applies when the decedent has one or more surviving grandparents, the decedent's deceased grandparent or grandparents are treated as having surviving descendants, the following rules apply:

(1) If all the surviving descendants of one or more deceased grandparents are also descendants of one or more surviving grandparents and none of those surviving grandparents has any other surviving descendant, those descendants are deemed to have predeceased the decedent.

(2) If two or more deceased grandparents have the same surviving descendants and none of those deceased grandparents has any other surviving descendant, those deceased grandparents are deemed to be one deceased grandparent with surviving descendants.

Comment

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

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

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

~~**2008 Revisions.** In addition to making a few stylistic changes, which were not intended to change meaning, the 2008 revisions divided this section into two subsections. New subsection (b)~~

2019 Revisions. This section was revised significantly in 2019. The revisions achieve four principal objectives:

(1) Blended families are taken into account not only in Section 2-102, as in the 1990 revisions, but also in this section.

(2) The per-capita-at-each-generation system of representation is incorporated throughout this section. This departs from the pre-2019 version of this section. Prior subsection (a)(4) divided the intestate estate into halves when one or more grandparents on each side survived the decedent. In contrast, current subsection (f) divides the intestate estate among the surviving grandparents and the surviving descendants of deceased grandparents on a per-capita-at-each-generation basis. Similarly, current subsection (h) divides the intestate estate among descendants of deceased spouses on a per-capita-at-each-generation basis.

(3) Outdated terms are removed, such as the references to a decedent's "maternal" and "paternal" grandparents.

(4) This section is reformulated to handle the possibility—recognized by the Uniform Parentage Act (2017)—that a child may have more than two parents, hence more than two sets of grandparents.

Subsection (b). Subsection (b) states the well-established rule that this section governs the part of the decedent's intestate estate not passing to the decedent's surviving spouse under Section 2-102—or the entire intestate estate if the decedent has no surviving spouse.

Subsection (c). Subsection (c) states the well-established rule that if the decedent is survived by one or more descendants, the intestate estate or part thereof passes by representation to the decedent's surviving descendants.

Example 1. G, the intestate, has a surviving spouse, S, and three surviving children, A, B, and C, who are also children of S. S has no other children. Section 2-102 provides that the entire intestate estate passes to S. Nothing passes under this section.

Example 2. Same facts as Example 1, except that S predeceased G. The intestate estate passes by representation to G's surviving children—A, B, and C—under subsection (c). "By representation" in subsection (c) is defined in Section 2-106(b). The result is that A, B, and C each inherit 1/3 of G's intestate estate.

Subsection (d). If the decedent is not survived by any descendants but is survived by one or more parents, subsection (d) provides that the intestate estate or part thereof is distributed according to a three-step procedure:

(1) The intestate estate or part thereof is divided into as many equal shares as there are (i) surviving parents and (ii) deceased parents with one or more surviving descendants, if any.

(2) One share passes to each surviving parent.

(3) The balance of the intestate estate or part thereof, if any, passes by representation to the surviving descendants of the decedent's deceased parents.

Example 3. G, the intestate, had two parents, P1 and P2. P1 also had one other child, A. P2 also had two other children, B and C. G was predeceased by P2 and was survived by P1, A, B, and C. The intestate estate is divided into two equal shares, because there is one surviving parent (P1) and one deceased parent with surviving descendants (P2). One share passes to P1, who inherits 1/2 of G's intestate estate. The balance passes by representation to the surviving descendants of P2: B and C. "By representation" in subsection (d) is defined in Section 2-106(c). The result is that B and C each inherit 1/4 of G's intestate estate.

The result in Example 3 contrasts with the result that would have been reached under the pre-2019 version of this section, which would have given the entire intestate estate to P1. The 2019 revisions respond to blended families not only in Section 2-102 but also in this section. Note that B and C inherit in Example 3 as G's siblings without regard to the fact that they are half-siblings. See Section 2-107.

Subsection (d) is subject to a special exception in subsection (i),which applies only when (1) the surviving descendants of a deceased parent are exactly the same as the surviving descendants of a surviving parent or (2) two or more deceased parents have exactly the same surviving descendants. This special rule is explained and illustrated later in this Comment.

Subsection (e). If the decedent is not survived by a descendant or parent but is survived by one or more descendants of a parent, subsection (e) provides that the intestate estate passes by

representation to the surviving descendants of the decedent's deceased parents.

Example 4. Same facts as Example 3, except that P1 and P2 predeceased G and that A, B, and C survived G. The intestate estate passes by representation to the surviving descendants (A, B, and C) of G's deceased parents (P1 and P2). "By representation" in subsection (e) is defined in Section 2-106(d). The result is that A, B, and C each inherit 1/3 of G's intestate estate.

Subsection (f). If the decedent is not survived by a descendant, parent, or descendant of a parent but is survived by one or more grandparents, subsection (f) provides that the intestate estate is distributed according to a three-step procedure:

(1) The intestate estate is divided into as many equal shares as there are (i) surviving grandparents and (ii) deceased grandparents with one or more surviving descendants, if any.

(2) One share passes to each surviving grandparent.

(3) The balance of the intestate estate, if any, passes by representation to the surviving descendants of the decedent's deceased grandparents.

Example 5. G, the intestate, was survived by one grandparent, GP1, who had a daughter (G's aunt), A. G was predeceased by a second grandparent, GP2, who had two sons (G's uncles), B and C. G was survived by GP1, A, B, and C. The intestate estate is divided into two equal shares, because there is one surviving grandparent (GP1) and one deceased grandparent with surviving descendants (GP2). One share passes to GP1, who inherits 1/2 of G's intestate estate. The balance passes by representation to the surviving descendants of GP2: B and C. "By representation" in subsection (f) is defined in Section 2-106(e). The result is that B and C each inherit 1/4 of G's intestate estate.

Subsection (f) is subject to a special exception in subsection (j), which applies only when (1) the surviving descendants of a deceased grandparent are exactly the same as the surviving descendants of a surviving grandparent or (2) two or more deceased grandparents have exactly the same surviving descendants. This special rule is explained and illustrated later in this Comment.

Subsection (g). If the decedent is not survived by a descendant, parent, descendant of a parent, or grandparent, subsection (g) provides that the intestate estate passes by representation to the surviving descendants of the decedent's deceased grandparents.

Example 6. Same facts as Example 5, except that G was survived only by A, B, and C. The intestate estate passes by representation to the surviving descendants (A, B, and C) of G's deceased grandparents (GP1 and GP2). "By representation" in subsection (g) is defined in Section 2-106(f). The result is that A, B, and C each inherit 1/3 of G's intestate estate.

Subsection (h). This subsection is based on former Section 2-103(b), which was added to the Code in 2008. The subsection grants inheritance rights to descendants of the intestate's deceased spouse(s) who are not also descendants of the intestate. The term deceased spouse

refers to an individual to whom the intestate was married at the individual's death.

Example 7. G, the intestate, was survived only by A and B (the children of G's predeceased spouse S1) and by C (the child of G's predeceased spouse S2). A, B, and C are not descendants of G. The intestate estate passes by representation to the surviving descendants (A, B, and C) of G's deceased spouses (S1 and S2). "By representation" in subsection (h) is defined in Section 2-106(g). The result is that A, B, and C each inherit 1/3 of G's intestate estate.

Subsections (i) and (j). Subsections (i) and (j) deal with two special cases. The first arises when a surviving parent and a predeceased parent (or a surviving grandparent and a predeceased grandparent) have exactly the same descendants who survive the decedent. To achieve the correct results when calculating the intestate shares, these subsections provide that those descendants of the predeceased parent (or grandparent) are deemed to have predeceased the decedent.

Example 8. G, the intestate, had two parents, P1 and P2. P1 survived G; P2 predeceased G. P1 and P2 had two other children, A and B, both of whom survived G. Under subsection (d), G's intestate estate is divided into only one share, for P1. The reason is subsection (i)(1): because the surviving descendants of P2 (A and B) are the same as the surviving descendants of P1, those descendants are ignored ("deemed to have predeceased").

Example 9. G, the intestate, was survived by a grandparent, GP1, and by two descendants (A and B) of GP1 who are also descendants of a predeceased grandparent, GP2. Under subsection (f), G's intestate estate is divided into only one share, for GP1. The reason is subsection (j)(1): because the surviving descendants of GP2 (A and B) are the same as the surviving descendants of GP1, those descendants are ignored ("deemed to have predeceased").

The second special case addressed by subsections (i) and (j) arises when two or more deceased parents (or two or more deceased grandparents) have exactly the same descendants who survive the decedent. To achieve the correct results when calculating the intestate shares, these subsections provide that those deceased parents are deemed to be one deceased parent (or those deceased grandparents are deemed to be one deceased grandparent).

Example 10. G, the intestate, had three parents, P1, P2, and P3. P1 survived G; P2 and P3 predeceased G. P2 and P3 had two children, A and B, who survived G. Under subsection (d), the intestate estate is divided into two shares: one for P1 and one for the descendants (A and B) of P2 and P3, who are deemed to be one deceased parent rather than two, under subsection (i)(2). The share passing to A and B passes to them by representation. "By representation" in subsection (d) is defined in Section 2-106(c). The result is that A and B each inherit 1/4 of G's intestate estate.

Example 11. G, the intestate, was survived by a grandparent, GP1, and by the descendants (A and B) of G's predeceased grandparents GP2 and GP3. Under subsection (f), the intestate estate is divided into two shares: one for GP1 and one for the descendants (A and B) of GP2 and GP3, who are deemed to be one deceased grandparent rather than two, under subsection (j)(2). The share passing to A and B passes to them by representation. "By representation" in

subsection (f) is defined in Section 2-106(e). The result is that A and B each inherit 1/4 of G's intestate estate.

More Than Two Parents; More Than Two Sets of Grandparents. The Uniform Parentage Act (2017) recognizes the possibility that a child may have more than two parents, hence more than two sets of grandparents. As revised in 2019, the rules of this section apply equally well irrespective of the number of parents or grandparents.

Historical Note. This Comment was revised in 2008 and 2019.

SECTION 2-104. REQUIREMENT OF SURVIVAL BY 120 HOURS; ~~INDIVIDUAL IN GESTATION~~ GESTATIONAL PERIOD; PREGNANCY AFTER DECEDENT'S DEATH.

(a) **[Definitions.]** In this section:

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

(2) "Gestational period" means the time between the start of a pregnancy and birth.

~~(a)~~(b) **[Requirement of Survival by 120 Hours; ~~Individual in Gestation~~ Gestational Period; Pregnancy After Decedent's Death.]** For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection ~~(b)~~(c), the following rules apply:

(1) An individual born before a decedent's death who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before the decedent's death survived the decedent by 120 hours, it is deemed that the individual failed to survive the required period.

(2) ~~An individual in gestation at the decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth.~~ If the decedent dies within a

gestational period that results in the birth of an individual who lives at least 120 hours after birth, that individual is deemed to be living at the decedent's death. If it is not established by clear and convincing evidence that the individual lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

(3) If the decedent dies before the start of a pregnancy by assisted reproduction resulting in the birth of an individual who lives at least 120 hours after birth, that individual is deemed to be living at the decedent's death if [the decedent's personal representative received notice or had actual knowledge within [6] months after the decedent's death of intent to use genetic material in assisted reproduction and thereby affect the distribution of the decedent's estate and]:

(A) the embryo was in utero not later than [36] months after the decedent's death; or

(B) the individual was born not later than [45] months after the decedent's death.

~~(b)~~(c) **[Section Inapplicable if Estate Would Pass to State.]** This section does not apply if its application would cause the estate to pass to the state under Section 2-105.

Legislative Note: *An enacting jurisdiction should consider enacting a provision in the procedural part of the probate code protecting a personal representative from liability for distributions that do not take into account the possibility of posthumous pregnancy unless the personal representative received notice or had actual knowledge of intent to use genetic material in assisted reproduction and thereby affect the distribution of property from the estate. See, e.g., Colo. Stat. § 15-12-703(3.5).*

An enacting jurisdiction also should consider enacting a provision requiring a personal representative, when notifying potential devisees or heirs of the personal representative's appointment, to inquire whether any devisees or heirs have knowledge of an intent to use genetic material in assisted reproduction and thereby affect the distribution of property from the estate.

In each case, an enacting jurisdiction should consider requiring the personal representative to indicate that, if a devisee or heir has such information, written notice must be

given to the personal representative within a designated time.

Comment

This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. See Halbach &Waggoner, The UPC's New Survivorship and Antilapse Provisions, 55 Alb. L. Rev. 1091, 1094-1099 (1992). The 120-hour period will not delay the administration of a decedent's estate because Sections 3-302 and 3-307 prevent informal issuance of letters for a period of five days from death. Subsection ~~(b)~~ (c) prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives for any period.

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

2008 Revisions. In 2008, this section was reorganized, revised, and combined with former Section 2-108. ~~What was contained in former Section 2-104 now appears as subsections (a)(1) and (b). What was contained in former Section 2-108 now appears as subsection (a)(2). Subsections (a)(1) and (a)(2) now distinguish between an individual who was born before the decedent's death and an individual who was in gestation at the decedent's death. With respect to an individual who was born before the decedent's death, it must be established by clear and convincing evidence that the individual survived the decedent by 120 hours. For a comparable provision applicable to wills and other governing instruments, see Section 2-702. With respect to an individual who was in gestation at the decedent's death, it must be established by clear and convincing evidence that the individual lived for 120 hours after birth. For a comparable provision applicable to wills and other governing instruments, see Section 2-705(g).~~

2019 Revisions. In 2019, this section was revised and combined with an updated and expanded version of former Section 2-120(k).

With respect to an individual born before the decedent's death, Subsection (b)(1) requires clear and convincing evidence that the individual survived the decedent by 120 hours.

If the decedent died within a gestational period that resulted in the birth of an individual, subsection (b)(2) requires clear and convincing evidence that the individual lived 120 hours after birth.

If the decedent died before the start of a pregnancy by assisted reproduction resulting in the birth of an individual who lives at least 120 hours after birth, subsection (b)(3) provides that the individual is deemed to be living at the decedent's death if the embryo was in utero not later than 36 months after the decedent's death or the individual was born not later than 45 months after the decedent's death. Bracketed language imposes a requirement of notice to the personal representative. (Note that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous pregnancy in the timing of all or part of the distribution of the estate.) The 36-month period is designed to allow for a period of grieving,

time to decide whether to go forward with assisted reproduction, and the possibility of initial unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the embryo is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

Subsection (b)(3) is an updated and expanded version of former Section 2-120(k). Former Section 2-120(k) applied only when the intestate decedent was the parent of the posthumous child. Subsection (b)(3) applies to all intestate decedents.

Cross Reference. For a discussion of why, in the context of intestate succession, the time limits in this section should apply rather than the time limits on parentage contained in the Uniform Parentage Act (2017), see the Comments to Sections 2-120 and 2-121.

Historical Note. This Comment was revised in 2008 and 2019.

* * *

SECTION 2-106. REPRESENTATION.

(a) **[Definitions.]** In this section:

(1) "Deceased descendant", "deceased parent", ~~or~~ "deceased grandparent", or "deceased spouse" means a descendant, parent, ~~or~~ grandparent, or spouse who either predeceased the decedent or is deemed to have predeceased the decedent under Section 2-104, 2-113, or 2-114.

(2) "Surviving descendant" means a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under Section 2-104 or 2-113.

(b) **[Decedent's Descendants.]** If, under Section 2-103(c), a decedent's intestate estate or a part thereof passes "by representation" to the decedent's surviving descendants, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii)

deceased descendants in the same generation ~~who left~~ with surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

~~(c) **[Descendants of Parents or Grandparents.]** If, under Section 2-103(a)(3) or (4), a decedent's intestate estate or a part thereof passes "by representation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest the deceased parents or either of them, or the deceased grandparents or either of them, that contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.~~

(c) **[Descendants of Parents When One or More Parents Survive.]** If a decedent is survived by one or more parents and, under Sections 2-103(d) and 2-103(i), the balance of the decedent's intestate estate or part thereof passes "by representation" to the surviving descendants of one or more of a decedent's deceased parents, that balance passes to those descendants as if they were the decedent's surviving descendants under subsection (b).

(d) **[Descendants of Parents When No Parent Survives.]** If a decedent is not survived by a parent and, under Section 2-103(e), the decedent's intestate estate passes "by

representation" to the surviving descendants of one or more of the decedent's deceased parents, the intestate estate passes to those descendants as if they were the decedent's surviving descendants under subsection (b).

(e) **[Descendants of Grandparents When One or More Grandparents Survive.]** If a decedent is survived by one or more grandparents and, under Sections 2-103(f) and 2-103(j), the balance of the decedent's intestate estate passes "by representation" to the surviving descendants of one or more of the decedent's deceased grandparents, that balance passes to those descendants as if they were the decedent's surviving descendants under subsection (b).

(f) **[Descendants of Grandparents When No Grandparent Survives.]** If a decedent is not survived by a grandparent and, under Section 2-103(g), the decedent's intestate estate passes "by representation" to the surviving descendants of one or more of the decedent's deceased grandparents, the intestate estate passes to those descendants as if they were the decedent's surviving descendants under subsection (b).

(g) **[Descendants of Deceased Spouses.]** If a decedent is survived by descendants of one or more deceased spouses and, under Section 2-103(h), the decedent's intestate estate passes "by representation" to the surviving descendants of one or more of a decedent's deceased spouses, the intestate estate passes to those descendants as if they were the decedent's surviving descendants under subsection (b).

Comment

~~Purpose and Scope of Revisions.~~ This section ~~is revised to adopt~~ adopts the system of representation called per capita at each generation. The per-capita-at-each-generation system ~~is more responsive to the underlying premise of the original UPC system, in that it always~~ provides equal shares to those equally related~~; the pre-1990 UPC achieved this objective in most but not all cases~~. ~~(See Variation 4, below, for an illustration of this point.)~~ In addition, ~~a~~ A ~~recent~~ survey of client preferences, conducted by Fellows of the American College of Trust and Estate Counsel, suggests that the per-capita-at-each-generation system of representation is preferred by most clients. See Young, ~~"~~Meaning of ~~'~~"Issue~~'~~" and ~~'~~"Descendants"~~,'"~~ 13 ACTEC Probate

Notes 225 (1988). The survey results were striking: Of 761 responses, 541 (71.1%) chose the per- capita-at-each-generation system; 145 (19.1%) chose the per-stirpes system, and 70 (9.2%) chose the pre-1990 UPC system.

* * *

Variation 3: All three children predecease G.

* * *

Solution: The pre-1990 UPC and the ~~1990~~ current UPC systems reach the same result: U, V, W, X, Y, and Z take 1/6 each.

* * *

Variation 4: Two of the three children, A, and B, predecease G; C survives G.

* * *

Solution: In this instance, the ~~1990~~ current UPC system (per capita at each generation) departs from the pre-1990 UPC system. Under the ~~1990~~ current UPC system, C takes 1/3 and the other two 1/3 shares are combined into a single share (amounting to 2/3 of the estate) and distributed as if C, Y, and Z had predeceased G; the result is that U, V, W, and X take 1/6 each.

Although the pre-1990 UPC rejected the per-stirpes system, the result reached under the pre-1990 UPC was aligned with the per-stirpes system in this instance: C would have taken 1/3, X would have taken 1/3, and U, V, and W would have taken 1/9 each.

~~The 1990 UPC system furthers the purpose of the pre-1990 UPC. The pre-1990 UPC system was premised on a desire to provide equality among those equally related. The pre-1990 UPC system failed to achieve that objective in this instance. The 1990 system (per-capita-at-each-generation) remedies that defect in the pre-1990 system.~~

Reference. Waggoner, ~~"~~A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution among Descendants~~"~~, 66 Nw.U.L. Rev. 626 (1971).

* * *

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

2019 Amendments. This section was rewritten and reorganized in 2019 as part of a package of amendments to the Code in light of the Uniform Parentage Act (2017). The 2019 amendments did not change the substance of the per-capita-at-each-generation system of representation, though the amendments added subsection (g) to clarify that the system applies also to descendants of deceased spouses. For additional examples illustrating the per-capita-at-each-generation system, see the Comment to Section 2-103.

Historical Note. This Comment was revised in 1990, 2002, and 2019.

SECTION 2-107. ~~KINDRED OF HALF BLOOD~~ INHERITANCE WITHOUT REGARD TO THE NUMBER OF COMMON ANCESTORS IN A GENERATION.

~~Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.~~ Heirs inherit without regard to how many common ancestors in the same generation they share with the decedent.

Comment

The pre-2019 version of this section provided: "Relatives of the half blood inherit the same share they would inherit if they were of the whole blood." This section was revised in 2019 to remove the references to blood, which are outdated given that parent-child relationships are formed in many ways including by adoption, assisted reproduction, and de facto parentage.

* * *

SECTION 2-109. ADVANCEMENTS.

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

* * *

Comment

* * *

2019 Technical Amendment. A technical amendment was made to this section in 2019 to remove gendered language ("his [or her]").

Historical Note. This Comment was revised in 2002, ~~and~~ 2008, and 2019.

SECTION 2-113. INDIVIDUALS RELATED TO THE DECEDENT THROUGH ~~TWO LINES~~ MORE THAN ONE LINE. An individual who is related to the decedent through ~~two lines~~ more than one line of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share, with the individual and the individual's descendants deemed to have predeceased the decedent with respect to the lines of relationship resulting in the smaller share or shares.

Comment

The pre-2019 version of this section provided: "An individual who is related to the decedent through two lines of relationship is entitled only to a single share based on the relationship that would entitle the individual to a larger share." This section was revised in 2019 to apply to an individual related to the decedent through more than one line. The revision recognizes that the number of lines of relationship may be more than two. As revised, the section provides that an individual related to the decedent through multiple lines is entitled only to a single share. The 2019 revision also is explicit that the individual and the individual's descendants are deemed to have predeceased the decedent with respect to the lines of relationship resulting in the smaller share or shares.

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

Historical Note. This Comment was revised in 2019.

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

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

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

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

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

(c) Except as otherwise provided in Section 2-119(b)(1), the termination of a parent's parental rights has no effect on the right of a child or a descendant of the child to inherit from or through the parent.

Comment

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

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

Subsection (a)(2) addresses a situation in which a parent's parental rights were not actually terminated. Nevertheless, a parent can still be barred from inheriting from or through a child if the child died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have

been terminated under law of this state other than this [code], but only if those parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

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

2019 Revisions. Subsection (c) was added in 2019 to repudiate the holding of Hall v. Hall, 818 S.E.2d 838 (W.Va. 2018). That case wrongly held that the termination of a parent's rights due to abuse and neglect also terminated the child's right to inherit from the parent's estate.

Historical Note. This Comment was revised in 2019.

Subpart 2. Parent-Child Relationship

SECTION 2-115. ~~DEFINITIONS~~ SCOPE. The rules pertaining to parent-child relationships in this [subpart] apply for purposes of intestate succession.

SECTION ~~2-115~~ 2-116. DEFINITIONS. In this [subpart]:

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

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

(3) "De facto parent" means an individual who is established under [Uniform Parentage Act (2017) or applicable state law] to be a de facto parent of a child.

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

~~(4) "Functioned as a parent of the child" means behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding~~

~~out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.~~

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

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

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

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

~~(9)~~(4) "Relative" means a grandparent or a descendant of a grandparent.

Comment

Scope. This section, formerly numbered as Section 2-115, sets forth definitions that apply for purposes of the intestacy rules contained in Subpart 2 (Parent-Child Relationship).

Definition of "Adoptee". The term "adoptee" is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

Definition of "Assisted Reproduction". The definition of "assisted reproduction" is copied from the Uniform Parentage Act (2017) § 102. Current methods of assisted reproduction include intrauterine or intracervical insemination (previously and sometimes currently called artificial insemination), donation of ~~eggs~~ gametes, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

Definition of "De Facto Parent". The term "de facto parent" is defined by reference to the Uniform Parentage Act (2017) or applicable state law.

~~**Definition of "Functioned as a Parent of the Child".** The term "functioned as a parent of the child" is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers. The Reporter's Note No. 4 to § 14.5 of the Restatement lists the following parental functions:~~

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

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

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

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

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

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

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

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

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

~~(g) providing moral and ethical guidance;~~

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

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

~~(a) providing economic support;~~

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

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

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

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

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

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

~~**Definition of "Genetic Father".** The term "genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. If the father-child relationship is established under the presumption of paternity recognized by the law of this state, the term means only the man for whom that relationship is established. As stated in the Legislative Note, a state that has enacted the Uniform Parentage Act (2000/2002) should insert a reference to Section 201(b)(1), (2), or (3) of that Act.~~

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

Historical Note. This Comment was revised in 2019.

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

regardless of the marital status of the parent.

Comment

The pre-2019 version of this section provided: "Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status." The section was revised in 2019 to eliminate the exceptions, which are no longer needed, and the reference to "genetic" parents.

Historical Note. This Comment was revised in 2019.

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

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

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

SECTION 2-118. ~~ADOPTEE AND ADOPTEE'S ADOPTIVE PARENT OR PARENTS~~ PARENT-CHILD RELATIONSHIP ESTABLISHED THROUGH ADOPTION OR ADJUDICATION OF DE FACTO PARENTAGE.

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

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

~~(1) an individual who is in the process of being adopted by a married couple when~~

~~one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent's surviving spouse; and~~

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

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

(b) **[Parent-Child Relationship Established Through an Adjudication of De Facto Parentage.]** A parent-child relationship exists between an individual and that individual's de facto parent or parents.

Comment

2019 Revisions. In 2019, this section was revised in light of the Uniform Parentage Act (2017).

~~2008 Revisions.~~ ~~In 2008, this section and Section 2-119 replaced former Section 2-114(b), which provided: "(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent". The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Subsection (a) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Section 2-119(a) and (b)(1) covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.~~

~~The 2008 revisions also added subsections (b)(2) and (c), which are explained below.~~

~~Data on Adoptions. Official data on adoptions are not regularly collected. Partial data are sometimes available from the Children's Bureau of the U.S. Department of Health and Human Services, the U.S. Census Bureau, and the Evan B. Donaldson Adoption Institute.~~

~~For an historical treatment of adoption, from ancient Greece, through the Middle Ages, 19th- and 20th-century America, to open adoption and international adoption, see Debora L. Spar, The Baby Business ch. 6 (2006) and sources cited therein.~~

Defined ~~Term~~ Terms. Adoptee is defined in Section ~~2-115~~ 2-116 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult. De facto parent is defined in Section 2-116 by reference to the Uniform Parentage Act (2017) or applicable state law.

Subsection (a): Parent-Child Relationship ~~Between Adoptee and Adoptive Parent or Parents~~ Established Through Adoption. Subsection (a) states the general rule that adoption creates a parent-child relationship between the adoptee and the adoptee's adoptive parent or parents.

~~Subsection (b)(1): Individual in Process of Being Adopted by Married Couple. If the spouse who subsequently died had filed a legal proceeding to adopt the individual before the spouse died, the individual is "in the process of being adopted" by the deceased spouse when the spouse died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.~~

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

~~Subsection (c): Child of Assisted Reproduction or Gestational Child in Process of Being Adopted. Subsection (c) provides that if, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). An example would be a situation in which an unmarried mother or father is the parent of a child of assisted reproduction or a gestational child, and subsequently marries an individual who then begins the process of adopting the child but who dies before the adoption becomes final. In such a case, subsection (c) provides that the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). The phrase "in the process of being adopted" carries the same meaning under subsection (c) as it does under subsection (b)(2).~~

The pre-2019 version of this section included provisions applicable to individuals in the process of being adopted. The drafting committee for the 2019 amendments deleted those provisions in order to simplify this section.

Subsection (b): Parent-Child Relationship Established Through an Adjudication of De Facto Parentage. Subsection (b) states the rule that a parent-child relationship exists between an individual and that individual's de facto parent or parents.

Historical Note. This Comment was revised in 2019.

SECTION 2-119. ~~ADOPTEE AND ADOPTEE'S GENETIC PARENTS~~ EFFECT OF ADOPTION; EFFECT OF ADJUDICATION OF DE FACTO PARENTAGE.

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

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

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

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

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

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

~~adoptee to inherit through either genetic parent.~~

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

(a) **[Definition.]** In this section, "pre-existing parent" means an individual who is a parent of a child immediately before (i) the individual dies or is deemed to have died under [this code] or (ii) another individual adopts or is adjudicated a de facto parent of that child.

(b) **[Adoption and Pre-existing Parents.]** A parent-child relationship does not exist between an adoptee and the adoptee's pre-existing parent or pre-existing parents unless otherwise provided by [court order or] law other than [this code] or if the adoptee is adopted:

(1) by the spouse of a pre-existing parent;

(2) by a relative or the spouse or surviving spouse of a relative of a pre-existing parent; or

(3) after the death of a pre-existing parent.

(c) **[Adjudication of De Facto Parentage and Pre-existing Parents.]** An adjudication that an individual is a child of a de facto parent does not affect a parent-child relationship between the individual and the individual's pre-existing parent or pre-existing parents.

Comment

2019 Revisions. In 2019, this section was revised in light of the Uniform Parentage Act (2017).

~~**2008 Revisions.** In 2008, this section and Section 2-118 replaced former Section 2-114(b), which provided: "(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent". The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Section 2-118(a) covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Subsections (a) and (b) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.~~

~~The 2008 revisions also added subsections (c), (d), and (e), which are explained below.~~

Defined Terms. Section 2-119 uses terms that are defined in this section or in Section ~~2-115~~ 2-116.

Adoptee is defined in Section ~~2-115~~ 2-116 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor, but includes an individual who is adopted as an adult.

De facto parent is defined in Section 2-116 by reference to the Uniform Parentage Act (2017) or applicable state law.

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

Pre-existing parent is defined in this section as an individual who is a parent of a child immediately before (i) the individual dies or is deemed to have died under this Code or (ii) another individual adopts or is adjudicated a de facto parent of that child.

Relative is defined in Section ~~2-115~~ 2-116 as a grandparent or a descendant of a grandparent.

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

states, however, that there are exceptions to this general rule to the extent provided by court order or law other than this Code, or as provided in subsections (b)(1) through ~~(d)~~(b)(3).

Subsection (b)(1): Stepchild Adopted by Stepparent. ~~Subsection (b) continues the so-called "stepparent exception" contained in the Code since its original promulgation in 1969.~~ When a stepparent adopts ~~his or her~~ a stepchild, Section 2-118 provides that the adoption creates a parent-child relationship between the child and ~~his or her~~ the adoptive stepparent. Section 2-119(b)(1) provides that a parent-child relationship continues to exist between the child and the child's ~~genetic~~ pre-existing parent or parents. ~~whose spouse adopted the child. Section 2-119(b)(2) provides that a parent-child relationship also continues to exist between an adopted stepchild and his or her other genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that genetic parent, but not for purposes of inheritance by the other genetic parent and his or her relatives from or through the adopted stepchild.~~

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

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

Subsection ~~(c)~~(b)(2): Individual Adopted by Relative of a ~~Genetic~~ Pre-existing Parent. Under subsection ~~(c)~~(b)(2), a child who is adopted by a ~~maternal or a paternal~~ relative of ~~either genetic~~ a pre-existing parent, or by the spouse or surviving spouse of such a relative, remains a child of ~~both genetic~~ the pre-existing parent or parents.

Example ~~3~~2. ~~F~~A and ~~M~~B, a married couple with a four-year old child, X, were badly injured in an automobile accident~~. F subsequently died. M, who was in a vegetative state and on life support remained seriously injured, was~~ and were ~~unable~~ no longer able to care for X. Thereafter, ~~M~~B's sister, ~~A~~S, ~~and A's husband, B,~~ adopted X. ~~F~~A's parent, P~~GF~~, ~~a widower,~~ then died intestate. Under subsection ~~(c)~~(b)(2), X is treated as P~~GF~~'s grandchild (~~F~~A's child).

Subsection ~~(d)~~(b)(3): Individual Adopted After Death of ~~Both Genetic~~ a Pre-existing ~~Parents~~ Parent. Usually, a post-death adoption does not remove a child from contact with the ~~genetic families~~ pre-existing parent or parents. ~~When someone with ties to the genetic family or families adopts a child after the deaths of the child's genetic parents, even if the adoptive parent is not a relative of either genetic parent or a spouse or surviving spouse of such a relative, the child continues to be in a parent-child relationship with both genetic parents.~~ Once a child has

taken root in a family, an adoption after the death of ~~both genetic~~ a pre-existing ~~parents~~ parent is likely to be by someone chosen or approved of by the ~~genetic~~ pre-existing family~~, such as a person named as guardian of the child in a deceased parent's will~~. In such a case, the child does not become estranged from the ~~genetic~~ pre-existing family. Such an adoption does not "remove" the child from the families of ~~both genetic~~ the pre-existing parent or parents. Such a child continues to be a child of ~~both genetic~~ the pre-existing parents, as well as a child of the adoptive parents.

~~*Example 4.* F and M, a married couple with a four-year-old child, X, were involved in an automobile accident that killed F and M. Neither M's parents nor F's father (F's mother had died before the accident) nor any other relative was in a position to take custody of X. X was adopted by F and M's close friends, A and B, a married couple approximately of the same ages as F and M. F's father, PGF, a widower, then died intestate. Under subsection (d), X is treated as PGF's grandchild (F's child). The result would be the same if F's or M's will appointed A and B as the guardians of the person of X, and A and B subsequently successfully petitioned to adopt X.~~

Example 3. A and B, a married couple with a four-year old child, X, were badly injured in an automobile accident. A subsequently died. B, who remained seriously injured, was no longer able to care for X. Thereafter, B's close friend, F, adopted X. A's parent, P, then died intestate. Under subsection (b)(3), X is treated as P's grandchild (A's child).

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

Subsection (c): Child of De Facto Parent. An adjudication that an individual is a child of a de facto parent does not affect a parent-child relationship between the individual and the individual's pre-existing parent or parents.

SECTION 2-120. ~~CHILD~~ INDIVIDUAL CONCEIVED BY ASSISTED REPRODUCTION OTHER THAN ~~CHILD~~ AN INDIVIDUAL BORN TO A GESTATIONAL ~~CARRIER~~ OR GENETIC SURROGATE. Except as provided under Section 2-121, parentage of an individual conceived by assisted reproduction is determined in accordance with [the provisions of Article 7 of the Uniform Parentage Act (2017) other than Section 708(b)(2)][applicable state law].

~~(a) **[Definitions.]** In this section:~~

~~(1) "Birth mother" means a woman, other than a gestational carrier under Section~~

~~2-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child's genetic mother.~~

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

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

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

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

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

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

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

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

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

~~(f) **[Parent-Child Relationship with Another.]** Except as otherwise provided in subsections (g), (i), and (j), and unless a parent-child relationship is established under subsection (d) or (e), a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:~~

~~(1) before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent; or~~

~~(2) in the absence of a signed record under paragraph (1):~~

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

~~(B) intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or~~

~~(C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.~~

~~(g) **[Record Signed More than Two Years after the Birth of the Child: Effect.]** For the purpose of subsection (f)(1), neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached [18] years of age.~~

~~(h) **[Presumption: Birth Mother is Married or Surviving Spouse.]** For the purpose of~~

subsection (f)(2), the following rules apply:

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

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

(i) **[Divorce Before Placement of Eggs, Sperm, or Embryos.]** If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

(j) **[Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos.]** If, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies subsection (f).

(k) **[When Posthumously Conceived Child Treated as in Gestation.]** If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual's death; or

(2) born not later than 45 months after the individual's death.

Legislative Note: States are encouraged to enact a provision requiring genetic depositories to provide a consent form that would satisfy subsection (f)(1). See Cal. Health & Safety Code §

1644.7 and .8 for a possible model for such a consent form.

Comment

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

AMA Ethics Policy on Posthumous Conception. The ethics policies of the American Medical Association concerning artificial insemination by a known donor state that "[i]f semen is frozen and the donor dies before it is used, the frozen semen should not be used or donated for purposes other than those originally intended by the donor. If the donor left no instructions, it is reasonable to allow the remaining partner to use the semen for intrauterine insemination but not to donate it to someone else. However, the donor should be advised of such a policy at the time of donation and be given an opportunity to override it." Am. Med. Assn. Council on Ethical & Judicial Affairs, Code of Medical Ethics: Current Opinions E-2.04 (Issued June 1993; updated December 2004).

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

Birth mother is defined as the woman (other than a gestational carrier under Section 2-121) who gave birth to a child of assisted reproduction.

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

Third-party donor. The definition of third-party donor is based on the definition of "donor" in the Uniform Parentage Act § 102.

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

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

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

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

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

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

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

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

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

Subsection (d): Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime By His Wife for Assisted Reproduction. The principal application of subsection (d) is in the case of the assisted reproduction procedure known as intrauterine insemination husband (IIH), or, in older terminology, artificial insemination husband (AIH). Subsection (d) provides that, except as otherwise provided in subsection (i), a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that were used during his lifetime by her for assisted reproduction and the husband is the genetic father of the child. The exception contained in subsection (i) relates to the withdrawal of consent in a record before the placement of eggs, sperm, or embryos. Note that subsection (d) only applies if the husband's sperm were used

during his lifetime by his wife to cause a pregnancy by assisted reproduction. Subsection (d) does not apply to posthumous conception.

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

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

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

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

Subsection (f): Parent-Child Relationship with Another. In order for someone other than the birth mother to have a parent-child relationship with the child, there needs to be proof that the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. The other individual's genetic material might or might not have been used to create the pregnancy. Except as otherwise provided in this section, merely depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with the child.

Subsection (f)(1): Signed Record Evidencing Consent, Considering All the Facts and Circumstances, to Assisted Reproduction with Intent to Be Treated as the Other Parent of the Child. Subsection (f)(1) provides that a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child.

~~Consent to assisted reproduction with intent to be treated as the other parent of the child is established if the individual signed a record, before or after the child's birth, that considering all the facts and circumstances evidences the individual's consent. Recognizing consent in a record not only signed before the child's birth but also at any time after the child's birth is consistent with the Uniform Parentage Act §§ 703 and 704.~~

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

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

~~**Subsection (g): Record Signed More than Two Years after the Birth of the Child: Effect.** Subsection (g) is designed to prevent an individual who has never functioned as a parent of the child from signing a record in order to inherit from or through the child or in order to make it possible for a relative of the individual to inherit from or through the child. Thus, subsection (g) provides that, for purposes of subsection (f)(1), an individual who signed a record more than two years after the birth of the child, or a relative of that individual, does not inherit from or through the child unless the individual functioned as a parent of the child before the child reached the age of [18].~~

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

~~divorce proceeding was pending, then in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).~~

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

~~**Subsection (j): Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos.** Subsection (j) is derived from Uniform Parentage Act Section 706(a). Subsection (j) provides that if, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies the requirements of subsection (f).~~

~~**Subsection (k): When Posthumously Conceived Gestational Child Treated as in Gestation.** Subsection (k) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (1) in utero no later than 36 months after the individual's death or (2) born no later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of all or part of the distribution of the estate.~~

~~The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.~~

Comment

The promulgation of the Uniform Parentage Act (2017) [UPA (2017)] enables this section to incorporate almost all of the provisions of Article 7 of the UPA (2017) by reference. The one provision inappropriate to incorporate here is Section 708(b)(2), which denies the existence of a parent-child relationship if an individual born as a result of a posthumous pregnancy fails to satisfy certain time limits. For illustrations of why these time limits on the existence of a parent-child relationship are inappropriate in the context of intestate succession, consider the following examples.

Example 1. S, facing impending death, deposited genetic material in a medical facility. Five years later, S's surviving spouse used the genetic material to give birth to a child, C.

Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except the time limits in Section 708(b)(2). After C's birth, S's parent P died intestate, survived only by P's grandchild X and by C. C, who is in being at P's death, should be, and under this Code is, considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C.

Example 2. S, facing impending death, deposited genetic material in a medical facility. Five years later, S's parent P died intestate, survived only by P's grandchild, X. Two months after P's death, S's surviving spouse notified P's personal representative of intent to use S's genetic material to have a child. Fifteen months after P's death, the embryo was in utero, and twenty-four months after P's death, S's surviving spouse gave birth to a child, C, who then satisfied the 120-hour requirement of survival in Section 2-104(b)(3). Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except the time limits in Section 708(b)(2). C should be, and under this Code is, considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C.

Historical Note. This Comment was revised in 2019.

SECTION 2-121. ~~CHILD~~ INDIVIDUAL BORN TO A GESTATIONAL ~~CARRIER~~ OR GENETIC SURROGATE. Parentage of an individual conceived by assisted reproduction born to a gestational or genetic surrogate is determined in accordance with [the provisions of Article 8 of the Uniform Parentage Act (2017) other than Sections 810(b)(2) and 817(b)(2)][applicable state law].

~~(a) **[Definitions.]** In this section:~~

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

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

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

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

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

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

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

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

~~(d)~~ **~~[Parent-Child Relationship With Intended Parent or Parents.]~~** ~~In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an intended parent who:~~

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

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

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

~~(B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a~~

~~parent of the child no later than two years after the child's birth; or~~

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

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

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

~~(2) other facts and circumstances establishing the individual's intent by clear and convincing evidence.~~

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

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

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

~~(3) the individual's spouse or surviving spouse functioned as a parent of the child~~

no later than two years after the child's birth.

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

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

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

(h) **[When Posthumously Conceived Gestational Child Treated as in Gestation.]** If, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual's death; or

(2) born not later than 45 months after the individual's death.

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

Comment

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

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

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

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

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

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

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

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

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

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

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

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

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

UPA Section 807. Parentage under Validated Gestational Agreement.

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

(1) confirming that the intended parents are the parents of the child;

(2) if necessary, ordering that the child be surrendered to the intended parents; and

(3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

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

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

~~**Subsection (c): Gestational Carrier.** Under subsection (c), the only way that a parent-child relationship exists between a gestational child and the child's gestational carrier is if she is (1) designated as a parent of the child in a court order described in subsection (b) or (2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.~~

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

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

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

~~divorce proceeding was pending; and (3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.~~

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

~~**Subsection (h): When Posthumously Conceived Gestational Child is Treated as in Gestation.** Subsection (h) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (1) in utero not later than 36 months after the individual's death or (2) born not later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate.~~

~~The 36-month period in subsection (g) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.~~

Comment

The promulgation of the Uniform Parentage Act (2017) [UPA (2017)] enables this section to incorporate almost all of the provisions of Article 8 of the UPA (2017) by reference. The two provisions inappropriate to incorporate here are Sections 810(b)(2) and 817(b)(2), which deny the existence of a parent-child relationship if an individual born as a result of a posthumous pregnancy fails to satisfy certain time limits. For illustrations of why these time limits on the existence of a parent-child relationship are inappropriate in the context of intestate succession, consider the following examples.

Example 1. S, facing impending death, deposited genetic material in a medical facility. S and S's spouse entered into an agreement with a surrogate. Five years later, S's surviving spouse arranged for the transfer of the genetic material to the surrogate. The surrogate gave birth to C. Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except the time limits in Sections 810(b)(2) and 817(b)(2). After C's birth, S's parent P died intestate, survived only by P's grandchild X and by C. C, who is in being at P's death, should be, and under this Code is, considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C.

Example 2. S, facing impending death, deposited genetic material in a medical facility. S and S's spouse entered into an agreement with a surrogate. Five years later, S's parent P died intestate, survived only by P's grandchild, X. Two months after P's death, S's surviving spouse notified P's personal representative of intent to use S's genetic material to have a child by surrogacy. Fifteen months after P's death, the embryo was in utero, and twenty-four months after P's death, the surrogate gave birth to C, who then satisfied the 120-hour requirement of survival in Section 2-104(b)(3). Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except the time limits in Sections 810(b)(2) and 817(b)(2). C should be, and under this Code is, considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C.

Historical Note. This Comment was revised in 2019.

* * *

PART 2. ELECTIVE SHARE OF SURVIVING SPOUSE

*** * ***

SECTION 2-201. DEFINITIONS. In this [part]:

* * *

(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]~~ the decedent, ~~his [or her]~~ the decedent's creditors, ~~his [or her]~~ the decedent's estate, or creditors of ~~his [or her]~~ the decedent's estate, whether or not the decedent then had the capacity to exercise the power.~~, and~~ The term includes a power to revoke or invade the principal of a trust or other property arrangement.

* * *

(9) "Transfer", as it relates to a transfer by or of the decedent, includes:

(A) an exercise or release of a presently exercisable general power of appointment held by the decedent,

(B) a lapse at death of a presently exercisable general power of

appointment held by the decedent, and

(C) an exercise, release, or lapse of a general power of appointment that the decedent ~~created in himself [or herself]~~ reserved ~~and~~ or of a power described in Section 2-205(2)(B) that the decedent conferred on a nonadverse party.

* * *

Comment

Technical amendments were made to this section in 2019 to remove gendered language (e.g., "his [or her]").

PART 3. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

*** * ***

SECTION 2-302. OMITTED CHILD.

(a) **[Parent-Child Relationship Established After Execution of a Will.]** Except as provided in subsection (b), if a testator becomes a parent to a child after the execution of the testator's will and fails to provide in ~~his [or her]~~ the will for ~~any of his [or her] children born or adopted after the execution of the will~~ the child, the omitted ~~after-born or after-adopted~~ child receives a share in the estate as follows:

(1) If the testator had no child living when ~~he [or she]~~ the testator executed the will, ~~an~~ the omitted ~~after-born or after-adopted~~ child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to ~~the other~~ another parent of the omitted child and that parent survives the testator and is entitled to take under the will.

(2) If the testator had one or more children living when ~~he [or she]~~ the testator executed the will, and the will devised property or an interest in property to one or more of the then-living children, ~~an~~ the omitted ~~after-born or after-adopted~~ child is entitled to share in the

testator's estate as follows:

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

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

(C) To the extent feasible, the interest granted ~~an~~ the omitted ~~after-born or after-adopted~~ child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

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

(b) **[Intentional Omission of a Child or Provision for a Child Outside of a Will.]** Neither subsection (a)(1) nor subsection (a)(2) applies if:

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

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

(c) **[Omission of a Child Believed to Be Dead.]** If at the time of execution of the will the

testator fails to provide in ~~his [or her]~~ the will for a living child solely because ~~he [or she]~~ the testator believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted ~~after-born or after-adopted~~ child.

(d) **[Abatement.]** In ~~satisfying~~ the satisfaction of a share provided by subsection (a)(1), devises made by the will abate under Section 3-902.

Comment

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits ~~one of his or her~~ a child~~ren~~ because of the mistaken belief that the child is dead. For the purpose of this section, the term "child" refers to a child who would take under a class gift created in the testator's will. See Section 2-705.

Basic Purposes and Scope of 1990 Revisions. This section was substantially revised in 1990. The revisions had two basic objectives. The first was to provide that a will that devised, under trust or not, all or substantially all of the testator's estate to the other parent of the omitted child prevents an after-born or after-adopted child from taking an intestate share if none of the testator's children was living when ~~he or she~~ the testator executed the will. (Under this rule, the other parent must survive the testator and be entitled to take under the will.)

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

The second basic objective of the 1990 revisions was to provide that if the testator had children when ~~he or she~~ the testator executed the will, and if the will made provision for one or more of the then-living children, an omitted after-born or after-adopted child does not take a full intestate share (which might be substantially larger or substantially smaller than given to the living children). Rather, the omitted after-born or after-adopted child participates on a pro rata basis in the property devised, under trust or not, to the then-living children.

A more detailed description of the ~~revised~~ rules as revised in 1990 follows.

No Child Living When Will Executed. If the testator had no child living when ~~he or she~~ the testator executed the will, subsection (a)(1) ~~provides~~ provided that an omitted after-born or after-adopted child receives the share ~~he or she~~ the child would have received had the testator

died intestate, unless the will devised, under trust or not, all or substantially all of the estate to the other parent of the omitted child. If the will did devise, under trust or not, all or substantially all of the estate to the other parent of the omitted child, and if that other parent survives the testator and is entitled to take under the will, the omitted after-born or after-adopted child receives no share of the estate. In the case of an after-adopted child, the term "other parent" refers to the other adopting parent. (The other parent of the omitted child might survive the testator, but not be entitled to take under the will because, for example, that devise, under trust or not, to the other parent was revoked under Section 2-803 or 2-804.)

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

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

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

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

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

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

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

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

Subsection (c). Subsection (c) addresses the problem that arises if at the time of execution of the will the testator fails to provide in ~~his or her~~ the will for a living child solely because ~~he or she~~ the testator believes the child to be dead. Extrinsic evidence is admissible to determine whether the testator omitted the living child solely because ~~he or she~~ the testator believed the child to be dead. Cf. Section 2-601, Comment. If the child was omitted solely

because of that belief, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

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

2019 Revisions. This section was revised in 2019 to eliminate gendered terms and to provide for the possibility that the omitted child may have more than two parents—for example, the reference in the prior version of Subsection (a)(1) to "the other parent" is now "another parent".

Historical Note. This Comment was revised in 1993, ~~and~~ 2010, and 2019.

* * *

PART 7. RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

*** * ***

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

(a) **[Definitions.]** In this section:

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

(1) "Assisted reproduction" has the meaning set forth in Section 2-116.

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

(2) "De facto parent" has the meaning set forth in Section 2-116.

(3) "Distribution date" means the time when an immediate or a postponed class gift is to take effect in possession or enjoyment.

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

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

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

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

(4) "Gestational period" means the time between the start of a pregnancy and birth.

(5) "In-law" includes a stepchild.

~~(8)~~(6) "Relative" has the meaning set forth in Section 2-116.

(b) **[Terms of Relationship.]** ~~A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. For the purpose of determining whether a contrary intention exists under Section 2-701, a provision in a governing instrument that relates to the inclusion or exclusion in a class gift of a child born to parents who are not married to each other but does not specifically refer to a child of conceived by assisted reproduction or a gestational child does not apply to a child of conceived by assisted reproduction or a gestational child.~~ Except as otherwise provided in subsections (c) and (d), a class gift in a governing instrument which uses a term of relationship to identify the class members is construed in accordance with the rules for intestate succession.

(c) **[~~Relatives by Marriage~~ In-Laws.]** ~~Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or nephews, are construed to exclude relatives by marriage,~~ A class gift in a governing instrument is construed to exclude in-laws unless:

(1) when the governing instrument was executed, the class was then and

foreseeably would be empty; or

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

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

~~(e) **[Transferor Not Genetic Parent.]** In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of that genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached [18] years of age.~~

~~(f) **[Transferor Not Adoptive Parent.]** In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:~~

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

~~(2) the adoptive paren[t was the adoptee's stepparent or foster parent; or~~

~~(3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached [18] years of age.~~

(d) **[Transferor Not Parent.]** In construing a dispositive provision of a transferor who is not the parent, an individual is not considered the child of the parent unless:

(1) the parent, a relative of the parent, or the spouse or surviving spouse of the parent or of a relative of the parent performed functions customarily performed by a parent before the individual reached [18] years of age; or

(2) the parent intended to perform such functions but was prevented from doing so by death or some other reason, if such intent is proved by clear and convincing evidence.

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

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

(1) If a particular time is within a gestational period that results in the birth of an individual who lives at least 120 hours after birth, that individual is deemed to be living at that particular time.

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

(2) If the start of a pregnancy resulting in the birth of an individual occurs after the death of the individual's parent and the distribution date is the death of that parent, the individual is deemed to be living on that distribution date if [the person with the power to appoint or distribute among the class members received notice or had actual knowledge within [6] months of the parent's death of intent to use genetic material in assisted reproduction and thereby affect class membership and] the individual lives at least 120 hours after birth and:

(A) the embryo was in utero not later than [36] months after the deceased parent's death; or

(B) the individual was born not later than [45] months after the deceased

parent's death.

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

(4) An individual who is in the process of being adjudicated a child of a de facto parent when the class closes is treated as a child of that de facto parent when the class closes if the de facto parentage is subsequently established.

Legislative Notes:

(1) In accordance with Section 8-101(b)(5), a rule of construction or presumption provided in this [section] applies to a governing instrument executed before the effective date unless there is a clear indication of a contrary intent.

(2) An enacting jurisdiction should consider enacting a provision protecting a fiduciary from liability for distributions that do not take into account the possibility of posthumous pregnancy unless the fiduciary received notice or had actual knowledge of intent to use genetic material in assisted reproduction and thereby affect the class membership. See, e.g., Colo. Stat. § 15-12-703(3.5).

An enacting jurisdiction also should consider enacting a provision requiring a fiduciary, when notifying beneficiaries of the fiduciary's appointment, to inquire whether any beneficiaries have knowledge of an intent to use genetic material in assisted reproduction and thereby affect the class membership.

In each case, an enacting jurisdiction should consider requiring the fiduciary to indicate that written notice must be given to the fiduciary within a designated time.

(3) If a jurisdiction has not enacted the Uniform Parentage Act (2017), it may wish to consider adding the following language to this Section:

> *A class gift in a dispositive provision of a transferor who is not the de facto parent of an individual is not construed to treat the individual as the child of the de facto parent if (i) the de facto parent opposed being adjudicated the de facto parent or (ii) the de facto parent or the individual died before the proceeding to adjudicate de facto parentage was commenced.*

In a jurisdiction that has enacted the Uniform Parentage Act (2017), no such provision relating to involuntary or posthumous de facto parentage is needed.

Comment

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

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

Subsection (a): Definitions. With ~~one exception~~ three exceptions, the definitions in subsection (a) rely on definitions contained in the Code's intestacy sections. The ~~one exception is~~ exceptions are the definitions of "in-law," which is defined to include a stepchild, and the ~~definition~~ definitions of "distribution date~~,~~" and "gestational period", which ~~is~~ are relevant to the class-closing rules contained in subsection ~~(g)~~(e). Distribution date is defined as the date when an immediate or postponed class gift takes effect in possession or enjoyment. Gestational period is defined as the time between the start of a pregnancy and birth.

Subsection (b): Terms of Relationship. Subsection (b) provides that—subject to the exceptions contained in subsections (c) and (d), which are discussed below—a class gift that uses a term of relationship—such as "spouses", "children", "grandchildren", "descendants", "issue", "parents", "grandparents", "brothers", "sisters", "nephews", or "nieces"— to identify the takers ~~includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class,~~ is construed in accordance with the rules for intestate succession ~~regarding parent-child relationships. As provided in subsection (g), inclusion of a child of assisted reproduction or a gestational child in a class is subject to the class-closing rules. See Examples 11 through 15~~. Thus, for example, a class gift to "spouses" is construed in accordance with Section 2-102, which makes no distinction between same-sex and opposite-sex spouses. Similarly, a class gift to an individual's "children" is construed in accordance with Section 2-107, which treats children equally without regard to how many common ancestors in the same generation they share.

~~The last sentence of subsection (b) was added by technical amendment in 2010. That sentence is necessary to prevent a provision in a governing instrument that relates to the inclusion or exclusion of a child born to parents who are not married to each other from applying to a child of assisted reproduction or a gestational child, unless the provision specifically refers to such a child. Technically, for example, a posthumously conceived child born to a decedent's surviving widow could be considered a nonmarital child. See e.g., Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 266-67 (Mass. 2002) ("Because death ends a marriage, ... posthumously conceived children are always nonmarital children."). A provision in a will, trust, or other governing instrument that relates to the inclusion or exclusion of a nonmarital child, or~~

~~to the inclusion or exclusion of a nonmarital child under specified circumstances, was not likely inserted with a child of assisted reproduction or a gestational child in mind. The last sentence of subsection (b) provides that, unless that type of provision specifically refers to a child of assisted reproduction or gestational child, such a provision does not state a contrary intention under Section 2-701 to the rule of construction contained in subsection (b).~~

Default Rules. The rules in this section are default rules. Under Section 2-701, the rules in this section yield if there is a finding of a contrary intention. One circumstance in which a court should not find a contrary intention is when the governing instrument contains a provision excluding a child born to parents who are not married to each other, but the provision does not say anything about a child conceived by assisted reproduction, and the question presented is whether the provision excluding a nonmarital child applies also to a child resulting from a posthumous pregnancy after death has ended a marriage. In a cramped and technical sense, a child resulting from a posthumous pregnancy is a nonmarital child. See e.g., Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 266-67 (Mass. 2002) ("Because death ends a marriage, ... posthumously conceived children are always nonmarital children."). This cramped interpretation is wrong. A child resulting from a posthumous pregnancy after death has ended a marriage should be considered a marital child, not a nonmarital child. The reason is that a provision in a will, trust, or other governing instrument that relates to the exclusion of a nonmarital child, without more, likely was not inserted with a child resulting from a posthumous preganancy in mind. So unless the provision of the governing instrument excluding a nonmarital child manifests an intent to exclude also a child resulting from a posthumous pregnancy after death has ended a marriage, the provision should not be interpreted to exclude such a child.

Posthumous Pregnancy: Time Limits on Parentage in the Uniform Parentage Act (2017) Inapplicable. Sections 708(b)(2), 810(b)(2), and 817(b)(2) of the Uniform Parentage Act (2017) [UPA (2017)] impose time limits on the posthumous creation of parent-child relationships. These time limits do not apply here. Subsection (b) provides that class gifts are construed in accordance with the rules for intestate succession. The rules for intestate succession include Sections 2-120 and 2-121, which incorporate most of the provisions of the UPA (2017) but not these time limits. These time limits are unnecessary and inappropriate in construing a term of relationship in a class gift because the class membership already is governed by the class-closing rules. See the discussion of In Re Martin B. and Examples 13 and 14 later in this Comment.

Class Closing. As provided in subsection (e), inclusion in a class is subject to the class-closing rules.

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

~~provided in subsection (g), inclusion of an adoptee or a child born to parents who are not married to each other in a class is subject to the class-closing rules. See Examples 9 and 10.~~

Subsection (c): ~~Relatives by Marriage~~ In-Laws. Subsection (c) provides that ~~terms of relationship that do not differentiate relationships by blood from those by marriage, such as "uncles", "aunts", "nieces", or "nephews",~~ class gifts are construed to exclude in-laws (relatives by marriage, including stepchildren), unless (1) when the governing instrument was executed, the class was then and foreseeably would be empty or (2) the language or circumstances otherwise establish that in-laws (relatives by marriage, including stepchildren) were intended to be included. The Restatement (Third) of Property: Wills and Other Donative Transfers § 14.9 adopts a similar rule of construction. As recognized in both subsection (c) and the Restatement, there are situations in which the circumstances would tend to include a relative by marriage. As provided in subsection ~~(g)~~(e), inclusion ~~of a relative by marriage~~ in a class is subject to the class-closing rules.

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

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

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

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

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

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

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

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

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

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

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

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

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

~~**Subsection (e): Transferor Not Genetic Parent.** The general theory of subsection (e) is that a transferor who is not the genetic parent of a child would want the child to be included in a class gift as a child of the genetic parent only if the genetic parent (or one or more of the specified relatives of the child's genetic parent functioned as a parent of the child before the child reached the age of [18]. As provided in subsection (g), inclusion of a genetic child in a class is subject to the class-closing rules.~~

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

~~If, however, A executed a will containing a devise to his children or designated his children as beneficiary of his life insurance policy, X would be included in the class. Under Section 2-117, X would be A's child for purposes of intestate succession. Subsection (c) is inapplicable because the transferor, A, is the genetic parent.~~

Subsection ~~(f)~~(d): Transferor Not ~~Adoptive~~ Parent. The general theory of subsection ~~(f)~~(d) is that a transferor who is not the ~~adoptive~~ parent of an ~~adoptee~~ individual would want the ~~child~~ individual to be included in a class gift as a child of the ~~adoptive~~ individual's parent only if ~~(1) the adoption took place before the adoptee reached the age of [18]; (2) the adoptive parent was the adoptee's stepparent or foster parent; or (3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of [18].~~

(1) the parent, a relative of the parent, or the spouse or surviving spouse of the parent or of a relative of the parent performed functions customarily performed by a parent before the individual reached the age of majority, or (2) the parent intended to perform such functions but was prevented from doing so by death or some other reason, if such intent is proved by clear and convincing evidence.

The phrase "performed functions customarily performed by a parent" is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers. Reporter's Note No. 4 to § 14.5 of the Restatement lists the following parental functions:

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

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

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

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

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

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

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

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

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

(g) providing moral and ethical guidance;

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

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

(a) providing economic support;

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

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

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

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

As provided in subsection ~~(g)~~(e), inclusion of an ~~adoptee~~ individual in a class is subject to the class-closing rules.

Example ~~10~~9. G's will created a trust, providing for income to G's daughter, A, for life, remainder in corpus to A's descendants who survive A, by representation. A and A's husband adopted a 47-year old man, X. Because ~~the adoption did not take place before X reached the age of [18], A was not X's stepparent or foster parent, and~~ A did not function as a parent of X before X reached the age of [18]~~.~~, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

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

Subsection ~~(g)~~(e): Class-Closing Rules. In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must (1) qualify as a class member under ~~subsection~~ subsections (b), (c), and (d)~~, and (e), or (f)~~ and (2) not be excluded by the class-closing rules. For an exposition of the class-closing rules, see Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1. Section 15.1 provides that, "unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution."

Subsection ~~(g)~~(e)(1): ~~Child in Utero~~ Class Closing During a Gestational Period. Subsection ~~(g)~~(e) (1) codifies the well-accepted rule that ~~a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth~~ if a particular time is within a gestational period that results in the birth of an individual who lives at least 120 hours after birth, that individual is deemed to be living at that particular time.

Subsection ~~(g)~~(e)(2): Children of Assisted Reproduction ~~and Gestational Children~~; Class Gift in Which Distribution Date ~~Arises At~~ is Deceased Parent's Death. Subsection ~~(g)~~(e)(2) changes the class-closing rules in one respect. If ~~a child of assisted reproduction (as defined in Section 2-120) or a gestational child (as defined in Section 2-121) is conceived posthumously~~ the start of a pregnancy resulting in the birth of an individual occurs after the death of the individual's parent, and if the distribution date ~~arises at~~ is the deceased parent's death, then the ~~child~~ individual is treated as living on the distribution date if the ~~child~~ individual lives 120 hours after birth and ~~was~~ either (1) the embryo was in utero no later than 36 months

after the deceased parent's death or (2) the individual was born no later than 45 months after the deceased parent's death. Bracketed language imposes an additional requirement: that the person with the power to appoint or distribute the property receive notice or have actual knowledge within [6] months of the parent's death of intent to use genetic material in assisted reproduction and thereby affect the class membership.

The 36-month period in subsection ~~(g)~~(e)(2) is designed to allow a surviving spouse or partner a period of grieving, time to ~~make up his or her mind about~~ decide whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a normal period of pregnancy.

In the following three examples, it is assumed that the decedent, G, is a parent of the child. The question is whether the child is included in the class under the class-closing rules.

Example 1~~1~~0. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my wife W and 10 percent of my estate to my children." G also left frozen sperm at a sperm bank in case he should be killed in action. G was killed in action. After G's death, W decided to become inseminated with his frozen sperm so that she could have his child. If ~~the child so produced was~~ either (1) the embryo was in utero within 36 months after G's death or (2) the child was born within 45 months after G's death, and if the child lived 120 hours after birth (see Section 2-702), the child is treated as living at G's death and is included in the class.

Example 1~~2~~1. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my husband H and 10 percent of my estate to my issue by representation." G also left frozen embryos in case she should be killed in action. ~~G consented to be the parent of the child within the meaning of Section 2-120(f).~~ G was killed in action. After G's death, H arranged for the embryos to be implanted in the uterus of a ~~gestational carrier~~ surrogate. If ~~the child so produced was~~ either (1) the embryo was in utero within 36 months after G's death or (2) the child was born within 45 months after the G's death, and if the child lived 120 hours after birth (see Section 2-702), the child is treated as living at G's death and is included in the class.

Example 1~~3~~2. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then to distribute the trust principal to G's children. When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. ~~G consented to be the parent of the child within the meaning~~

~~of Section 2-120(f).~~ After G's death, G's widow decided to become inseminated with his frozen sperm so that she could have his child. If ~~the child so produced was~~ either (1) the embryo was in utero within 36 months after G's death or (2) the child was born within 45 months after ~~the~~ G's death, and if the child lived 120 hours after birth (see Section 2-702), the child is treated as living at G's death and is included in the class ~~under the rule of convenience~~.

Subsection ~~(g)~~(e)(2) Inapplicable Unless ~~Child of Assisted Reproduction or Gestational Child is Conceived Posthumously~~ Pregnancy Is Posthumous and Distribution Date Arises At Deceased Parent's Death. Subsection ~~(g)~~(e)(2) only applies if ~~a child of assisted reproduction or a gestational child is conceived posthumously~~ there is a posthumous pregnancy and if the distribution date arises at the deceased parent's death. Subsection ~~(g)~~(e)(2) does not apply if ~~a child of assisted reproduction or a gestational child is not conceived posthumously~~ the pregnancy is not posthumous. It also does not apply if the distribution date arises before or after the deceased parent's death. The reason is that in all of these cases the special rule in (e)(2) is not needed. ~~In cases to which subsection (g)(2) does not apply~~ Instead, the ordinary class-closing rules—including subsections (e)(1), (e)(3), and (e)(4)—~~apply~~ suffice. ~~For purposes of the ordinary class-closing rules, subsection (g)(1) provides that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.~~ See Sheldon F. Kurtz & Lawrence W. Waggoner, The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies, 25 ACTEC J. 30, 36 (2009).

~~This means, for example, that, with respect to a child of assisted reproduction or a gestational child, a class gift in which the distribution date arises after the deceased parent's death is not limited to a child who is born before or in utero at the deceased parent's death or, in the case of posthumous conception, either (1) in utero within 36 months after the deceased parent's death or (2) born within 45 months after the deceased parent's death. The ordinary class-closing rules would only exclude a child of assisted reproduction or a gestational child if the child was not yet born or in utero on the distribution date (or who was then in utero but who failed to live 120 hours after birth).~~

A case that reached the same result that would be reached under this section is In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father's widow ~~around~~ approximately three and five years after his death) were included in class gifts of principal to the deceased father's "issue" or "descendants". The children would be included under this section because (1) the requirements in the UPA (2017)—other than the time limits rendered inapplicable by subsection (b), which references the rules for intestate succession, including Section 2-120—for a parent-child relationship between the children and the deceased father ~~signed a record that would satisfy Section 2-120(f)(1)~~ were satisfied, (2) the distribution dates arose after the deceased father's death, and (3) the children were living on the distribution dates, thus satisfying subsection ~~(g)~~(e)(1).

Martin B. illustrates why the time limits in Sections 708(b)(2), 810(b)(2), and 817(b)(2) of the UPA (2017) are not needed or appropriate in the construction of class gifts. The rules for class closing govern. Consider also the following examples.

*Example 14*3. G created a revocable inter vivos trust shortly before his death. The trustee was directed to pay the income to G for life, then "to pay the income to my wife, W, for life, then to distribute the trust principal by representation to my descendants who survive W." When G died, G and W had no children. Shortly before G's death and after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. ~~G consented to be the parent of the child within the meaning of Section 2-120(f).~~ Assume that the parentage requirements of the UPA (2017) were satisfied except for the time limits in Section 708(b)(2) of that Act. After G's death, W decided to become inseminated with G's frozen sperm so that she could have his child. The child, X, was born five years after G's death. W raised X. Upon W's death many years later, X was a grown adult. X is entitled to receive the trust principal, because the requirements for a parent-child relationship between G and X ~~existed under Section 2-120(f)~~ were satisfied except for the time limits in Section 708(b)(2) of the UPA (2017) which are rendered inapplicable by subsection (b) (which references the rules for intestate succession, including Section 2-120), and X was living on the distribution date.

*Example 15*4. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then "to pay the income by representation to G's issue from time to time living, and at the death of G's last surviving child, to distribute the trust principal by representation to G's descendants who survive G's last surviving child." When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. ~~G consented to be the parent of the child within the meaning of Section 2-120(f).~~ Assume that the parentage requirements of the UPA (2017) were satisfied except for the time limits in Section 708(b)(2) of that Act. After G's death, G's widow decided to become inseminated with his frozen sperm so that she could have his child. If ~~the child so produced was~~ either (1) the embryo was in utero within 36 months after G's death or (2) the child was born within 45 months after ~~the~~ G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class-gift of income ~~under the rule of convenience~~ for which the distribution date is G's death. ~~If~~ Whether or not G's widow later decides to use his frozen sperm to have another child or children, ~~those~~ G's child or children would be included in or excluded from the class-gift of subsequent income distributions (assuming they live 120 hours after birth) ~~even if they were not in utero within 36 months after G's death or born within 45 months after the G's death~~ based on the ordinary class-closing rules. The reason is that an income interest in class-gift form is treated as creating separate class gifts in which the distribution date is the time ~~of payment~~ of each ~~subsequent~~ successive income payment. See Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 cmt. p. Regarding the remainder interest in principal that takes effect in possession on the death of G's last living child, the ~~issue~~ then-living descendants of ~~the posthumously conceived~~ G's children ~~who are then living~~ would take the trust principal.

~~Subsection~~ **Subsections ~~(g)~~(e)(3) and (e)(4).** For purposes of the class-closing rules, an individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted. An individual is "in the process of being adopted" if a legal proceeding to adopt the individual had been filed before the class closed. However, the phrase "in the process of being adopted" is not intended to be limited to the

filing of a legal proceeding, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Similarly, an individual who is in the process of being adjudicated a child of a de facto parent when the class closes is treated as a child of that de facto parent when the class closes if the de facto parentage is subsequently established.

~~**Reference.** For the application of this section to children of assisted reproduction and gestational children, see Sheldon F. Kurtz & Lawrence W. Waggoner, The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies, 35 ACTEC J. 30 (2009).~~

Historical Note. This Comment was revised in 1993, 2008, ~~and~~ 2010, and 2019.

* * *

PART 8. GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

*** * ***

SECTION 2-802. EFFECT OF DIVORCE, ANNULMENT, AND DECREE OF SEPARATION.

(a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, ~~he [or she]~~ the individual is married to the decedent at the time of death. A decree of separation that does not terminate the ~~status of spouse~~ marriage is not a divorce for purposes of this section.

(b) For purposes of [Parts] 1, 2, 3, and 4 of this [article], and of Section 3-203, a surviving spouse does not include:

(1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless subsequently they participate in a marriage ceremony purporting to marry each to the other or live together as spouses;

(2) an individual who, following an invalid decree or judgment of divorce or

annulment obtained by the decedent, participates in a marriage ceremony with a third individual; or

(3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Comment

Clarifying Revision in 1993. The only substantive revision of this section is a clarifying revision of subsection (b)(2), making it clear that this subsection refers to an invalid decree of divorce or annulment.

Rationale. Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce. Subsection (a) states an obvious proposition, but subsection (b) deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section 2-213 as a waiver or renunciation of benefits under a prior will and by intestate succession.

Cross Reference. See Section 2-804 for similar provisions relating to the effect of divorce to revoke devises and other revocable provisions to a former spouse.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 159 (Supp.1992). Technical amendments to subsection (a) and subsection (b)(1) were made in 2017 to replace "husband and wife" with "spouse" or "spouses." Further technical amendments to subsection (a) were made in 2019, primarily to eliminate gendered terms (e.g., "he [or she]").

* * *

SECTION 2-803. EFFECT OF HOMICIDE ON INTESTATE SUCCESSION, WILLS, TRUSTS, JOINT ASSETS, LIFE INSURANCE, AND BENEFICIARY DESIGNATIONS.

(a) **[Definitions.]** In this section:

* * *

(3) "Revocable", with respect to a disposition, appointment, provision, or

nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate ~~himself [or herself]~~ the decedent in place of ~~his [or her]~~ the killer and whether or not the decedent then had capacity to exercise the power.

* * *

(b) **[Forfeiture of Statutory Benefits.]** An individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed ~~his [or her]~~ the intestate share.

* * *

(f) **[Wrongful Acquisition of Property.]** A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from ~~his [or her]~~ a wrong.

Comment

* * *

2019 Technical Amendments. Technical amendments were made to this section in 2019 to remove gendered language (e.g., "his [or her]").

Historical Note. This Comment was revised in 1993, 1997, ~~and~~ 2014, and 2019.

SECTION 2-804. REVOCATION OF PROBATE AND NONPROBATE TRANSFERS BY DIVORCE; NO REVOCATION BY OTHER CHANGES OF CIRCUMSTANCES.

(a) **[Definitions.]** In this section:

* * *

(2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the ~~status of spouse~~ marriage is not a divorce for purposes of this section.

* * *

(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of ~~his [or her]~~ a marriage to ~~his [or her]~~ the divorced individual's former spouse.

(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by ~~blood, adoption,~~ application of the rules establishing parent-child relationships under [Subpart 2 of Part 1] or affinity and who, after the divorce or annulment, is not related to the divorced individual by ~~blood, adoption,~~ application of the rules establishing parent-child relationships under [Subpart 2 of Part 1] or affinity.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of ~~his [or her]~~ the divorced individual's former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate ~~himself [or herself]~~ the divorced individual in place of ~~his [or her]~~ the divorced individual's former spouse or in place of ~~his [or her]~~ the divorced individual's former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) **[Revocation Upon Divorce.]** Except as provided by the express terms of a governing

instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable

(A) disposition or appointment of property made by a divorced individual to ~~[his or her]~~ the divorced individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse,

* * *

Comment

Purpose and Scope of Revision. The revisions of this section, pre-1990 Section 2-508, intend to unify the law of probate and nonprobate transfers. As originally promulgated, pre-1990 Section 2-508 revoked a predivorce devise to the testator's former spouse. The revisions expand the section to cover "will substitutes" such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment). As revised, this section also effects a severance of the interests of the former spouses in property that they held at the time of the divorce (or annulment) as joint tenants with the right of survivorship; their co-ownership interests become tenancies in common.

As revised, this section is the most comprehensive provision of its kind, but many states have enacted piecemeal legislation tending in the same direction. For example, Michigan and Ohio have statutes transforming spousal joint tenancies in land into tenancies in common upon the spouses' divorce. Mich.Comp.Laws Ann. § 552.102; Ohio Rev.Code Ann. § 5302.20(c)(5). Ohio, Oklahoma, and Tennessee have recently enacted legislation effecting a revocation of provisions for the settlor's former spouse in revocable inter-vivos trusts. Ohio Rev.Code Ann. § 1339.62; Okla.Stat.Ann. tit. 60, § 175; Tenn.Code Ann. § 35-50-5115 (applies to revocable and irrevocable inter-vivos trusts). Statutes in Michigan, Ohio, Oklahoma, and Texas relate to the consequence of divorce on life-insurance and retirement-plan beneficiary designations. Mich.Comp.Laws Ann. § 552.101; Ohio Rev.Code Ann. § 1339.63; Okla.Stat.Ann. tit. 15, § 178; Tex.Fam.Code §§ 3.632-.633.

The courts have also come under increasing pressure to use statutory construction techniques to extend statutes like the pre-1990 version of Section 2-508 to various will substitutes. In Clymer v. Mayo, 473 N.E.2d 1084 (Mass.1985), the Massachusetts court held the statute applicable to a revocable inter-vivos trust, but restricted its "holding to the particular facts

of this case-specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death." 473 N.E.2d at 1093. The trust in that case was an unfunded life-insurance trust; the life insurance was employer-paid life insurance. In Miller v. First Nat'l Bank & Tr. Co., 637 P.2d 75 (Okla.1981), the court also held such a statute to be applicable to an unfunded life-insurance trust. The testator's will devised the residue of his estate to the trustee of the life-insurance trust. Despite the absence of meaningful evidence of intent to incorporate, the court held that the pour-over devise incorporated the life-insurance trust into the will be reference, and thus was able to apply the revocation-upon-divorce statute. In Equitable Life Assurance Society v. Stitzel, 1 Pa.Fiduc.2d 316 (C.P.1981), however, the court held a statute similar to the pre-1990 version of Section 2-508 to be inapplicable to effect a revocation of a life-insurance beneficiary designation of the former spouse.

Revoking Benefits of the Former Spouse's Relatives. In several cases, including Clymer v. Mayo, 473 N.E.2d 1084 (Mass.1985), and Estate of Coffed, 387 N.E.2d 1209 (N.Y.1979), the result of treating the former spouse as ~~if he or she predeceased~~ predeceasing the testator was that a gift in the governing instrument was triggered in favor of relatives of the former spouse who, after the divorce, were no longer relatives of the testator. In the Massachusetts case, the former spouse's nieces and nephews ended up with an interest in the property. In the New York case, the winners included the former spouse's child by a prior marriage. For other cases to the same effect, see Porter v. Porter, 286 N.W.2d 649 (Iowa 1979); Bloom v. Selfon, 555 A.2d 75 (Pa.1989); Estate of Graef, 368 N.W.2d 633 (Wis.1985). Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result. This section, therefore, also revokes these gifts.

* * *

Historical Note. The above Comment was revised in 1993, 2002, ~~and~~ 2014, and 2019. A technical amendment to subsection (a)(2) was made in 2017 to replace "husband and wife" with "spouse." Further technical amendments were made in 2019, primarily to clarify the definition in Subsection (a)(5) of "Relative of the divorced individual's former spouse" and to eliminate gendered terms (e.g., "his [or her]") in Subsections (a) and (b).

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ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

* * *

PART 7. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

* * *

SECTION 3-703. GENERAL DUTIES; RELATION AND LIABILITY TO PERSONS INTERESTED IN ESTATE; STANDING TO SUE.

(a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this [code], and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this [code], the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(b) A personal representative may not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. This section does not affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants whose claims have been allowed, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this [code].

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had

immediately prior to death.

(d) A personal representative shall not be surcharged for distributions made that do not take into consideration the possibility of posthumous pregnancy unless the personal representative received notice or had actual knowledge [within [6] months after the decedent's death] of intent to use genetic material in assisted reproduction and thereby affect the distribution of the decedent's estate.

Comment

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See Section 3-501.

~~Pursuant to subsection (a), a personal representative has a duty to settle and distribute the estate as expeditiously and efficiently as is consistent with the best interests of the estate. While this duty includes an obligation to ascertain the beneficiaries of the estate, it does not require the personal representative to delay distribution pending the possible birth of a posthumously conceived child. A delay is appropriate only if the personal representative has (1) received notice or has knowledge that there is an intention to use the decedent's genetic material to create a child and (2) the birth of the child could have an effect on distribution of the decedent's estate. Should the personal representative properly distribute the estate and a posthumously conceived child is later born, any remedy the child might have is against the other beneficiaries, and not the personal representative. See Sections 3-909, 3-1005.~~

The fundamental responsibility of a personal representative is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See Sections 3-107 and 3-704. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time". Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See Section 3-302 concerning the status of a will probated without notice and Section 3-102 concerning the ineffectiveness of an unprobated will. However, it does not follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. See Sections 3-909 and 3-1004.

Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

~~Paragraph~~ Subsection (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV, are designed to eliminate many of the present reasons for ancillary administrations.

1997 Technical Amendment. By technical amendment, the final sentence of Section 3-703(b) was modified to clarify the originally intended meaning that a personal representative of a decedent's estate does not owe fiduciary duties to a person having claims against the estate until the claim has been allowed. This added language is not intended to affect any duty to give notice to prospective claimants under Section 3-801 or Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988).

2010 Technical Amendment. By technical amendment, a cross-reference in subsection (a) to Section 7-302 was deleted. Article VII, which addressed selected issues of trust law, including the standard of care for trustees, was withdrawn due to the approval of and widespread enactment of the Uniform Trust Code ~~(2000/2005)~~.

2019 Amendment. Subsection (d) was added in 2019 as part of a package of amendments to the Uniform Probate Code in light of the Uniform Parentage Act (2017). The subsection is a modified version of Colo. Stat. § 15-12-703(3.5).

Historical Note~~:~~. ~~The second paragraph of the Comment was added in 2010 due to the approval in 2008 of provisions relating to children born of assisted reproductive technology.~~ This Comment was revised in 1997, 2010, and 2019.