UNIFORM PROBATE CODE

(Last Amended or Revised in 2006)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

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National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300, Chicago, IL 60611
(312) 915-0195, Fax (312) 915-0187, www.nccusl.org

UNIFORM PROBATE CODE

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Section

8-101. Time of Taking Effect; Provisions for Transition.
8-102. Specific Repealer and Amendments.

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UNIFORM PROBATE CODE

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Official Text and Comments Approved by the National Conference of Commissioners on Uniform State Laws.

AN ACT

Relating to affairs of decedents, missing persons, protected persons, minors, incapacitated persons and certain others and constituting the Uniform Probate Code; consolidating and revising aspects of the law relating to wills and intestacy and the administration and distribution of estates of decedents, missing persons, protected persons, minors, incapacitated persons and certain others; ordering the powers and procedures of the Court concerned with the affairs of decedents and certain others; providing for the validity and effect of certain non-testamentary transfers, contracts and deposits which relate to death and appear to have testamentary effect; providing certain procedures to facilitate enforcement of testamentary and other trusts; making uniform the law with respect to decedents and certain others; and repealing inconsistent legislation.

COMMENT

The long title of the Code should be adapted to the constitutional, statutory requirements and practices of the enacting jurisdiction. The concept of the Code is that the "affairs of decedents, missing persons, disabled persons, minors, and certain others" is a single subject of the law notwithstanding its many facets.

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ARTICLE I

GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

PART 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Section

1-101. Short Title.
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PART 4

NOTICE, PARTIES AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

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1-401. Notice; Method and Time of Giving.
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PART 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Section 1-101. Short Title.

This Act shall be known and may be cited as the Uniform Probate Code.

Section 1-102. Purposes; Rule of Construction.

(a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Code are:

(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(2) to discover and make effective the intent of a decedent in distribution of his property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

Section 1-103. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

Section 1-104. Severability.

If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

Section 1-105. Construction Against Implied Repeal.

This Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

Section 1-106. Effect of Fraud and Evasion.

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 5 years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

COMMENT

This is an overriding provision that provides an exception to the procedures and limitations provided in the Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be a forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period (section 3-108) has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing (section 3-1005). However, if there is fraudulent misrepresentation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case, innocent purchasers for value are protected.

Any action under this section is subject to usual rules of res judicata; thus, if a forged will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under section 3-1001 of which the heir is given notice, followed by an order of complete settlement of the estate, the heir could not bring a subsequent action under section 1-106 but would be bound by the litigation in which the issue could have been raised. The usual rules for securing relief for fraud on a Court would govern, however.

The final limitation in this section is designed to protect innocent distributees after a reasonable period of time. There is no limit (other than the 2 years from discovery of the fraud) against the wrongdoer. But there ought to be some limit after which innocent persons who have built up expectations in good faith cannot be deprived of the property by a restitution action.

The time of "discovery" of a fraud is a fact question to be determined in the individual case. In some situations persons may not actually know that a fraud has been perpetrated but have such strong suspicion and evidence that a Court may conclude there has been a discovery of the fraud at that stage. On the other hand, there is no duty to exercise reasonable care to discover fraud; the burden should not be on the heirs and devisees to check on the honesty of the other interested persons or the fiduciary.

Section 1-107. Evidence of Death or Status.

In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death and status apply:

(1) Death occurs when an individual [is determined to be dead under the Uniform Determination of Death Act] [has sustained either (i) irreversible cessation of circulatory and respiratory functions or (ii) irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards].

(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place

where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.

(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(4) In the absence of prima facie evidence of death under paragraph (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(5) An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of 5 years, during which he [or she] has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His [or her] death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(6) In the absence of evidence disputing the time of death stated on a document described in paragraph (2) or (3), a document described in paragraph (2) or (3) that states a time of death 120 hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by 120 hours.

COMMENT

Paragraph (1) defines death by reference to the Uniform Determination of Death Act (UDDA). States that have adopted the UDDA should use the first set of bracketed language. States that have not adopted the UDDA should use the second set of bracketed language.

Note that paragraph (6) is made desirable by the fact that Sections 2-104 and 2-702 require that survival by 120 hours must be established by clear and convincing evidence.

Paragraph (4) is inconsistent with Section 1 of Uniform Absence as Evidence of Death and Absentees' Property Act (1938).

Proceedings to secure protection of property interests of an absent person may be commenced as provided in 5-401.

Section 1-108. Acts by Holder of General Power.

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to

perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

COMMENT

The status of a holder of a general power in estate litigation is dealt with by section 1-403.

This section permits the settlor of a revocable trust to excuse the trustee from registering the trust so long as the power of revocation continues.

"General power," as used in this section, is intended to refer to the common law concept, rather than to tax or other statutory meanings. A general power, as used herein, is one which enables the power holder to draw absolute ownership to himself.

PART 2

DEFINITIONS

Section 1-201. General Definitions.

Subject to additional definitions contained in the subsequent Articles that are applicable to specific Articles, parts, or sections, and unless the context otherwise requires, in this Code:

(1) "Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

(2) "Application" means a written request to the Registrar for an order of informal probate or appointment under Part 3 of Article III.

(3) "Beneficiary," as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation," refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing ," includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, or a

person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(4) "Beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

(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.

(6) "Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(7) “Conservator” as defined in Section 5-102.

(8) "Court" means the [… Court] or branch in this State having jurisdiction in matters relating to the affairs of decedents.

(9) "Descendant" of an individual means all of his [or her] descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this Code.

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

(11) "Devisee" means a person designated in a will to receive a devise. For the purposes of Article III, in the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(12) "Distributee" means any person who has received property of a decedent from his [or her] personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his [or her] hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, "testamentary trustee" includes a

trustee to whom assets are transferred by will, to the extent of the devised assets.

(13) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(14) "Exempt property" means that property of a decedent's estate which is described in Section 2-403.

(15) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

(16) "Foreign personal representative" means a personal representative appointed by another jurisdiction.

(17) "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

(18) "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(19) "Guardian" is as defined in Section 5-102.

(20) "Heirs," except as controlled by Section 2-711, means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.

(21) "Incapacitated person" means an individual described in Section 5-102.

(22) "Informal proceedings" means those conducted without notice to interested persons by an officer of the Court acting as a registrar for probate of a will or appointment of a personal representative.

(23) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(24) "Issue" of an individual means descendant.

(25) "Joint tenants with the right of survivorship" and "community property with the right of survivorship" includes co-owners of

property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(26) "Lease" includes an oil, gas, or other mineral lease.

(27) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(28) "Minor" has the meaning described in Section 5-102.

(29) "Mortgage" means any conveyance, agreement, or arrangement in which property is encumbered or used as security.

(30) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his [or her] death.

(31) "Organization" means a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(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.

(33) "Payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(34) "Person" means an individual or an organization.

(35) "Personal representative" includes executor administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(36) "Petition" means a written request to the Court for an order after notice.

(37) "Proceeding" includes action at law and suit in equity.

(38) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(39) "Protected person" is as defined in Section 5-102.

(40) "Protective proceeding" means a proceeding under Part 4 of Article V.

(41) "Registrar" refers to the official of the Court designated to perform the functions of Registrar as provided in Section 1-307.

(42) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(43) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

(44) "Special administrator" means a personal representative as described by Sections 3-614 through 3-618.

(45) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(46) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(47) "Successors" means persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this Code.

(48) "Supervised administration" refers to the proceedings described in Article III, Part 5.

(49) "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 or 2-702. The term includes its derivatives, such as "survives," "survived," "survivor," "surviving."

(50) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(51) "Testator" includes an individual of either sex.

(52) "Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under

which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article VI, custodial arrangements pursuant to [each state should list its legislation, including that relating to [gifts][transfers] to minors, dealing with special custodial situations], business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(53) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(54) "Ward" means an individual described in Section 5-102.

(55) "Will" includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

[FOR ADOPTION IN COMMUNITY PROPERTY STATES]

[(56)"Separate property" (if necessary, to be defined locally in accordance with existing concept in adopting state.)

(57) "Community property" (if necessary, to be defined locally in accordance with exciting concept in adopting state.)]

COMMENT

Special definitions for Articles V and VI are contained in Sections 5-103, 6-201, and 6-301. Except as controlled by special definitions applicable to these particular Articles, or applicable to particular sections, the definitions in Section 1-201 apply to the entire Code.

PART 3

SCOPE, JURISDICTION AND COURTS

Section 1-301. Territorial Application.

Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this state, (2) the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state, (3) incapacitated persons and

minors in this state, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this state.

Section 1-302. Subject Matter Jurisdiction.

(a) To the full extent permitted by the constitution, the Court has persons; and jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (2) protection of minors and incapacitated (3) trusts.

(b) The Court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

(c) The Court has jurisdiction over protective proceedings and guardianship proceedings.

(d) If both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

Section 1-303. Venue; Multiple Proceedings; Transfer.

(a) Where a proceeding under this Code could be maintained in more than one place in this state, the Court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one Court of this state, the Court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling Court determines that venue is properly in another Court, it shall transfer the proceeding to the other Court.

(c) If a Court finds that in the interest of justice a proceeding or a file should be located in another Court of this state, the Court making the finding may transfer the proceeding or file to the other Court.

Section 1-304. Practice in Court.

Unless specifically provided to the contrary in this Code or unless inconsistent with its provisions, the rules of civil procedure including the rules concerning vacation of orders and appellate review govern formal proceedings under this Code.

Section 1-305. Records and Certified Copies.

The [Clerk of Court] shall keep a record for each decedent, ward, protected person or trust involved in any document which may be filed with the Court under this Code, including petitions and applications, demands for notices or bonds, trust registrations, and of any orders or responses relating thereto by the Registrar or Court, and establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the [clerk] must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills must indicate whether the decedent was domiciled in this state, and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment.

Section 1-306. Jury Trial.

(a) If duly demanded, a party is entitled to trial by jury in [a formal testacy proceeding and] any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

(b) If there is no right to trial by jury under subsection (a)or the right is waived, the Court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

Section 1-307. Registrar; Powers.

The acts and orders which this Code specifies as performable by the Registrar may be performed either by a judge of the Court or by a person, including the clerk, designated by the Court by a written order filed and recorded in the office of the Court.

Section 1-308. Appeals.

Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments and power of the appellate court, is governed by the rules applicable to the appeals to the [Supreme Court] in equity cases from the [court of general jurisdiction], except that in proceedings where jury trial has been had as a matter of right, the rules applicable to the scope of review in jury cases apply.

Section 1-309. Qualifications of Judge.

A judge must have the same qualifications as a judge of the [court of general jurisdiction].

COMMENT

In Article VIII, Section 8-101 on transition from old law to new law provision is made for the continuation in service of a sitting judge not qualified for initial selection.

Section 1-310. Oath or Affirmation on Filed Documents.

Except as otherwise specifically provided in this Code or by rule, every document filed with the Court under this Code including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

PART 4

NOTICE, PARTIES AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

Section 1-401. Notice; Method and Time of Giving.

(a) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least 14 days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy thereof to the person being notified personally at least 14 days before the time set for the hearing; or

(3) if the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for 3 consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least 10 days before the time set for the hearing.

(b) The Court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

Section 1-402. Notice; Waiver.

A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding. A person for whom a guardianship or other protective order is sought, a ward, or a protected person may not waive notice.

COMMENT

The subject of appearance is covered by Section 1-304.

Section 1-403. Pleadings; When Parties Bound by Others; Notice.

In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following rules apply:

(1) Interests to be affected must be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests or in another appropriate manner.

(2) A person is bound by an order binding another in the following cases:

(i) An order binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, binds other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power.

(ii) To the extent there is no conflict of interest between them or among persons represented:

(A) An order binding a conservator binds the person whose estate the conservator controls;

(B) An order binding a guardian binds the ward if no conservator of the ward's estate has been appointed;

(C) An order binding a trustee binds beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a former fiduciary, and in proceedings involving creditors or other third parties;

(D) An order binding a personal representative binds persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and

(E) An order binding a sole holder or all co-holders of a general testamentary power of appointment binds other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power.

(iii) Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained person is bound by an order to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) If no conservator or guardian has been appointed, a parent may represent a minor child.

(4) Notice is required as follows:

(i) The notice prescribed by Section 1-401 must be given to every interested person or to one who can bind an interested person as described in paragraph (2)(i) or (ii). Notice may be given both to a person and to another who may bind the person.

(ii) Notice is given to unborn or unascertained persons, who are not represented under paragraph(2)(i)or (ii), by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(5) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall state its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

COMMENT

A general power, as used here and in Section 1-108, is one which enables the power holder to draw absolute ownership to himself. The section assumes a valid general power. If the validity of the power itself were in issue, the power holder could not represent others, as for example, the takers in default.

The general rules of civil procedure are applicable where not replaced by specific provision, *see* Section 1-304. Those rules would determine the mode of giving notice or serving process on a minor or the mode of notice in class suits involving large groups of persons made party to a suit.

1997 Technical Amendment. By technical amendment effective July 31, 1997, (E) under subsection 2(ii) was added to clarify that orders binding the holder of a general testamentary power may bind others to the extent their interests are subject to the power. The addition, like the other lettered segments of subsection (2)(ii), is qualified by the stem language: "To the extent there is no conflict between them or among persons represented…" Also, (iii) under (2) was broadened to include minors and incapacitated persons with the others listed as persons who may be bound by judicial orders under principles of virtual representation.

ARTICLE II

INTESTACY, WILLS, AND DONATIVE TRANSFERS (1990)

PART 1

INTESTATE SUCCESSION

Section

2-101. Intestate Estate.
2-102. Share of Spouse.
2-102A. [Share of Spouse.]
2-103. Share of Heirs Other Than Surviving Spouse.
2-104. Requirement That Heir Survive Decedent For 120 Hours.
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The following free-standing Acts are associated with Article II:

Uniform Disclaimer of Property Interests Act (1999)

Article II, Part 11 has been adopted as the free-standing Uniform Disclaimer of Property Interests Act (1999).

Uniform International Wills Act

Article II, Part 10 has been adopted as the free-standing Uniform International Wills Act.

Uniform Act on Intestacy, Wills, and Donative Transfers Act

Revised Article II has been adopted as the free-standing Uniform Act on Intestacy, Wills, and Donative Transfers Act.

Uniform Simultaneous Death Act

Article II, sections 1-107, 2-104 and 2-702 have been adopted as the free-standing Uniform Simultaneous Death Act (1993).

Uniform Statutory Rule Against Perpetuities with 1990 Amendments

Article II, Part 9, Subpart 1 has been adopted as the free-standing Uniform Statutory Rule Against Perpetuities with 1990 Amendments.

Uniform Testamentary Additions to Trusts Act (1991)

Article II, Section 2-511 has been adopted as the free-standing Uniform Testamentary Additions to Trusts Act (1991).

PREFATORY NOTE

The Uniform Probate Code was promulgated in 1969. In 1990, Article II of the Code underwent significant revision. The 1990 revisions are the culmination of a systematic study of the Code conducted by the Joint Editorial Board for the Uniform Probate Code (JEB-UPC) and a special Drafting Committee to Revise Article II. The 1990 revisions concentrate 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; the effect of homicide and divorce on succession rights; and the rule against perpetuities and honorary trusts.

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

The 1990 revisions respond to these themes. The multiple-marriage society and the partnership/marital-sharing theory are reflected in the revised

elective-share provisions of Part 2. As the General Comment to Part 2 explains, the revised elective share grants the surviving spouse a right of election that implements the partnership/marital-sharing theory by adjusting the elective share to the length of the marriage.

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

The proliferation of will substitutes and other inter-vivos transfers is recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison. One aspect of this tendency is 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. 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 divide pre-1990 Part 6 into two parts-Part 6, containing rules of construction for wills only; and Part 7, containing rules of construction for wills and other governing instruments. A few new rules of construction are also added.

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

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

PART 1

INTESTATE SUCCESSION

GENERAL COMMENT

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

The principal features of the 1990 revisions are:

1. So-called negative wills are authorized, under which the decedent who dies

intestate, in whole or in part, can by will disinherit a particular heir.

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

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

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

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

Section 2-101. 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] intestate share.

COMMENT

Purpose of Revision. The amendments to subsection (a) are stylistic, not substantive.

New subsection (b) authorizes the decedent, by will, to exclude or limit the right of an individual or class to share in the decedent's intestate estate, in effect disinheriting that individual or class. By specifically authorizing so-called negative wills, subsection (b) reverses the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason. *See* Note, "The Intestate Claims of Heirs Excluded by Will: Should 'Negative

Wills' Be Enforced?", 52 U. Chi. L. Rev. 177(1985).

Whether or not in an individual case the decedent's will has excluded or limited the right of an individual or class to take a share of the decedent's intestate estate is a question of construction. A clear case would be one in which the decedent's will expressly states that an individual is to receive none of the decedent's estate. Examples would be testamentary language such as "my brother, Hector, is not to receive any of my property" or "Brother Hector is disinherited."

Another rather clear case would be one in which the will states that an individual is to receive only a nominal devise, such as "I devise $50.00 to my brother, Hector, and no more."

An individual need not be identified by name to be excluded. Thus, if brother Hector is the decedent's only brother, Hector could be identified by a term such as "my brother." A group or class of relatives (such as "my brothers and sisters") can also be excluded under this provision.

Subsection (b) establishes the consequence of a disinheritance-the share of the decedent's intestate estate to which the disinherited individual or class would have succeeded passes as if that individual or class had disclaimed the intestate share. Thus, if the decedent's will provides that brother Hector is to receive $50.00 and no more, Hector is entitled to the $50.00 devise (because Hector is *not* treated as having predeceased the decedent for purposes of *testate* succession), but the portion of the decedent's *intestate* estate to which Hector would have succeeded passes as if Hector had disclaimed his intestate share. The consequence of a disclaimer by Hector of his intestate share is governed by Section 2-1106(b), which provides that Hector's intestate share passes to Hector's descendants by representation.

Example: G died partially intestate. G is survived by brother Hector, Hector's 3 children (X, Y, and Z), and the child (V) of a deceased sister. G's will excluded Hector from sharing in G's intestate estate.

Solution: V takes half of G's intestate estate, X, Y, and Z split the other half, i.e. they take 1/6 each. Sections 2-103(3); 2-106, 2-1106(b). Had Hector not been excluded by G's will, the share to which Hector would have succeeded would have been 1/2. Under section 2-1106(b), that half, not the whole of G's intestate estate, is what passes to Hector's descendants by representation as if Hector had disclaimed the intestate share.

Note that if brother Hector had *actually* predeceased G, or was treated as if he predeceased G by reason of not surviving G by 120 hours (see section 2-104), then no consequence flows from Hector's disinheritance: V, X, Y, and Z would each take 1/4 of G's intestate estate under section 2-103(3) and 2-106.

Section 2-102. Share of Spouse.

The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

COMMENT

Purpose and Scope of Revisions. This section is revised to give the surviving spouse a larger share than the pre-1990 UPC. If the decedent leaves no surviving descendants and no surviving parent or if the decedent does leave surviving descendants but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent's intestate estate.

If the decedent leaves no surviving descendants but does leave a surviving parent, the decedent's surviving spouse receives the first $200,000 plus three-fourths of the balance of the intestate estate.

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent's descendants are unlikely to be the *exclusive* beneficiaries of the surviving spouse's estate, the surviving spouse receives the first $150,000 plus one-half of the balance of the intestate estate. The purpose is to assure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds $150,000.

If the decedent has other descendants, the surviving spouse receives $100,000 plus one-half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.

Note that in all the cases where the surviving spouse receives a lump sum plus a fraction of the balance, the lump sums must be understood to be in addition to the probate exemptions and allowances to which the surviving spouse is entitled under Part 4. These can add up to a minimum of $43,000.

Under the pre-1990 Code, the decedent's surviving spouse received the entire intestate estate only if there were neither surviving descendants nor parents. If there were surviving descendants, the descendants took one-half of the balance of the estate in excess of $50,000 (for example, $25,000 in a $100,000 estate). If there were no surviving descendants, but there was a surviving parent or parents, the parent or parents took that one-half of the balance in

excess of $50,000.

References. The theory of this section is discussed in Waggoner, *"The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code,"* 76 Iowa L. Rev. 223, 229-35 (1991).

Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their *entire* estates to their surviving spouses, even when the couple has children. *See* C. Shammas, M. Salmon & M. Bahlin, *Inheritance in America from Colonial Times to the Present 184-85* (1987); M. Sussman, J. Cates & D. Smith, *The Family and Inheritance* (1970); Browder, *"Recent Patterns of Testate Succession in the United States and England,"* 67 Mich. L. Rev. 1303, 1307-08 (1969); Dunham, "*The Method, Process and Frequency of Wealth Transmission at Death,*" 30 U. Chi. L. Rev. 241, 252 (1963); Gibson, *"Inheritance of Community Property in Texas-A Need for Reform,"* 47 Texas L. Rev. 359, 364-66 (1969); Price, *"The Transmission of Wealth at Death in a Community Property Jurisdiction,"* 50 Wash. L. Rev. 277, 283, 311-17 (1975). *See also* Fellows, Simon & Rau, "*Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States,*" 1978 Am. B. F. Research J. 319, 355-68; Note, "*A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes,*" 63 Iowa L. Rev. 1041, 1091-92 (1978).

Cross Reference. *See* Section 2-802 for the definition of spouse, which controls for purposes of intestate succession.

[ALTERNATE PROVISION FOR COMMUNITY PROPERTY STATES]

[Section 2-102A. Share of Spouse.

(a) The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

(b) The one-half of community property belonging to the decedent passes to the [surviving spouse] as the intestate share.]

COMMENT

The brackets around the term "surviving spouse" in subsection (b) indicate that states are free to adopt a different scheme for the distribution of the decedent's half of the community property, as some community property states have done.

Section 2-103. Share of Heirs other than Surviving Spouse.

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

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

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

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

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

COMMENT

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

Purpose and Scope of Revisions. The revisions are stylistic and clarifying, not

substantive. The pre-1990 version of this section contained the phrase "if they are all of the same degree of kinship to the decedent they take equally (etc.)" That language has been removed. It was unnecessary and confusing because the system of representation in Section 2-106 gives equal shares if the decedent's descendants are all of the same degree of kinship to the decedent.

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

Section 2-104. Requirement that Heir Survive Decedent for 120 Hours.

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

COMMENT

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of one another. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. (Section 2-702 recommends revision of the Uniform Simultaneous Death Act.)

This section requires an heir to survive by five days in order to succeed to the decedent's intestate property; for a comparable provision as to wills and other governing instruments, *see* Section 2-702. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. 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. The last sentence prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives him or her 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).

Section 2-105. No Taker.

If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

Section 2-106. Representation.

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

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

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

(b) **[Decedent's Descendants.]** If, under Section 2-103(1), a decedent's intestate estate or a part thereof passes "by representation" to the decedent's 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 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(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.

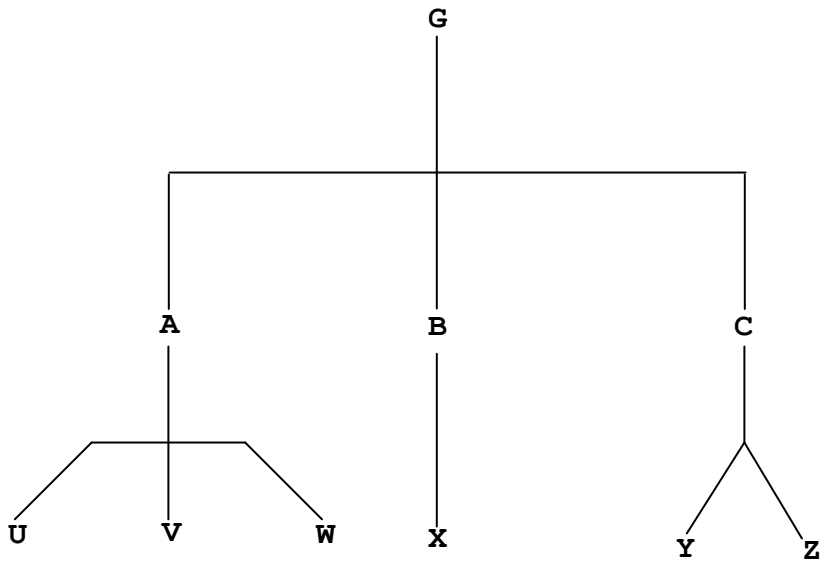
COMMENT

Purpose and Scope of Revisions. This section is revised to adopt 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 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 (71.1l) chose the per-capita-at-each-generation system; 145 (19.1l) chose the per-stirpes system, and 70 (9.2l) chose the pre-1990 UPC system.

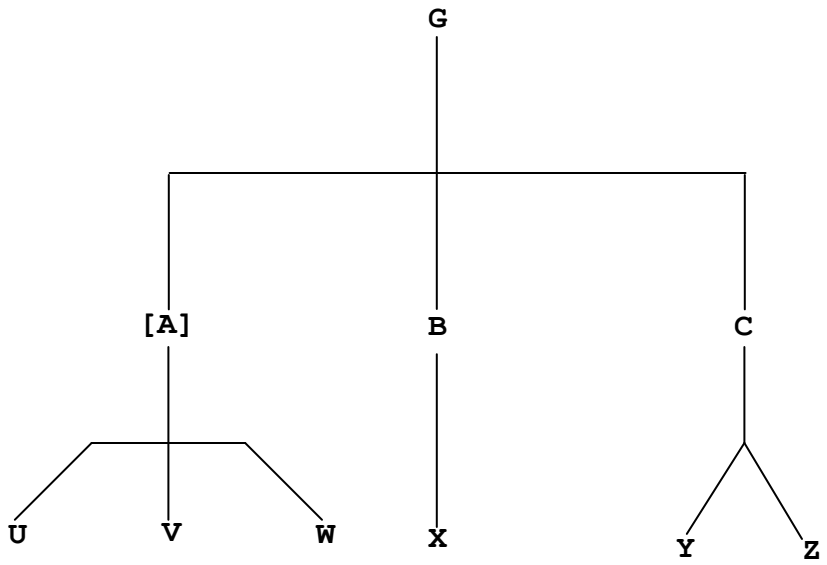
To illustrate the differences among the three systems, consider a family, in which G is the intestate. G has 3 children, A, B, and C. Child A has 3 children, U,V, and W. Child B has 1 child, X. Child C has 2 children, Y and Z. Consider four variations.

Variation 1: All Three children survive G.



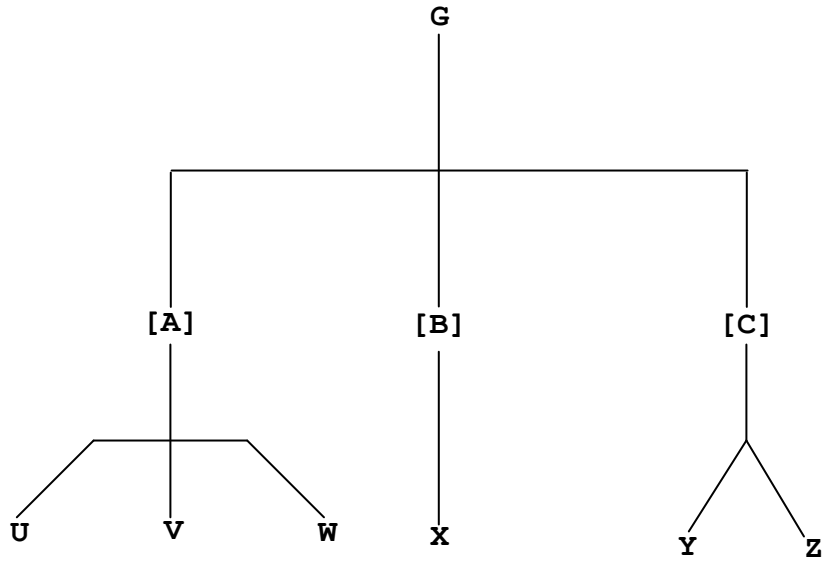
Solution: All three systems reach the same result: A,B, and C take 1/3 each.

Variation 2: One child, A, predeceases G; the other two survive G.



Solution: Again, all three systems reach the same result: B and C take 1/3 each; U, V, and W take 1/9 each.

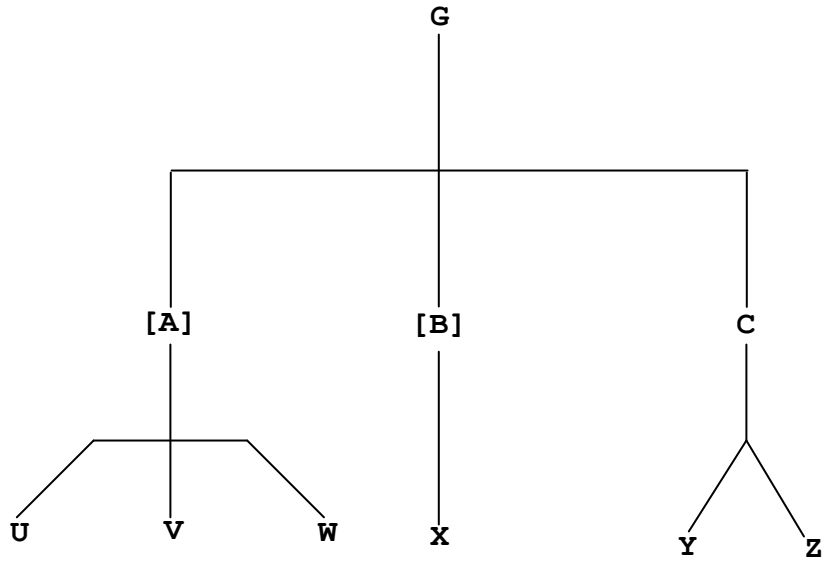
Variation 3: All three children predecease G.



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

The per-stirpes system gives a different result: U, V, and W take 1/9 each; X takes 1/3; and Y and Z take 1/6 each.

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



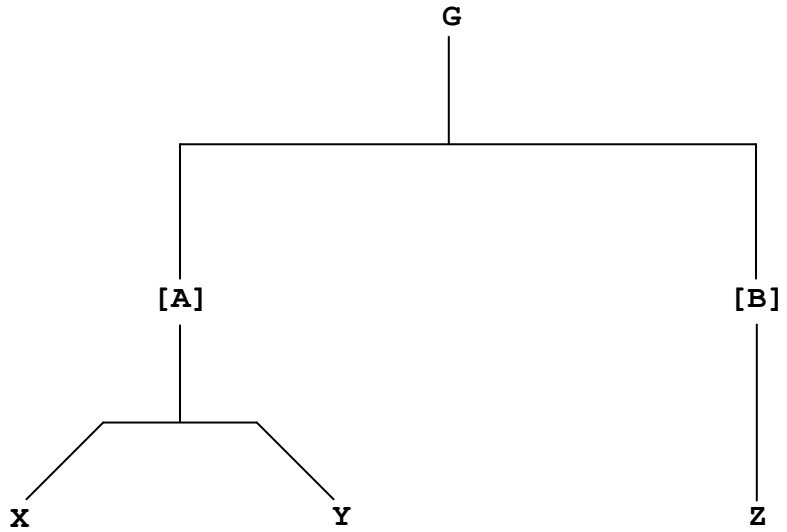
Solution: In this instance, the 1990 UPC system (per capita at each generation) departs from the pre-1990 UPC system. Under the 1990 UPC system, C takes 1/3 and the other two 1/3 shares are combined into a single share (amounting to 2/3 of the estate) and distributed as if C, Y and Z had predeceased 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).

Effect of Disclaimer. By virtue of Section 2-1106(b), an heir cannot use a disclaimer to effect a change in the division of an intestate's estate. To illustrate this point, consider the following example:



As it stands, G's intestate estate is divided into two equal parts: A takes half and B's child, Z, takes the other half. Suppose, however, that A files a disclaimer under Article II, Part 11. A cannot affect the basic division of G's intestate estate by this maneuver. Section 2-1106(b)(3)(A) provides that "the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution [except that] if, by law…, the descendents of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interst passes only to the descedents of the disclaimant who survive the time of distribution." In this example, the "disclaimed interest" is A's share (1/2) of G's estate; thus the 1/2 interest renounced by A devolves to A's children, X and Y, who take 1/4 each.

If Section 2-1106(b)(3)(A) had provided that G's "estate" is to be divided as if A predeceased G, A could have used his disclaimer to increase the share going to his children from 1/2 to 2/3 (1/3 for each child) and to decrease Z's share to 1/3. The careful wording of 2-1106(b)(3)(A), however, prevents A from manipulating the result by this method.

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§2-1001 – 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.

Section 2-107. Kindred of Half Blood.

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

Section 2-108. Afterborn Heirs.

An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.

Section 2-109. Advancements.

(a) If an individual dies intestate as to all or a portion of his [or her] 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.

(b) For purposes of subsection (a), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.

(c) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

COMMENT

Purpose of the Revisions. This section is revised so that an advancement can be taken into account with respect to the intestate portion of a partially intestate estate.

Other than these revisions, and a few stylistic and clarifying amendments, the original content of the section is maintained, under which the common law relating to advancement is altered by requiring written evidence of the intent that an inter-vivos gift be an advancement.

The statute is phrased in terms of the donee being an heir "at the decedent's

death." The donee need not be a prospective heir at the time of the gift. For example, if the intestate, G, made an inter-vivos gift intended to be an advancement to a grandchild at a time when the intestate's child who is the grandchild's parent is alive, the grandchild would not then be a prospective heir. Nevertheless, if G's intent that the gift be an advancement is contained in a written declaration or acknowledgment as provided in subsection (a), the gift is regarded as an advancement if G's child (who is the grandchild's parent) predeceases G, making the grandchild an heir.

To be an advancement, the gift need not be an outright gift; it can be in the form of a will substitute, such as designating the donee as the beneficiary of the intestate's life-insurance policy or the beneficiary of the remainder interest in a revocable inter-vivos trust.

Most inter-vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during the donor's lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he or she intends to die intestate, charge the gift as an advance by a writing within the present section.

This section applies to advances to the decedent's spouse and collaterals (such as nephews and nieces) as well as to descendants.

Computation of Shares-Hotchpot Method. This section does not specify the method of taking an advancement into account in distributing the decedent's intestate estate. That process, called the hotchpot method, is provided by the common law. The hotchpot method is illustrated by the following example.

Example: G died intestate, survived by his wife (W) and his three children (A, B, and C) by a prior marriage. G's probate estate is valued at $190,000. During his lifetime, G had advanced A $50,000 and B $10,000. G memorialized both gifts in a writing declaring his intent that they be advancements.

Solution. The first step in the hotchpot method is to add the value of the advancements to the value of G's probate estate. This combined figure is called the hotchpot estate.

In this case, G's hotchpot estate preliminarily comes to $250,000 ($190,000 + $50,000) +$10,000). W's intestate share of a $250,000 estate under section 2-102(4) is $175,000 ($100,000 + 1/2 of $150,000). The remaining $75,000 is divided equally among A, B, and C, or $25,000 each. This calculation reveals that A has received an advancement greater than the share to which he is entitled; A can retain the $50,000 advancement, but is not entitled to any additional amount. A and A's $50,000 advancement are therefore disregarded and the process is begun over.

Once A and A's $50,000 advancement are disregarded, G's revised hotchpot estate is $200,000 ($190,000 + $10,000). W's intestate share is $150,000 ($100,000 + 1/2 of $100,000). The remaining $50,000 is divided equally between B and C, or $25,000 each. From G's intestate estate, B receives $15,000 (B already having received $10,000 of his ultimate $25,000 share as an advancement); and C receives $25,000. The final division of G's probate state is $150,000 to W, zero to A, $15,000 to B, and $25,000 to C.

Effect if Advancee Predeceases the Decedent; Disclaimer. If a decedent had made an advancement to a person who predeceased the decedent, the last sentence of

Section 2-109 provides that the advancement is not taken into account in computing the intestate share of the recipient's descendants (unless the decedent's declaration provides otherwise). The rationale is that there is no guarantee that the recipient's descendants received the advanced property or its value from the recipient's estate.

To illustrate the application of the last sentence of Section 2-109, consider this case: During her lifetime, G had advanced $10,000 to her son, A. G died intestate, leaving a probate estate of $50,000. G was survived by her daughter, B, and by A's child, X. A predeceased G.

G's advancement to A is *disregarded*. G's $50,000 intestate estate is divided into two equal shares, half ($25,000) going to B and the other half ($25,000) going to A's child, X.

Now, suppose that A survived G. In this situation, of course, the advancement to A is taken into account in the division of G's intestate estate. Under the hotchpot method, illustrated above, G's hotchpot estate is $60,000 (probate estate of $50,000 plus advancement to A of $10,000). A takes half of this $60,000 amount, or $30,000 but is charged with already having received $10,000 of it. Consequently, A takes only a 2/5 share ($20,000) of G's intestate estate, and B takes the remaining 3/5 share ($30,000).

Note that A cannot use a disclaimer under Section 2-1105 in effect to give his child, X, a larger share than A was entitled to. Under Section 2-1106(b)(3)(A), the effect of a disclaimer by A is that the disclaimant's "interest" devolves to A's descendants as if the disclaimant had predeceased the decedent. The "interest" that A renounced was a right to a 2/5 share of G's estate, not a 1/2 share. Consequently, A's 2/5 share ($20,000) passes to A's child, X.

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§2-1001 – 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.

Section 2-110. Debts to Decedent.

A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants.

COMMENT

Section 2-110 supplements Section 3-903, Right of Retainer.

Effect of Disclaimer. Section 2-1106(b)(3)(A) prevents a living debtor from using the combined effects of the last sentence of Section 2-110 and a disclaimer to avoid a setoff. Although Section 2-110 provides that, if the debtor actually fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants, the same result is not produced when a living debtor disclaims. Section 2-1106(b)(3)(A) provides that the "interest" disclaimed, not the decedent's estate as a whole,

devolves as though the disclaimant predeceased the decedent. The "interest" disclaimed by a living debtor is the share the *debtor* would have taken had he or she not disclaimed-his or her intestate share minus the debt.

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§2-1001 – 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.

Section 2-111. Alienage.

No individual is disqualified to take as an heir because the individual or an individual through whom he [or she] claims is or has been an alien.

COMMENT

This section eliminates the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.

Section 2-112. Dower and Curtesy Abolished.

The estates of dower and curtesy are abolished.

COMMENT

The provisions of this Code replace the common-law concepts of dower and curtesy and their statutory counterparts. Thos estates provided both a share in intestacy and a protection against disinheritance.

In states that have previously abolished dower and curtesy, or where those states have never existed, the above section should be omitted.

Section 2-113. Individuals Related to Decedent Through Two Lines.

An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

COMMENT

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.

Section 2-114. Parent and Child Relationship.

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

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

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

COMMENT

Subsection (a). Subsection (a) sets forth the general rule: For purposes of intestate succession, a child is the child of his or her natural parents, regardless of their marital status. In states that have enacted the Uniform Parentage Act (UPA), the parent and child relationship may be established under the UPA. Non-UPA states should insert a reference to its own statute or, if it has no statute on the question, should insert the phrase "applicable state law."

Subsection (b). Subsection (b) contains exceptions to the general rule of subsection (a). Subsection (b) states the rule that, for inheritance purposes, an adopted individual becomes part of the adopting family and is no longer part of the natural family.

The revision of subsection (b) affects only the exception from the rule pertaining to the adoption of an individual by that individual's stepparent. As revised, an individual who is adopted by his or her stepparent (the spouse of the custodial natural parent) becomes part of the adopting stepparent's family for inheritance purposes but also continues to be part of the family of the custodial natural parent. With respect to the noncustodial natural parent and that parent's family, however, a different rule is promulgated. The adopted individual and the adopted individual's descendants continue to have a right of inheritance from and through that noncustodial natural parent, but that noncustodial natural parentand that noncustodial natural parent's family do not have a right to inherit from or through the adopted individual.

Subsection (c). Subsection (c) is revised to provide that neither natural parent (nor that natural parent's kindred) can inherit from or through a child unless that natural parent, mother or father, has openly treated the child as his or

hers and has not refused to support the child. Prior to the revision, that rule was applied only to the father. The phrase "has not refused to support the child" refers to the time period during which the parent has a legal obligation to support the child.

Companion Statute. A state enacting this provision should also consider enacting the Uniform Status of Children of Assisted Conception Act (1988).

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 118 (Supp. 1992).

PART 2

ELECTIVE SHARE OF SURVIVING SPOUSE

GENERAL COMMENT

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

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

The Partnership Theory of Marriage

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." M. Glendon, *The Transformation of Family Law 131* (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse

an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost." Id.

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

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

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

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

Long-term Marriages. To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The pre-1990 elective-share fraction of one-third of the

decedent's estate plainly does not implement a partnership principle. The actual result depends on which spouse happens to die first and on how the property accumulated during the marriage was nominally titled.

Example 1-Long-term Marriage under Conventional Forced-share Law.

Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B. Throughout their long life together, the couple managed to accumulate assets worth $600,000, marking them as a somewhat affluent but hardly wealthy couple.

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

Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets.

If all the marital assets were titled in A's name, B's claim against A's estate would only be for $200,000-well below B's $300,000 entitlement produced by the partnership/marital-sharing principle.

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

Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share.

If $300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for $100,000, which when combined with B's "own" $300,000 yields a $400,000 cut for B-well above the $300,000 amount to which the partnership/marital-sharing principle would lead.

Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion.

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

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

Example 2-Short-term, Later-in-Life Marriage under Conventional Elective-share Law.

Consider B and C. A year or so after A's death, B married C. Both B and C are in their seventies, and after five years of marriage, B dies survived by C. Both B and C have adult children and a few grandchildren by their prior marriages, and each naturally would prefer to leave most or all of his or her property to those children.

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

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

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

The Redesigned Elective Share

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

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

In the short-term, later-in-life marriage illustrated in Example 2, the effect of implementing a partnership theory is to decrease or even eliminate the entitlement of the surviving spouse because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth. Put differently, the effect is to deny a windfall to the survivor who contributed little to decedent's wealth, and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. Bear in mind that in such a marriage, which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a natural instinct to want to leave most or all of

his or her property to the children of his or her former, long-term marriage. In hardship cases, however, as explained later, a special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support.

Specific Features of the Redesigned Elective Share

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

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

Section 2-203-the "Augmented Estate." The elective-share percentage determined under Section 2-202(a) is applied to the value of the "augmented estate." As defined in Section 2-203, the "augmented estate" equals the value of the couple's *combined* assets, not merely to the value of the assets nominally titled in the decedent's name, as described in Sections 2-204 through 2-207.

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

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

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

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

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

had the surviving spouse been the decedent.

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

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

Subsection (a)(1)-amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent's nonprobate transfers to the surviving spouse; and

Subsection (a)(2)-twice the elective-share percentage, under Section 2-202(a), of the survivor's owned assets and nonprobate transfers to others, as determined under Section 2-207.

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

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

Example 3-15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name.

A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made no nonprobate transfers to others as defined in Section 2-205.

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

(1)	A's net probate estate	$400,000
(2)	A's nonprobate transfers to others	0
(3)	A's nonprobate transfers to B	0
(4)	B's assets and nonprobate transfers to others	$200,000
	Augmented Estate	$600,000

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

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

Example 4-15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Survivor's Name.

As in Example 3, A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made no nonprobate transfers to others as defined in Section 2-205.

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

(1)	A's net probate estate	$200,000
(2)	A's nonprobate transfers to others	0
(3)	A's nonprobate transfers to B	0
(4)	B's assets and nonprobate transfers to others	$400,000
	Augmented Estate	$600,000

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

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

In a marriage that has lasted less than 15 years, only a portion of the survivor's assets-not all-count toward making up the elective-share amount. This is because the elective-share percentage in these shorter-term marriages is less than 50% and, under Section 2-209(a)(2), the portion of the survivor's assets that count toward making up the elective-share amount is double the elective-share percentage.

To explain why this is appropriate requires further elaboration of the underlying theory of the redesigned system. The system avoids the tracing-to-source problem by applying an ever-increasing percentage to the couple's combined assets without regard to when or how those assets were acquired, rather than applying a constant percentage (50%) to an ever-growing accumulation of assets. By approximation, the redesigned system equates the elective-share percentage of the couple's combined assets with 50% of the couple's marital assets-assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage that has endured long enough for the elective-share percentage to be 30%, Section 2-209(a)(2) in effect equates 30% of the couple's combined assets with 50% of the couple's marital assets. In the aggregate, Section 2-209(a)(2) equates 60% of the couple's combined assets with the assets subject to equalization.

Example 5-Under 15-Year Marriage under the Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name.

A and B were married to each other more than 5 but less than 6 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made no nonprobate transfers to others as defined in Section 2-205.

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

(1)	A's net probate estate	$400,000
(2)	A's nonprobate transfers to others	0
(3)	A's nonprobate transfers to B	0
(4)	B's assets and nonprobate transfers to others	$200,000
	Augmented Estate	$600,000

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

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

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

Accordingly, B is treated as already owning $60,000 of the $180,000 of marital property. Under Section 2-209(a)(2), $60,000 of B's

$90,000 elective-share amount comes from B's own assets. Section 2-209(b) makes A's net probate estate liable for the unsatisfied balance-$30,000. (Remember that $120,000 of A's assets are attributed to marital property; thus, removing $30,000 of those $120,000 from A and adding that $30,000 to B's $60,000 in marital assets equalizes the aggregate $180,000 marital assets in a 50/50 split-$90,000 for A and $90,000 for B.)

The Support Theory

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

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

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

Example 6-Supplemental Elective-Share Amount.

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

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

(1)	B's net probate estate	$ 90,000
(2)	B's nonprobate transfers to others	0
(3)	B's nonprobate transfers to C	0
(4)	C's assets and nonprobate transfers to others	$ 10,000
	Augmented Estate	$100,000

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

Solution under Redesigned Elective Share.

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

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

2-207	$10,000
2-209(a)(1)	0
Elective-share amount from decedent's probate estate under Section 2-209(b)	$12,000
Total	$22,000

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

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

Decedent's Nonprobate Transfers to Others

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

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

of insurance policies in the augmented estate as part of the decedent's nonprobate transfers to others under Section 2-205.

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

Section 2-201. Definitions.

In this Part:

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

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

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

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

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

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

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

(8) "Property" includes values subject to a beneficiary designation.

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

(10) "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] and of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party.

Section 2-202. Elective Share.

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

If the decedent and the spouse were married to each other:	The elective-share percentage is:
Less than 1 year	Supplemental Amount Only.
1 year but less than 2 years	3% of the augmented estate.
2 years but less than 3 years	6% of the augmented estate.
3 years but less than 4 years	9% of the augmented estate.
4 years but less than 5 years	12% of the augmented estate.
5 years but less than 6 years	15% of the augmented estate.
6 years but less than 7 years	18% of the augmented estate.
7 years but less than 8 years	21% of the augmented estate.
8 years but less than 9 years	24% of the augmented estate.
9 years but less than 10 years	27% of the augmented estate.
10 years but less than 11 years	30% of the augmented estate.
11 years but less than 12 years	34% of the augmented estate.
12 years but less than 13 years	38% of the augmented estate.
13 years but less than 14 years	42% of the augmented estate.
14 years but less than 15 years	46% of the augmented estate.
15 years or more	50% of the augmented estate.

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

decedent's nonprobate transfers to others in the order of priority set forth in Section 2-209(b) and (c).

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

(d) **[Non-Domiciliary.]** The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

COMMENT

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

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

Subsection (a). Subsection (a) implements the partnership theory by increasing the maximum elective-share percentage of the augmented estate to fifty percent, but by phasing that ultimate entitlement in so that it does not reach the maximum fifty-percent level until the marriage has lasted at least 15 years. If the decedent and the surviving spouse were married to each other more than once, all periods of marriage to each other are added together for purposes of subsection (a); periods between marriages are not counted.

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

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

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

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

Section 2-203. Composition of the Augmented Estate.

Subject to Section 2-208, the value of the augmented estate, to the extent provided in Sections 2-204, 2-205, 2-206, and 2-207, consists of the sum of the values of all property, whether real or personal; movable or immovable, tangible or intangible, wherever situated, that constitute the decedent's net probate estate, the decedent's nonprobate transfers to others, the decedent's nonprobate transfers to the surviving spouse, and the surviving spouse's property and nonprobate transfers to others.

COMMENT

The elective-share percentage, determined by the length of the marriage under Section 2-202, is applied to the augmented estate. This section, added in 1993 as part of the reorganization and clarification of the elective-share provisions, operates as an umbrella section identifying the augmented estate as consisting of the sum of the values of four components. On the decedent's side are the values of (1) the decedent's net probate estate (Section 2-204) and (2) the decedent's nonprobate transfers to others (Section 2-205). Straddling between the decedent's side and the surviving spouse's side is the value of (3) the decedent's nonprobate transfers to the surviving spouse (Section 2-206). On the surviving spouse's side are the values of (4) the surviving spouse's net assets and the surviving spouse's nonprobate transfers to others (Section 2-207).

Historical Note. This Comment was added in 1993.

Section 2-204. Decedent's Net Probate Estate.

The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims.

COMMENT

This section, which in the 1990 version appeared as a paragraph of a single, long section defining the augmented estate, establishes as the first component of the augmented estate the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance (Section 2-402), family allowances (Section 2-404), exempt property (Section 2-403), and enforceable claims. The term "claims" is defined in Section 1-201 as including "liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate."

Various aspects of Section 2-204 are illustrated by Examples 10, 11, and 12 in the Comment to Section 2-205, below.

Historical Note. This Comment was added in 1993.

Section 2-205. Decedent's Nonprobate Transfers to Others.

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

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

(i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

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

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

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

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

(i) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the

decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

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

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

(i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1)(i), (ii), or (iii), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, nterest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph, "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(i), "termination" occurs when the power terminated by exercise or release, but not otherwise.

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

(iii)Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in either of the two years exceeded $10,000.

COMMENT

This section, which in the 1990 version appeared in substance as a paragraph of a single, long section defining the augmented estate, establishes as the second component of the augmented estate the value of the decedent's nonprobate transfers to others. In the 1990 version, the term "reclaimable estate" was used rather than the term "nonprobate transfers to others".

This component is divided into three basic categories: (1) property owned or owned in substance by the decedent immediately before death that passed outside probate to persons other than the surviving spouse; (2) property transferred by the decedent during marriage that passed outside probate to persons other than the surviving spouse; and (3) property transferred by the decedent during marriage and during the two-year period next preceding the decedent's death. Various aspects of each category and each subdivision within each category are discussed and illustrated below.

Paragraph (1)-Property Owned or Owned in Substance by the Decedent. This category covers property that the decedent owned or owned in substance immediately before death and that passed outside probate at the decedent's death to a person or persons other than the surviving spouse.

Paragraph (1) subdivides this category into four specific components:

(i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

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

(iii) The decedent's ownership interest in property or accounts held

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

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

With one exception for nonseverable joint tenancies (*see* Example 4 of this Section), each of the above components covers a type of asset of which the decedent could have become the full, technical owner by merely exercising his or her power of appointment, incident of ownership, or right of severance or withdrawal. Had the decedent exercised these powers or rights to become the full, technical owner, the decedent could have controlled the devolution of these assets by his or her will; by not exercising these powers or rights, the decedent allowed the assets to pass outside probate to persons other than the surviving spouse. Thus, *in effect,* property covered by these components passes at the decedent's death by nonprobate transfer from the decedent to others. This is what justifies including these components in the augmented estate without regard to the person who *created* the decedent's substantive ownership interest, whether the decedent or someone else, and without regard to *when* it was created, whether before or after the decedent's marriage.

Although the augmented estate under the pre-1990 Code did not include life insurance, annuities, etc., payable to other persons, the revisions do include their value; this move recognizes that such arrangements were, under the pre-1990 Code, used to deplete the estate and reduce the spouse's elective-share entitlement.

Various aspects of paragraph (1) are illustrated by the following examples. Other examples illustrating various aspects of this paragraph are Example 19 in this Comment, below, and Examples 20 and 21 in the Comment to Section 2-206, below. In each of the following examples, G is the decedent and S is the decedent’s surviving spouse.

Example 1-General Testamentary Power. G's mother, M, created a testamentary trust, providing for the income to go to G for life, remainder in corpus to such persons, including G, G's creditors, G's estate, or the creditors of G's estate, as G by will appoints; in default of appointment, to X. G died, survived by S and X. G's will did not exercise his power in favor of S.

The value of the corpus of the trust at G's death is not included in the augmented estate under paragraph (1)(i), regardless of whether G exercised the power in favor of someone other than S or let the power lapse, so that the trust corpus passed in default of appointment to X. Section 2-205(1)(i) only applies to *presently exercisable* general powers; G's power was a general *testamentary* power. (Note that paragraph (2)(ii) does cover property subject to a general *testamentary* power, but only if the power was created by G during marriage. G's general testamentary power was created by M and hence not covered by paragraph (2)(ii).)

Example 2-Nongeneral Power and "5-and-5" Power. G's father, F, created a testamentary trust, providing for the income to go to G for life, remainder in corpus to such persons, except G, G's creditors, G's estate, or the creditors of G's estate, as G by will appoints; in default of appointment, to X. G was also given a noncumulative annual power to withdraw an amount equal to the greater of $5,000 or five percent of the trust corpus. G died, survived by S and X. G did not exercise her power in favor of S.

G's power over the remainder interest does not cause inclusion of the value of the full corpus in the augmented estate under paragraph (1)(i) because that power was a *nongeneral* power.

The value of the greater of $5,000 or five percent of the corpus of the trust *at G's death* is included in the augmented estate under paragraph (1)(i), to the extent that that property passed at G's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse, because that portion of the trust corpus was subject to a *presently exercisable general* power of appointment held by G immediately before G's death. No additional amount is included, however, whether G exercised the withdrawal power or allowed it to lapse in the years prior to G's death. (Note that paragraph (3)(i) is inapplicable to this case. That paragraph only applies to property subject to powers *created by the decedent during marriage* that lapse within the two-year period next preceding the decedent's death.)

Example 3-Revocable Inter-Vivos Trust. G created a revocable inter-vivos trust, providing for the income to go to G for life, remainder in corpus to such persons, except G, G's creditors, G's estate, or the creditors of G's estate, as G by will appoints; in default of appointment, to X. G died, survived by S and X. G never exercised his power to revoke, and the corpus of the trust passed at G's death to X.

Regardless of whether G created the trust before or after marrying S, the value of the corpus of the trust at G's death is included in the augmented estate under paragraph (1)(i) because, immediately before G's death, the trust corpus was subject to a presently exercisable general power of appointment (the power to revoke: see Section 2-201(6)) held by G.

(Note that if G created the trust during marriage, paragraph (2)(ii) also requires inclusion of the value of the trust corpus. Because these two subparagraphs overlap, and because both subparagraphs include the same value, Section 2-208(c) provides that the value of the trust corpus is included under one but not both subparagraphs.)

Example 4-Joint Tenancy. G, X, and Y owned property in joint tenancy. G died, survived by S, X, and Y.

Because G's fractional interest in the property immediately before death was one-third, and because that one-third fractional interest passed by right of survivorship to X and Y at G's death, one-third of the value of the property at G's death is included in the augmented estate under paragraph (1)(ii). This is the result whether or not under local law G had the unilateral right to sever her fractional interest. See Section 2-201(2).

Example 5-TOD Registered Securities and POD Account. G registered securities that G owned in TOD form. G also contributed all the funds in a savings

account that G registered in POD Form. X was designated to take the securities and Y was designated to take the savings account on G's death. G died, survived by S, X, and Y.

Because G was the sole owner of the securities immediately before death (see Sections 6-302 and 6-306), and because ownership of the securities passed to X upon G's death (see Section 6-307), the full value of the securities at G's death is included in the augmented estate under paragraph (1)(iii). Because G contributed all the funds in the savings account, G's ownership interest in the savings account immediately before death was 100 percent. See Section 6-211. Because that 100 percentage ownership interest passed by right of survivorship to Y at G's death, the full value of the account at G's death is included in the augmented estate under paragraph (1)(iii).

Exam*ple 6-Joint Checking Account.* G, X, and Y were registered as co-owners of a joint checking account. G contributed 75 percent of the funds in the account. G died, survived by S, X, and Y.

G's ownership interest in the account immediately before death, determined under Section 6-211, was 75 percent of the account. Because that percentage ownership interest passed by right of survivorship to X and Y at G's death, 75 percent of the value of the account at G's death is included in the augmented estate under paragraph (1)(iii).

Example 7-Joint Checking Account. G's mother, M, added G's name to her checking account so that G could pay her bills for her. M contributed all the funds in the account. The account was registered in co-ownership form with right of survivorship. G died, survived by S and M.

Because G had contributed none of his own funds to the account, G's ownership interest in the account immediately before death, determined under Section 6-211, was zero. Consequently, no part of the value of the account at G's death is included in the augmented estate under paragraph (1)(iii).

Example 8-Life Insurance. G, as owner of a life-insurance policy insuring her life, designated X and Y as the beneficiaries of that policy. G died owning the policy, survived by S, X, and Y.

The full value of the proceeds of that policy is included in the augmented estate under paragraph (1)(iv).

Paragraph (2)-Property Transferred by the Decedent During Marriage. This category covers property that the decedent transferred in specified forms during "marriage" (defined in Section 2-201(3) as "any marriage of the decedent to the decedent's surviving spouse"). If the decedent and the surviving spouse were married to each other more than once, transfers that took place during any of their marriages to each other count as transfers during marriage.

The word "transfer," as it relates to a transfer by or of the decedent, is defined in Section 2-201(10), as including "(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] and of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party."

Paragraph (2) covers the following specific forms of transfer:

(i) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

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

Various aspects of paragraph (2) are illustrated by the following examples. Other examples illustrating various aspects of this paragraph are Examples 1 and 3, above, and Example 22 in the Comment to Section 2-206, below. In the following examples, as in the examples above, G is the decedent and S is the decedent's surviving spouse.

Example 9-Retained Income Interest for Life. Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to be paid annually to G for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The value of the corpus of the trust at G's death is included in the augmented estate under paragraph (2)(i). This paragraph applies to a retained income interest that terminates at the decedent's death, as here. The amount included is the value of the property that passes outside probate to any person other than the decedent's estate or surviving spouse, which in this case is the full value of the corpus that passes outside probate to X.

Had G retained the right to only one-half of the income, with the other half payable to Y for G's lifetime, only one half of the value of the corpus at G's death would have been included under paragraph (2)(i) because that paragraph specifies that "the amount included is the value of the fraction of the property to which the decedent's right related." Note, however, that if G had created the trust within two years before death, paragraph (3)(iii) would require the inclusion of the value at the date the trust was established of the other half of the income interest for G's life and of the remainder interest in the other half of the corpus, each value to be reduced by as much as $10,000 as appropriate under the facts, taking into account other gifts made to Y and to X in the same year, if any.

Example 10-Retained Unitrust Interest for a Term. Before death, and during

marriage, G created an irrevocable inter-vivos trust, providing for a fixed percentage of the value of the corpus of the trust (determined annually) to be paid annually to G for ten years, then for the corpus of the trust (and any accumulated income) to go to X. G died six years after the trust was created, survived by S and X.

The full value of the corpus at G's death is included in the augmented estate under a combination of Sections 2-204 and 2-205(2)(i).

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest at G's death. This paragraph applies to a retained income interest, which under Section 2-201(9) includes a unitrust interest. Moreover, Section 2-205(2)(i) not only applies to a retained income interest that terminates at the decedent's death, but also applies to a retained income interest that continues beyond the decedent's death, as here. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's remainder interest at G's death.

Section 2-204 requires the inclusion of the commuted value of the remaining four years of G's unitrust interest because that interest passes through G's probate estate to G's devisees or heirs.

Because both the four-year unitrust interest and the remainder interest that directly succeeds it are included in the augmented estate, there is no need to derive separate values for X's remainder interest and for G's remaining unitrust interest. The sum of the two values will equal the full value of the corpus, and that is the value that is included in the augmented estate. (Note, however, that *for purposes of Section 2-209 (Sources from Which Elective Share Payable),* it might become necessary to derive separate values for these two interests.)

Had the trust been revocable, the end-result would have been the same. The only difference would be that the revocabilty of the trust would cause paragraph (2)(i) to be inapplicable, but would also cause overlapping application of paragraphs (1)(i) and (2)(ii) to X's remainder interest. Because each of these paragraphs yields the same value, Section 2-208(c) would require the commuted value of X's remainder interest to be included in the augmented estate under any one, but only one, of them. Note that neither paragraphs (1)(i) nor (2)(ii) would apply to G's remaining four-year term because that four-year term would have passed to G's estate by lapse of G's power to revoke. As above, the commuted value of G's remaining four-year term would be included in the augmented estate under Section 2-204, obviating the need to derive separate valuations of G's four-year term and X's remainder interest.

Example 11-Personal Residence Trust. Before death, and during marriage, G created an irrevocable inter-vivos trust of G's personal residence, retaining the right to occupy the residence for ten years, then for the residence to go to X. G died six years after the trust was created, survived by S and X.

The full value of the residence at G's death is included in the augmented estate under a combination of Sections 2-204 and 2-205(2)(i).

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest at G's death. This paragraph applies to a retained right to possession that continues beyond the decedent's death, as here. The

amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's remainder interest at G's death.

Section 2-204 requires the inclusion of the commuted value of G's remaining four-year term because that interest passes through G's probate estate to G's devisees or heirs.

As in Example 10, there is no need to derive separate valuations of the remaining four-year term and the remainder interest that directly succeeds it. The sum of the two values will equal the full value of the residence at G's death, and that is the amount included in the augmented estate. (Note, however, that *for purposes of Section 2-209 (Sources from Which Elective Share Payable),* it might become necessary to derive separate values for these two interests.)

Example 12-Retained Annuity Interest for a Term. Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for a fixed dollar amount to be paid annually to G for ten years, then for half of the corpus of the trust to go to X; the other half was to remain in trust for an additional five years, after which time the remaining corpus was to go to X. G died fourteen years after the trust was created, survived by S and X.

The value of the one-half of the corpus of the trust remaining at G's death is included in the augmented estate under a combination of Sections 2-204 and 2-205(2)(i). The other one-half of the corpus of the trust that was distributed to X four years before G's death is not included in the augmented estate.

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest in half of the corpus of the trust. This section applies to a retained income interest, which under Section 2-201(9), includes an annuity interest that continues beyond the decedent's death, as here. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's remainder interest at G's death.

Section 2-204 requires the inclusion of the commuted value of the remaining one year of G's annuity interest in half of the corpus of the trust, which passed through G's probate estate to G's devisees of heirs.

There is no need to derive separate valuations of G's remaining annuity interest and X's remainder interest that directly succeeds it. The sum of the two values will equal the full value of the remaining one-half of the corpus of the trust at G's death, and that is the amount included in the augmented estate. (Note, however, that *for purposes of Section 2-209 (Sources from Which Elective Share Payable),* it might become necessary to derive separate values for these two interests.)

Had G died eleven years after the trust was created, so that the termination of half of the trust would have occurred within the two-year period next preceding G's death, the value of the half of the corpus of the trust that was distributed to X ten years after the trust was created would also have been included in the augmented estate under Section 2-205(3)(i).

Example 13-Commercial Annuity. Before G's death, and during marriage, G purchased three commercial annuities from an insurance company. Annuity One

was a single-life annuity that paid a fixed sum to G annually and that contained a refund feature payable to X if G died within ten years. Annuity Two was a single-life annuity that paid a fixed sum to G annually, but contained no refund feature. Annuity Three was a self and survivor annuity that paid a fixed sum to G annually for life, and then paid a fixed sum annually to X for life. G died six years after purchasing the annuities, survived by S and X.

Annuity One: The value of the refund payable to X at G's death under Annuity One is included in the augmented estate under paragraph (2)(i). G retained an income interest, as defined in Section 2-201(9), that terminated at G's death. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the refund amount to which X is entitled.

Annuity Two: Annuity Two does not cause any value to be included in the augmented estate because it expired at G's death; although G retained an income interest, as defined in Section 2-201(9), that terminated at G's death, nothing passed outside probate to any person other than G's estate or surviving spouse.

Annuity Three: The commuted value at G's death of the annuity payable to X under Annuity Three is included in the augmented estate under paragraph (2)(i). G retained an income interest, as defined in Section 2-201(9), that terminated at G's death. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's right to the annuity payments for X's lifetime.

Example 14-Joint Power. Before death, and during marriage, G created an inter-vivos trust, providing for the income to go to X for life, remainder in corpus at X's death to X's then-living descendants, by representation; if none, to a specified charity. G retained a power, exercisable only with the consent of X, allowing G to withdraw all or any portion of the corpus at any time during G's lifetime. G died without exercising the power, survived by S and X.

The value of the corpus of the trust at G's death is included in the augmented estate under paragraph (2)(ii). This paragraph applies to a power created by the decedent over the corpus of the trust that is exercisable by the decedent "in conjunction with any other person," who in this case is X. Note that the fact that X has an interest in the trust that would be adversely affected by the exercise of the power in favor of G is irrelevant. The amount included is the full value of the corpus of the trust at G's death because the power related to the full corpus of the trust and the full corpus passed at the decedent's death, by lapse or default of the power, to a person other than the decedent's estate or surviving spouse-X, X's descendants, and the specified charity.

Example 15-Power in Nonadverse Party. Before death, and during marriage, G created an inter-vivos trust, providing for the income to go to X for life, remainder in corpus to X's then-living descendants, by representation; if none, to a specified charity. G conferred a power on the trustee, a bank, to distribute, in the trustee's complete and uncontrolled discretion, all or any portion of the trust corpus to G or to X. One year before G's death, the trustee distributed $50,000 of trust corpus to G and $40,000 of trust corpus to X. G died, survived by S and X.

The full value of the portion of the corpus of the trust remaining at G's death is included in the augmented estate under paragraph (2)(ii). This paragraph applies to a power created by the decedent over the corpus of the trust that is exercisable by a "nonadverse party." As defined in Section 2-201(4), the term "nonadverse party" is "a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he [or she] possesses respecting the trust or other property arrangement. "The trustee in this case is a nonadverse party. The amount included is the full value of the corpus of the trust at G's death because the trustee's power related to the full corpus of the trust and the full corpus passed at the decedent's death, by lapse or default of the power, to a person other than the decedent's estate or surviving spouse-X, X's descendants, and the specified charity.

In addition to the full value of the remaining corpus at G's death, an additional amount is included in the augmented estate because of the $40,000 distribution of corpus to X within two years before G's death. As defined in Section 2-201(10), a transfer of the decedent includes the exercise "of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party." Consequently, the $40,000 distribution to X is considered to be a transfer of the decedent within two years before death, and is included in the augmented estate under paragraph (3)(iii) to the extent it exceeded $10,000 of the aggregate gifts to X that year. If no other gifts were made to X in that year, the amount included would be $30,000 ($40,000 168 $10,000).

Paragraph (3)-Property Transferred by the Decedent During Marriage and During the Two-Year Period Next Preceding the Decedent's Death. This paragraph-called the two-year rule-requires inclusion in the augmented estate of the value of property that the decedent transferred in specified forms during marriage and within two years of death. The word "transfer," as it relates to a transfer by or of the decedent, is defined in Section 2-201(10), as including "(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] and of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party."

The two-year rule of paragraph (3) covers the following specific forms of transfer:

(i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1)(i), (ii), or (iii), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power

terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(i), "termination" occurs when the power terminated by exercise or release, but not otherwise.

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

(iii) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in either of the two years exceeded $10,000.

Various aspects of paragraph (3) are illustrated by the following examples. Other examples illustrating various aspects of this paragraph are Examples 2, 9, 12, 14, and 15, above, and Examples 33 and 34 in the Comment to Section 2-207, below. In the following examples, as in the examples above, G is the decedent and S is the decedent's surviving spouse.

Example 16-Retained Income Interest Terminating Within Two Years Before Death. Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to G for ten years, then for the corpus of the trust to go to X. G died 11 years after the trust was created, survived by S and X. G was married to S when the trust terminated.

The full value of the corpus of the trust at the date of its termination is included in the augmented estate under paragraph (3)(i). The full value of the corpus at death would have been included in the augmented estate under paragraph (2)(i) had G's income interest not terminated until death; G's income interest terminated within the two-year period next preceding G's death; G was married to S when the trust was created and when the income interest terminated; and the trust corpus upon termination passed to a person other than S, G, or G's estate.

Example 17-Personal Residence Trust Terminating Within Two Years Before Death. Before death, and during marriage, G created an irrevocable inter-vivos trust of G's personal residence, retaining the right to occupy the residence for ten years, then for the residence to go to X. G died eleven years after the trust was created, survived by S and X. G was married to S when the right to possession terminated.

The full value of the residence at the date the trust terminated is included in the augmented estate under paragraph (3)(i). The full value of the residence would have been included in the augmented estate under paragraph (2)(i) had G's right to possession not terminated until death; G's right to possession terminated within the two-year period next preceding G's death; G was married to S when the trust was created and when the right to possession terminated; and the residence passed upon termination to a person other than S, G, or G's estate.

Example 18-Irrevocable Assignment of Life-Insurance Policy Within Two Years Before Death. In Example 8, G irrevocably assigned the life-insurance policy to X and Y within two years preceding G's death. G was married to S when the

policy was assigned. G died, survived by S, X, and Y.

The full value of the proceeds are included in the augmented estate under paragraph (3)(ii). The full value of the proceeds would have been included in the augmented estate under paragraph (1)(iv) had G owned the policy at death; G assigned the policy within the two-year period next preceding G's death; G was married to S when the policy was assigned; and the proceeds were payable to a person other than S or G's estate.

Example 19-Property Purchased in Joint Tenancy Within Two Years Before Death. Within two years before death, and during marriage, G and X purchased property in joint tenancy; G contributed $75,000 of the $100,000 purchase price and X contributed $25,000. G died, survived by S and X.

Regardless of when or by whom the property was purchased, the value at G's death of G's fractional interest of one-half is included in the augmented estate under paragraph (1)(ii) because G's half passed to X as surviving joint tenant. Because the property was purchased within two years before death, and during marriage, and because G's contribution exceeded the value of G's fractional interest in the property, the excess contribution of $25,000 constitutes a gift to X within the two-year period next preceding G's death. Consequently, an additional $15,000 ($25,000 minus $10,000) is included in the augmented estate under paragraph (3)(iii) as a gift to X.

Had G provided all of the $100,000 purchase price, then paragraph (3)(iii) would require $40,000 ($50,000 minus $10,000) to be included in the augmented estate (in addition to the inclusion of one-half the value of the property at G's death under paragraph (1)(ii).

Had G provided one-half or less of the $100,000 purchase price, then G would not have made a gift to X within the two-year period next preceding G's death. Half the value of the property at G's death would still be included in the augmented estate under paragraph (1)(ii), however.

Cross Reference. On obtaining written spousal consent to assure qualification for the charitable deduction for charitable remainder trusts or outright charitable donations, see the Comment to Section 2-208.

Historical Note. This Comment was added in 1993.

Section 2-206. Decedent's Nonprobate Transfers to the Surviving Spouse.

Excluding property passing to the surviving spouse under the federal Social Security system, the value of the augmented estate includes the value of the decedent's nonprobate transfers to the decedent's surviving spouse, which consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(1) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant,

(2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner, and

(3) all other property that would have been included in the augmented estate under Section 2-205(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

COMMENT

This section, which in the 1990 version appeared in substance as a paragraph of a single, long section defining the augmented estate, establishes as the third component of the augmented estate the value of the decedent's nonprobate transfers to the decedent's surviving spouse. Under this section, the decedent's nonprobate transfers to the decedent's surviving spouse:

consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(1) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant,

(2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner, and

(3) all other property that would have been included in the augmented estate under Section 2-205(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

Property passing to the surviving spouse under the federal Social Security system is excluded.

Various aspects of Section 2-206 are illustrated by the following examples. In these examples, as in the examples in the Comment to Section 2-205, above, G is the decedent and S is the decedent’s surviving spouse.

Example 20-Tenancy by the Entirety. G and S own property in tenancy by the entirety. G died, survived by S.

Because the definition in Section 1-201 of "joint tenants with the right of survivorship" includes tenants by the entirety, the provisions of Section 2-206 relating to joint tenancies with right of survivorship apply to tenancies by the entirety.

In total, therefore, the full value of the property is included in the

augmented estate-G's one-half under Section 2-206(1) and S's one-half under Section 2-207(a)(1)(i).

Section 2-206(1) requires the inclusion of the value of G's one-half fractional interest because it passed to S as surviving joint tenant.

Section 2-207(a)(1)(i) requires the inclusion of S's one-half fractional interest. Because G was a joint tenant immediately before G's death, S's fractional interest, for purposes of Section 2-207, is determined immediately before G's death, disregarding the fact that G predeceased S. Immediately before G's death, S's fractional interest was then a one-half fractional interest. Despite Section 2-205(1)(ii), none of S's fractional interest is included under Section 2-207(a)(2) because that provision does not apply to fractional interests that are included under Section 2-207(a)(1)(i). Consequently, the value of S's one-half interest is included under Section 2-207(a)(1)(i) but not under Section 2-207(a)(2).

Example 21-Joint Tenancy. G, S, and X own property in joint tenancy. G died more than two years after the property was titled in that form, survived by S and X.

In total, two-thirds of the value of the property at G's death is included in the augmented estate-one-sixth under Section 2-205, one-sixth under Section 2-206, and one-third under Section 2-207.

Section 2-205(1)(ii) requires the inclusion of half of the value of G's one-third fractional interest because that half passed by right of survivorship to X.

Section 2-206(1) requires the inclusion of the value of the other half of G's one-third fractional interest because that half passed to S as surviving joint tenant.

Section 2-207(a)(1)(i) requires the inclusion of the value of S's one-third interest. Because G was a joint tenant immediately before G's death, S's fractional interest, for purposes of Section 2-207, is determined immediately before G's death, disregarding the fact that G predeceased S. Immediately before G's death, S's fractional interest was then a one-third fractional interest. Despite Section 2-205(1)(ii), none of S's fractional interest is included under Section 2-207(a)(2) because that provision does not apply to fractional interests that are included under Section 2-207(a)(1)(i). Consequently, the value of S's one-third fractional interest is included in the augmented estate under Section 2-207(a)(1)(i) but not under Section 2-207(a)(2).

Example 22-Income Interest Passing to Surviving Spouse. Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the income to go to S for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The full value of the corpus of the trust at G's death is included in the augmented estate under a combination of Sections 2-205 and 2-206.

Section 2-206(3) requires the inclusion of the commuted value of S's income interest. Note that, although S owns the income interest as of G's death, the value of S's income interest is not included under Section 2-207 because Section 2-207 only includes property interests that are not included under

Section 2-206.

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest.

Example 23-Corpus Passing to Surviving Spouse. Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the corpus of the trust to go to S. G died, survived by S.

The value of the corpus of the trust at G's death is included in the augmented estate under Section 2-206(3). Note that, although S owns the corpus as of G's death, the value of S's ownership interest in the corpus is not included under Section 2-207 because Section 2-207 only includes property interests that are not included under Section 2-206.

Example 24-TOD Registered Securities, POD Account, and Life Insurance Payable to Surviving Spouse. In Examples 5 and 8 in the Comment to Section 2-205, G designated S to take the securities on death, registered S as the beneficiary of the POD savings account, and named S as the beneficiary of the life-insurance policy.

The same values that were included in the augmented estate under Section 2-205(1) in those examples are included in the augmented estate under Section 2-206.

Example 25-Joint Checking Account. G and S were registered as co-owners of a joint checking account. G contributed 75 percent of the funds in the account and S contributed 25 percent of the funds. G died, survived by S.

G's ownership interest in the account immediately before death, determined under Section 6-211, was 75 percent of the account. Because that percentage ownership interest passed by right of survivorship to S at G's death, 75 percent of the value of the account at G's death is included in the augmented estate under Section 2-206. The remaining 25 percent of the account is included in the augmented estate under Section 2-207.

Historical Note. This Comment was added in 1993.

Section 2-207. Surviving Spouse's Property and Nonprobate Transfers to Others.

(a) **[Included Property.]** Except to the extent included in the augmented estate under Section 2-204 or 2-206, the value of the augmented estate includes the value of:

(1) property that was owned by the decedent's surviving spouse at the decedent's death, including:

(i) the surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship,

(ii) the surviving spouse's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, and

(iii) property that passed to the surviving spouse by reason of the decedent's death, but not including the spouse's right to homestead allowance, family allowance, exempt property, or payments under the federal Social Security system; and

(2) property that would have been included in the surviving spouse's nonprobate transfers to others, other than the spouse's fractional and ownership interests included under subsection (a)(1)(i) or (ii), had the spouse been the decedent.

(b) **[Time of Valuation.]** Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of subsection (a)(1)(i) and (ii), the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of subsection (a)(2), proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under Section 2-205(1)(iv) are not valued as if he [or she] were deceased.

(c) **[Reduction for Enforceable Claims.]** The value of property included under this section is reduced by enforceable claims against the surviving spouse.

COMMENT

This section, which in the 1990 version appeared in substance as a paragraph of a single, long section defining the augmented estate, establishes as the fourth component of the augmented estate the value of property owned by the surviving spouse at the decedent's death plus the value of amounts that would have been includible in the surviving spouse's nonprobate transfers to others had the spouse been the decedent, reduced by enforceable claims against that property or that spouse, as provided in Sections 2-207(c) and 2-208(b)(1).

Note that amounts that would have been includible in the surviving spouse's nonprobate transfers to others under Section 2-205(1)(iv) are not valued as if he or she were deceased. Thus, if, at the decedent's death, the surviving spouse owns a $1 million life-insurance policy on his or her life, payable to his or her sister, that policy would not be valued at its face value of $1 million, but rather could be valued under the method used in the federal estate tax under Treas. Reg. § 20.2031-8.

The purpose of combining the estates and nonprobate transfers of both spouses is to implement a partnership or marital-sharing theory. Under that theory, there is a fifty/fifty split of the property acquired by *both* spouses. Hence the redesigned elective share includes the survivor's net assets in the augmented-estate entity. (Under a different rationale, no longer appropriate under the redesigned system, the pre-1990 version of Section 2-202 also added the value of property owned by the surviving spouse, but only to the extent the

owned property had been derived from the decedent. An incidental benefit of the redesigned system is that this tracing-to-source feature of the pre-1990 version is eliminated.)

Various aspects of Section 2-207 are illustrated by the following examples. Other examples illustrating various aspects of this section are Examples 20, 21, 22, 23, and 25 in the Comment to Section 2-206. In the following examples, as in the examples in the Comments to Sections 2-205 and 2-206, above, G is the decedent and S is the decedent’s surviving spouse.

Example 26-Inter-Vivos Trust Created by Surviving Spouse; Corpus Payable to Spouse at Decedent's Death. Before G's death, and during marriage, S created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the corpus of the trust to go to S. G died, survived by S.

The value of the corpus of the trust at G's death is included in the augmented estate under Section 2-207(a)(1) as either an interest owned by S at G's death or as an interest that passed to the spouse by reason of G's death.

Example 27-Inter-Vivos Trust Created by Another; Income Payable to Spouse for Life. Before G's death, X created an irrevocable inter-vivos trust, providing for the income to go to S for life, then for the income to go to G for life, then for the corpus of the trust to go to Y. G died, survived by S and Y.

The commuted value of S's income interest as of G's death is included in the augmented estate under Section 2-207(a), as a property interest owned by the surviving spouse at the decedent's death.

Example 28-Inter-Vivos Trust Created by Another; Income Payable to Spouse for Life. Before G's death, X created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the income to go to S for life, then for the corpus of the trust to go to Y. G died, survived by S and Y.

The commuted value of S's income interested at the decedent's death is included in the augmented estate under Section 2-207(a)(1), as either a property interest owned by the surviving spouse at the decedent's death or a property interest that passed to the surviving spouse by reason of the decedent's death.

Example 29-Life Insurance on Decedent's Life Owned by Surviving Spouse; Proceeds Payable to Spouse. Before G's death, S bought a life-insurance policy on G's life, naming S as the beneficiary. G died, survived by S.

The value of the proceeds of the life-insurance policy is included in the augmented estate under Section 2-207(a)(1), as property owned by the surviving spouse at the decedent's death.

Example 30-Life Insurance on Decedent's Life Owned by Another; Proceeds Payable to Spouse. Before G's death, X brought a life-insurance policy on G's life, naming S as the beneficiary. G died, survived by S.

The value of the proceeds of the life-insurance policy is included in the augmented estate under Section 2-207(a)(1)(iii), as property that passed to the surviving by reason of the decedent's death.

Example 31-Joint Tenancy Between Spouse and Another. S and Y own property in joint tenancy. G died, survived by S and Y.

The value of S's one-half fractional interest at G's death is included in the augmented estate under Section 2-207(a)(1)(i). Despite Section 2-205(1)(ii), none of S's fractional interest is included under Section 2-207(a)(2) because that provision does not apply to fractional interests required to be included under Section 2-207(a)(1)(i). Consequently, the value of S's one-half is included under Section 2-207(a)(1)(i) but not under Section 2-207(a)(2).

Example 32-Inter-Vivos Trust with Retained Income interest Created by Surviving Spouse. Before G's death, and during marriage, S created an irrevocable inter-vivos trust, providing for the income to go to S for life, then for the income to go to G for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The value of the trust corpus at G's death is included in the augmented estate under Section 2-207(a)(2) because, if S were the decedent, that value would be included in the spouse's nonprobate transfers to others under Section 2-205(2)(i). Note that property included under Section 2-207 is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account. Thus, G's remainder in income for life is extinguished, and the full value of the corpus is included in the augmented estate under Section 2-207(a)(2). The commuted value of S's income interest would also be included under Section 2-207(a)(1) but for the fact that Section 2-208(c) provides that when two provisions apply to the same property interest, the interest is not included under both provisions, but is included under the provision yielding the highest value. Consequently, since Section 2-207(a)(2) yields a higher value (the full corpus) than Section 2-207(a)(1) (the income interest), and since the income interest is part of the value of the corpus, and hence both provisions apply to the same property interest, the full corpus is included under Section 2-207(a)(2) and nothing is included under Section 2-207(a)(1).

Example 33-Inter-Vivos Trust Created by Decedent; Income to Surviving Spouse. More than two years before G's death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to S for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The commuted value of S's income interest as of G's death is included in the augmented estate under Section 2-207. If G had created the trust within the two-year period next preceding G's death, the commuted value of X's remainder interest as of the date of the creation of the trust (less $10,000, assuming G made no other gifts to X in that year) would also have been included in the augmented estate under Section 2-205(3)(iii).

Example 34-Inter-Vivos Trust Created by Surviving Spouse; No Retained Interest or Power. More than two years before G's death, and during marriage, S created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the corpus of the trust to go to Y. G died, survived by S and Y.

The value of the trust is not included in the augmented estate. If S had created the trust within the two-year period next preceding G's death, the commuted value of Y's remainder interest as of the date of the creation of the

trust (less $10,000, assuming no other gifts to Y in that year) would have been included in the augmented estate under Section 2-207(a)(2) because if S were the decedent, the value of the remainder interest would have been included in S's nonprobate transfers to others under Section 2-205(3)(iii).

Historical Note. This Comment was added in 1993.

Section 2-208. Exclusions, Valuation, and Overlapping Application.

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

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

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

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

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

COMMENT

Subsection (a). This subsection excludes from the decedent's nonprobate transfers to others the value of any property (i) to the extent that the decedent received adequate and full consideration in money or money's worth for a transfer of the property or (ii) if the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse.

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

Obtaining the Charitable Deduction for Transfers Coming Within Section 2-205(2) or (3). Because, under Section 2-201(10), the term "right to income" includes a right to payments under an annuity trust or a unitrust, the value of a charitable remainder trust established by a married grantor without written

spousal consent or joinder would be included in the decedent's nonprobate transfers to others under Section 2-205(2)(i). Consequently, a married grantor planning to establish a charitable reminder trust is advised to obtain the written consent of his or her spouse to the transfer, as provided in Section 2-208(a), in order to be assured of qualifying for the charitable deduction.

Similarly, outright gifts made by a married donor within two years preceding death are included in the augmented estate under Section 2-205(3)(iii) to the extent that the aggregate gifts to any one donee exceed $10,000 in either of the two years. Consequently, a married donor planning to donate more than $10,000 to any charitable organization within a twelve-month period is advised to obtain the written consent of his or her spouse to the transfer, as provided in Section 2-208(a), in order to be assured of qualifying for the charitable deduction.

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

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

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

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

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

Historical Note. This Comment was added in 1993.

Section 2-209. Sources from Which Elective Share Payable.

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

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

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

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

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

COMMENT

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

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

(1) amounts included in the augmented estate under Section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent's nonprobate transfers to the surviving spouse, including the proceeds of insurance (including accidental death benefits) on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, but excluding property passing under the Federal Social Security system; and

(2) amounts included in the augmented estate under Section 2-207 up to the applicable percentage thereof, the applicable percentage being twice the elective-share percentage as determined under Section 2-202(a). (The phrase "amounts included in the augmented estate under Section 2-207" refers to the value of property owned by the surviving spouse at the decedent's death, plus the value of property that would have been includible in the spouse's nonprobate transfers to others had the surviving spouse been the decedent, reduced by enforceable claims against included property and against the surviving spouse.)

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

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

Subsections (b) and (c) establish a layer of priority within the decedent's probate estate and nonprobate transfers to others. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others that was not included in the augmented estate under Section 2-205(3)(i) or (iii) are liable first. Only if and to the extent that those amounts are insufficient does the remaining portion of the decedent's nonprobate transfers to others become liable.

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

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

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

Section 2-210. Personal Liability of Recipients.

(a) Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to him [or her] or to pay the value of the amount for which he [or she] is liable.

(b) If any section or part of any section of this Part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in Section 2-209, to the person who would have been entitled to it were that section or part of that section not preempted.

Section 2-211. Proceeding for Elective Share; Time Limit.

(a) Except as provided in subsection (b), the election must be made by filing in the Court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse must give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's nonprobate transfers to others are not included within the augmented estate for the purpose of computing the elective-share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's nonprobate transfers to others are not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse may withdraw his [or her] demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under Sections 2-209 and 2-210. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he [or she] would have been under Sections 2-209 and 2-210 had relief been secured against all persons subject to contribution.

(e) An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this State or other jurisdictions.

COMMENT

This section is revised to coordinate the terminology with that used in revised Section 2-205 and with the fact that an election can be made by a conservator, guardian, or agent on behalf of a surviving spouse, as provided in Section 2-212(a).

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 98 (Supp. 1992).

Section 2-212. Right of Election Personal to Surviving Spouse; Incapacitated Surviving Spouse.

(a) **[Surviving Spouse Must Be Living at Time of Election.]** The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under Section 2-211(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his [or her] conservator, guardian, or agent under the authority of a power of attorney.

(b) **[Incapacitated Surviving Spouse.]** If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective-share and supplemental elective-share amounts due from the decedent’s probate estate and recipients of the decedent’s nonprobate transfers to others under Section 2-209(b) and (c) must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated

person. For purposes of the custodial trust established by this subsection, (i) the electing guardian, conservator, or agent is the custodial trustee, (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust is deemed to have been created by the decedent spouse by written transfer that takes effect at the decedent spouse's death and that directs the custodial trustee to administer the custodial trust as for an incapacitated beneficiary.

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

> (1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.
>
> (2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order but with regard to other support, income, and property of the beneficiary [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need.
>
> (3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial trust property in the following order: (i) under the residuary clause, if any, of the will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the beneficiary; or (ii) to that predeceased spouse's heirs under Section 2-711 of [this State's] Uniform Probate Code.

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

[(b) **[Incapacitated Surviving Spouse.]** If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the Court must set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section 2-209(b) and (c) and must appoint a trustee to

administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the Court determines appropriate:

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

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

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

COMMENT

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

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

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

attorney, the surviving spouse is presumed to be an "incapacitated person"; the presumption is rebuttable.

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

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

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

At the surviving spouse's death, the remaining custodial trust property does not go to the surviving spouse's estate, but rather under the residuary clause of the will of the predeceased spouse whose probate estate and nonprobate transfers to others were the source of the property in the custodial trust, as if the predeceased spouse died immediately after the surviving spouse. In the absence of a residuary clause, the property goes to the predeceased spouse's heirs. *See Section 2-711*.

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

Planning for an Incapacitated Surviving Spouse Not Disrupted. Note that the portion of the elective-share or supplemental elective-share amounts that go into the custodial or support trust is that portion due from the decedent's probate estate and nonprobate transfers to others under Section 2-209(b) and (c). These amounts constitute the involuntary transfers to the surviving spouse under the elective-share system. Amounts voluntarily transferred to the surviving spouse under the decedent's will, by intestacy, or by nonprobate transfer, if any, do not go into the custodial or support trust. Thus, estate planning measures deliberately established for a surviving spouse who is incapacitated are not disrupted. For example, the decedent's will might establish a trust that qualifies for or that can be elected as qualifying for the federal estate tax marital deduction. Although the value of the surviving spouse's interests in such a trust count toward satisfying the elective-share amount under Section 2-209(a)(1), the trust itself is not dismantled by virtue of Section 2-212(b) in order to force that property into the nonqualifying custodial or support trust.

Rationale. The approach of this section is based on a general expectation that most surviving spouses are, at the least, generally aware of and accept their decedents' overall estate plans and are not antagonistic to them. Consequently,

to elect the elective share, and not have the disposition of that part of it that is payable from the decedent's probate estate and nonprobate transfers to others under Section 2-209(b) and (c) governed by subsections (b) and (c), the surviving spouse must not be an incapacitated person. When the election is made by or on behalf of a surviving spouse who is not an incapacitated person, the surviving spouse has personally signified his or her opposition to the decedent's overall estate plan.

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

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 95 (Supp. 1992).

Section 2-213. Waiver of Right to Elect and of Other Rights.

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

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

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

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

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

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

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

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

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

COMMENT

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

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

Effect of Premarital Agreement or Waiver on ERISA Benefits. As amended in 1984 by the Retirement Equity Act, ERISA requires each employee benefit plan subject to its provisions to provide that an election of a waiver shall not take effect unless (i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or form benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designation by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of election and is witnessed by a plan representative or a notary public.

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

In *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir.1992), the Court held that a premarital agreement was not an effective waiver of a wife's claims to spousal death benefits under a qualified profit sharing plan in which the deceased husband was the sole participant. The premarital agreement provided, in part, that "each party hereby waives and releases to the other party and to the other party's heirs, executor, administrators and assigns any and all rights and causes of action which may arise by reason of the marriage between the parties ... with respect to any property, real or personal, tangible or intangible ... now owned or hereafter acquired by the other party, as fully as though the parties had never married...." The Court held that the premarital agreement was not an effective waiver because it "did not designate a beneficiary and did not acknowledge the effect of the waiver as required by ERISA." 982 F.2d at 781. Although the district Court had held that the premarital agreement was also ineffective because the wife was not married to the participant when she signed the agreement, the Second Circuit "reserve[d] judgment on whether the [premarital] agreement might have operated as an effective waiver if its only deficiency were that it had been entered into before marriage." Id. at 781 n.

3. The Court did, however, quote *Treas. Reg. § 1.401(a)-20* (1991), which specifically states that "an agreement entered into prior to marriage does not satisfy the applicable consent requirements...." Id.at 782. Other cases involving the validity of premarital agreements on ERISA benefits include *Callahan v. Hutsell, Callahan & Buchino*, 813 F.Supp. 541 (W.D.Ky.1992); *Zinn v. Donaldson Co., Inc.,* 799 F.Supp. 69 (D.Minn.1992); *Estate of Hopkins*, 574 N.E.2d 230 (Ill.App.Ct.1991); *see also Howard v. Branham & Baker Coal Co.*, 1992 U.S.App. LEXIS 16247 (6th Cir.1992).

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

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 97 (Supp. 1992).

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§2-1001 – 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.

Section 2-214. Protection of Payors and Other Third Parties.

(a) Although under Section 2-205 a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

(b) A written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property, and, upon its determination under Section 2-211(d), shall order disbursement in accordance with the determination. If no

petition is filed in the court within the specified time under Section 2-211(a) or, if filed, the demand for an elective share is withdrawn under Section 2-211(c), the court shall order disbursement to the designated beneficiary. Payments or transfers to the court or deposits made into court discharge the payor or other third party from all claims for amounts so paid or the value of property so transferred or deposited.

(c) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this Part.

COMMENT

This section provides protection to "payors" and other third parties who made payments or took any other action before receiving written notice of the spouse's intention to make an election under this Part or that an election has been made. The term "payor" is defined in Section 1-201 as meaning "a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments."

Historical Note. Although this Comment was added in 1993, the substance of the Comment previously appeared as the last paragraph of the Comment to Section 2-202, 8 U.L.A. 92, 93 (Supp. 1992).

PART 3

SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

Section 2-301. Entitlement of Spouse; Premarital Will.

(a) If a testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 to such a child or to a descendant of such a child, unless:

(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse 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.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Section 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902.

COMMENT

Purpose and Scope of the Revisions. This section applies only to a premarital will, a will executed prior to the testator's marriage to his or her surviving spouse. If the decedent and the surviving spouse were married to each other more than once, a premarital will is a will executed by the decedent at any time when they were not married to each other but not a will executed during a prior marriage. This section reflects the view that the intestate share of the spouse in that portion of the testator's estate not devised to certain of the testator's children, under trust or not, (or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the antilapse statute) is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation.

Under this section, a surviving spouse who married the testator after the testator executed his or her will may be entitled to a certain minimum amount of the testator's estate. The surviving spouse's entitlement under this section, if any, is granted automatically; it need not be elected. If the surviving spouse exercises his or her right to take an elective share, amounts provided under this section count toward making up the elective-share amount by virtue of the language in subsection (a) stating that the amount provided by this section is treated as "an intestate share." Under Section 2-209(a)(1), amounts passing to the surviving spouse by intestate succession count first toward making up the spouse's elective-share amount.

Subsection (a). Subsection (a) is revised to make it clear that a surviving spouse who, by a premarital will, is devised, under trust or not, less than the share of the testator's estate he or she would have received had the testator died intestate as to that part of the estate, if any, not devised to certain of the testator's children, under trust or not, (or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the antilapse statute) is entitled to be brought up to that share. Subsection (a) was amended in 1993 to make it clear that any lapsed devise that passes under section 2-604 to a child of the testator by a prior marriage, rather than only to a descendant of such a child, is covered.

Example. G's will devised the residue of his estate "to my two children, A and B, in equal shares." A and B are children of G's prior marriage. G is survived by A and by G's new spouse, X. B predeceases G, without leaving any descendants who survived G by 120 hours. Under Section 2-604, B's half of the residue passes to G's

child, A. A is a child of the testator's prior marriage but not a descendant of B. X's rights under Section 2-301 are to take an intestate share in that portion of G's estate not covered by the residuary clause.

The pre-1990 version of Section 2-301 was titled "*Omitted* Spouse," and the section used phrases such as "*fails* to provide" and "*omitted* spouse." The implication of the title and these phrases was that the section was inapplicable if the person the decedent later married was a devisee in his or her premarital will. It was clear, however, from the underlying purpose of the section that this was not intended. The Courts recognized this and refused to interpret the section that way, but in doing so they have been forced to say that a premarital will containing a devise to the person to whom the testator was married at death could still be found to "fail to provide" for the survivor *in the survivor's capacity as spouse. See Estate of Christensen*, 665 P.2d 646 (Utah 1982); *Estate of Ganier*, 418 So.2d 256 (Fla.1982); Note, *"The Problem of the 'Un-omitted' Spouse Under Section 2-301 of the [Pre-1990] Uniform Probate Code*," 52 U.Chi. L. Rev. 481 (1985). By making the existence and amount of a premarital devise to the spouse irrelevant, the revisions of subsection (a) make the operation of the statute more purposive.

Subsection (a)(1), (2), and (3) Exceptions. The moving party has the burden of proof on the exceptions contained in subsections (a)(1), (2), and (3). For a case interpreting the language of subsection (a)(3), *see Estate of Bartell,* 776 P.2d 885 (Utah 1989). This section can be barred by a premarital agreement, marital agreement, or waiver as provided in Section 2-213.

Subsection (b). Subsection (b) is also revised to provide that the value of any premarital devise to the surviving spouse, equitable or legal, is used first to satisfy the spouse's entitlement under this section, before any other devises suffer abatement. This revision is made necessary by the revision of subsection (a): If the existence or amount of a premarital devise to the surviving spouse is irrelevant, any such devise must be counted toward and not be in addition to the ultimate share to which the spouse is entitled. Normally, a devise in favor of the person whom the testator *later* marries will be a specific or general devise, not a residuary devise. The effect under the pre-1990 version of subsection (b) was that the surviving spouse could take the intestate share under Section 2-301, which in the pre-1990 version was satisfied out of the residue (under the rules of abatement in Section 3-902), *plus* the devise in his or her favor. The revision of subsection (b) prevents this "double dipping," so to speak.

Reference. The theory of this section is discussed in Waggoner, *"Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code,"* 26 Real Prop. Prob. & Tr. J. 683, 748-51 (1992).

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 101 (Supp. 1992).

Section 2-302. Omitted Children.

(a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, 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] executed the will, an 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 parent of the omitted child and that other 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] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(i) 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.

(ii) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (i), 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.

(iii) To the extent feasible, the interest granted an 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.

(iv) In satisfying 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) 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) If at the time of execution of the will the testator fails to provide in his [or her] will for a living child solely because he [or she] 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) In satisfying 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 children because of the mistaken belief that the child is dead.

Basic Purposes and Scope of Revisions. This section is substantially revised. The revisions have two basic objectives. The first basic objective is 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 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 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 revisions is to provide that if the testator had children when he or she 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 follows.

No Child Living When Will Executed. If the testator had no child living when he or she executed the will, subsection (a)(1) provides that an omitted after-born or after-adopted child receives the share he or she 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 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 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 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 (a)(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 (b)(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 will for a living child solely because he or she believes the child to be dead. Extrinsic evidence is admissible to determine whether the testator omitted the living child solely because he or she 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).

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

PART 4

EXEMPT PROPERTY AND ALLOWANCES

GENERAL COMMENT

For decedents who die domiciled in this State, this part grants various allowances to the decedent's surviving spouse and certain children. The allowances have priority over unsecured creditors of the estate and persons to whom the estate may be devised by will. If there is a surviving spouse, all of the allowances described in this Part, which (as revised to adjust for inflation) total $25,000, plus whatever is allowed to the spouse for support during administration, normally pass to the spouse. If the surviving spouse and minor or dependent children live apart from one another, the minor or dependent children may receive some of the support allowance. If there is no surviving spouse, minor or dependent children become entitled to the homestead exemption of $15,000 and to support allowances. The exempt property section confers rights on the spouse, if any, or on all children, to $10,000 in certain chattels, or funds if the unencumbered value of chattels is below the $10,000 level. This provision is designed in part to relieve a personal representative of the duty to sell household chattels when there are children who will have them.

These family protection provisions supply the basis for the important small estate provisions of Article III, Part 12.

States adopting the Code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is probably less need for uniformity of law regarding these provisions than for any of the other parts of this article. Still, it is quite important for all states to limit their homestead, support allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

Cross Reference. Notice that under Section 2-104 a spouse or child claiming under this Part must survive the decedent by 120 hours.

Section 2-401. Applicable Law.

This Part applies to the estate of a decedent who dies domiciled in this State. Rights to homestead allowance, exempt property, and family allowance for a decedent who dies not domiciled in this State are governed by the law of the decedent's domicile at death.

Section 2-402. Homestead Allowance.

A decedent's surviving spouse is entitled to a homestead allowance of [$15,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [$15,000] divided by the number of minor and dependent

children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.

COMMENT

As originally adopted in 1969, the bracketed dollar amount was $5,000. To adjust for inflation, the bracketed amount was increased to $15,000 in 1990.

See Section 2-802 for the definition of "spouse," which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204. "Election" between a provision of a will and homestead is not required unless the will so provides.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-404. The “small estate” line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 12 of Article III dealing with small estates rests on the assumption that the only justification for keeping a decedent’s assets from his creditors is to benefit the decedent’s spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his or her other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the decedent.

[Section 2-402A. Constitutional Homestead.

The value of any constitutional right of homestead in the family home received by a surviving spouse or child must be charged against the spouse or child's homestead allowance to the extent the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution.]

COMMENT

This optional section is designed for adoption only in states with a constitutional homestead provision. The value of the surviving spouse’s constitutional right of homestead may be considerably less than the full value of the family home if the constitution gives him or her only a terminable life estate enjoyable in common with minor children.

Section 2-403. Exempt Property.

In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding $10,000 in excess of any security interests therein, in household furniture, automobiles,

furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt property, is less than $10,000, or if there is not $10,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $10,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share.

COMMENT

As originally adopted in 1969, the dollar amount exempted was set at $3,500. To adjust for inflation, the amount was increased to $10,000 in 1990.

Unlike the exempt amount described in Sections 2-402 and 2-404, the exempt amount described in this section is available in a case in which the decedent left no spouse but left only adult children. The provision in this section that establishes priorities is required because of possible difference between beneficiaries of the exemptions described in this section and those described in Sections 2-402 and 2-404.

Section 2-204 covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an election with reference to exemptions, but that no election is presumed to be required.

Section 2-404. Family Allowance.

(a) In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his [or her] guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance.

(b) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession or by way of elective

share. The death of any person entitled to family allowance terminates the right to allowances not yet paid.

COMMENT

The allowance provided by this section does not qualify for the marital deduction under the federal estate tax because the interest is a non-deductible terminable interest. A broad code must be drafted to provide the best possible protection for the family in all cases, even though this may not provide desired tax advantages for certain larger estates. In the estates falling in the federal estate tax bracket where careful planning may be expected, it is important to the operation of formula clauses that the family allowance be clearly deductible or clearly non-deductible. With the section clearly creating a non-deductible interest, estate planners can create a plan that will operate with certainty. Finally, in order to facilitate administration of this allowance without Court supervision it is necessary to provide a fairly simple and definite framework.

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed. While the death of the principal income producer may necessitate some change in the standard of living, there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. A living trust may provide the needed income without resorting to the probate estate.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note, however, that under the next section the personal representative may not determine an allowance of more that $1500 per month for one year; a Court Order would be necessary if a greater allowance is reasonably necessary.

Section 2-405. Source, Determination, and Documentation.

(a) If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make those selections if the surviving spouse, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. The personal representative may determine the family allowance in a lump sum not exceeding $18,000 or periodic installments not exceeding $1,500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed

payment, or failure to act under this section may petition the court for appropriate relief, which may include a family allowance other than that which the personal representative determined or could have determined.

(b) If the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to the trust established under Section 2-212(b).

COMMENT

Scope and Purpose of Revision. As originally adopted in 1969, the maximum family allowance the personal representative was authorized to determine without Court order was a lump sum of $6,000 or periodic installments of $500 per month for one year. To adjust for inflation, the amounts are increased to $18,000 and $1,500 respectively.

A new subsection (b) is added to provide for the case where the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person. In that case, the personal representative is authorized to add any unexpended portions under the homestead allowance, exempt property, and family allowance to the custodial trust established by Section 2-212(b).

If Domiciliary Assets Insufficient. Note that a domiciliary personal representative can collect against out of state assets if domiciliary assets are insufficient.

Cross References. *See* Sections 3-902, 3-906, and 3-907.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 108 (Supp. 1992).

PART 5

WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

GENERAL COMMENT

Part 5 of Article II is retitled to reflect the fact that it now includes the provisions on will contracts (pre-1990 section 2-701) and on custody and deposit of wills (pre-1990 sections 2-901 and 2-902).

Part 5 deals with capacity and formalities for execution and revocation of wills. The basic intent of the pre-1990 sections was to validate wills whenever possible. To that end, the minimum age for making wills was lowered to eighteen, formalities for a written and attested will were reduced, holographic wills written and signed by the testator were authorized, choice of law as to validity of execution was broadened, and revocation by operation of law was limited to divorce or annulment. In addition, the statute also provided for an optional method of execution with acknowledgment before a public officer (the self-proved will).

These measures have been retained, and the purpose of validating wills whenever possible has been strengthened by the addition of a new section, section 2-503, which allows a will to be upheld despite a harmless error in it execution.

Section 2-501. Who May Make Will.

An individual 18 or more years of age who is of sound mind may make a will.

COMMENT

This section states a uniform minimum age of eighteen for capacity to execute a will. "Minor" is defined in Section 1-201, and may involve an age different from that prescribed here.

Section 2-502. Execution; Witnessed Wills; Holographic Wills.

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

(1) in writing;

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

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

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

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

COMMENT

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

Subsection (a). Three formalities for execution of a witnessed will are imposed. Subsection (a)(1) requires the will to be in writing. Any reasonably permanent record is sufficient. A tape-recorded will has been held not to be "in writing." Estate of Reed, 672 P.2d 829 (Wyo. 1983).

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

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

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

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

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

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

By requiring only the "material portions of the document" to be in the testator's handwriting (rather than requiring, as some existing statutes do,

that the will be "entirely" in the decedent's handwriting), a holograph may be valid even though immaterial parts such as date or introductory wording are printed, typed, or stamped.

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

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

Section 2-503. Harmless Error

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

COMMENT

Purpose of New Section. By way of dispensing power, this new section allows the probate Court to excuse a harmless error in complying with the formal requirements for executing or revoking a will. The measure accords with legislation in force in the Canadian province of Manitoba and in several Australian jurisdictions. The Uniform Laws Conference of Canada approved a comparable measure for the Canadian Uniform Wills Act in 1987.

Legislation of this sort was enacted in the state of South Australia in 1975. The experience there has been closely studied by a variety of law reform commissions and in the scholarly literature. *See, e.g., Law Reform Commission of British Columbia, Report on the Making and Revocation of Wills* (1981); *New South Wales Law Reform Commission, Wills: Execution and Revocation* (1986); *Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law,* 87 Colum. L. Rev. 1 (1987). A similar measure has been in effect in Israel since 1965 *(see British Columbia Report, supra, at 44-46; Langbein, supra,* at 48-51).

Consistent with the general trend of the revisions of the UPC, Section 2-503 unifies the law of probate and nonprobate transfers, extending to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers. *See, e.g., Annot.,* 19 A.L.R.2d 5 (1951) (life insurance beneficiary designations).

Evidence from South Australia suggests that the dispensing power will be applied mainly in two sorts of cases. *See Langbein, supra*, at 15-33. When the testator

misunderstands the attestation requirements of Section 2-502(a) and neglects to obtain one or both witnesses, new Section 2-503 permits the proponents of the will to prove that the defective execution did not result from irresolution or from circumstances suggesting duress or trickery - in other words, that the defect was harmless to the purpose of the formality. The measure reduces the tension between holographic wills and the two-witness requirement for attested wills under Section 2-502(a). Ordinarily, the testator who attempts to make an attested will but blunders will still have achieved a level of formality that compares favorably with that permitted for holographic wills under the Code.

The other recurrent class of case in which the dispensing power has been invoked in South Australia entails alterations to a previously executed will. Sometimes the testator adds a clause, that is, the testator attempts to interpolate a defectively executed codicil. More frequently, the amendment has the character of a revision - the testator crosses out former text and inserts replacement terms. Lay persons do not always understand that the execution and revocation requirements of Section 2-502 call for fresh execution in order to modify a will; rather, lay persons often think that the original execution has continuing effect.

By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which Courts at the trial and appellate levels are urged to police with rigor), Section 2-503 imposes procedural standards appropriate to the seriousness of the issue. Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation. Indeed, as an Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power "actually prevents a great deal of unnecessary litigation," because it eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator's intent. *British Columbia Report, supra,* at 46.

The larger the departure from Section 2-502 formality, the harder it will be to satisfy the Court that the instrument reflects the testator's intent. Whereas the South Australian and Israeli Courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement. *See Langbein, supra, at* 23-29, 49-50. The main circumstance in which the South Australian Courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other. E.g., *Estate of Blakely*, 32 S.A.S.R. 473 (1983). Recently, the New York Court of Appeals remedied such a case without aid of statute, simply on the ground "what has occurred is so obvious, and what was intended so clear." *In re Snide*, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981).

Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases of harmless error.

Reference. The rule of this section is supported by the Restatement (Third) of Property: Wills and Other Donative Transfers § 3.3 (1999)

Section 2-504. Self-Proved Will.

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

I, _____, the testator, sign my name to this instrument this ____ day of _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as [his] [her] will and that [he] [she] signs it willingly (or willingly directs another to sign for [him] [her]), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

The State of _____
County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this ____ day of _____.

(Seal)

(Signed) _____

_____

(Official capacity of officer)

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

The State of _____
County of _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he] [she] had signed willingly (or willingly directed another to sign for [him] [her]), and that [he] [she] executed it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of [his] [her] knowledge the testator was at that time eighteen years or age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this ____, day of _____.

(Seal)

(Signed) _____

_____
(Official capacity of officer)

(c) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.

COMMENT

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

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

Section 2-505. Who May Witness.

(a) An individual generally competent to be a witness may act as a witness to a will.

(b) The signing of a will by an interested witness does not invalidate the will or any provision of it.

COMMENT

This section carries forward the position of the pre-1990 Code. The position adopted simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will is not penalized.

This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance, and the device might be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses.

Under Section 3-406, an interested witness is competent to testify to prove execution of the will.

Section 2-506. Choice of Law as to Execution.

A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

COMMENT

This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of Section 2-502 or 2-503. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this State would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or, if a national of Mexico executes a written will in this state which does not meet the requirements of Section 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators.

Section 2-507. Revocation by Writing or by Act.

(a) A will or any part thereof is revoked:

(1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or

(2) by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will," whether or not the burn, tear, or cancellation touched any of the words on the will.

(b) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(c) The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption

arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

(d) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

COMMENT

Purpose and Scope of Revisions. Revocation of a will may be by either a subsequent will or an authorized act done to the document. Revocation by subsequent will cannot be effective unless the subsequent will is valid.

Revocation by Inconsistency. As originally promulgated, this section provided no standard by which the Courts were to determine whether in a given case a subsequent will with no revocation clause revokes a prior will, wholly or partly, by inconsistency. Some Courts seem to have been puzzled about the standard to be applied. New subsections (b), (c), and (d) codify the workable and common-sense standards set forth in the Restatement (Second) of Property (Donative Transfers) § 34.2 comment b (1991). Under these subsections, the question whether the subsequent will was intended to replace rather than supplement the previous will depends upon whether the second will makes a complete disposition of the testator's estate. If the second will does make a complete disposition of the testator's estate, a presumption arises that the second will was intended to replace the previous will. If the second will does not make a complete disposition of the testator's estate, a presumption arises that the second will was intended to supplement rather than replace the previous will. The rationale is that, when the second will does not make a complete disposition of the testator's estate, the second will is more in the nature of a codicil to the first will. This standard has been applied in the cases without the benefit of a statutory provision to this effect. *E.g., Gilbert v. Gilbert*, 652 S.W.2d 663 (Ky. Ct. App. 1983).

Example. Five years before her death, G executed a will (Will # 1), devising her antique desk to A; $20,000 to B; and the residue of her estate to C. Two years later, A died, and G executed another will (Will # 2), devising her antique desk to A's spouse, X; $10,000 to B; and the residue of her estate to C. Will # 2 neither expressly revoked Will # 1 nor made any other reference to it. G's net probate estate consisted of her antique desk (worth $10,000) and other property (worth $90,000). X, B, and C survived G by 120 hours.

Solution. Will # 2 was presumptively intended by G to replace Will # 1 because Will # 2 made a complete disposition of G's estate. Unless this presumption is rebutted by clear and convincing evidence, Will # 1 is wholly revoked; only Will # 2 is operative on G’s death.

If however, Will #2 had not contained a residuary clause, and hence had not made a complete disposition of G’s estate, “Will #2” is more in the nature of a codicil to Will #1, and solution would be

different. Now, Will #2 would presumptively be treated as having been intended to supplement rather than replace Will #1. In the absence of evidence clearly and convincingly rebutting this presumption, Will #1 would be revoked only to the extent Will #2 is consistent with it; both wills would be operative on G's death, to the extent they are not inconsistent. As to the devise of the antique desk, Will # 2 is inconsistent with Will # 1, and the antique desk would go to X. There being no residuary clause in Will # 2, there is nothing in Will # 2 that is inconsistent with the residuary clause in Will # 1, and so the residue would go to C. The more difficult question relates to the cash devises in the two wills. The question whether they are inconsistent with one another is a question of interpretation in the individual case. Section 2-507 does not establish a presumption one way or the other on that question. If the Court finds that the cash devises are inconsistent with one another, i.e., if the Court finds that the cash devise in Will # 2 was intended to replace rather than supplement the cash devise in Will # 1, then B takes $10,000. But if the Court finds that the cash devises are not inconsistent with one another, B would take $30,000.

Revocatory Act. In the case of an act of revocation done to the document, subsection (a)(2) is revised to provide that a burning, tearing, or canceling is a sufficient revocatory act even though the act does not touch any of the words on the will. This is consistent with cases on burning or tearing *(e.g., White v.Casten*, 46 N.C. 197 (1853) (burning); *Crampton v.Osburn*, 356 Mo. 125, 201 S.W.2d 336 (1947) (tearing)), but inconsistent with most, but not all, cases on cancellation *(e.g., Yont v. Eads*, 317 Mass. 232, 57 N.E.2d 531 (1944); *Kronauge v. Stoecklein,* 33 Ohio App.2d 229, 293 N.E.2d 320 (1972); *Thompson v. Royall*, 163 Va. 492, 175 S.E. 748 (1934); contra, *Warner v. Warner's Estate,* 37 Vt. 356 (1864)). By substantial authority, it is held that removal of the testator's signature-by, for example, lining it through, erasing or obliterating it, tearing or cutting it out of the document, or removing the entire signature page-constitutes a sufficient revocatory act to revoke the entire will. *Board of Trustees of the University of Alabama v. Calhoun,* 514 So.2d 895 (Ala.1987) and cases cited therein.

Subsection (a)(2) is also revised to codify the "conscious-presence" test. As revised, subsection (a)(2) provides that, if the testator does not perform the revocatory act, but directs another to perform the act, the act is a sufficient revocatory act if the other individual performs it in the testator's conscious presence. The act need not be performed in the testator's line of sight. *See* the Comment to Section 2-502 for a discussion of the "conscious-presence" test.

Revocatory Intent. To effect a revocation, a revocatory act must be accompanied by revocatory intent. Determining whether a revocatory act was accompanied by revocatory intent may involve exploration of extrinsic evidence, including the testator's statement as to intent.

Partial Revocation. This section specifically permits partial revocation.

Dependent Relative Revocation. Each Court is free to apply its own doctrine of dependent relative revocation. *See generally Palmer, "Dependent Relative Revocation and Its Relation to Relief for Mistake*," 69 Mich. L. Rev. 989 (1971). Note, however, that dependent relative revocation should less often be necessary under the revised provisions of the Code. Dependent relative revocation is the law of second best, i.e., its application does not produce the result the testator actually intended, but is designed to come as close as possible to that

intent. A precondition to the application of dependent relative revocation is, or should be, good evidence of the testator's actual intention; without that, the Court has no basis for determining which of several outcomes comes the closest to that actual intention.

When there is good evidence of the testator's actual intention, however, the revised provisions of the Code would usually facilitate the effectuation of the result the testator actually intended. If, for example, the testator by revocatory act revokes a second will for the purpose of reviving a former will, the evidence necessary to establish the testator's intent to revive the former will should be sufficient under Section 2-509 to effect a revival of the former will, making the application of dependent relative revocation as to the second will unnecessary. If, by revocatory act, the testator revokes a will in conjunction with an effort to execute a new will, the evidence necessary to establish the testator's intention that the new will be valid should, in most cases, be sufficient under Section 2-503 to give effect to the new will, making the application of dependent relative revocation as to the old will unnecessary. If the testator lines out parts of a will or dispositive provision in conjunction with an effort to alter the will's terms, the evidence necessary to establish the testator's intention that the altered terms be valid should be sufficient under Section 2-503 to give effect to the will as altered, making dependent relative revocation as to the lined-out parts unnecessary.

Section 2-508. Revocation by Change of Circumstances.

Except as provided in Sections 2-803 and 2-804, a change of circumstances does not revoke a will or any part of it.

Section 2-509. Revival of Revoked Will.

(a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

(b) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed.

(c) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later, will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

COMMENT

Purpose and Scope of Revisions. Although a will takes effect as a revoking instrument when it is executed, it takes effect as a dispositive instrument at death. Once revoked, therefore, a will is ineffective as a dispositive instrument unless it has been revived. This section covers the standards to be applied in determining whether a will (Will # 1) that was revoked by a subsequent will (Will # 2), either expressly or by inconsistency, has been revived by the revocation of the subsequent will, i.e., whether the revocation of Will # 2 (the revoking will) revives Will # 1 (the will that Will # 2 revoked).

As revised, this section is divided into three subsections. Subsections (a) and (b) cover the effect of revoking Will # 2 (the revoking will) by a revocatory act under Section 2-507(a)(2). Under subsection (a), if Will # 2 (the revoking will) wholly revoked Will # 1, the revocation of Will # 2 does not revive Will # 1 unless "it is evident from the circumstances of the revocation of [Will # 2] or from the testator's contemporary or subsequent declarations that the testator intended [Will # 1] to take effect as executed." This standard places the burden of persuasion on the proponent of Will # 1 to establish that the decedent's intention was that Will # 1 is to be his or her valid will. Testimony regarding the decedent's statements at the time he or she revokes Will # 2 or at a later date can be admitted. Indeed, all relevant evidence of intention is to be considered by the Court on this question; the open-ended statutory language is not to be undermined by translating it into discrete subsidiary elements, all of which must be met, as the Court did in *Estate of Boysen,* 309 N.W.2d 45 (Minn. 1981). *See Langbein to Waggoner, "Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code,"* 55 Alb. L. Rev. 871, 885-87 (1992).

The pre-1990 version of this section did not distinguish between complete and partial revocation. Regardless of whether Will # 2 wholly or partly revoked Will # 1, the pre-1990 version presumed against revival of Will # 1 when Will # 2 was revoked by act.

As revised, this section properly treats the two situations as distinguishable. The presumption against revival imposed by subsection (a) is justified because where Will # 2 wholly revoked Will # 1, the testator understood or should have understood that Will # 1 had no continuing effect. Consequently, subsection (a) properly presumes that the testator's act of revoking Will # 2 was not accompanied by an intent to revive Will # 1.

Subsection (b) establishes the opposite presumption where Will # 2 (the revoking will) revoked Will # 1 only in part. In this case, the revocation of Will # 2 revives the revoked part or parts of Will # 1 unless "it is evident from the circumstances of the revocation of [Will # 2] or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed." This standard places the burden of persuasion on the party arguing that the revoked part or parts of Will # 1 were not revived. The justification is that where Will # 2 only partly revoked Will # 1, Will # 2 is only a codicil to Will # 1, and the testator knows (or should know) that Will # 1 does have continuing effect. Consequently, subsection (b) properly presumes that the testator's act of revoking Will # 2 (the codicil) was accompanied by an intent to revive or reinstate the revoked parts of Will # 1.

Subsection (c) covers the effect on Will # 1 of revoking Will # 2 (the revoking will) by another, later, will (Will # 3). Will # 1 remains revoked except to the extent that Will # 3 shows an intent to have Will # 1 effective.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 118 (Supp. 1992).

Section 2-510. Incorporation by Reference.

A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

COMMENT

This section codifies the common-law doctrine of incorporation by reference, except that the sometimes troublesome requirement that the will refer to the document as being in existence when the will was executed has been eliminated.

Section 2-511. Testamentary Additions to Trusts.

(a) A will may validly devise property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person, or by some other person, including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts, or (ii) at the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(b) Unless the testator's will provides otherwise, property devised to a trust described in subsection (a) is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised, and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(c) Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise to lapse.

COMMENT

Purpose and Scope of Revisions. In addition to making a few stylistic changes, several substantive changes in this section are made.

As revised, it has been made clear that the "trust" need not have been established (funded with a trust res) during the decedent's lifetime, but can be established (funded with a res) by the devise itself. The pre-1990 version probably contemplated this result and reasonably could be so interpreted (because of the phrase "regardless of the *existence* . . . of the corpus of the trust"). Indeed, a few cases have expressly stated that statutory language like the pre-1990 version of this section authorizes pour-over devises to unfunded trusts. *E.g., Clymer v. Mayo,* 473 N.E.2d 1084 (Mass. 1985); *Trosch v. Maryland Nat'l Bank,* 32 Md. App. 249, 359 A.2d 564 (1976). The authority of these pronouncements is problematic, however, because the trusts in these cases were so-called "unfunded" life-insurance trusts. An unfunded life-insurance trust is not a trust without a trust res; the trust res in an unfunded life-insurance trust is the contract right to the proceeds of the life-insurance policy conferred on the trustee by virtue of naming the trustee the beneficiary of the policy. *See Gordon v. Portland Trust Bank,* 201 Or. 648, 271 P.2d 653 (1954) ("[T]he [trustee as the] beneficiary [of the policy] is the owner of a promise to pay the proceeds at the death of the insured . . . "); *Gurnett v. Mutual Life Ins. Co.,* 356 Ill. 612, 191 N.E. 250 (1934). Thus, the term "unfunded life-insurance trust" does not refer to an unfunded trust, but to a funded trust that has not received *additional* funding. For further indication of the problematic nature of the idea that the pre-1990 version of this section permits pour-over devises to unfunded trusts, *see Estate of Daniels,* 665 P.2d 594 (Colo. 1983) (pour-over devise failed; before signing the trust instrument, the decedent was advised by counsel that the "mere signing of the trust agreement would not activate it and that, before the trust could come into being, [the decedent] would have to fund it;" decedent then signed the trust agreement and returned it to counsel "to wait for further directions on it;" no further action was taken by the decedent prior to death; the decedent's will devised the residue of her estate to the trustee of the trust, but added that the residue should go elsewhere "if the trust created by said agreement is not in effect at my death.")

Additional revisions of this section are designed to remove obstacles to carrying out the decedent's intention that were contained in the pre-1990 version. These revisions allow the trust terms to be set forth in a written instrument executed after as well as before or concurrently with the execution of the will; require the devised property to be administered in accordance with the terms of the trust as amended after as well as before the decedent's death, even though the decedent's will does not so provide; and allow the decedent's will to provide that the devise is not to lapse even if the trust is revoked or terminated before the decedent's death.

Revision of Uniform Testamentary Additions to Trusts Act. The freestanding Uniform Testamentary Additions to Trusts Act (UTATA) was revised in 1991 in accordance with the revisions to UPC §2-511. States that enact Section 2-511 need not enact the UTATA as revised in 1991 and should repeal the original version of UTATA if previously enacted in the state.

Section 2-512. Events of Independent Significance.

A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

Section 2-513. Separate Writing Identifying Devise of Certain Types of Tangible Personal Property.

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

COMMENT

Purpose and Scope of Revision. As part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his or her will to a separate document disposing of tangible personalty other than money. The pre-1990 version precluded the disposition of "evidences of indebtedness, documents of title, and securities, and property used in a trade or business." These limitations are deleted in the revised version, partly to remove a source of confusion in the pre-1990 version, which arose because evidences of indebtedness, documents of title, and securities are not items of tangible personal property to begin with, and partly to permit the disposition of a broader range of items of tangible personal property.

The language "items of tangible personal property" does not require that the separate document specifically itemize each item of tangible personal property covered. The only requirement is that the document describe the items covered "with reasonable certainty." Consequently, a document referring to "all my tangible personal property other than money" or to "all my tangible personal property located in my office" or using similar catch-all type of language would normally be sufficient.

The separate document disposing of an item or items of tangible personal property may be prepared after execution of the will, so would not come within Section 2-510 on incorporation by reference. It may even be altered from time to time. The only requirement is that the document be signed by the testator. The pre-1990 version of this section gave effect to an unsigned document if it was in the testator's handwriting. The revisions remove the language giving effect to such an unsigned document. The purpose is to prevent a mere handwritten draft from becoming effective without sufficient indication that the testator intended it to be effective. The signature requirement is designed to prevent mere drafts from becoming effective against the testator's wishes. An unsigned document could still be given effect under Section 2-503, however, if the proponent could carry the burden of proving by clear and convincing evidence that the testator intended the document to be effective.

The typical case covered by this section would be a list of personal effects and the persons whom the decedent desired to take specified items.

Sample Clause. Section 2-513 might be utilized by a clause in the decedent's

will such as the following:

I might leave a written statement or list disposing of items of tangible personal property. If I do and if my written statement or list is found and is identified as such by my Personal Representative no later than 30 days after the probate of this will, then my written statement or list is to be given effect to the extent authorized by law and is to take precedence over any contrary devise or devises of the same item or items of property in this will.

Section 2-513 only authorizes disposition of tangible personal property "not otherwise specifically disposed of by the will." The sample clause above is consistent with this restriction. By providing that the written statement or list takes precedence over any contrary devise in the will, a contrary devise is made conditional upon the written statement or list not contradicting it; if the written statement or list does contradict a devise in the will, the will does not otherwise specifically dispose of the property.

If, however, the clause in the testator's will does not provide that the written statement or list is to take precedence over any contrary devise in the will (or contain a provision having similar effect), then the written statement or list is ineffective to the extent it purports to dispose of items of property that were otherwise specifically disposed of by the will.

Section 2-514. Contracts Concerning Succession.

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Article, may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

COMMENT

Section Relocated. No substantive revision of this section is made, but the section is relocated and renumbered to make room for new Part 7.

The purpose of this section is to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

This section does not preclude recovery in quantum meruit for the value of services rendered the testator.

Section 2-515. Deposit of Will with Court in Testator's Lifetime.

A will may be deposited by the testator or the testator's agent with any court for safekeeping, under rules of the court. The will must be sealed and kept confidential. During the testator's lifetime, a deposited will must be delivered only to the testator or to a person authorized in writing signed by the testator to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible, and to ensure that it will be resealed and kept on deposit after the examination. Upon being informed of the testator's death, the court shall notify any person designated to receive the will and deliver it to that person on request; or the court may deliver the will to the appropriate court.

COMMENT

Many states already have statutes permitting deposit of wills during a testator's lifetime. Most of these statutes have elaborate provisions governing purely administrative matters: how the will is to be enclosed in a sealed wrapper, what is to be endorsed on the wrapper, the form of receipt or certificate given to the testator, the fee to be charged, how the will is to be opened after testator's death and who is to be notified. Under this section, details have been left to Court rule, except as other relevant statutes such as one governing fees may apply.

It is, of course, vital to maintain the confidential nature of deposited wills. However, this obviously does not prevent the opening of the will after the death of the testator if necessary in order to determine the executor or other interested persons to be notified. Nor should it prevent opening the will to microfilm for confidential record storage, for example. These matters could again be regulated by Court rule.

The provision permitting examination of a will of a protected person by the conservator supplements Section 5-427.

Section 2-516. Duty of Custodian of Will; Liability.

After the death of a testator and on request of an interested person, a person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate court. A person who willfully fails to deliver a will is liable to any person aggrieved for any damages that may be sustained by the failure. A person who willfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

COMMENT

In addition to a registrar or clerk, a person authorized to accept delivery of a will from a custodian may be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.

Section 2-517. Penalty Clause for Contest.

A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

COMMENT

This section replicates Section 3-905.

PART 6

RULES OF CONSTRUCTION APPLICABLE ONLY TO WILLS

GENERAL COMMENT

Parts 6 and 7 address a variety of construction problems that commonly occur in wills, trusts, and other types of governing instruments. All of the "rules" set forth in these parts yield to a finding of a contrary intention and are therefore rebuttable presumptions.

The rules of construction set forth in Part 6 apply only to wills. The rules of construction set forth in Part 7 apply to wills and other governing instruments.

The sections in Part 6 deal with such problems as death before the testator (lapse), the inclusiveness of the will as to property of the testator, effect of failure of a gift in the will, change in form of securities specifically devised, ademption by reason of fire, sale and the like, exoneration, and exercise of a power of appointment by general language in the will.

Section 2-601. Scope.

In the absence of a finding of a contrary intention, the rules of construction in this Part control the construction of a will.

COMMENT

Purpose and Scope of Revisions. Common-law rules of construction yield to a finding of a contrary intention. The pre-1990 version of this section provided that the rules of construction in Part 6 yielded only to a "contrary intention indicated by the will." To align the statutory rules of construction in Part 6

with those established at common law, this section is revised so that the rules of construction yield to a "finding of a contrary intention." As revised, evidence extrinsic to the will as well as the content of the will itself is admissible for the purpose of rebutting the rules of construction in Part 6.

As originally promulgated, this section began with the sentence: "The intention of a testator as expressed in his will controls the legal effect of his dispositions." This sentence is removed primarily because it is inappropriate and unnecessary in a part of the Code containing rules of construction. The deletion of this sentence does not signify a retreat from the widely accepted proposition that a testator's intention controls the legal effect of his or her dispositions.

A further reason for deleting this sentence is that a possible, though unintended, reading of this sentence might be that it prevents the judicial adoption of a general reformation doctrine for wills, as approved by the American Law Institute in the Restatement (Second) of Property § 34.7 & comment d, illustration 11, and as advocated in *Langbein & Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?,"* 130 U. Pa. L. Rev. 521 (1982). The striking of this sentence removes that possible impediment to the judicial adoption of a general reformation doctrine for wills as approved by the American Law Institute and as advocated in the Langbein-Waggoner article.

Cross Reference. *See* Section 8-101(b) for the application of the rules of construction in this Part to documents executed prior to the effective date of this Article.

Section 2-602. Will May Pass All Property and After-Acquired Property.

A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death.

COMMENT

Purpose and Scope of Revision. This section is revised to assure that, for example, a residuary clause in a will not only passes property owned at death that is not otherwise devised, even though the property was acquired by the testator after the will was executed, but also passes property acquired by a testator's estate after his or her death. This reverses a case like *Braman Estate,* 435 Pa. 573, 258 A.2d 492 (1969), where the Court held that Mary's residuary devise to her sister Ruth "or her estate," which had passed to Ruth's estate where Ruth predeceased Mary by about a year, could not go to Ruth's residuary legatee. The Court held that Ruth's will had no power to control the devolution of property acquired by Ruth's estate after her death; such property passed, instead, by intestate succession from Ruth. This section, applied to the *Braman Estate case,* would mean that the property acquired by Ruth's estate after her death would pass under her residuary clause.

The added language also makes it clear that items such as bonuses awarded to an employee after his or her death pass under his or her will.

Section 2-603. Antilapse; Deceased Devisee; Class Gifts.

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

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

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

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

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

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

(6) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under Section 2-702.

(7) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

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

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

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

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

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

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

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

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

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

(3) In this subsection:

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

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary devise.

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

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

COMMENT

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

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

"Antilapse" Statutes-Rationale of Section 2-603. Statutes such as Section 2-603 are commonly called "antilapse" statutes. An antilapse statute is remedial in nature, tending to preserve equality of treatment among different lines of succession. Although Section 2-603 is a rule of construction, and hence under Section 2-601 yields to a finding of a contrary intention, the remedial character of the statute means that it should be given the widest possible latitude to operate in considering whether the testator had formed a contrary intent.

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

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

Class Gifts. In line with modern policy, subsection (b)(2) continues the pre-1990 Code's approach of expressly extending the antilapse protection to class gifts. Subsection (b)(2) applies to class gifts in which one or more class members fail to survive the testator leaving descendants who survive the testator; in order for the subsection to apply, it is not necessary that any of the class members survive the testator. Class gifts to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," "family," or a class described by language of similar import are excluded, however, because antilapse protection is unnecessary in class gifts of these types. They already contain within themselves the idea of representation, under which a deceased class member's descendants are substituted for him or her. *See* Sections 2-708, 2-709, 2-711.

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

Protected Relatives. The specified relatives whose devises are protected by this section are the testator's grandparents and their descendants and the testator's stepchildren or, in the case of a testamentary exercise of a power of appointment, the testator's (donee's) or donor's grandparents and their descendants and the testator's or donor's stepchildren.

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

Other than stepchildren, devisees related to the testator by affinity are not

protected by this section.

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

Substituted Gift. The substitute gifts provided for by subsections (b)(1) and (b)(2) are to the deceased devisee's descendants. They include adopted persons and children of unmarried parents to the extent they would inherit from the devisee; *see Sections 1-201 and 2-114.*

The 120-hour survival requirement stated in Section 2-702 does not require descendants who would be substituted for their parent by this section to survive *their parent* by any set period.

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

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

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

Under Section 2-601, the rule of Section 2-603 yields to a finding of a contrary intention. A foolproof means of expressing a contrary intention is to add to a devise the phrase "and not to [the devisee's] descendants." In the case of a power of appointment, the phrase "and not to an appointee's descendants" can be added by the donor of the power in the document creating the power of appointment, if the donor does not want the antilapse statute to apply to an appointment under a power. In addition, adding to the residuary clause a phrase such as "including all lapsed or failed devises," adding to a nonresiduary devise a phrase such as "if the devisee does not survive me, the devise is to pass under the residuary clause," or adding a separate clause providing generally that "if the devisee of any nonresiduary devise does not survive me, the devise is to pass under the residuary clause" makes the residuary clause an "alternative devise." Under subsection (b)(4), an alternative devise supersedes a substitute gift created by subsection (b)(1) or (b)(2) if one or more expressly designated devisees of the alternative devise is entitled to take under the will. *See* infra Example 3.

A much-litigated question is whether mere words of survivorship-such as in a devise "to my daughter, A, if A survives me" or "to my surviving children"-*automatically* defeat the antilapse statute. Lawyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statue are mistaken. The very fact that the question is litigated so frequently is itself proof that the use of mere words of survivorship is far from foolproof. In addition, the results of the litigated cases are divided on the question. To be sure, many cases hold that mere words of survivorship do automatically defeat the antilapse statute. *E.g., Estate of Stroble*, 636 P.2d 236 (Kan. Ct. App. 1981); Annot., 63 A.L.R.2d 1172, 1186 (1959); Annot., 92 A.L.R. 846, 857 (1934). Other cases, however, reach the opposite conclusion. *E.g., Estate of Ulrikson,* 290 N.W.2d 757 (Minn. 1980) (residuary devise to testator's brother Melvin and sister Rodine, and "in the event that either one of them shall predecease me, then to the other surviving brother or sister"; Melvin and Rodine predeceased testator, Melvin but not Rodine leaving descendants who survived testator; Court held residue passed to Melvin's descendants under antilapse statute); *Detzel v. Nieberding*, 219 N.E.2d 327 (Ohio P. Ct. 1966) (devise of $5,000 to sister "provided she be living at the time of my death"; sister predeceased testator; Court held $5,000 devise passed under antilapse statute to sister's descendants); *Henderson v. Parker,* 728 S.W.2d 768 (Tex. 1987)(devise of all of testator's property "unto our surviving children of this marriage"; two of testator's children survived testator, but one child, William, predeceased testator leaving descendants who survived testator; Court held that share William would have taken passed to Williams's descendants under antilapse statute; words of survivorship found ineffective to counteract antilapse statute because Court interpreted those words as merely restricting the devisees to those living at the time the will was executed); *see also Restatement (Second) of Property (Donative Transfers) § 27.2 comment f, illustration 5; cf.id. § 27.1 comment e, illustration 6.* It may also be noted that the antilapse statutes in some other common-law countries expressly provide that words of survivorship do not defeat the statute. *See, e.g., Queensland Succession Act 1981, § 33(2) ("A general requirement or condition that [protected relatives] survive the testator or attain a specified age is not a contrary intention for the purposes of this section.").*

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

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

Another objection to applying the antilapse statute is that mere words of survivorship somehow establish a contrary intention. The argument is that attaching words of survivorship indicates that the testator thought about the matter and intentionally did not provide a substitute gift to the devisee's descendants. At best, this is an inference only, which may or may not accurately reflect the testator's actual intention. An equally plausible inference is that

the words of survivorship are in the testator's will merely because the testator's lawyer used a will form with words of survivorship. The testator who went to lawyer X and ended up with a will containing devises with a survivorship requirement could by chance have gone to lawyer Y and ended up with a will containing devises with no survivorship requirement-with no different intent on the testator's part from one case to the other.

Even a lawyer's deliberate use of mere words of survivorship to defeat the antilapse statute does not guarantee that the lawyer's intention represents the client's intention. Any linkage between the lawyer's intention and the client's intention is speculative unless the lawyer discussed the matter with the client. Especially in the case of younger-generation devisees, such as the client's children or nieces and nephews, it cannot be assumed that all clients, on their own, have anticipated the possibility that the devisee will predecease the client and will have thought through who should take the devised property in case the never-anticipated event happens.

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

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

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

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

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

"surviving" is used.

Note that subsection (b)(3) provides that words of survivorship are not by themselves to be taken as expressing a contrary intention for purposes of Section 2-601. Under Section 2-601, a finding of a contrary intention could appropriately be based on affirmative evidence that G deliberately used the words of survivorship to defeat the antilapse statute. In the case of such a finding, B would take the full $10,000 devise. Relevant evidence tending to support such a finding might be a pre-execution letter or memorandum to G from G's attorney stating that G's attorney used the word "surviving" for the purpose of assuring that if one of G's children were to predecease G, that child's descendants would not take the predeceased child's share under any statute or rule of law.

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

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

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

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

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

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

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

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

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

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

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

Solution: B takes the full $10,000. Because the takers of the $10,000 devise are both named and numbered ("my *two* children, *A* and *B*"), the devise is not in the form of a class gift. The substance of the devise is as if it read "half of $10,000 to A, but if A predeceases me, that half to B if B survives me and the other half of $10,000 to B, but if B predeceases me, that other half to A if A survives me." With respect to each half, A and B have alternative devises, one to the other. Subsection (b)(1) creates a substitute gift to A's descendant, X, with respect to A's alternative devise in each half. Under subsection (b)(4), however, that substitute gift to X with respect to each half is superseded by the alternative devise

to B because the alternative devisee, B, survived G by 120 hours and is entitled to take under G's will.

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

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

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

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

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

Because A failed to survive G by 120 hours and left descendants who survived G by 120 hours, subsection (b)(1) substitutes A's descendants who survived G by 120 hours for A. But that substitute gift is superseded under subsection (b)(4) by the alternative devise to A's children. Under subsection (b)(4), an alternative devise supersedes a substitute gift "if an expressly designated devisee of the alternative devise is entitled to take under the will." In this case, Y is an expressly designated devisee of the alternative devise who is entitled to take under the will. Note that a devisee of an alternative devise can be expressly designated by class designation, as here, as well as by name. Note also that only one member of the class needs to be entitled to take under the will in order for an alternative devise to supersede a substitute gift.

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

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

tie-breaking mechanism for such situations.

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

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

Subsection (c) is illustrated by the following examples:

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

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

Both devises require application of subsection (c). In the case of both devises, the statute produces a substitute gift for the devise to A and for the devise to B, each devise being an alternative devise, one to the other. The question of which of the substitute gifts takes effect is resolved by determining which of the devisees themselves would take the devised property if both A and B had survived G by 120 hours.

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 2-604. Failure of Testamentary Provision.

(a) Except as provided in Section 2-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(b) Except as provided in Section 2-603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

COMMENT

This section applies only if Section 2-603 does not produce a substitute taker for a devisee who fails to survive the testator by 120 hours. There is also a special rule for disclaimers contained in Section 2-1106(b)(3)(A); a disclaimed devise may be governed by either Section 2-603 or the present section, depending on the circumstances.

A devise of "all of my estate," or a devise using words of similar import, constitutes a residuary devise for purposes of this section.

Historical Note. This Comment was revised in 1993, For the prior version, see 8 U.L.A. 132 (Supp. 1992).

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§2-1001 – 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.

Section 2-605. Increase in Securities; Accessions.

(a) If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

(1) securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;

(2) securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization; or

(3) securities of the same organization acquired as a result of a plan of reinvestment.

(b) Distributions in cash before death with respect to a described security are not part of the devise.

COMMENT

Purpose and Scope of Revisions. The rule of subsection (a), as revised, relates to a devise of securities (such as a devise of 100 shares of XYZ Company), regardless of whether that devise is characterized as a general or specific devise. If the testator executes a will that makes a devise of securities and if the testator then owned securities that meet the description in the will, then the devisee is entitled not only to the described securities to the extent they are owned by the testator at death; the devisee is also entitled to any additional securities owned by the testator at death that were acquired by the testator during his or her lifetime after the will was executed and were acquired as a result of the testator's ownership of the described securities by reason of an action specified in subsections (a)(1), (a)(2), or (a)(3), such as the declaration of stock splits or stock dividends or spinoffs of a subsidiary.

The impetus for these revisions derives from the rule on stock splits enunciated by *Bostwick v. Hurstel,* 364 Mass. 282, 304 N.E.2d 186 (1973), and now codified in Massachusetts as to actions covered by subsections (a)(1) and (a)(2). Mass. Gen. Laws c. 191, § 1A(4).

Subsection (a) Not Exclusive. Subsection (a) is not exclusive, i.e., it is not to be understood as setting forth the only conditions under which additional securities of the types described in paragraphs (1), (2), and (3) are included in the devise. For example, the express terms of subsection (a) do not apply to a case in which the testator owned the described securities when he or she executed the will, but later sold (or otherwise disposed of) those securities, and then later purchased (or otherwise acquired) securities that meet the description in the will, following which additional securities of the type or types described in paragraphs (1), (2), or (3) are acquired as a result of the testator's ownership of the later-acquired securities. Nor do the express terms of subsection (a) apply to a similar (but less likely) case in which the testator did not own the described securities when he or she executed the will, but later purchased (or otherwise acquired) such securities. Subsection (a) does not preclude a Court, in an appropriate case, from deciding that additional securities of the type described in paragraphs (1), (2), or (3) acquired as a result of the testator's ownership of the later-acquired securities pass under the devise in either of these two cases, or in other cases if appropriate.

Subsection (b) codifies existing law that distributions in cash, such as interest, accrued rent, or cash dividends declared and payable as of a record date before the testator's death, do not pass as a part of the devise. It makes no difference whether such cash distributions were paid before or after death. *See* Section 4 of the Revised Uniform Principal and Income Act.

Cross Reference. The term "organization" is defined in Section 1-201.

Section 2-606. Nonademption of Specific Devises; Unpaid Proceeds of Sale, Condemnation, or Insurance; Sale by Conservator or Agent.

(a) A specific devisee has a right to specifically devised property in the testator's estate at the testator's death and to:

(1) any balance of the purchase price, together with any security agreement, owed by a purchaser at the testator's death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(4) any property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(5) any real property or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real property or tangible personal property; and

(6) if not covered by paragraphs (1) through (5), a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.

(b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal or a condemnation award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection (a).

(d) For the purposes of the references in subsection (b) to a conservator, subsection (b) does not apply if after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication for at least one year.

(e) For the purposes of the references in subsection (b) to an agent acting within the authority of a durable power of attorney an incapacitated principal, (i)"incapacitated principal" means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

COMMENT

Purpose and Scope of Revisions. Under the "identity" theory followed by most Courts, the common-law doctrine of ademption by extinction is that a specific devise is adeemed-rendered ineffective-if the specifically devised property is not owned by the testator at death. In applying the "identity" theory, Courts do not inquire into the testator's intent to determine whether the testator's objective in disposing of the specifically devised property was to revoke the devise. The only thing that matters is that the property is no longer owned at death. The application of the "identity" theory of ademption has resulted in harsh results in a number of cases, where it was reasonable clear that the testator did not intend to revoke the devise. Notable examples include *McGee v. McGee,* 413 A.2d 72 (R.I.1980); *Estate of Dungan,* 73 A.2d 776 (Del.Ch.1950).

Recently, some Courts have begun to break away from the "identity" theory and adopt instead the so-called "intent" theory. *E.g., Estate of Austin,* 113 Cal. App. 3d 167, 169 Cal. Rptr. 648 (1980). The major import of the revisions of this section is to adopt the "intent" theory in subsections (a)(5) and (a)(6).

Subsection (a)(5) does not import a tracing principle into the question of ademption, but rather should be seen as a sensible "mere change in form" principle.

Example 1. G's will devised to X "my 1984 Ford." After she executed her will, she sold her 1984 Ford and bought a 1988 Buick; later, she sold the 1988 Buick and bought a 1993 Chrysler. She still owned the 1993 Chrysler when she died. Under subsection (a)(5), X takes the 1993 Chrysler.

Variation. If G had sold her 1984 Ford (or any of the replacement cars) and used the proceeds to buy shares in a mutual fund, which she owned at death, subsection (a)(5) does not give X the shares in the mutual fund. If G owned an automobile at death as a replacement for her 1984 Ford, however, X would be entitled to that automobile, even though it was bought with funds other than the proceeds of the sale of the 1984 Ford.

Subsection (a)(6) applies only to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by the provisions of paragraphs (1) through (5). In that event, subsection (a)(6) creates a mild presumption against ademption by extinction, imposing on the party claiming that an ademption has occurred the burden of establishing that the facts and circumstances indicate that ademption of the devise was intended by the testator or that ademption of the devise is consistent with the testator's manifested plan of distribution.

Example 2. G's will devised to his son, A, "that diamond ring I

inherited from grandfather" and devised to his daughter, B, "that diamond brooch I inherited from grandmother." After G executed his will, a burglar entered his home and stole the diamond ring (but not the diamond brooch, as it was in G's safety deposit box at his bank).

Under subsection (a)(6), the party claiming that A's devise was adeemed would be unlikely to be able to establish that G intended A's devise to be adeemed or that ademption is consistent with G's manifested plan of distribution. In fact, G's equalizing devise to B affirmatively indicates that ademption is inconsistent with G's manifested plan of distribution. The likely result is that, under subsection (a)(6), A would be entitled to the value of the diamond ring.

Example 3. G's will devised her painting titled *The Bar* by Edouard Manet to X. After executing her will, G donated the painting to a museum. G's deliberate act of giving away the specifically devised property is a fact and circumstance indicating that ademption of the devise was intended. In the absence of persuasive evidence to the contrary, therefore, X would not be entitled to the value of the painting.

Reference. Section 2-606 is discussed in Alexander, *"Ademption and the Domain of Formality in Wills Law,"* 55 Alb. L. Rev. 1067 (1992).

Historical Note. The above Comment was revised in 1993 and 1997. For the prior version, see 8 U.L.A. 134 (Supp. 1992).

1997 Technical Amendment. By technical amendment effective July 31, 1997, subsection (a)(6) was substantially revised. Subsection (a)(6) previously provided:

(a) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

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(6) unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value of its replacement is not covered by paragraphs (1) through (5).

Of the seven enactments of section 2-606 as of early 1997, five omitted subsection (a)(6). Attorneys accustomed to the concept that a specific devise automatically fails if the devised property is not in the testator's estate at death, were confused by the reverse assumption, stated in original (a)(6). The confusion was heightened by the fact that (a)(6), stating a general rule, followed five carefully tailored safe harbors. The replacement provision, like the other exceptions, places the burden on the devisee to establish that an ademption has not occurred.

Section 2-607. Nonexoneration.

A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

COMMENT

See Section 3-814 empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the substantive rights of the devisee. The common-law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted.

For the rule as to exempt property, *see* Section 2-403.

The rule of this section is not inconsistent with Section 2-606(b). If a conservator or agent for an incapacitated principal mortgages specifically devised property, Section 2-606(b) provides that the specific devisee is entitled to a pecuniary devise equal to the amount of the unpaid loan. Section 2-606(b) does not contradict this section, which provides that the specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration.

Section 2-608. Exercise of Power of Appointment.

In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if (i) the power is a general power and the creating instrument does not contain a gift if the power is not exercised or (ii) the testator's will manifests an intention to include the property subject to the power.

COMMENT

General Residuary Clause. As revised, this section, in conjunction with Section 2-601, provides that a general residuary clause (such as "All the rest, residue, and remainder of my estate, I devise to . . ..") in the testator's will or a will making general disposition of all of the testator's property (such as "All of my estate, I devise to . . ..") is presumed to express an intent to exercise a power of appointment held by the donee of the power only if one or the other of two circumstances or sets of circumstances are satisfied. One such circumstance (whether the power is general or nongeneral) is if the testator's will manifests an intention to include the property subject to the power. A simple example of a residuary clause that manifests such an intention is a so-called "blending" or "blanket-exercise" clause, such as "All the rest, residue, and remainder of my estate, including any property over which I have a power of appointment, I devise to . . .."

The other circumstance under which a general residuary clause or a will making

general disposition of all of the testator's property is presumed to express an intent to exercise a power is if the power is a *general* power *and* the instrument that created the power does not contain a gift over in the event the power is not exercised (a "gift in default"). In well planned estates, a general power of appointment will be accompanied by a gift in default. The gift-in-default clause is ordinarily expected to take effect; it is not merely an after-thought just in case the power is not exercised. The power is not expected to be exercised, and in fact is often conferred mainly to gain a tax benefit-the federal estate-tax marital deduction under section 2056(b)(5) of the Internal Revenue Code or, now, inclusion of the property in the gross estate of a younger-generation beneficiary under Section 2041 of the Internal Revenue Code, in order to avoid the possibly higher rates imposed by the new federal generation-skipping tax. *See Blattmachr & Pennell, "Adventures in Generation Skipping, Or How We Learned to Love the 'Delaware Tax Trap,' "* 24 Real Prop. Prob. & Tr. J. 75 (1989). A general power should not be exercised in such a case without clear evidence of an intent to appoint.

In poorly planned estates, on the other hand, there may be no gift-in-default clause. In the absence of a gift-in-default clause, it seems better to let the property pass under the donee's will than force it to return to the donor's estate, for the reason that the donor died before the donee died and it seems better to avoid forcing a reopening of the donor's estate.

Cross Reference. *See also* Section 2-704 for a provision governing the meaning of a requirement that a power of appointment be exercised by a reference (or by an express or specific reference) to the power.

Section 2-609. Ademption by Satisfaction.

(a) Property a testator gave in his [or her] lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if (i) the will provides for deduction of the gift, (ii) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise, or (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

(b) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(c) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying Sections 2-603 and 2-604, unless the testator's contemporaneous writing provides otherwise.

COMMENT

Scope and Purpose of Revisions. In addition to minor stylistic changes, this section is revised to delete the requirement that the gift in satisfaction of a devise be made to the devisee. The purpose is to allow the testator to satisfy a devise to A by making a gift to B. Consider why this might be desirable. G's

will made a $20,000 devise to his child, A. G was a widower. Shortly before his death, G in consultation with his lawyer decided to take advantage of the $10,000 annual gift tax exclusion and sent a check for $10,000 to A and another check for $10,000 to A's spouse, B. The checks were accompanied by a letter from G explaining that the gifts were made for tax purposes and were in lieu of the $20,000 devise to A. The removal of the phrase "to that person" from the statute allows the $20,000 devise to be fully satisfied by the gifts to A and B.

This section parallels Section 2-109 on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in the distribution of an estate, whether testate or intestate. Although Courts traditionally call this "ademption by satisfaction" when a will is involved, and "advancement" when the estate is intestate, the difference in terminology is not significant.

Some wills expressly provide for lifetime advances by a hodgepodge clause. Where the will contains no such clause, this section requires either the testator to declare in writing that the gift is in satisfaction of the devise or its value is to be deducted from the value of the devise or the devisee to acknowledge the same in writing.

To be a gift in satisfaction, the gift need not be an outright gift; it can be in the form of a will substitute, such as designating the devisee as the beneficiary of the testator's life-insurance policy or the beneficiary of the remainder interest in a revocable inter-vivos trust.

Subsection (b) on value accords with Section 2-109 and applies if, for example, property such as stock is given. If the devise is specific, a gift of the specific property to the devisee during lifetime adeems the devise by extinction rather than by satisfaction, and this section would be inapplicable. Unlike the common law of satisfaction, however, specific devises are not excluded from the rule of this section. If, for example, the testator makes a devise of a specific item of property, and subsequently makes a gift of cash or other property to the devisee, accompanied by the requisite written intent that the gift satisfies the devise, the devise is satisfied under this section even if the subject of the specific devise is still in the testator's estate at death (and hence would not be adeemed under the doctrine of ademption by extinction).

Under subsection (c), if a devisee to whom a gift in satisfaction is made predeceases the testator and his or her descendants take under Section 2-603 or 2-604, they take the same devise as their ancestor would have taken had the ancestor survived the testator; if the devise is reduced by reason of this section as to the ancestor, it is automatically reduced as to the devisee's descendants. In this respect, the rule in testacy differs from that in intestacy; *see* Section 2-109(c).

PART 7

RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

GENERAL COMMENT

Part 7 contains rules of construction applicable to wills and other governing instruments, such as deeds, trusts, appointments, beneficiary designations, and

so on. Like the rules of construction in Part 6 (which apply only to wills), the rules of construction in this Part yield to a finding of a contrary intention.

Some of the sections in Part 7 are revisions of sections contained in Part 6 of the pre-1990 Code. Although these sections originally applied only to wills, their restricted scope was inappropriate.

Some of the sections in Part 7 are new, having been added to the Code as desirable means of carrying out common intention.

Application to Pre-Existing Governing Instruments. Under Section 8-101(b), for decedents dying after the effective date of enactment, the provisions of this Code apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature of the Code. The statement, titled *"Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents,"* can be found at 17 Am. C. Tr. & Est. Couns. Notes 184 (1991) or can be obtained from the headquarters office of the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair St., Suite 1700, Chicago, IL 60611, Phone 312/915-0195, FAX 312/915-0187.

Historical Note. This General Comment was revised in 1993. For the prior version, see 8 U.L.A. 137 (Supp. 1992).

Section 2-701. Scope.

In the absence of a finding of a contrary intention, the rules of construction in this Part control the construction of a governing instrument. The rules of construction in this Part apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

COMMENT

The rules of construction in this Part apply to governing instruments of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

The term "governing instrument" is defined in Section 1-201 as "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type."

Certain of the sections in this Part are limited in their application to donative dispositions or governing instruments of a certain type or types. Section 2-704, for example, applies only to a governing instrument creating a power of appointment. Section 2-706 applies only to governing instruments that are "beneficiary designations," a term defined in Section 1-201 as referring to "a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form

(TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death." Section 2-707 applies only to governing instruments creating a future interest under the terms of a trust.

Cross References. *See* the Comment to Section 2-601.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 138 (Supp. 1992).

Section 2-702. Requirement of Survival by 120 Hours.

(a) **[Requirement of Survival by 120 Hours Under Probate Code.]** For the purposes of this Code, except as provided in subsection (d), an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is deemed to have predeceased the event.

(b) **[Requirement of Survival by 120 Hours under Governing Instrument.]** Except as provided in subsection (d), for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event.

(c) **[Co-owners With Right of Survivorship; Requirement of Survival by 120 Hours.]** Except as provided in subsection (d), if (i) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours and (ii) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by 120 hours, the property passes in the proportion that one bears to the whole number of co-owners. For the purposes of this subsection, "co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others.

(d) **[Exceptions.]** Survival by 120 hours is not required if:

(1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;

(2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;

(3) the imposition of a 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under Section 2-901(a)(1), (b)(1), or (c)(1) or to become invalid under Section 2-901(a)(2), (b)(2), or (c)(2); but survival must be established by clear and convincing evidence; or

(4) the application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence.

(e) **[Protection of Payors and Other Third Parties.]**

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a claimed lack of entitlement under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this section.

(2) Written notice of a claimed lack of entitlement under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the Court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the Court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The Court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the Court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

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

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return

the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

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

COMMENT

Scope and Purpose of Revision. This section parallels Section 2-104, which requires an heir to survive the intestate by 120 hours in order to inherit.

The scope of this section is expanded to cover all provisions of a governing instrument and this Code that relate to an individual surviving an event (including the death of another individual). As expanded, this section imposes the 120-hour requirement of survival in the areas covered by the Uniform Simultaneous Death Act. By 1993 technical amendment, an anomalous provision exempting securities registered under Part 3 of Article VI (Uniform TOD Security Registration Act) from the 120-hour survival requirement was eliminated. The exemption reflected a temporary concern attributable to UTODSRA's preparation prior to discussion of inserting a 120-hour survival requirement in the freestanding Uniform Simultaneous Death Act (USDA).

In the case of a multiple-party account such as a joint checking account registered in the name of the decedent and his or her spouse with right of survivorship, the 120-hour requirement of survivorship will not, under the facility-of-payment provision of Section 6-222(1), interfere with the surviving spouse's ability to withdraw funds from the account during the 120-hour period following the decedent's death.

Note that subsection (d)(1) provides that the 120-hour requirement of survival is inapplicable if the governing instrument "contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case." The application of this provision is illustrated by the following example.

Example. G died leaving a will devising her entire estate to her husband, H, adding that "in the event he dies before I do, at the same time that I do, or under circumstances as to make it doubtful who died first," my estate is to go to my brother Melvin. H died

about 38 hours after G's death, both having died as a result of injuries sustained in an automobile accident.

Under subsection (b), G's estate passes under the alternative devise to Melvin because H's failure to survive G by 120 hours means that H is deemed to have predeceased G. The language in the governing instrument does not, under subsection (d)(1), nullify the provision that causes H, because of his failure to survive G by 120 hours, to be deemed to have predeceased G. Although the governing instrument does contain language dealing with simultaneous deaths, that language is not operable under the facts of the case because H did not die before G, at the same time as G, or under circumstances as to make it doubtful who died first.

Note that subsection (d)(4) provides that the 120-hour requirement of survival is inapplicable if "the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition." The application of this provision is illustrated by the following example.

Example. Pursuant to a common plan, H and W executed mutual wills with reciprocal provisions. Their intention was that a $50,000 charitable devise would be made on the death of the survivor. To that end, H's will devised $50,000 to the charity if W predeceased him. W's will devised $50,000 to the charity if H predeceased her. Subsequently, H and W were involved in a common accident. W survived H by 48 hours.

Were it not for subsection (d)(4), not only would the charitable devise in W's will be effective, because H in fact predeceased W, but the charitable devise in H's will would also be effective, because W's failure to survive H by 120 hours would result in her being deemed to have predeceased H. Because this would result in an unintended duplication of the $50,000 devise, subsection (d)(4) provides that the 120-hour requirement of survival is inapplicable. Thus, only the $50,000 charitable devise in W's will is effective.

Subsection (d)(4) also renders the 120-hour requirement of survival inapplicable had H and W died in circumstances in which it could not be established by clear and convincing evidence that either survived the other. In such a case, an appropriate result might be to give effect to the common plan by paying half of the intended $50,000 devise from H's estate and half from W's estate.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. *See* the Comment to Section 2-804 for a discussion of the ERISA preemption question.

Revision of Uniform Simultaneous Death Act. The freestanding Uniform Simultaneous Death Act (USDA) was revised in 1991 in accordance witht he revisions of this section. States that enact Sections 2-104 and 2-702 need not enact the USDA as revised in 1991 and should repeal the original version of the USDA if previously enacted in the state.

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

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 140 (Supp. 1992).

Section 2-703. Choice of Law as to Meaning and Effect of Governing Instrument.

The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in Part 2, the provisions relating to exempt property and allowances described in Part 4, or any other public policy of this State otherwise applicable to the disposition.

COMMENT

Purpose and Scope of Revisions. The scope of this section is expanded to cover all governing instruments, not just wills. As revised, this section enables the law of a particular state to be selected in the governing instrument for purposes of interpreting the instrument without regard to the location of property covered thereby. So long as local public policy is accommodated, the section should be accepted as necessary and desirable.

Cross Reference. Choice of law rules regarding formal validity of a will are in Section 2-506. *See* also Sections 3-202 and 3-408.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 141 (Supp. 1992).

Section 2-704. Power of Appointment; Meaning of Specific Reference Requirement.

If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.

COMMENT

Rationale of New Section. In the creation of powers of appointment, it has become common estate-planning practice to require that the donee of the power can exercise the power only by making reference (or express or specific reference)to it. The question of whether the donee has made a sufficiently specific reference is much litigated. The precise question often is whether a so-called blanket-exercise clause (also called a blending clause)-a clause referring to "any property over which I have a power of appointment"-constitutes a sufficient reference to a particular power to exercise that power. E.g., *First*

National Bank v. Walker, 607 S.W.2d 469 (Tenn. 1980), and cases cited therein.

Section 2-704 sets forth the presumption that the donor's purpose in imposing a reference requirement was to prevent an inadvertent exercise of the power by the donee. Under this section, mere use by the donee of a blanket-exercise clause would be ineffective to exercise the power because such a clause would not make a sufficient reference to the particular power. If, however, it could be shown that the donee had knowledge of and intended to exercise the power, the blanket-exercise clause would be sufficient to exercise the power, unless the presumption of this section is overcome. Under Section 2-701, the presumption of this section would be overcome if it could be shown that the donor's intention was not merely to prevent an inadvertent exercise of the power but was to prevent any exercise of the power, intentional or inadvertent, that failed to identify in explicit terms the specific power or the creating instrument.

Reference. *See Langbein & Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?,"* 130 U. Pa. L. Rev. 521, 583 n.223 (1982), suggesting that a donee's will that omits a sufficiently specific reference to a particular power can be reformed to include the necessary reference if it can be shown by clear and convincing evidence that the omission was caused by a scrivener's mistake. This approach is not inconsistent with Section 2-704. See Sections 2-601 (and accompanying Comment); 2-701. *See also Motes/Henes Trust v. Mote,* 297 Ark. 380, 761 S.W.2d 938 (1988) (donee's intended exercise given effect despite use of blanket-exercise clause); *In re Strobel,* 149 Ariz. 213, 717 P.2d 892 (1986) (donee's intended exercise given effect despite defective reference to power).

Cross Reference. *See* Section 2-608 for a provision governing whether a general residuary clause in the donee's will exercises a power of appointment that does not require a reference (or an express or specific reference) by the donee of the power.

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

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

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

(c) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the adopting parent, an

adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.

COMMENT

Purpose and Scope of Revisions. 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 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.

The pre-1990 version of this section applied only to devises contained in wills. As revised and relocated in Part 7, this section is freed of that former restriction; it now applies to dispositive provisions of all governing instruments, as prescribed by Section 2-701.

Subsections (b) and (c) are based on Cal. Prob. Code § 6152. These subsections impose requirements for inclusion that are additional to the requirement of subsection (a). Put differently, a child must satisfy subsection (a) in all cases. In addition, if either subsection (b) or (c) applies, the child must also satisfy the requirements of that subsection to be included under the class gift or term of relationship.

The general theory of subsection (b) is that a transferor who is not the natural (biological) parent of a child would want the child to be included in a class gift as a child of the biological parent only if the child lived while a minor as a regular member of the household of that biological parent (or of specified relatives of that biological parent).

Example. 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 X never lived while a minor as a regular member of A's household or the household of A's parent, brother, sister, spouse, or surviving spouse. D later married E; D and E raised X as a member of their household.

Solution: Never having lived as a regular member of A's household or of the household of any of A's specified relatives, 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, D's parent had created a similar trust, income to D for life, remainder in corpus to D's descendants who survive D, by representation, X would be included as a member of the class of D's descendants who take the corpus of this trust on D's death.

Also, if 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 2-114, X would be A's child for purposes of intestate succession. Subsection (b) is inapplicable because the transferor, A,

is the biological parent.

The general theory of subsection (c) is that a transferor who is not the adopting parent of an adopted child would want the child to be included in a class gift as a child of the adopting parent only if the child lived while a minor, either before or after the adoption, as a regular member of the household of that adopting parent.

Example. G's will created a trust, 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, who never lived *while a minor* as a regular member of A's household.

Solution: Never having lived while a minor as a regular member of A's household, 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 device to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class. Under Section 2-114, X would be A's child for purposes of intestate succession. Subsection (c) is inapplicable because the transferor, A, is an adopting parent.

Companion Statute. A state enacting this provision should also consider enacting the Uniform Status of Children of Assisted Conception Act (1988).

Reference. *Halbach, "Issues About Issue,"* 48 Mo.L.Rev. 333 (1983).

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 143 (Supp. 1992).

Section 2-706. Life Insurance; Retirement Plan; Account With POD Designation; Transfer-on-Death Registration; Deceased Beneficiary.

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

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

(2) "Beneficiary" means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes (i) a class member if the beneficiary designation is in the form of a class gift and (ii) an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with

the right of survivorship and a party to a joint and survivorship account.

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

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

(5) "Stepchild" means a child of the decedent's surviving, deceased, or former spouse, and not of the decedent.

(6) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under Section 2-702.

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

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

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

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

survives me," or in a beneficiary designation to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative beneficiary designation only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

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

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

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

(3) In this subsection:

(i) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

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

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

(d) **[Protection of Payors.]**

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

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

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

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

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other

benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

COMMENT

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

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

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

The printed terms of G's policy provide:

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

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

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

If any designated Beneficiary predeceases the Insured, the interest of such Beneficiary will terminate and shall be shared equally by such of the

Beneficiaries as survive the Insured.

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

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

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

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

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

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

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

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

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

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

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

Section 2-707. Survivorship with Respect to Future Interests under Terms of Trust; Substitute Takers.

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

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

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

(3) "Class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had he [or she] survived the distribution date.

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

(5) "Future interest" includes an alternative future interest and a future interest in the form of a class gift.

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

(7) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under Section 2-702.

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

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

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

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

(4) If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

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

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

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

(3) In this subsection:

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

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

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

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

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

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

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

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

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

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

COMMENT

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

The objective of this section is to project the antilapse idea into the area of future interests. The structure of this section substantially parallels the structure of the regular antilapse statute, Section 2-603, and the antilapse-type statute relating to beneficiary designations, Section 2-706. The rationale for restricting this section to future interests under the terms of a trust is that legal life estates in land, followed by indefeasibly vested remainder interests, are still created in some localities, often with respect to farmland. In such cases, the legal life tenant and the person holding the remainder interest can, together, give good title in the sale of the land. If the antilapse idea were injected into this type of situation, the ability of the parties to sell the land would be impaired if not destroyed because the antilapse idea would, in effect, create a contingent substitute remainder interest in the present and future descendants of the person holding the remainder interest.

Background. At common law, conditions of survivorship are not implied with respect to *future* interests (whether in trust or otherwise). For example, in the simple case of a trust, "income to husband, A, for life, remainder to daughter, B," B's interest is not defeated at common law if she predeceases A; B's interest would pass through her estate to her successors in interest (probably either her residuary legatees or heirs), who would become entitled to possession when A died. If any of B's successors in interest died before A, the interest held by that deceased successor in interest would likewise pass through his or her estate to his or her successors in interest; and so on.

The rationale for adopting a statutory provision reversing the common-law rule is to prevent cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests, who may have died long before the distribution date.

Subsection (b): Subsection (b) imposes a condition of survivorship on future interests to the distribution date-defined as the time when the future interest is to take effect in possession or enjoyment.

The 120-hour Survivorship Period. In effect, the requirement of survival of the distribution date means survival of the 120-hour period following the distribution date. This is because, under Section 2-702(a), "an individual who is not established to have survived an event ... by 120 hours is deemed to have

predeceased the event." As made clear by subsection (a)(7), for the purposes of section 2-707, the "event" to which section 2-702(a) relates is the distribution date.

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

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

Ambiguous Survivorship Language. Subsection (b) serves another purpose. It resolves a frequently litigated question arising from ambiguous language of survivorship, such as in a trust, "income to A for life, remainder in corpus to my surviving children." Although some case law interprets the word "surviving" as merely requiring survival of the testator (*e.g., Nass' Estate,* 182 A. 401 (Pa.1936)), the predominant position at common law interprets "surviving" as requiring survival of the life tenant, *A. Hawke v. Lodge,* 77 A. 1090 (Del. Ch. 1910); Restatement of Property § 251 (1940). The first sentence of subsection (b), in conjunction with paragraph (3), codifies the predominant common-law/Restatement position that survival relates to the distribution date.

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

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

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

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

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

Subsection (b)(1)-Future Interests Not in the Form of a Class Gift: Subsection (b)(1) applies to non-class gifts, such as the "income to A for life, remainder

in corpus to B" trust discussed above. If B predeceases A, subsection (b)(1) creates a substitute gift with respect to B's future interest; the substitute gift is to B's descendants who survive A.

Subsection (b)(2)-Class Gift Future Interests. Subsection (b)(2) applies to class gifts, such as in a trust "income to A for life, remainder in corpus to A's children." Suppose that A had two children, X and Y. X predeceases A; Y survives A. Subsection (b)(2) creates a substitute gift with respect to any of A's children who predecease A leaving descendants who survive A. Thus, if X left descendants who survived A, X's descendants would take X's share; if X left no descendants living at A's death, Y would take it all.

Subsection (b)(2) does not apply to future interests to classes such as "issue," "descendants," "heirs of the body," "heirs," "next of kin," "distributees," "relatives," "family," or the like. The reason is that these types of class gifts have their own internal systems of representation, and so the substitute gift provided by subsection (b)(1) would be out of place with respect to these types of future interests. The first sentence of subsection (a) and subsection (d) do apply, however. For example, suppose a nonresiduary devise "to A for life, remainder to A's issue, by representation." If A leaves issue surviving him, they take. But if A leaves no issue surviving him, the testator's residuary devisees are the takers.

Subsection (b)(4). Subsection (b)(4) provides that, if a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment. Consider, for example, a trust under the income is to be paid to A for life, remainder in corpus to B if B survives A, but if not to C if C survives A. If B predeceases A, leaving descendants who survive A, subsection (b)(1) creates a substitute gift to B's descendants. But, if C survives A, the alternative future interest in C supersedes the substitute gift to B's descendants. Upon A's death, the trust corpus passes to C.

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

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

Subsection (c)(2) provides an exception to this rule. Under subsection (c)(2), the property does not pass under the primary substitute gift if there is a "younger-generation future interest"-defined as a future interest that (A) is to a descendant of a beneficiary of the primary future interest, (B) is an alternative future interest with respect to the primary future interest, (C) is a future interest for which a substitute gift is created, and (D) would have taken effect had all the deceased beneficiaries who left surviving descendants

survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest. If there is a younger-generation future interest, the property passes under the "younger-generation substitute gift"-defined as the substitute gift created with respect to the younger-generation future interest.

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

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

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

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

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

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

Example 3. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to B if B survives A. B predeceased A. At A's death, G and X, B's child, are living.

Solution: X takes the trust property. Because B's future interest is not in the form of a class gift, subsection (b)(1) applies, not (b)(2). Subsection (b)(1) creates a substitute gift with respect to B's future interest; the

substitute gift is to B's child, X. Under subsection (b)(3), the words of survivorship ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. Nor, under subsection (b)(4), is the substitute gift superseded by an alternative future interest; G's reversion is not an alternative future interest as defined in subsection (a)(1) because it was not *expressly* created.

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

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

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

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

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

Solution: On A's death, the trust property goes to B, not to X and Y. Because the future interest in A's children is in the form of a class gift, subsection (b)(2) applies, not (b)(1). Subsection (b)(2) creates a substitute gift with respect to the future interest in A's children; the substitute gift is to the descendants of A's children, X and Y. Under subsection (b)(3), the words of survivorship ("to A's children who survive A") do not indicate an intent contrary to the creation of that substitute gift. But, under subsection (b)(4), the alternative future interest to B supersedes the substitute gift to the descendants of A's children because B survived A.

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

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

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

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

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

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

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

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

Subsection (b)(2) produces substitute gifts with respect to A's children who predeceased A leaving descendants who survived A. Subsection (b)(1) creates a substitute gift with respect to B's future interest. A's children's future interest and B's future interest are alternative future interests, one to the other. A's children's future interest is expressly conditioned on surviving

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

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

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

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

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

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

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

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

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

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

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

Section 2-708. Class Gifts to "Descendants," "Issue," or "Heirs of the Body"; Form of Distribution if None Specified.

If a class gift in favor of "descendants," "issue," or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift.

COMMENT

Purpose of New Section. This new section tracks Restatement (1st) of Property § 303(1), and does not accept the position taken in Restatement (Second) of Property, Donative Transfers § 28.2 (1988), under which a per stirpes form of distribution is presumed, regardless of the form of distribution used in the applicable law of intestate succession.

Section 2-709. Representation; Per Capita at Each Generation; Per Stirpes.

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

(1) "Deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under Section 2-702.

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

(3) "Surviving ancestor," "surviving child," or "surviving descendant" means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under Section 2-702.

(b) **[Representation; Per Capita at Each Generation.]** If an applicable statute or a governing instrument calls for property to be distributed "by representation" or "per capita at each generation," the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants (ii) and 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 distribution date.

(c) **[Per Stirpes.]** If a governing instrument calls for property to be distributed "per stripes," the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(d) **[Deceased Descendant With No Surviving Descendant Disregarded.]** For the purposes of subsections (b) and (c), an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

COMMENT

Purpose of New Section. This new section provides statutory definitions of "representation," "per capita at each generation," and "per stirpes." Subsection (b) applies to both private instruments and to provisions of applicable statutory law (such as Sections 2-603, 2-706, and 2-707) that call for property to be divided "by representation." The system of representation employed is the same as that which is adopted in Section 2-106 for intestate succession.

Subsection (c)'s definition of "per stirpes" accords with the predominant understanding of the term. In 1993, the phrase "if any" was added to subsection (c) to clarify the point that, under per stirpes, the initial division of the estate is made at the children generation even if no child survives the ancestor.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 154 (Supp. 1992).

Section 2-710. Worthier-Title Doctrine Abolished.

The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs," "heirs at law," "next of kin," "distributees," "relatives," or "family," or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

COMMENT

Purpose of New Section. This new section abolishes the doctrine of worthier title as a rule of law and as a rule of construction.

Cross Reference. *See* Section 2-711 for a rule of construction concerning the meaning of a disposition to the heirs, etc., of a designated person.

Section 2-711. Interests in "Heirs" and Like.

If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual's "heirs," "heirs at law," "next of kin," "relatives," or "family," or language of similar import, the property passes to those persons, including the state, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

COMMENT

Purpose of New Section. This new section provides a statutory definition of "heirs," etc., when contained in a dispositive provision or a statute (such as Section 2-707(h)). This section was amended in 1993 to make it applicable to present as well as future interests in favor of heirs and the like. Application of this section to present interests codifies the position of the Restatement (Second) of Property § 29.4 cmts. c & g (1987).

Cross Reference. *See* Section 2-710, abolishing the doctrine of worthier title.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 155 (Supp. 1992).

PART 8

GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

GENERAL COMMENT

Part 8 contains three general provisions that cut across probate and nonprobate transfers. Part 8 previously contance a fourth provision, Section 2-801, which dealt with disclaimers. Section 2-801 was replaced in 2002 by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§2-1101 to 2-1117). To avoid renumbering the other sections in this Part, Section 2-801 is reserved for possible future use.

Section 2-802 deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share.

Section 2-803 spells out the legal consequence of intentional and felonious killing on the right of the killer to take as heir and under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Section 2-804 deals with the consequences of a divorce on the right of the former spouse (and relatives of the former spouse) to take under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Application to Pre-Existing Governing Instruments. Under Section 8-101(b), for decedents dying after the effective date of enactment, the provisions of this Code apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature of the Code. The statement, titled "*Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents,*" can be found at 17 Am. C. Tr. & Est. Couns. Notes 184 (1991) or can be obtained from the headquarters office of the National Conference of Commissioners on Uniform State Laws, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, Phone 312/915-0195, FAX 312/915-0187.

Historical Note. This General Comment was revised in 1993 and 2002.

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 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.

Section 2-801. [Reserved.]

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] is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife 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 husband and wife;

(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. 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).

Section 2-803. Effect of Homicide on Intestate Succession, Wills, Trusts, Joint Assets, Life Insurance, and Beneficiary Designations.

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

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Governing instrument" means a governing instrument executed by the decedent.

(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] in place of his [or her] 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] intestate share.

(c) **[Revocation of Benefits Under Governing Instruments.]** The felonious and intentional killing of the decedent:

(1) revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer, and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and

(2) severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship transforming the interests of the decedent and killer into equal tenancies in common.

(d) **[Effect of Severance.]** A severance under subsection (c)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(e) **[Effect of Revocation.]** Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

(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] wrong.

(g) **[Felonious and Intentional Killing; How Determined.]** After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

(h) **[Protection of Payors and Other Third Parties.]**

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for having taken any other action in good faith reliance on the validity of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice of a claimed forfeiture or revocation under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of a claimed forfeiture or revocation under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed forfeiture or revocation under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

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

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

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

COMMENT

Purpose and Scope of Revisions. This section is substantially revised. Although the revised version does make a few substantive changes in certain subsidiary rules (such as the treatment of multiple party accounts, etc.), it does not alter the main thrust of the pre-1990 version. The major change is that the revised version is more comprehensive than the pre-1990 version. The structure of the section is also changed so that it substantially parallels the structure of Section 2-804, which deals with the effect of divorce on revocable benefits to the former spouse.

The pre-1990 version of this section was bracketed to indicate that it may be omitted by an enacting state without difficulty. The revised version omits the brackets because the Joint Editorial Board/Article II Drafting Committee believes that uniformity is desirable on the question.

As in the pre-1990 version, this section is confined to felonious and intentional killing and excludes the accidental manslaughter killing. Subsection (g) leaves no doubt that, for purposes of this section, a killing can be "felonious and intentional," whether or not the killer has actually been convicted in a criminal prosecution. Under subsection (g), after all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. Acquittal, however, does not preclude the acquitted

individual from being regarded as the decedent's killer for purposes of this section. This is because different considerations as well as a different burden of proof enter into the finding of criminal accountability in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir, devisee, or beneficiary of a revocable beneficiary designation, etc. of the decedent, the probate Court, upon the petition of an interested person, may find that, under a preponderance of the evidence standard, he or she would be found criminally accountable for the felonious and intentional killing of the decedent and thus be barred under this section from sharing in the affected property. In fact, in many of the cases arising under this section there may be no criminal prosecution because the killer has committed suicide.

It is now well accepted that the matter dealt with is not exclusively criminal in nature but is also a proper matter for probate Courts. The concept that a wrongdoer may not profit by his or her own wrong is a civil concept, and the probate Court is the proper forum to determine the effect of killing on succession to the decedent's property covered by this section. There are numerous situations where the same conduct gives rise to both criminal and civil consequences. A killing may result in criminal prosecution for murder and civil litigation by the decedent's family under wrongful death statutes. Another analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed the fraud in a civil proceeding.

The phrases "criminal accountability" and "criminally accountable" for the felonious and intentional killing of the decedent not only include criminal accountability as an actor or direct perpetrator, but also as an accomplice or co-conspirator.

Unlike the pre-1990 version, the revised version contains a subsection protecting payors who pay before receiving written notice of a claimed forfeiture or revocation under this section, and imposing personal liability on the recipient or killer.

The pre-1990 version's provision on the severance of joint tenancies and tenancies by the entirety also extended to "joint and multiple party accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents." Under subsection (c)(2) of the revised version, the severance applies only to "property held by [the decedent and killer] as joint tenants with the right of survivorship [or as community property with the right of survivorship]." The terms "joint tenants with the right of survivorship" and "community property with the right of survivorship" are defined in Section 1-201. That definition includes tenancies by the entirety, but excludes "forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution." Under subsection (c)(1), any portion of the decedent's contribution to the co-ownership registration running in favor of the killer would be treated as a revocable and revoked disposition.

Subsection (e) was amended in 1993 to make it clear that the antilapse statute applies in appropriate cases in which the killer is treated as having disclaimed.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of

ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. *See* the Comment to Section 2-804 for a discussion of the ERISA preemption question.

Cross References. *See* Section 1-201 for definitions of "beneficiary designated in a governing instrument," "governing instrument," "joint tenants with the right of survivorship," "community property with the right of survivorship," and "payor."

Historical Note. The above Comment was revised in 1993. For the prior version, see 8 U.L.A. 161 (Supp. 1992).

1997 Technical Amendment. By technical amendment effective July 31, 1997, the word "equal" was added to subsection (c)(2) to make it clear that the effect of severing the interests of the decedent and killer is to transform their interest into equal tenancies in common, without regard to the percentage of consideration furnished by either. Although this was the intent of this subsection, the court in *Estate of Garland*, 928 P.2d 928 (Mont. 1996), misconstrued the original language and held that once the interests were severed and transformed into tenancies in common, the shares "depend on the decedent's and the [killer's] individual contributions to the acquisition and maintenance of the property." This percentage-of-consideration rule is inconsistent with both the general principle of section 2-803 and with the statutory language. Section 2-803 is based on the principle that while the killer should not gain from the killing, neither should the killer be deprived of the killer's own property. In the case of a joint tenancy, neither the killer nor the victim could by a lawful, unilateral act have severed and become owner of more than his or her fractional interest. This is true even if one joint tenant provided more consideration than another joint tenant. Once property is titled in joint tenancy, any excess consideration provided by one joint tenant constitutes an irrevocable gift to the other joint tenant or tenants. The original statutory language established a fractional-interest rule by providing that the interests that are transformed into tenancies in common are "the [severed] interests of the decedent and killer." The statutory language, as revived, confirms this strict fractioning.

Section 2-804. Revocation of Probate and Nonprobate Transfers by Divorce; No Revocation by other Changes of Circumstances.

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

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(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 husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.

(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] 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, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, 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] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] 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 (i) disposition or appointment of property made by a divorced individual to his [or her] 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, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship transforming the interests of the former spouses into equal tenancies in common.

(c) **[Effect of Severance.]** A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and

location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) **[Effect of Revocation.]** Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(e) **[Revival if Divorce Nullified.]** Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(f) **[No Revocation for Other Change of Circumstances.]** No change of circumstances other than as described in this section and in Section 2-803 effects a revocation.

(g) **[Protection of Payors and Other Third Parties.]**

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(2) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

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

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

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

COMMENT

Purpose 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 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.

Consequence of Revocation. The effect of revocation by this section is that the provisions of the governing instrument are given effect as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed all provisions revoked by this section (*see* Section 2-1106 for the effect of a disclaimer). Note that this means that the antilapse statute applies in appropriate cases in which the divorced individual or relative is treated as having disclaimed. In the case of a revoked nomination in a fiduciary or representative capacity, the provisions of the governing instrument are given effect as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment. If the divorced individual (or relative of the divorced individual) is the donee of an unexercised power of appointment that is revoked by this section, the gift-in-default clause, if any, is to take effect, to the extent that the gift-in-default clause is not itself revoked by this section.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of

ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.

ERISA's preemption clause is extraordinarily broad. ERISA Section 514(a) does not merely preempt state laws that conflict with specific provisions in ERISA. Section 514(a) preempts "any and all State laws" insofar as they "relate to" any ERISA-governed employee benefit plan.

A complex case law has arisen concerning the question of whether to apply ERISA Section 514(a) to preempt state law in circumstances in which ERISA supplies no substantive regulation. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal Courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees. *See, e.g., American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979). The Retirement Equity Act of 1984 amended ERISA to add Sections 206(d)(3) and 514(b)(7), confirming the judicially created exception for state domestic relations decrees.

The federal Courts have been less certain about whether to defer to local probate law. In *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.,* 830 F.2d 1009 (9th Cir.1987), the Court held that ERISA preempted the Montana nonclaim statute (which is Section 3-803 of the Uniform Probate Code). On the other hand, in *Mendez-Bellido v. Board of Trustees,* 709 F.Supp. 329 (E.D.N.Y.1989), the Court applied the New York "slayer-rule" against an ERISA preemption claim, reasoning that "state laws prohibiting murderers from receiving death benefits are relatively uniform [and therefore] there is little threat of creating a 'patchwork scheme of regulations' " that ERISA sought to avoid.

It is to be hoped that the federal Courts will continue to show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. To the extent that the federal Courts think themselves unable to craft exceptions to ERISA's preemption language, it is open to them to apply local law concepts as federal common law. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

Cross References. *See* Section 1-201 for definitions of "beneficiary designated in a governing instrument," "governing instrument," "joint tenants with the right of survivorship," "community property with the right of survivorship," and "payor."

References. The theory of this section is discussed in Waggoner, *"Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code,"* 26 Real Prop. Prob. & Tr. J. 683, 689-701 (1992). *See also* Langbein, *"The*

Nonprobate Revolution and the Future of the Law of Succession," 97 Harv.L.Rev. 1108 (1984).

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§2-1001 – 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.

Historical Note. The above Comment was revised in 1993 and 2002.

PART 9

STATUTORY RULE AGAINST PERPETUITIES; HONORARY TRUSTS

GENERAL COMMENT

Subpart 1 of this Part incorporates into the Code the Uniform Statutory Rule Against Perpetuities (USRAP or Uniform Statutory Rule) and Subpart 2 contains an optional section on honorary trusts and trusts for pets. Subpart 2 is under continuing review and, after appropriate study, might subsequently be revised to add provisions affecting certain types of commercial transactions respecting land, such as options in gross, that directly or indirectly restrain alienability.

In codifying Subparts 1 and 2, enacting states may deem it appropriate to locate them at some place other than in the probate code.

Subpart 1. Statutory Rule Against Perpetuities

GENERAL COMMENT

Simplified Wait-and-See/Deferred-Reformation Approach Adopted. The Uniform Statutory Rule reforms the common-law Rule Against Perpetuities (common-law Rule) by adding a simplified wait-and-see element and a deferred-reformation element.

Wait-and-see is a two-step strategy. Step One (Section 2-901(a)(1)) preserves the validating side of the common-law Rule. By satisfying the common-law Rule, a nonvested future interest in property is valid at the moment of its creation. Step Two (Section 2-901(a)(2)) is a salvage strategy for future interests that would have been invalid at common law. Rather than invalidating such interests at creation, wait-and-see allows a period of time, called the permissible vesting period, during which the nonvested interests are permitted to vest according to the trust's terms.

The traditional method of measuring the permissible vesting period has been by reference to lives in being at the creation of the interest (the measuring lives) plus 21 years. There are, however, various difficulties and costs associated with identifying and tracing a set of actual measuring lives to see which one is the survivor and when he or she dies. In addition, it has been documented that the use of actual measuring lives plus 21 years does not produce a period of time that self-adjusts to each disposition, extending dead-hand

control no further than necessary in each case; rather, the use of actual measuring lives (plus 21 years) generates a permissible vesting period whose length almost always exceeds by some arbitrary margin the point of actual vesting in cases traditionally validated by the wait-and-see strategy. The actual-measuring-lives approach, therefore, performs a margin-of-safety function. Given this fact, and given the costs and difficulties associated with the actual-measuring-lives approach, the Uniform Statutory Rule forgoes the use of actual measuring lives and uses instead a permissible vesting period of a flat 90 years.

The philosophy behind the 90-year period is to fix a period of time that approximates the average period of time that would traditionally be allowed by the wait-and-see doctrine. The flat-period-of-years method was not used as a means of increasing permissible dead-hand control by lengthening the permissible vesting period beyond its traditional boundaries. In fact, the 90-year period falls substantially short of the absolute maximum period of time that could theoretically be achieved under the common-law Rule itself, by the so-called "twelve-healthy-babies ploy"-a ploy that would average out to a period of about 115 years,[1] 25 years or 27.8% longer than the 90 years allowed by USRAP. The fact that the traditional period roughly averages out to a longish-sounding 90 years is a reflection of a quite different phenomenon: the dramatic increase in longevity that society as a whole has experienced in the course of the twentieth century.

The framers of the Uniform Statutory Rule derived the 90-year period as follows. The first point recognized was that if actual measuring lives were to have been used, the length of the permissible vesting period would, in the normal course of events, be governed by the life of the youngest measuring life. The second point recognized was that no matter what method is used to identify the measuring lives, the youngest measuring life, in standard trusts, is likely to be the transferor's youngest descendant living when the trust was created.[2] The 90-year period was premised on these propositions. Using four hypothetical families deemed to be representative of actual families, the framers of the Uniform Statutory Rule determined that, on average, the transferor's youngest descendant in being at the transferor's death-assuming the transferor's death to occur between ages 60 and 90, which is when 73 percent of the population die-is about 6 years old. *See* Waggoner, *"Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities,"* 20 U. Miami Inst. on Est. Plan. Ch. 7 at 7-17 (1986). The remaining life expectancy of a 6-year-old is about 69 years. The 69 years, plus the 21-year tack-on period, gives a permissible vesting period of 90 years.

Acceptance of the 90-year-period Approach under the Federal Generation-skipping Transfer Tax. Federal regulations, to be promulgated by the U.S. Treasury Department under the generation-skipping transfer tax, will accept the Uniform Statutory Rule's 90-year period as a valid approximation of the period that, on average, would be produced by lives in being plus 21 years. See Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (as to be revised). When originally promulgated in 1988, this regulation was prepared without knowledge of the Uniform Statutory

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[1] Actuarially, the life expectancy of the longest living member of a group of twelve new-born babies is about 94 years; with the 21-year tack-on period, the "twelve-healthy-babies ploy" would produce, on average, a period of about 115 years (94 + 21).

[2] Under section 2-707, the descendants of a beneficiary of a future interest are presumptively made substitute beneficiaries, almost certainly making those descendants in being at the creation of the interest measuring lives, were measuring lives to have been used.

Rule Against Perpetuities, which had been promulgated in 1986; as first promulgated, the regulation only recognized a period measured by actual lives in being plus 21 years. After the 90-year approach of the Uniform Statutory Rule was brought to the attention of the U.S. Treasury Department, the Department issued a letter of intent to amend the regulation to treat the 90-year period as the equivalent of a lives-in-being-plus-21-years period. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990). For further discussion of the coordination of the federal generation-skipping transfer tax with the Uniform Statutory Rule, see the Comment to Section 2-901(e), infra, and the Comment to Section 1(e) of the Uniform Statutory Rule Against Perpetuities.

The 90-year Period Will Seldom be Used Up. Nearly all trusts (or other property arrangements) will terminate by their own terms long before the 90-year permissible vesting period expires, leaving the permissible vesting period to extend unused (and ignored) into the future long after the contingencies have been resolved and the property distributed. In the unlikely event that the contingencies have not been resolved by the expiration of the permissible vesting period, Section 2-903 requires the disposition to be reformed by the Court so that all contingencies are resolved within the permissible period.

In effect, wait-and-see with deferred reformation operates similarly to a traditional perpetuity saving clause, which grants a margin-of-safety period measured by the lives of the transferor's descendants in being at the creation of the trust or other property arrangement (plus 21 years).

No New Learning Required. The Uniform Statutory Rule does not require the practicing bar to learn a new and unfamiliar set of perpetuity principles. The effect of the Uniform Statutory Rule on the planning and drafting of documents for clients should be distinguished from the effect on the resolution of actual or potential perpetuity-violation cases. The former affects many more practicing lawyers than the latter.

With respect to the planning and drafting end of the practice, the Uniform Statutory Rule requires no modification of current practice and no new learning. *Lawyers can and should continue to use the same traditional perpetuity-saving/termination clause, using specified lives in being plus 21 years, they used before enactment.* Lawyers should not shift to a "later of" type clause that purports to operate upon the *later of* (A) 21 years after the death of the survivor of specified lives in being or (B) 90 years. As explained in more detail in the Comment to Section 2-901, such a clause is not effective. If such a "later of" clause is used in a trust that contains a violation of the common-law rule against perpetuities, Section 2-901(a), by itself, would render the clause ineffective, limit the maximum permissible vesting period to 90 years, and render the trust vulnerable to a reformation suit under Section 2-903. Section 2-901(e), however, saves documents using this type of clause from this fate. By limiting the effect of such clauses to the 21-year period following the death of the survivor of the specified lives, subsection (e) in effect transforms this type of clause into a traditional perpetuity-saving/termination clause, bringing the trust into compliance with the common-law rule against perpetuities and rendering it invulnerable to a reformation suit under Section 2-903.

Far fewer in number are those lawyers (and judges) who have an actual or potential perpetuity-violation case. An actual or potential perpetuity-violation case will arise very infrequently under the Uniform Statutory Rule. When such a

case does arise, however, lawyers (or judges) involved in the case will find considerable guidance for its resolution in the detailed analysis contained in the commentary accompanying the Uniform Statutory Rule itself. In short, the detailed analysis in the commentary accompanying the Uniform Statutory Rule need not be part of the general learning required of lawyers in the drafting and planning of dispositive documents for their clients. The detailed analysis is supplied in the commentary for the assistance in the resolution of an actual violation. Only then need that detailed analysis be consulted and, in such a case, it will prove extremely helpful.

General References. Fellows, *"Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89,"* 25 Real Prop. Prob. & Tr. J. 597 (1991) (testing the various types of perpetuity reform measures and concluding, on the basis of empirical evidence, that the Uniform Statutory Rule is the best opportunity offered to date for a uniform perpetuity law that efficiently and effectively achieves a fair balance between present and future property owners); Waggoner, *"The Uniform Statutory Rule Against Perpetuities: Oregon Joins Up,"* 26 Willamette L. Rev. 259 (1990) (explaining the operation of the Uniform Statutory Rule); Waggoner, *"The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period,"* 73 Cornell L. Rev. 157 (1988) (explaining the derivation of the 90-year period); Waggoner, *"The Uniform Statutory Rule Against Perpetuities,"* 21 Real Prop., Prob. & Tr. J. 569 (1986) (explaining the theory and operation of the Uniform Statutory Rule).

Section 2-901. Statutory Rule Against Perpetuities.

(a) **[Validity of Nonvested Property Interest.]** A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

(b) **[Validity of General Power of Appointment Subject to a Condition Precedent.]** A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) when the power is created, the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) **[Validity of Nongeneral or Testamentary Power of Appointment.]** A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) **[Possibility of Post-death Child Disregarded.]** In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) **[Effect of Certain "Later-of" Type Language.]** If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

COMMENT

Section 2-901 codifies the validating side of the common-law Rule and implements the wait-and-see feature of the Uniform Statutory Rule Against Perpetuities. As provided in Section 2-906, this section and the other sections in Subpart 1 of Part 9 supersede the common-law Rule Against Perpetuities (common-law Rule) in jurisdictions previously adhering to it (or repeals any statutory version or variation thereof previously in effect in the jurisdiction). The common-law Rule (or the statutory version or variation thereof) is replaced by the Statutory Rule in Section 2-901 and by the other provisions of Subpart 1 of Part 9.

Section 2-901(a) covers nonvested property interests, and will be the subsection most often applicable. Subsections (b) and (c) cover powers of appointment.

Paragraph (1) of subsections (a), (b), and (c) is a codified version of the validating side of the common-law Rule. In effect, paragraph (1) of these subsections provides that nonvested property interests and powers of appointment that are valid under the common-law Rule Against Perpetuities, including those that are rendered valid because of a perpetuity saving clause, continue to be valid under the Statutory Rule and can be declared so at their inceptions. This means that no new learning is required of competent estate planners: The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.

Paragraph (2) of subsections (a), (b), and (c) establishes the wait-and-see rule. Paragraph (2) provides that an interest or a power of appointment that is not validated by paragraph (1), and hence would have been invalid under the common-law Rule, is given a second chance: Such an interest is valid if it does

not actually remain in existence and nonvested when the 90-year permissible vesting period expires; such a power of appointment is valid if it ceases to be subject to a condition precedent or is no longer exercisable when the permissible 90-year period expires.

Subsection (d). The rule established in subsection (d) deserves a special comment. Subsection (d) declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purpose of determining the validity of an interest (or a power of appointment) under paragraph (1) of subsection (a), (b), or (c). The rule of subsection (d) does not apply, for example, to questions such as whether a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest-as a member of a class or otherwise. Neither subsection (d), nor any other provision of Part 9, supersedes the widely accepted common-law principle, codified in Section 2-109, that a child in gestation (a child sometimes described as a child en ventre sa mere) who is later born alive (and, under Section 2-109, lives for 120 hours or more after birth) is regarded as alive during gestation.

The limited purpose of subsection (d) is to solve a perpetuity problem created by advances in medical science. The problem is illustrated by a case such as "to A for life, remainder to A's children who reach 21." When the common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of a deceased pregnant woman long enough to develop the fetus to viability-advances in medical science unanticipated when the common-law Rule was in its developmental stages-having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 2-901(a)(1) on the interest of A's children in the above example. The rule of subsection (d), however, does insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) in place, the third component of the common-law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a), (b), and (c) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in the above example A leaves sperm on deposit at a sperm bank and after A's death a woman (A's widow or another) becomes pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. Cf. Restatement

(Second) of Property (Donative Transfers) Introductory Note to Ch. 26 (1988). Without trying to predict how that question will be resolved in the future, the best way to handle the problem from the perpetuity perspective is the rule in subsection (d) requiring the possibility of post-death children to be disregarded.

Subsection (e)-Effect of Certain "Later-of" Type Language. Subsection (e) was added to the Uniform Statutory Rule in 1990. It primarily applies to a non-traditional type of "later of" clause (described below). Use of that type of clause might have produced unintended consequences, which are now rectified by the addition of subsection (e).

In general, perpetuity saving or termination clauses can be used in either of two ways. The predominant use of such clauses is as an override clause. That is, the clause is not an integral part of the dispositive terms of the trust, but operates independently of the dispositive terms; the clause provides that all interests must vest no later than at a specified time in the future, and sometimes also provides that the trust must then terminate, but only if any interest has not previously vested or if the trust has not previously terminated. The other use of such a clause is as an integral part of the dispositive terms of the trust; that is, the clause is the provision that directly regulates the duration of the trust. Traditional perpetuity saving or termination clauses do not use a "later of" approach; they mark off the maximum time of vesting or termination only by reference to a 21-year period following the death of the survivor of specified lives in being at the creation of the trust.

Subsection (e) applies to a non-traditional clause called a "later of" (or "longer of") clause. Such a clause might provide that the maximum time of vesting or termination of any interest or trust must occur no later than the later of (A) 21 years after the death of the survivor of specified lives in being at the creation of the trust or (B) 90 years after the creation of the trust.

Under the Uniform Statutory Rule as originally promulgated, this type of "later of" clause would not achieve a "later of" result. If used as an override clause in conjunction with a trust whose terms were, by themselves, valid under the common-law Rule against perpetuities (common-law Rule), the "later of" clause did no harm. The trust would be valid under the common-law Rule as codified in subsection (a)(1) because the clause itself would neither postpone the vesting of any interest nor extend the duration of the trust. But, if used either (1) as an override clause in conjunction with a trust whose terms were not valid under the common-law Rule or (2) as the provision that directly regulated the duration of the trust, the "later of" clause would not cure the perpetuity violation in case (1) and would create a perpetuity violation in case (2). In neither case would the clause qualify the trust for validity at common law under subsection (a)(1) because the clause would not guarantee that all interests will be certain to vest or terminate no later than 21 years after the death of an individual then alive.[3] In any given case, 90 years can turn out to be longer than the

[3] By substantial analogous authority, the specified-lives-in-being-plus-21-years prong of the "later of" clause under discussion is not sustained by the separability doctrine (described in Part H of the Comment to § 1 of the Uniform Statutory Rule Against Perpetuities). *See, e.g.,* Restatement of Property § 376 comments e & f & illustration 3 (1944); *Easton v. Hall*, 323 Ill. 397, 154 N.E. 216 (1926); *Thorne v. Continental Nat'l Bank & Trust Co.,* 305 Ill.App. 222, 27 N.E.2d 302 (1940). The inapplicability of the separability doctrine is also

period produced by the specified-lives-in-being-plus-21-years language.

Because the clause would fail to qualify the trust for validity under the common-law Rule of subsection (a)(1), the nonvested interests in the trust would be subject to the wait-and-see element of subsection (a)(2) and vulnerable to a reformation suit under Section 2-903. Under subsection (a)(2), an interest that is not valid at common law is invalid unless it actually vests or terminates within 90 years after its creation. Subsection (a)(2) does not grant such nonvested interests a permissible vesting period of either 90 years or a period of 21 years after the death of the survivor of specified lives in being. Subsection (a)(2) only grants such interest a period of 90 years in which to vest.

The operation of subsection (a), as outlined above, is also supported by perpetuity policy. If subsection (a) allowed a "later of" clause to achieve a "later of" result, it would authorize an improper use of the 90-year permissible vesting period of subsection (a)(2). The 90-year period of subsection (a)(2) is designed to approximate the period that, *on_average*, would be produced by using actual lives in being plus 21 years. Because in any given case the period actually produced by lives in being plus 21 years can be shorter or longer than 90 years, an attempt to utilize a 90-year period in a "later of" clause improperly seeks to turn the 90-year *average* into a *minimum*.

Set against this background, the addition of subsection (e) is quite beneficial. Subsection (e) limits the effect of this type of "later of" language to 21 years after the death of the survivor of the specified lives, in effect transforming the clause into a traditional perpetuity saving/termination clause. By doing so, subsection (e) grants initial validity to the trust under the common-law Rule as codified in subsection (a)(1) and precludes a reformation suit under Section 2-903.

Note that subsection (e) covers variations of the "later of" clause described above, such as a clause that postpones vesting until the later or (A) *20* years after the death of the survivor of specified lives in being or (B) *89* years. Subsection (e) does not, however, apply to all dispositions that incorporate a "later of" approach. To come under subsection (e), the specified-lives prong must include a tack-on period of up to 21 years. Without a tack-on period, a "later of" disposition, unless valid at common law, comes under subsection (a)(2) and is given 90 years in which to vest. An example would be a disposition that creates an interest that is to vest upon "the later of the death of my widow or 30 years after my death."

Coordination of the Federal Generation-skipping Transfer Tax with the Uniform Statutory Rule. In 1990, the Treasury Department announced a decision to coordinate the tax regulations under the "grandfathering" provisions of the federal generation-skipping transfer tax with the Uniform Statutory Rule. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990) (hereinafter *Treasury Letter*).

Section 1433(b)(2) of the Tax Reform Act of 1986 generally exempts ("grandfathers") trusts from the federal generation-skipping transfer tax that were irrevocable on September 25, 1985. This section adds, however, that the exemption shall apply "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." The provisions of Section 1433(b)(2) were first implemented by Temp. Treas. Reg. § 26.2601-1, promulgated

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supported by perpetuity policy, as described in the text above.

by T.D. 8187 on March 14, 1988. Insofar as the Uniform Statutory Rule is concerned, a key feature of that temporary regulation is the concept that the statutory reference to "corpus added to the trust after September 25, 1985" not only covers actual post-9/25/85 transfers of new property or corpus to a grandfathered trust but "constructive" additions as well. Under the temporary regulation as first promulgated, a "constructive" addition occurs if, after 9/25/85, the donee of a nongeneral power of appointment exercises that power "in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years. If a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised." Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988).

Because the Uniform Statutory Rule was promulgated in 1986 and applies only prospectively, any "grandfathered" trust would have become irrevocable prior to the enactment of USRAP in any state. Nevertheless, the second sentence of Section 2-905(a) extends USRAP's wait-and-see approach to post-effective-date exercises of nongeneral powers even if the power itself was created prior to USRAP's effective date. Consequently, a post-USRAP-effective-date exercise of a nongeneral power of appointment created in a "grandfathered" trust could come under the provisions of the Uniform Statutory Rule.

The literal wording, then, of Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988), as first promulgated, could have jeopardized the grandfathered status of an exempt trust if (1) the trust created a nongeneral power of appointment, (2) the donee exercised that nongeneral power, and (3) USRAP is the perpetuity law applicable to the donee's exercise. This possibility arose not only because the donee's exercise itself might come under the 90-year permissible vesting period of subsection (a)(2) if it otherwise violated the common-law Rule and hence was not validated under subsection (a)(1). The possibility also arose in a less obvious way if the donee's exercise created another nongeneral power. The last sentence of the temporary regulation states that "if a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised."

In late March 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Joint Editorial Board for the Uniform Probate Code (JEB-UPC) filed a formal request with the Treasury Department asking that measures be taken to coordinate the regulation with USRAP. By the *Treasury Letter* referred to above, the Treasury Department responded by stating that it "will amend the temporary regulations to accommodate the 90-year period under USRAP as originally promulgated [in 1986] or as amended [in 1990 by the addition of subsection (e)]." This should effectively remove the possibility of loss of grandfathered status under the Uniform Statutory Rule merely because the donee of a nongeneral power created in a grandfathered trust inadvertently exercises that power in violation of the common-law Rule or merely because the donee exercises that power by creating a second nongeneral power that might, in the future, be inadvertently exercised in violation of the common-law Rule.

The *Treasury Letter* states, however, that any effort by the donee of a nongeneral power in a grandfathered trust to obtain a "later of" specified-lives-in-being-plus-21-years or 90-years approach will be treated as a constructive addition, unless that effort is nullified by state law. As explained above, the Uniform Statutory Rule, as originally promulgated in 1986 or as amended in 1990 by the addition of subsection (e), nullifies any direct

effort to obtain a "later of" approach by the use of a "later of" clause.

The *Treasury Letter* states that an indirect effort to obtain a "later of" approach would also be treated as a constructive addition that would bring grandfathered status to an end, unless the attempt to obtain the later-of approach is nullified by state law. The Treasury Letter indicates that an indirect effort to obtain a "later of" approach could arise if the donee of a nongeneral power successfully attempts to prolong the duration of a grandfathered trust by switching from a specified-lives-in-being-plus-21-years perpetuity period to a 90-year perpetuity period, or vice versa. Donees of nongeneral powers in grandfathered trusts would therefore be well advised to resist any temptation to wait until it becomes clear or reasonably predictable which perpetuity period will be longer and then make a switch to the longer period if the governing instrument creating the power utilized the shorter period. No such attempted switch and no constructive addition will occur if in each instance a traditional specified-lives-in-being-plus-21-years perpetuity saving clause is used.

Any such attempted switch is likely in any event to be nullified by state law and, if so, the attempted switch will not be treated as a constructive addition. For example, suppose that the original grandfathered trust contained a standard perpetuity saving clause declaring that all interests in the trust must vest no later than 21 years after the death of the survivor of specified lives in being. In exercising a nongeneral power created in that trust, any indirect effort by the donee to obtain a "later of" approach by adopting a 90-year perpetuity saving clause will likely be nullified by subsection (e). If that exercise occurs at a time when it has become clear or reasonably predictable that the 90-year period will prove longer, the donee's exercise would constitute language in a governing instrument that seeks to operate in effect to postpone the vesting of any interest until the later of the specified-lives-in-being-plus-21-years period or 90 years. Under subsection (e), "that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives."

Quite apart from subsection (e), the relation-back doctrine generally recognized in the exercise of nongeneral powers stands as a doctrine that could potentially be invoked to nullify an attempted switch from one perpetuity period to the other perpetuity period. Under that doctrine, interests created by the exercise of a nongeneral power are considered created by the donor of that power. *See, e.g.,* Restatement (Second) of Property, Donative Transfers § 11.1 comment b (1986). As such, the maximum vesting period applicable to interests created by the exercise of a nongeneral power would apparently be covered by the perpetuity saving clause in the document that created the power, notwithstanding any different period the donee purports to adopt.

Reference. Section 2-901 is Section 1 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with numerous examples illustrating its application, *see* the Official Comment to Section 1 of the Uniform Act.

Section 2-902. When Nonvested Property Interest or Power of Appointment Created.

(a) Except as provided in subsections (b) and (c) and in Section 2-905(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of Subpart 1 of this Part, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii)a property interest subject to a power of appointment described in Section 2-901(b) or (c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. [For purposes of Subpart 1 of this Part, a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]

(c) For purposes of Subpart 1 of this Part, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

COMMENT

Section 2-902 defines the time when, for purposes of Subpart 1 of Part 9, a nonvested property interest or a power of appointment is created. The period of time allowed by Section 2-901 is measured from the time of creation of the nonvested property interest or power of appointment in question. Section 2-905, with certain exceptions, provides that Subpart 1 of Part 9 applies only to nonvested property interests and powers of appointment created on or after the effective date of Subpart 1 of Part 9.

Subsection (a). Subsection (a) provides that, with certain exceptions, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law. Because a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that a nonvested property interest or a power of appointment created by will is created at the decedent's death. With respect to an inter-vivos transfer, an interest or power is created on the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed or the funding of the trust.

Nonvested Property Interests and Powers of Appointment Created by the Exercise of a Power of Appointment. If a nonvested property interest or a power of appointment was created by the testamentary or inter-vivos exercise of a power of appointment, general principles of property law adopt the "relation-back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created, not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the nonvested property interest or power of appointment was created by the exercise of a nongeneral or a testamentary power of appointment that was itself created by the exercise of a nongeneral or a testamentary power of appointment, the relation-back doctrine is applied twice and the nonvested property interest or power of appointment was created when the first power of appointment was created, not when the second power was created or exercised.

Example 1. G's will created a trust that provided for the income to go to G's son, A, for life, remainder to such of A's descendants as A shall by will appoint.

A died leaving a will that exercised his nongeneral power of appointment, providing that the trust is to continue beyond A's death, paying the income to A's daughter, X, for her lifetime, remainder in corpus to such of X's descendants as X shall by will appoint; in default of appointment, to X's descendants who survive X, by representation.

A's exercise of his nongeneral power of appointment gave a nongeneral power of appointment to X and a nonvested property interest to X's descendants. For purposes of Section 2-901, X's power of appointment and the nonvested property interest in X's descendants is deemed to have been "created" at G's death when A's nongeneral power of appointment was created, not at A's death when he exercised his power of appointment.

Suppose that X subsequently dies leaving a will that exercises her nongeneral power of appointment. For purposes of Section 2-901, any nonvested property interest or power of appointment created by an exercise of X's nongeneral power of appointment is deemed to have been "created" at G's death, not at A's death or at X's death.

If the exercised power was a presently exercisable general power, the relation-back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

Example 2. The same facts as Example 1, except that A's will exercised his nongeneral power of appointment by providing that the trust is to continue beyond A's death, paying the income to A's daughter, X, for her lifetime, remainder in corpus to such person or persons, including X, her estate, her creditors, and the creditors of her estate, as X shall appoint; in default of appointment, to X's descendants who survive X, by representation.

A's exercise of his nongeneral power of appointment gave a presently exercisable general power of appointment to X. For purposes of Section 2-901, any nonvested property interest or power of appointment created by an exercise of X's presently exercisable general power of appointment is deemed to be "created" when X irrevocably exercises her power of appointment, not when her power of appointment or A's power of appointment was created.

A's exercise of his nongeneral power also granted a nonvested property interest to X's descendants (under the gift-in-default clause). Were it not for the presently exercisable general power granted to X, the nonvested property interest in X's surviving descendants would, under the relation-back doctrine, be deemed "created" for purposes of Section 2-901 at the time of G's death. However, under Section 2-902(b), the fact that X is granted the presently exercisable general power postpones the time of creation of the nonvested property interest of X's descendants. Under Section 2-902(b), that nonvested property interest is deemed not to have been "created" for purposes of Section 2-901 at G's death but rather when X's presently exercisable general power "terminates." Consequently, the time of "creation" of the nonvested interest of X's descendants is postponed as of the time that X was granted the presently

exercisable general power (upon A's death) and continues in abeyance until X's power terminates. X's power terminates by the first to happen of the following: X's irrevocable exercise of her power; X's release of her power; X's entering into a contract to exercise or not to exercise her power; X's dying without exercising her power; or any other action or nonaction that would have the effect of terminating her power.

Subsection (b). Subsection (b) provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 2-901(b) or 2-901(c)), the time of creation of the nonvested property interest (or the power of appointment) is postponed until the power to become the unqualified beneficial owner ceases to exist. This is in accord with existing common law. The standard example of the application of this subsection is a revocable inter-vivos trust. For perpetuity purposes, both at common law and under Subpart 1 of Part 9, the nonvested property interests and powers of appointment created in the trust are created when the power to revoke expires, usually at the settlor's death. For another example of the application of subsection (b), *see* the last paragraph of Example 2, above.

Subsection (c). Subsection (c) provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable inter-vivos trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to each transfer. The prospect of staggered periods is avoided by subsection (c). Subsection (c) is in accord with the saving-clause principle of wait-and-see embraced by Part 9. If the irrevocable inter-vivos trust had contained a saving clause, the perpetuity-period component of the clause would be measured by reference to lives in being when the original contribution to the trust was made, and the clause would cover subsequent contributions as well.

Reference. Section 2-902 is Section 2 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with examples illustrating its application, *see* the Official Comment to Section 2 of the Uniform Act.

Section 2-903. Reformation.

Upon the petition of an interested person, a Court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 2-901(a)(2), 2-901(b)(2), or 2-901(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under Section 2-901 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 2-901 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by Section 2-901(a)(1) can vest but not within 90 years after its creation.

COMMENT

Section 2-903 implements the deferred-reformation feature of the Uniform Statutory Rule Against Perpetuities. Upon the petition of an interested person, the Court is directed to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the Court most closely to approximate the transferor's manifested plan of distribution, in any one of three circumstances. The "interested person" who would frequently bring the reformation suit would be the trustee.

Section 2-903 applies only to dispositions the validity of which is governed by the wait-and-see element of Section 2-901(a)(2), 2-901(b)(2), or 2-901(c)(2); it does not apply to dispositions that are initially valid under Section 2-901(a)(1), 2-901(b)(1), or 2-901(c)(1)-the codified version of the validating side of the common-law Rule.

Section 2-903 will seldom be applied. Of the fraction of trusts and other property arrangements that fail to meet the requirements for initial validity under the codified version of the validating side of the common-law Rule, almost all of them will have been settled under their own terms long before any of the circumstances requisite to reformation under Section 2-903 arise.

If, against the odds, one of the circumstances requisite to reformation does arise, it will be found easier than perhaps anticipated to determine how best to reform the disposition. The Court is given two criteria to work with: (i) the transferor's manifested plan of distribution, and (ii) the allowable 90-year period. Because governing instruments are where transferors manifest their plans of distribution, the imaginary horrible of Courts being forced to probe the minds of long-dead transferors will not materialize.

Subsection (1). The theory of Section 2-903 is to defer the right to reformation until reformation becomes truly necessary. Thus, the basic rule of Section 2-903(1) is that the right to reformation does not arise until a nonvested property interest or a power of appointment becomes invalid; under Section 2-901, this does not occur until the expiration of the 90-year permissible vesting period. This approach is more efficient than the "immediate cy pres" approach to perpetuity reform because it substantially reduces the number of reformation suits. It also is consistent with the saving-clause principle embraced by the Statutory Rule. Deferring the right to reformation until the permissible vesting period expires is the only way to grant every reasonable opportunity for the donor's disposition to work itself out without premature interference.

Subsection (2). Although, generally speaking, reformation is deferred until an invalidity has occurred, Section 2-903 grants an earlier right to reformation when it becomes necessary to do so or when there is no point in waiting the full 90-year period out. Thus subsection (2), which pertains to class gifts that are not yet but still might become invalid under the Statutory Rule, grants a right to reformation whenever the share of any class member whose share had vested within the permissible vesting period might otherwise have to wait out the remaining part of the 90 years before obtaining his or her share. Reformation under this subsection will seldom be needed, however, because of the common

practice of structuring trusts to split into separate shares or separate trusts at the death of each income beneficiary, one such separate share or separate trust being created for each of the income beneficiary's then-living children; when this pattern is followed, the circumstances described in subsection (2) will not arise.

Subsection (3). Subsection (3) also grants a right to reformation before the 90-year permissible vesting period expires. The circumstances giving rise to the right to reformation under subsection (3) occurs if a nonvested property interest can vest but not before the 90-year period has expired. Though unlikely, such a case can theoretically arise. If it does, the interest-unless it terminates by its own terms earlier-is bound to become invalid under Section 2-901 eventually. There is no point in deferring the right to reformation until the inevitable happens. Section 2-903 provides for early reformation in such a case, just in case it arises.

Infectious Invalidity. Given the fact that this section makes reformation mandatory, not discretionary with the Court, the common-law doctrine of infectious invalidity is superseded by this section. In a state in which the Courts have been particularly zealous about applying the infectious-invalidity doctrine, however, an express codification of the abrogation of this doctrine might be thought desirable. If so, the above section could be made subsection (a), with the following new subsection (b) added:

(b) The common-law rule known as the doctrine of infectious invalidity is abolished.

Reference. Section 2-903 is Section 3 of the Uniform Statutory Rule Against Perpetuities (Uniform Act. For further discussion of this section, with examples illustrating its application, *see* the Official Comment to Section 3 of the Uniform Act.

Section 2-904. Exclusions from Statutory Rule Against Perpetuities.

Section 2-901 (statutory rule against perpetuities) does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

COMMENT

This section lists the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law but in part not. Under subsection (7), all the exclusions from the common-law Rule recognized at common law and by statute in the state are preserved.

The major departure from existing common law comes in subsection (1). In line with long-standing scholarly commentary, subsection (1) excludes nondonative transfers from the Statutory Rule. The Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control of such arrangements. The period of the Rule-a life in being plus 21 years-is suitable for donative transfers only, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 2-901. That period, as noted, represents an approximation of the period of time that would be produced, on average, by tracing a set of actual measuring lives and adding a 21-year period following the death of the survivor.

Certain types of transactions-although in some sense supported by consideration, and hence arguably nondonative-arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to such transactions, subsection (1) lists and restores such transactions, such as premarital or postmarital agreements, contracts to make or not to revoke a will or trust, and so on, to the donative-transfers category that does not qualify for an exclusion.

Reference. Section 2-904 is Section 4 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with

examples illustrating its application, *see* the Official Comment to Section 4 of the Uniform Act.

Section 2-905. Prospective Application.

(a) Except as extended by subsection (b), Subpart 1 of this Part applies to a nonvested property interest or a power of appointment that is created on or after the effective date of Subpart 1 of this Part. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the effective date of Subpart 1 of this Part and is determined in a judicial proceeding, commenced on or after the effective date of Subpart 1 of this Part, to violate this State's rule against perpetuities as that rule existed before the effective date of Subpart 1 of this Part, a Court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

COMMENT

Section 2-905 provides that, except for Section 2-905(b), this Part applies only to nonvested property interests or powers of appointment created on or after the effective date of this Subpart. The second sentence of subsection (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. The import of this special rule, which applies to the exercise of all types of powers of appointment (general testamentary powers and nongeneral powers as well as presently exercisable general powers), is that all the provisions of this Subpart except Section 2-905(b) apply if the donee of a power of appointment exercises the power on or after the effective date of this Subpart, whether the donee's exercise is revocable or irrevocable. In addition, all the provisions of Subpart 1 except Section 2-905(b) apply if the donee exercised the power before the effective date of this Subpart if (i) that pre-effective-date exercise was revocable and (ii) that revocable exercise becomes irrevocable on or after the effective date of this Subpart. The special rule, in other words, prevents the common-law doctrine of relation back from inappropriately shrinking the reach of this Subpart.

Although the Uniform Statutory Rule does not apply retroactively, Section 2-905(b) authorizes a Court to exercise its equitable power of reform instruments that contain a violation of the state's former rule against perpetuities and to which the Uniform Statutory Rule does not apply because the offending property interest or power of appointment was created before the effective date of this Subpart. Courts are urged to consider reforming such dispositions by judicially inserting a perpetuity saving clause, because a perpetuity saving clause would probably have been used at the drafting stage of

the disposition had it been drafted competently. To obviate any possibility of an inequitable exercise of the equitable power to reform, Section 2-905(b) limits the authority to reform to situations in which the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the effective date of this Subpart. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

Reference. Section 2-905 is Section 5 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with examples illustrating its application, *see* the Official Comment to Section 5 of the Uniform Act.

Section 2-906. [Supersession][Repeal].

Subpart 1 of this Part [supersedes the rule of the common law known as the rule against perpetuities][repeals(list statutes to be repealed)].

COMMENT

The first set of bracketed text is provided for states that follow the common-law Rule Against Perpetuities. The second set of bracketed text is provided for the repeal of statutory adoptions of the common-law Rule Against Perpetuities, statutory variations of the common-law Rule Against Perpetuities, or statutory prohibitions on the suspension of the power of alienation for more than a certain period. Some states may find it appropriate to enact both sets of bracketed text by joining them with the word "and." This would be appropriate in states having a statute that declares that the common-law Rule Against Perpetuities is in force in that jurisdiction except as modified therein.

A cautionary note for states repealing listed statutes: If the statutes to be repealed contain exclusions from the rule against perpetuities, states should consider whether to repeal or retain those exclusions, in light of Section 2-904(7), which excludes from the Uniform Statutory Rule property interests, powers of appointment, and other arrangements "excluded by another statute of this state."

Subpart 2. [Honorary Trusts]

GENERAL COMMENT

Subpart 2 contains an optional provision on honorary trusts and trusts for pets. If this optional provision is enacted, a new subsection (8) should be added to Section 2-904 to avoid an overlap or conflict between Subpart 1 of Part 9 (USRAP) and Subpart 2 of Part 9. Subsection (8) makes it clear that Subpart 2 of Part 9 is the exclusive provision applicable to the property interests or arrangements subjected to a time limit by the provisions of Subpart 2. Subsection (8) states:

(8) a property interest or arrangement subjected to a time limit under Subpart 2 of Part 9.

Additionally, the "or" at the end of Section 2-904(6) should be removed and

placed after Section 2-904(7).

[Optional provision for validating and limiting the duration of so-called honorary trusts and trusts for pets.]

[Section 2-907. Honorary Trusts; Trusts for Pets.

(a) **[Honorary Trust.]** Subject to subsection (c), if (i) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.

(b) **[Trust for Pets.]** Subject to this subsection and subsection (c), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(c) **[Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.]** In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:

(1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal.

(2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed in the trust instrument;

(ii) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(iii)if no taker is produced by the application of subparagraph (i) or (ii), to the transferor's heirs under Section 2-711.

(3) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(4) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(5) Except as ordered by the Court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(6) A Court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).

(7) If no trustee is designated or no designated trustee is willing or able to serve, a Court shall name a trustee. A Court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A Court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.]

COMMENT

Subsection (a) of this section authorizes so-called honorary trusts and places a 21-year limit on their duration. The figure "21" is bracketed to indicate that an enacting state may select a different figure.

Subsection (b) provides more elaborate provisions for a particular type of honorary trust, the trust for the care of domestic or pet animals. Under subsection (b), a trust for the care of a designated domestic or pet animal is valid.

Subsection (b) meets a concern of many pet owners by providing them a means for leaving funds to be used for the pet's care.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 180 (Supp. 1992).

PART 10

UNIFORM INTERNATIONAL WILLS ACT
INTERNATIONAL WILL; INFORMATION REGISTRATION

PREFATORY NOTE

Introduction

The purpose of the Washington Convention of 1973 concerning international wills is to provide testators with a way of making wills that will be valid as to form in all countries joining the Convention. As proposed by the Convention, the objective would be achieved through uniform local rules of form, rather than through local or international law that makes recognition of foreign wills turn on choice of law rules involving possible application of foreign law. The international will provisions, prepared for the National Conference of Commissioners on Uniform State Laws by the Joint Editorial Board for the Uniform Probate Code which has functioned as a special committee of the Conference for the project, should be enacted by all states, including those that have not accepted the Uniform Probate Code. To that end, this statute is framed both as a free-standing act and as an added part of the Uniform Probate Code. The bracketed headings and numbers fit the proposal into UPC; the others present the proposal as a free-standing act.

Uniform enactment of these provisions will permit the Washington Convention of 1973 to be implemented through state legislation familiar to will draftsmen. Thus, local proof of foreign law and reliance on federal legislation regarding wills can be avoided when foreign wills come into our states to be implemented. Also, the citizens of all states will have a will form available that should greatly reduce perils of proof and risks of invalidity that attend proof of American wills abroad.

History of the International Will

Discussions about possible international accord on an acceptable form of will led the Governing Council of UNIDROIT (International Institute for the Unification of Private Law) in 1960 to appoint a small committee of experts from several countries to develop proposals. Following week-long meetings at the Institute's quarters in Rome in 1963, and on two occasions in 1965, the Institute published and circulated a Draft Convention of December 1966 with an annexed uniform law that would be required to be enacted locally by those countries agreeing to the convention. The package and accompanying explanations were reviewed in this country by the Secretary of State's Advisory Committee on Private International Law. In turn, it referred the proposal to a special committee of American probate specialists drawn from member of NCCUSL's Special Committee on the Uniform Probate Code and its advisers and reporters. The resulting reports and recommendations were affirmative and urged the State Department to cooperate in continuing efforts to develop the 1966 Draft Convention, and to endeavor to interest other countries in the subject.

Encouraged by support for the project from this country and several others, UNIDROIT served as host for a 1971 meeting in Rome of an expanded group that included some of the original panel of experts and others from several countries that were not represented in the early drafting sessions. The result of this meeting was a revised draft of the proposed convention and annexed uniform law and this, in turn, was the subject of study and discussion by many more persons in this country. In mid-1973, the proposal from UNIDROIT was discussed in a joint program of the Real Property Probate and Trust Law Section, and the

Section of International Law at the American Bar Association's annual meeting held that year in Washington, D.C. By late 1973, the list of published, scholarly discussions of the International Will proposals included Fratcher, *"The Uniform Probate Code and the International Will",* 66 Mich.L.Rev. 469 (1968); Wellman, *"Recent Unidroit Drafts on the International Will",* 6 The International Lawyer 205 (1973); and Wellman, *"Proposed International Convention Concerning Wills",* 8/4 Real Property, Probate and Trust Journal 622 (1973).

In October 1973, pursuant to a commitment made earlier to UNIDROIT representatives that it would provide leadership for the international will proposal if sufficient interest from other countries became evident, the United States served as host for the diplomatic Conference on Wills which met in Washington from October 10 to 26, 1973. 42 governments were represented by delegations, 6 by observers. The United States delegation of 8 persons plus 2 Congressional advisers and 2 staff advisers, was headed by Ambassador Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law who also was selected president of the Conference. The result of the Conference was the Convention of October 26, 1973 Providing a Uniform Law on the Form of an International Will, an appended Annex, Uniform Law on the Form of an International Will, and a Resolution recommending establishment of state assisted systems for the safekeeping and discovery of wills. These three documents are reproduced at the end of these preliminary comments.

A more detailed account of the UNIDROIT project and the 1973 Convention, together with recommendations regarding United States implementation of the Convention, appears in Nadelmann, "The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will", XXII The American Journal of Comparative Law, 365 (1974).

Description of the Proposal

The 1973 Convention obligates countries becoming parties to make the annexed uniform law a part of their local law. The proposed uniform law contemplates the involvement in will executions under this law of a state recognized expert who is referred to throughout the proposals as the "authorized person". Hence, the local law called for by the Convention must designate authorized persons, and prescribe the formalities for an international will and the role of authorized persons relating thereto. The Convention binds parties to respect the authority of another party's authorized persons and this obligation, coupled with local enactment of the common statute prescribing the role of such persons and according finality to their certificates regarding due execution of wills, assures recognition of international wills under local law in all countries joining the Convention.

The Convention and the annexed uniform law deal only with the formal validity of wills. Thus, the proposal is entirely neutral in relation to local laws dealing with revocation of wills, or those defining the scope of testamentary power, or regulating the probate, interpretation, and construction of wills, and the administration of decedents' estates. The proposal describes a highly formal mode of will execution; one that is sufficiently protective against imposition and mistake to command international approval as being safe enough. However, failure to meet the requirements of an international will does not necessarily result in invalidity, for the mode of execution described for an international will does not pre-empt or exclude other standards of testamentary validity.

The details of the prescribed mode of execution reflect a blend of common and civil law elements. Two attesting witnesses are required in the tradition of the English Statute of Wills of 1837 and its American counterparts. The

authorized person whose participation in the ceremony of execution is required, and whose certificate makes the will self-proved, plays a role not unlike that of the civil law notary, though he is not required to retain custody of the will as is customary with European notaries.

The question of who should be given state recognition as authorized persons was resolved by designation of all licensed attorneys. The reasons for this can be seen in the observations about the role of Kurt H. Nadelmann, writing in The American Journal of Comparative Law:

The duties imposed by the Uniform Law upon the person doing the certifying go beyond legalization of signatures, the domain of the notary public. At least paralegal training is a necessity. Abroad, in countries with the law trained notary, the designation is likely to go to this class or at least to include it. Similarly, in countries with a closely supervised class of solicitors, their designation may be expected.

Attorneys are subject to training and licensing requirements everywhere in this country. The degree to which they are supervised after qualification varies considerably from state to state, but the trend is definitely in the direction of more rather than less supervision. Designation of attorneys in the uniform law permits a state to bring the statute into its local law books without undue delay.

Roles for Federal and State Law in Relation to International Will

Several alternatives are available for arranging federal and local laws on the subject of international wills. The 1973 Convention obligates nations becoming parties to introduce the annexed uniform law into their local law, and to recognize the authority, *vis a vis* will executions and certificates relating to wills, of persons designated as authorized by other parties to the Convention. But, the Convention includes a clause for federal states that may be used by the United States as it moves, through the process of Senate Advice and Consent, to accept the international compact. Through it, the federal government may limit the areas in this country to which the Convention will be applicable. Thus, Article XIV of the 1973 Convention provides:

1. If a state has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

One alternative would be for the federal government to refrain from use of Article XIV and to accept the Convention as applicable to all areas of the country. The obligation to introduce the uniform law into local law then could be met by passage of a federal statute incorporating the uniform law and designating authorized persons who can assist testators desiring to use the international format, possibly leaving it open for state legislatures, if they wish, to designate other or additional groups of authorized persons. As to constitutionality, the federal statute on wills could be rested on the power of the federal government to bind the states by treaty and to implement a treaty obligation to bring agreed upon rules into local law by any appropriate method. Missouri v. Holland, 252 U.S. 416 (1920); Nadelmann, *"The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of An International*

Will", XXII The Am. Jn'l of Comp.L. 365, 375 (1974). Prof. Nadelmann favors this approach, arguing that new risks of invalidity of wills would arise if the treaty were limited so as to be applicable only in designated areas of the country, presumably those where state enactment of the uniform law already had occurred.

One disadvantage of this approach is that it would place a potentially important method for validating wills in federal statutes where probate practitioners, long accustomed to finding the statutes pertinent to their specialty in state compilations, simply would not discover it. Another, of course, relates to more generalized concerns that would attend any move by the federal government into an area of law traditionally reserved to the states and states.

Alternatively, the federal government might accept the Convention and uniform law as applicable throughout the land, so that international wills executed with the aid of authorized persons of other countries would be good anywhere in this country, but refrain from any designation of authorized persons, other than possibly of some minimum federal cadre, or of those who could function within the District of Columbia, leaving the selection of more useful groups of authorized persons entirely to the local states. One result would be to greatly narrow the advantage of international wills to American testators who wanted to execute their instruments at home. In probable consequence, there would be pressure on state legislatures to enact the uniform law so as to make the advantages of the system available to local testators. Assuming some state legislatures respond to the pressure affirmatively and others negatively, a crazy quilt pattern of international will states would develop, leading possibly to some of the confusion and risk of illegality feared by Prof. Nadelmann. On the other hand, since execution of an international will involves use of an authorized person who derives authority from (on this assumption) state legislation, it seem somewhat unlikely that testators in those states which have not designated authorized persons will be led to believe that they can make an international will unless they go to a state where authorized persons have been designated. Hence, the confusion may not be as great as if the Convention were inapplicable to portions of the country.

Finally, the federal government might use Article XIV as suggested earlier, and designate some but not all states as areas of the country in which the Convention applied. This seems the least desirable of all alternatives because it subjects international wills from abroad to the risk of non-recognition in some states, and offers the risk of confusion of American testators regarding the areas of the country where they can execute a will that will be received outside this country as an international will.

Under any of the approaches, the desirability of widespread enactment of state statutes embodying the uniform law and designating authorized persons, seems clear, as does the necessity for this project of the National Conference of Commissioners on Uniform State Laws.

Style

In preparing the International Will proposal, the special committee, after considerable discussion and consideration of alternatives, decided to stick as closely as possible to the wording of the Annex to the Convention of October 26, 1973. The Convention and its Annex were written in the English, French, Russian and Spanish languages, each version, as declared by Article XVI of the Convention, being equally authentic. Not surprisingly, the English version of the Annex has a style that is somewhat different than that to which the National Conference is accustomed. Nonetheless, from the view of those using languages

other than English who may be reviewing our state statutes on the International Will to see if they adhere to the Annex, it is more important to stick with the agreed formulations than it is to re-style these expressions to suit our traditions. However, some changes from the Annex were made in the interests of clarity, and because some of the language of the Annex is plainly inappropriate in a local enactment. These changes are explained in the Comments.

Will Registration

A bracketed section 10[2-1010], is included in the International Will proposal to aid survivors in locating international and other wills that have been kept secret by testators during their lives. Differing from the section 2-901 of the Uniform Probate Code and the many existing statutes from which section 2-901 was derived which constitute the probate Court as an agency for the safekeeping of wills deposited by living testators, the bracketed proposal is for a system of registering certain minimum information about wills, including where the instrument will be kept pending the death of the testator. It can be separated or omitted from the rest of the Act.

This provision for a state will registration system is derived from recommendations by the Council of Europe for common market countries. These recommendations were urged on the group that assembled in Rome in 1971, and were received with interest by representatives of United Kingdom, Canada and United States, where will-making laws and customs have not included any officially sanctioned system for safekeeping of wills or for locating information about wills, other than occasional statutes providing for ante-mortem deposit of wills with probate Courts. Interest was expressed also by the notaries from civil law countries who have traditionally aided will-making both by formalizing execution and by being the source thereafter of official certificates about wills, the originals of which are retained with the official records of the notary and carefully protected and regulated by settled customs of the profession. All recognized that acceptance of the international will would tend to increase the frequency with which owners of property in several different countries relied on a single will to control all of their properties. This prospect, plus increasing mobility of persons between countries, indicates that new methods for safekeeping and locating wills after death should be developed. The Resolution adopted as the final act of the 1973 Conference on Wills shows that the problem also attracted the interest and attention of that assembly.

Apart from problems of wills that may have effect in more than one country, Americans are moving from state to state with increasing frequency. As the international will statute becomes enacted in most if not all states, our laws will tend to induce persons to rely on a single will as sufficient even though they may own land in two or more states, and to refrain from making new wills when they change domicile from one state to another. The spread of the Uniform Probate Code, tending as it does to give wills the same meaning and procedural status in all states, will have a similar effect.

General enactment of the will registration section should lead to development of new state and interstate systems to meet the predictable needs of testators and survivors that will follow as the law of wills is detached from provincial restraints. It is offered with the international will provisions because both meet obvious needs of the times.

Documents from 1973 Convention

Three documents representing the work of the 1973 Convention are reproduced here for the convenience of members of the Conference.

CONVENTION PROVIDING A UNIFORM LAW
ON THE FORM OF AN INTERNATIONAL WILL

The United States signatory to the present Convention,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

Article I 1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

Article II 1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

Article III The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

Article V 1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Article VI 1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Article VII The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

Article VIII No reservation shall be admitted to this Convention or to its Annex.

Article IX 1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

Article X 1. The Convention shall be open indefinitely for accession.

2. Instruments of accession shall be deposited with the Depositary Government.

Article XI 1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.

2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

Article XII 1. Any Contracting Party may denounce this Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

Article XIII 1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.

3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

Article XIV 1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this

Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

Article XV If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

Article XVI 1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the United States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

(a) any signature;

(b) the deposit of any instrument of ratification or accession;

(c) any date on which this Convention enters into force in accordance with Article XI;

(d) any communication received in accordance with Article I, paragraph 4;

(e) any notice received in accordance with Article II, paragraph 2;

(f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;

(g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;

(h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

Annex

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1 1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2 This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3 1. The will shall be made in writing.

2. It need not be written by the testator himself.

3. It may be written in any language, by hand or by any other means.

Article 4 1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5 1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6 1. The signatures shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7 1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

Article 8 In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9 The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have

been complied with.

Article 10 The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE
(Convention of October 26, 1973)

1. I, _____ (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on _____ (date) at _____ (place)
3. (testator) _____ (name, address, date and place of birth) in my presence and that of the witnesses
4. (a)_____ (name, address, date and place of birth)
   (b)_____ (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses
   (1) the testator has signed the will or has acknowledged his signature previously affixed.
   *(2) following a declaration of the testator stating that he was unable to sign his will for the following reason _____
   -I have mentioned this declaration on the will
   *-the signature has been affixed by _____ (name, address)
7. (b) the witnesses and I have signed the will;
8. *(c) each page of the will has been signed by _____ and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:
    _____
    _____

*To be completed if appropriate

12. PLACE
13. DATE
14. SIGNATURE and, if necessary, SEAL

Article 11 The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12 In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13 The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14 The international will shall be subject to the ordinary rules of revocation of wills.

Article 15 In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

RESOLUTION

The Conference

Considering the importance of measures to permit the safeguarding of wills and to find them after the death of the testator;

Emphasizing the special interest in such measures with respect to the international will, which is often made by the testator far from his home;

RECOMMENDS to the States that participated in the present Conference

-that they establish an internal system, centralized or not, to facilitate the safekeeping, search and discovery of an international will as well as the accompanying certificate, for example, along the lines of the Convention on the Establishment of a Scheme of Registration of Wills, concluded at Basel on May 16, 1972;

-that they facilitate the international exchange of information in these matters and, to this effect, that they designate in each state an authority or a service to handle such exchanges.

[Section 2-1001. Definitions.

In this Part:

(1) "International will" means a will executed in conformity with sections 2-1002 through 2-1005.

(2) "Authorized person" and "person authorized to act in connection with international wills" mean a person who by section 2-1009, or by the laws of the United States including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations, is empowered to supervise the execution of international wills.

COMMENT

The term "international will" connotes only that a will has been executed in conformity with this act. It does not indicate that the will was planned for implementation in more than one country, or that it relates to an estate that has or may have international implications. Thus, it will be entirely appropriate to use an "international will" whenever a will is desired.

The reference in subsection (2) to persons who derive their authority to act from federal law, including Foreign Service Regulations, anticipates that the United States will become a party to the 1973 Convention, and that Congress, pursuant to the obligation of the Convention, will enact the annexed uniform law and include therein some designation, possibly of a cadre only, of authorized persons. See the discussion under "Roles for Federal and State Law in Relation to International Will", in the Prefatory Note, *supra.* If all states enact

similar laws and designate all attorneys as authorized persons, the need for testators to resort to those designated by federal law may be minimal. It seems desirable, nonetheless, to associate whoever may be designated by federal law as suitable authorized persons for purposes of implementing state enactments of the uniform act. The resulting "borrowing" of those designated federally should minimize any difficulties that might arise from variances in the details of execution of international wills that may develop in the state and federal enactment process.

In the Explanatory Report of the 1973 Convention prepared by Mr. Jean-Pierre Plantard, Deputy Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT) as published by the Institute in 1974, the following paragraphs that are relevant to this section appear:

"The Uniform Law gives no definition of the term will. The preamble of the Convention also uses the expression 'last wills'. The material contents of the document are of little importance as the Uniform Law governs only its form. There is, therefore, nothing to prevent this form being used to register last wishes that do not involve the naming of an heir and which in some legal systems are called by a special name, such as 'Kodizill' in Austrian Law (ABGB § 553).

"Although it is given the qualification 'international', the will dealt with by the Uniform Law can easily be used for a situation without any international element, for example, by a testator disposing in his own country of his assets, all of which are situated in that same country. The adjective 'international', therefore, only indicates what was had in mind at the time when this new will was conceived. Moreover, it would have been practically impossible to define a satisfactory sphere of application, had one intended to restrict its use to certain situations with an international element. Such an element could only be assessed by reference to several factors (nationality, residence, domicile of the testator, place where the will was drawn up, place where the assets are situated) and, moreover, these might vary considerably between when the will was drawn up and the beginning of the inheritance proceedings.

"Use of the international will should, therefore, be open to all testators who decide they want to use it. Nothing should prevent it from competing with the traditional forms if it offers advantages of convenience and simplicity over the other forms and guarantees the necessary certainty."

Section 2-1002. International Will; Validity.

(a) A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the requirements of this Part.

(b) The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

(c) This Part shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

COMMENT

This section combines what appears in Articles 1 and 2 of the Annex into a single section. Except for the reference to later sections, the first sentence is identical to Article 1, section 1 of the Annex, the second sentence is identical to Article 1, section 2, and the third is identical to Article 2.

Mr. Plantard's commentary that is pertinent to this section is as follows:

"The Uniform Law is intended to be introduced into the legal system of each Contracting State. Article 1, therefore, introduces into the internal law of each Contracting State the new, basic principle according to which the international will is valid irrespective of the country in which it was made, the nationality, domicile or residence of the testator and the place where the assets forming the estate are located.

"The scope of the Uniform Law is thus defined in the first sentence. As was mentioned above, the idea behind it was to establish a new type of will, the form of which would be the same in all countries. The Law obviously does not affect the subsistence of all the other forms of will known under each national law . . .

"Some of the provisions relating to form laid down by the Uniform Law are considered essential. Violation of these provisions is sanctioned by the invalidity of the will as an international will. These are: that the will must be made in writing, the presence of two witnesses and of the authorized person, signature by the testator and by the persons involved (witnesses and authorized person) and the prohibition of joint wills. The other formalities, such as the position of the signature and date, the delivery and form of the certificate, are laid down for reasons of convenience and uniformity but do not affect the validity of the international will.

"Lastly, even when the international will is declared invalid because one of the essential provisions contained in Articles 2 to 5 has not been observed, it is not necessarily deprived of all effect. Paragraph 2 of Article 1 specifies that it may still be valid as a will of another kind, if it conforms with the requirements of the applicable national law. Thus, for example, a will written, dated and signed by the testator but handed over to an authorized person in the absence of witnesses or without the signature of the witnesses and the authorized person could quite easily be considered a valid holograph will. Similarly, an international will produced in the presence of a person who is not duly authorized might be valid as a will witnessed in accordance with Common law rules.

"However, in these circumstances, one could no longer speak of an international will and the validity of the document would have to be assessed on the basis of the rules of internal law or of private international law.

"A joint will cannot be drawn up in the form of an international will. This is the meaning of Article 2 of the Uniform Law which does not give an opinion as to whether this prohibition on joint wills, which exists in many legal systems, is connected with its form or its substance.

"A will made in this international form by several people together in the same document would, therefore, be invalid as an international will but could possibly be valid as another kind of will, in accordance with Article 1, paragraph 2 of the Uniform Law.

"The terminology used in Article 2 is in harmony with that used in Article 4 of The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions."

Section 2-1003. International Will; Requirements.

(a) The will shall be made in writing. It need not be written by the testator himself. It may be written in any language, by hand or by any other means.

(b) The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

(c) In the presence of the witnesses, and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

(d) When the testator is unable to sign, the absence of his signature does not affect the validity of the international will if the testator indicates the reason for his inability to sign and the authorized person makes note thereof on the will. In these cases, it is permissible for any other person present, including the authorized person or one of the witnesses, at the direction of the testator to sign the testator's name for him, if the authorized person makes note of this also on the will, but it is not required that any person sign the testator's name for him.

(e) The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

COMMENT

The five subsections of this section correspond in content to Articles 3 through 5 of the Annex to the 1973 Convention. Article 1, section 1 makes it clear that compliance with all requirements listed in Articles 3 through 5 is necessary in order to achieve an international will. As re-organized for enactment in the United States, all mandatory requirements have been grouped in this section. Except for subsection (d), each of the sentences in the subsections corresponds exactly with a sentence in the Annex. Subsection (d), derived from Article 5, section 2 of the Annex, was re-worded for the sake of clarity.

Mr. Plantard's comments on the requirements are as follows:

"Paragraph 1 of Article 3 lays down an essential condition for a will's validity as an international will: it must be made in writing.

"The Uniform Law does not explain what is meant by 'writing'. This is a word of everyday language which, in the opinion of the Law's authors, does not call for any definition but which covers any form of expression made by signs on a durable substance.

"Paragraphs 2 and 3 show the very liberal approach of the draft.

"Under paragraph 2, the will does not necessarily have to be written by the testator himself. This provision marks a moving away from the holograph will toward the other types of will: the public will or the mystic will and especially the Common law will. The latter, which is often very long, is only in exceptional cases written in the hand of the testator, who is virtually obliged to use a lawyer, in order to use the technical formulae necessary to give effect to his wishes. This is all the more so as wills frequently involve inter vivos family arrangements, and fiscal considerations play a very important part in this matter.

"This provision also allows for the will of illiterate persons, or persons who, for some other reason, cannot write themselves, for example paralysed or blind persons.

"According to paragraph 3 a will may be written in any language. This provision is in contrast with the rules accepted in various countries as regards public wills. It will be noted that the Uniform Law does not even require the will to be written in a language known by the testator. The latter is, therefore, quite free to choose according to whichever suits him best: it is to be expected that he will usually choose his own language but, if he thinks it is better, he will sometimes also choose the language of the place where the will is drawn up or that of the place where the will is mainly to be carried out. The important point is that he have full knowledge of the contents of his will, as is guaranteed by Articles 4 and 10.

"Lastly, a will may be written by hand or by any other method. This provision is the corollary of paragraph 2. What is mainly had in mind is a typewriter, especially in the case of a will drawn up by a lawyer advising the testator.

"The liberal nature of the principles set out in Article 3 calls for certain guarantees on the other hand. These are provided by the presence of three persons, already referred to in the context of Articles III and V of the Convention, that is to say, the authorised person and the two witnesses. It is evident that these three persons must all be simultaneously present with the testator during the carrying out of the formalities laid down in Articles 4 and 5.

"Paragraph 1 of Article 4 requires, first of all, that the testator declare, in the presence of these persons, that the document produced by him is his will and that he knows the contents thereof. The word 'declares' covers any unequivocal expression of intention, by way of words as well as by gestures or signs, as, for example, in the case of a testator who is dumb. This declaration must be made on pain of the international will being invalid. This is justified by the fact that the will produced by the testator might have been materially drawn up by a person other than the testator and even, in theory, in a language which is not his own.

"Paragraph 2 of the article specifies that this declaration is sufficient: the testator does not need to 'inform' the witnesses or the authorized person 'of the contents of the will'. This rule makes the international will differ from the public will and brings it closer to the other types of will: the holograph will and especially the mystic will and the Common law will.

"The testator can, of course, always ask for the will to be read, a precaution

which can be particularly useful if the testator is unable to read himself. The paragraph under consideration does not in any way prohibit this; it only aims at ensuring respect for secrecy, if the testator should so wish. The international will can therefore be a secret will without being a closed will.

"The declaration made by the testator under Article 4 is not sufficient: under Article 5, paragraph 1, he must also sign his will. However, the authors of the Uniform Law presumed that, in certain cases, the testator might already have signed the document forming his will before producing it. To require a second signature would be evidence of an exaggerated formalism and a will containing two signatures by the testator would be rather strange. That is why the same paragraph provides that, when he has already signed the will, the testator can merely acknowledge it. This acknowledgement is completely informal and is normally done by a simple declaration in the presence of the authorized person and witnesses.

"The Uniform Law does not explain what is meant by 'signature'. This is once more a word drawn from everyday language, the meaning of which is usually the same in the various legal systems. The presence of the authorized person, who will necessarily be a practicing lawyer will certainly guarantee that there is a genuine signature correctly affixed.

"Paragraph 2 was designed to give persons incapable of signing the possibility of making an international will. All they have to do is indicate their incapacity and the reason therefore to the authorized person. The authorized person must then note this declaration on the will which will then be valid, even though it has not been signed by the testator. Indication of the reason for incapacity is an additional guarantee as it can be checked. The certificate drawn up by the authorized person in the form prescribed in Article 10 again reproduces this declaration.

"The authors of the Uniform Law were also conscious of the fact that in some legal systems-for example, English law-persons who are incapable of signing can name someone to sign in their place. Although this procedure is completely unknown to other systems in which a signature is exclusively personal, it was accepted that the testator can ask another person to sign in his name, if this is permitted under the law from which the authorized person derives his authority. This amounts to nothing more than giving satisfaction to the practice of certain legal systems, as the authorized person must, in any case, indicate on the will that the testator declared that he could not sign, and give the reason therefore. This indication is sufficient to make the will valid. There will, therefore simply be a signature affixed by a third person instead of that of the testator. Although there is nothing stipulating this in the Uniform Law, one can expect the authorized person to explain the source of this signature on the document, all the more so as the signature of this substitute for the testator must also appear on the other pages of the will, by virtue of Article 6.

"This method over which there were some differences of opinion at the Diplomatic Conference, should not however interfere in any way with the legal systems which do not admit a signature in the name of someone else. Besides, its use is limited to the legal systems which admit it already and it is now implicitly accepted by the others when they recognize the validity of a foreign document drawn up according to this method. However, this situation can be expected to arise but rarely, as an international will made by a person who is incapable of signing it will certainly be a rare event.

"Lastly, Article 5 requires that the witnesses and authorized person also sign the will there and then in the presence of the testator. By using the words 'attest the will by signing', when only the word 'sign' had been used when referring to the testator, the authors of the Uniform Law intended to make a distinction between the person acknowledging the contents of a document and those who have only to affix their signature in order to certify their participation and presence.

"In conclusion, the international will will normally contain four signatures: that of the testator, that of the authorized person and those of the two witnesses. The signature of the testator might be missing: in this case, the will must contain a note made by the authorized person indicating that the testator was incapable of signing, adding his reason. All these signatures and notes must be made on pain of invalidity. Finally, if the signature of the testator is missing, the will could contain the signature of a person designated by the testator to sign in his name, in addition to the above-mentioned note made by the authorized person."

Section 2-1004. International Will; Other Points of Form.

(a) The signatures shall be placed at the end of the will. If the will consists of several sheets, each sheet will be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

(b) The date of the will shall be the date of its signature by the authorized person. That date shall be noted at the end of the will by the authorized person.

(c) The authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Section 5.

(d) A will executed in compliance with Section 3 shall not be invalid merely because it does not comply with this section.

COMMENT

Mr. Plantard's commentary about Articles 6, 7 and 8 of the Annex [*supra*] relate to subsections (a), (b) and (c) respectively of this section. Subsections (a) and (b) are identical to Articles 6 and 7; subsection (c) is the same as Article 8 of the Annex except that the prefatory language "In the absence of any mandatory rule pertaining to the safekeeping of the will . . . " has been deleted because it is inappropriate for inclusion in a local statute designed for enactment by a state that has had no tradition or familiarity with mandatory rules regarding the safekeeping of the wills. Subsection (d) embodies the sense of Article 1, section 1 of the Annex which states that compliance with Articles 2 to 5 is necessary and so indicates that compliance with the remaining articles prescribing formal steps is not necessary.

Mr. Plantard's commentary is as follows:

"The provisions of Article 6 and those of the following articles are not imposed on pain of invalidity. They are nevertheless compulsory legal provisions which can involve sanctions, for example, the professional, civil and even criminal liability of the authorized person, according to the provisions of the law from which he derives his authority.

"The first paragraph, to guarantee a uniform presentation for international wills, simply indicates that signatures shall be placed at the end of international wills, that is, at the end of the text.

"Paragraph 2 provides for the frequent case in which the will consists of several sheets. Each sheet has to be signed by the testator, to guarantee its authenticity and to avoid substitutions. The use of the word 'signed' seems to imply that the signature must be in the same form as that at the end of the will. However, in the legal systems which merely require that the individual sheets be paraphed, usually by means of initials, this would certainly have the same value as signature, as a signature itself could simply consist of initials.

"The need for a signature on each sheet, for the purpose of authentifying each such sheet, led to the introduction of a special system for the case when the testator is incapable of signing. In this case it will generally be the authorized person who will sign each sheet in his place, unless, in accordance with Article 5, paragraph 2, the testator has designated another person to sign in his name. In this case, it will of course be this person who will sign each sheet.

"Lastly, it is prescribed that the sheets shall be numbered. Although no further details are given on this subject, it will in practice be up to the authorized person to check if they have already been numbered and, if not, to number them or ask the testator to do so.

"The aim of this provision is obviously to guarantee the orderliness of the document and to avoid losses, subtractions or substitutions.

"The date is an essential element of the will and its importance is quite clear in the case of successive wills. Paragraph 1 of Article 7 indicates that the date of the will in the case of an international will is the date on which it was signed by the authorized person, this being the last of the formalities prescribed by the Uniform Law on pain of invalidity (Article 5, paragraph 3). It is therefore, from the moment of this signature that the international will is valid.

"Paragraph 2 stipulates that the date shall be noted at the end of the will by the authorized person. Although this is compulsory for the authorized person, this formality is not sanctioned by the invalidity of the will which, as is the case in many legal systems such as English, German and Austrian law, remains fully valid even if it is not dated or is wrongly dated. The date will then have to be proved by some other means. It can happen that the will has two dates, that of its drawing up and the date on which it was signed by the authorized person as a result of which it became an international will. Evidently only this last date is to be taken into consideration.

"During the preparatory work it had been intended to organize the safekeeping of the international will and to entrust its care to the authorized person. This plan caused serious difficulties both for the countries which do not have the

notary as he is known in Civil law systems and for the countries in which wills must be deposited with a public authority, as is the case, for example, in the Federal Republic of Germany, where wills must be deposited with a Court.

"The authors of the Uniform Law therefore abandoned the idea of introducing a unified system for the safekeeping of international wills. However, where a legal system already has rules on this subject, these rules of course also apply to the international will as well as to other types of will. Finally, the Washington Conference adopted, at the same time as the Convention, a resolution recommending States, in particular, to organize a system facilitating the safekeeping of international wills (see the commentary on this resolution, at the end of this Report). It should lastly be underlined that States desiring to give testators an additional guarantee as regards the international will will organize its safekeeping by providing, for example, that it shall be deposited with the authorized person or with a public officer. Complementary legislation of this kind could be admitted within the framework of paragraph 3 of Article 1 of the Convention, as was mentioned in our commentary on that article.

"These considerations explain why Article 8 starts by stipulating that it only applies 'in the absence of any mandatory rule pertaining to the safekeeping of the will'. If there happens to be such a rule in the national law from which the authorized person derives his authority this rule shall govern the safekeeping of the will. If there is no such rule, Article 8 requires the authorized person to ask the testator whether he wishes to make a declaration in this regard. In this way, the authors of the Uniform Law sought to reconcile the advantage of exact information so as to facilitate the discovery of the will after the death of the testator, on the one hand, and respect for the secrecy which the testator may want as regards the place where his will is kept, on the other hand. The testator is therefore quite free to make or not to make a declaration in this regard, but his attention is nevertheless drawn to the possibility left open to him, and particularly to the opportunity he has, if he expressly asks for it, to have the details he thinks appropriate in this regard mentioned on the certificate provided for in Article 9. It will thus be easier to find the will again at the proper time, by means of the certificate made out in three copies, one of which remains in the hands of the authorized person."

Section 2-1005. International Will; Certificate.

The authorized person shall attach to the will a certificate to be signed by him establishing that the requirements of this Part for valid execution of an international will have been complied with. The authorized person shall keep a copy of the certificate and deliver another to the testator. The certificate shall be substantially in the following form:

CERTIFICATE
(Convention of October 26, 1973)

1. I, _____ (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on _____ (date) at _____ (place)
3. (testator) _____ (name, address, date and place of birth) in my presence and that of the witnesses
4. (a) _____ (name, address, date and place of birth)

(b) _____ (name, address, date and place of birth)has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed.

* following a declaration of the testator stating that he

(2) was unable to sign his will for the following reason _____, I have mentioned this declaration on the will

* and the signature has been affixed by _____ (name and address)

7. (b) the witnesses and I have signed the will;

8. *(c) each page of the will has been signed by _____ and numbered;

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:

12. PLACE OF EXECUTION

13. DATE

14. SIGNATURE and, if necessary, SEAL

* to be completed if appropriate

COMMENT

This section embodies the content of Articles 9, 10 and 11 of the Annex with only minor, clarifying changes. Those familiar with the pre-proved will authorized by Uniform Probate Code § 2-504 should be comfortable with sections 5 and 6 of this act. Indeed, inclusion of these provisions in the Annex was the result of a concession by those familiar with civil law approaches to problems of execution and proof of wills, to the English speaking countries where will ceremonies are divided between those occurring as testator acts, and those occurring later when the will is probated. Further, since English and Canadian practices reduce post-mortem probate procedures down to little more than the presentation of the will to an appropriate registry and so, approach civil law customs, the concession was largely to accommodate American states where post-mortem probate procedures are very involved. Thus, the primary purpose of the certificate, which provides conclusive proof of the formal validity of the will, is to put wills executed before a civil law notary and wills executed in the American tradition on a par; with the certificate, both are good without question insofar as formal requirements are concerned.

It should be noted that Article III of the Convention binds countries becoming parties to recognize the capacity of an authorized person to act in relation to an international will, as conferred by the law of another country that is a party. This means that an international will coming into one of our states that has enacted the uniform law will be entirely good under local law, and that the certificate from abroad will provide conclusive proof of its validity.

May an international will be contested? The answer is clearly affirmative as to

contests based on lack of capacity, fraud, undue influence, revocation or ineffectiveness based on the contents of the will or substantive restraints on testamentary power. Contests based on failure to follow mandatory requirements of execution are not precluded because the next section provides that the certificate is conclusive only "in the absence of evidence to the contrary". However, the Convention becomes relevant when one asks whether a probate Court may require additional proof of the genuineness of signatures by testators and witnesses. It provides:

Article VI 1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Presumably, the prohibition against legalization would not preclude additional proof of genuineness if evidence tending to show forgery is introduced, but without contrary proof, the certificate proves the will.

The authorized person is directed to attach the certificate to the will, and to keep a copy. The sense of "keep" intended by the draftsman is "continuously keep," or "preserve."

If the will with attached certificate is to be retained by the authorized person or otherwise placed for safekeeping out of the possession of the testator, good practice would involve an unexecuted copy of the will that could be given to the testator for disposition or retention as he saw fit. It would seem that good practice in these cases also would involve attachment of the testator's copy of the certificate to testator's copy of the will. The statute is silent on this point, however.

Mr. Plantard's commentary on the articles of the Annex that are pertinent to section 5, are as follows:

"This provision specifies that the authorized person must attach to the international will a certificate drawn up in accordance with the form set out in Article 10, establishing that the Uniform Law's provisions have been complied with. The term 'joint au testament' means that the certificate must be added to the will, that is, fixed thereto. The English text which uses the work 'attach' is perfectly clear on this point. Furthermore, it results from Article 11 that the certificate must be made out in three copies. This document, the contents of which are detailed in Article 10, is proof that the formalities required for the validity of the international will have been complied with. It also reveals the identity of the persons who participated in drawing up the document and may, in addition, contain a declaration by the testator as to the place where he intends his will to be kept. It should be stressed that the certificate is drawn up under the entire responsibility of the authorized person who is the only person to sign it.

"Article 10 sets out the form for the certificate. The authorized person must abide by it, in accordance with the provisions of Article 10 itself, laying down this or a substantially similar form. This last phrase could not be taken as authorizing him to depart from this form: it only serves to allow for small changes of detail which might be useful in the interests of improving its comprehensibility or presentation, for example, the omission of the particulars

marked with an asterisk indicating that they are to be completed where appropriate when in fact they do not need to be completed and thus become useless.

"Including the form of a certificate in one of the articles of a Uniform Law is unusual. Normally these appear in the annexes to Conventions. However, in this way, the authors of the Uniform Law underlined the importance of the certificate and its contents. Moreover, the Uniform Law already forms the Annex to the Convention itself.

"The 14 particulars indicated on the certificate are numbered. These numbers must be reproduced on each certificate, so as to facilitate its reading, especially when the reader speaks a foreign language, as they will help him to find the relevant details more easily: the name of the authorized person and the testator, addresses, etc.

"The certificate contains all the elements necessary for the identification of the authorized person, testator and witnesses. It expressly mentions all the formalities which have to be carried out in accordance with the provisions of the Uniform Law. Furthermore, the certificate contains all the information required for the will's registration according to the system introduced by the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, signed at Basle on 16 May 1972.

"The authorized person must keep a copy of the certificate and deliver one to the testator. Seeing that another copy has to be attached to the will in accordance with Article 9, it may be deduced that the authorized person must make out altogether three copies of the certificate. These cannot be simple copies but have to be three signed originals. This provision is useful for a number of reasons. The fact that the testator keeps a copy of the certificate is a useful reminder for him, especially when his will is being kept by the authorized person or deposited with someone designated by national law. Moreover, discovery of the certificate among the testators' papers will inform his heirs of the existence of a will and will enable them to find it more easily. The fact that the authorized person keeps a copy of the certificate enables him to inform the heirs as well, if necessary. Lastly, the fact that there are several copies of the certificate is a guarantee against changes being made to one of them and even, to a certain extent, against certain changes to the will itself, for example as regards its date."

Section 2-1006. International Will; Effect of Certificate.

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Part. The absence or irregularity of a certificate shall not affect the formal validity of a will under this Part.

COMMENT

This section, which corresponds to Articles 11 and 12 of the Annex, must be read with the definition of "authorized person" in section 1, and Articles III and IV of the 1973 Convention which will become binding on all states if and when the United States joins that treaty. Articles III and IV of the Convention provide:

Article III. The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV. The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

In effect, the state enacting this law will be recognizing certificates by authorized persons designated, not only by this state, but by the United States and other parties to the 1973 Convention. Once the identity of one making a certificate on an international will is established, the will may be proved without more, assuming the presence of the recommended form of certificate. Article IX (3) of the 1973 Convention constitutes the United States as the Depositary under the Convention, and Article II obligates each country joining the Convention to notify the Depositary Government of the persons designated by its law as authorized to act in connection with international wills. Hence, persons interested in local probate of an international will from another country will be enabled to determine from the Department of State whether the official making the certificate in which they are interested had the requisite authority.

In this connection, it should be noted that under Article II of the Convention, each contracting country may designate its diplomatic or consular representatives abroad as authorized persons insofar as the local law does not prohibit it. Since the Uniform Act will be the law locally, and since it does not prohibit persons designated by foreign states that are parties to the Convention from acting locally in respect to international wills, there should be a considerable amount of latitude in selecting authorized persons to assist with wills and a correlative reduction in the chances of local non-recognition of an authorized person from abroad. Also, it should be noted that the Uniform Act does not restrict the persons which it constitutes as authorized persons in relation to the places where they can so function. This supports the view that local law as embodied in this statute should not be construed as restrictive in relation to local activities concerning international wills of foreign diplomatic and consular representatives who are resident here.

The certificate requires the authorized person to state that the witnesses had the requisite capacity. If the authorized person derives his authority from the law of a state other than that where he is acting, it would be advisable to have the certificate identify the applicable law.

The Uniform Act is silent in regard to methods of meeting local probate requirements contemplating deposit of the original will with the Court. Section 3-409 of the Uniform Probate Code, or its counterpart in a state that has not adopted the uniform law on the point, becomes pertinent. The last sentence of UPC 3-409 provides:

A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

One final matter warrants mention. Implicit in local proof of an instrument by means of authentication provided by a foreign official, is the problem of proving the authority of the official. The traditional, exceedingly formalistic, method of accomplishing this has been through what has been known

as "legalization", a process that involves a number of certificates. The capacity of the official who authenticates the signature of the party to the document, if derived from his status as a county official, is proved by the certificate of a high county official. In turn, the county official's status is proved by the certificate of the area's secretary of state, whose status is established by another and so on until, ultimately, the Department of State certifies to the identity of the highest local government official in a format that will be persuasive to the receiving country's foreign relations representative.

Article VI of the 1973 Convention forbids legalization of the signature of testators and witnesses. It provides:

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Thus, it would appear that if the United States, as contracting party, satisfies itself that the signature of a foreign authorized person is authentic, and so indicates to those interested in local probate of the document, the local Court, though presumably able to receive and to act upon evidence to the contrary, cannot reject an international will for lack of proof. This is not to say, of course, that the authenticity of the signature of the foreign authorized person must be shown through the aid of the State Department; plainly, the point may be implied from the face of the document unless and until challenged.

Mr. Plantard's commentary on this portion of the uniform law is as follows:

"Article 12 states that the certificate is conclusive of the formal validity of the international will. It is therefore a kind of proof supplied in advance.

"This provision is only really understandable in those legal systems, like the United States, where a will can only take effect after it has been subjected to a preliminary procedure of verification ('Probate') designed to check on its validity. The mere presentation of the certificate should suffice to satisfy the requirements of this procedure.

"However, the certificate is not always irrefutable as proof, as is indicated by the words 'in the absence of evidence to the contrary'. If it is challenged, then the ensuing litigation will be solved in accordance with the legal procedure applicable in the Contracting State where the will and certificate are presented.

"The principle set out in Article 13 is already implied by Article 1, as only the provisions of Articles 2 to 5 are prescribed on pain of invalidity. Besides, it is perfectly logical that the absence of or irregularities in a certificate should not affect the formal validity of the will, as the certificate is a document serving essentially for purposes of proof drawn up by the authorized person, without the testator taking any part either in drawing it up or in checking it. This provision is in perfect harmony with Article 12 which by the terms 'in the absence of evidence to the contrary' means that one can challenge what is stated in the certificate.

"In consideration of the fact that the authorized person will be a practicing lawyer officially designated by each Contracting State, it is difficult to imagine him omitting or neglecting to draw up the certificate provided for by the national law to which he is subject. Besides, he would lay himself open to an action based on his professional and civil liability. He could even expose himself to sanctions laid down by his national law.

"However, the international will subsists, even if, by some quirk, the certificate which is a means of proof but not necessarily the only one, should be missing, be incomplete or contain particulars which are manifestly erroneous. In these undoubtedly very rare circumstances, proof that the formalities prescribed on pain of invalidity have been carried out will have to be produced in accordance with the legal procedures applicable in each State which has adopted the Uniform Law."

Section 2-1007. International Will; Revocation.

The international will shall be subject to the ordinary rules of revocation of wills.

COMMENT

Mr. Plantard's commentary on this portion of the uniform law is as follows:

"The authors of the Uniform Law did not intend to deal with the subject of the revocation of wills. There is indeed no reason why the international will should be submitted to a regime different from that of other kinds of wills. Article 14 therefore merely gives expression to this idea. Whether or not there has been revocation-for example, by a subsequent will-is to be assessed in accordance with the law of each State which has adopted the Uniform Law, by virtue of Article 14. Besides, this is a question mainly concerning rules of substance which would thus overstep the scope of the Uniform Law."

Section 2-1008. Source and Construction.

Sections 2-1001 through 2-1007 derive from Annex to Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will. In interpreting and applying this Part, regard shall be had to its international origin and to the need for uniformity in its interpretation.

COMMENT

Mr. Plantard's commentary on this portion of the uniform law is as follows:

"This Article contains a provision which is to be found in a similar form in several conventions or draft Uniform Laws. It seeks to avoid practising lawyers interpreting the Uniform Law solely in terms of the principles of their respective internal law, as this would prejudice the international unification being sought after. It requests judges to take the international character of the Uniform Law into consideration and to work towards elaborating a sort of common caselaw, taking account of the foreign legal systems which provided the

foundation for the Uniform Law and the decisions handed down on the same text by the Courts of other countries. The effort toward unification must not be limited to just bringing about the Law's adoption, but should be carried on into the process of putting it into operation."

Section 2-1009. Persons Authorized to Act in Relation to International Will; Eligibility; Recognition by Authorizing Agency.

Individuals who have been admitted to practice law before the courts of this state and who are in good standing as active law practitioners in this state, are hereby declared to be authorized persons in relation to international wills.

COMMENT

The subject of who should be designated to be authorized persons under the Uniform Law is discussed under the heading "Description of the Proposal" in the Prefatory Note.

The first draft of the Uniform Law presented to the National Conference at its 1975 meeting in Quebec City included provision for a special new licensing procedure through which others than attorneys might become qualified. The ensuing discussion resulted in rejection of this approach in favor of the simpler approach of section 9. Among other difficulties with the special licensee approach, representatives of the State Department expressed concern about the attendant burden on the U.S. as Depositary Government, of receiving, keeping up to date, and interpreting to foreign governments the results of fifty different state licensing systems.

Section 2-1010. International Will Information Registration.

The [Secretary of State] shall establish a registry system by which authorized persons may register in a central information center, information regarding the execution of international wills, keeping that information in strictest confidence until the death of the maker and then making it available to any person desiring information about any will who presents a death certificate or other satisfactory evidence of the testator's death to the center. Information that may be received, preserved in confidence until death, and reported as indicated is limited to the name, social-security or any other individual-identifying number established by law, address, and date and place of birth of the testator, and the intended place of deposit or safekeeping of the instrument pending the death of the maker. The [Secretary of State], at the request of the authorized person, may cause the information it receives about execution of any international will to be transmitted to the registry system of another jurisdiction as identified by the testator, if that other system adheres to rules protecting the confidentiality of the information similar to those established in this state.]

COMMENT

The relevance of this optional, bracketed section to the other sections constituting the uniform law concerning international wills is explained in the Prefatory Note. Also, Mr. Plantard's observations regarding the Resolution attached to the 1973 Convention are pertinent. He writes:

"The Resolution adopted by the Washington Conference and annexed to its Final Act encourages States which adopt the Uniform Law to make additional provisions for the registering and safekeeping of the international will. The authors of the Uniform Law considered that it was not possible to lay down uniform rules on this subject on account of the differences in tradition and outlook, but several times, both during the preparatory work and during the final diplomatic phase, they underlined the importance of States making such provisions.

"The Resolution recommends organizing a system enabling . . . 'the safekeeping, search and discovery of an international will as well as the accompanying certificate' . . .

"Indeed lawyers know that many wills are never carried out because the very existence of the will itself remains unknown or because the will is never found or is never produced. It would be quite possible to organize a register or index which would enable one to know after the death of a person whether he had drawn up a will. Some countries have already done something in this field, for example, Quebec, Spain, the Federal Republic of Germany, where this service is connected with the Registry of Births, Marriages and Deaths. Such a system could perfectly well be fashioned so as to ensure respect for the legitimate wish of testators to keep the very existence of their will secret.

"The Washington Conference also underlined that there is already an International Convention on this subject, namely the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, concluded at Basle on 16 May 1972, to which States which are not members of the Council of Europe may accede.

"In this Convention the Contracting States simply undertake to create an internal system for registering wills. The Convention stipulates the categories of will which should be registered, in terms which include the international will. Apart from national bodies in charge of registration, the Convention also provides for the designation by each Contracting State of a national body which must remain in contact with the national bodies of other States and communicate registrations and any information asked for. The Convention specifies that registration must remain secret during the life of the testator. This system, which will come into force between a number of European States in the near future, interested the authors of the Convention, even if they do not accede to it. The last paragraph of the Resolution follows the pattern of the Basle Convention by recommending, in the interests of facilitating an international exchange of information on this matter, the designation in each State of authorities or services to handle such exchanges.

"As for the organization of the safekeeping of international wills, the resolution merely underlies the importance of this, without making any specific suggestions in this regard. This problem has already been discussed in connection with Article 8 of the Uniform Law.

"The Council of Europe Convention on the Establishment of a Scheme of Registration of Wills of May 16, 1972 and related documents were available to

the reporter and provided the guidelines for section 10 of this Act."

PART 11

UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT (1999)

GENERAL COMMENT

Part 11 incorporates into the Code the Uniform Disclaimer of Property Interests Act (UDIPA or Act). The UDPIA replaces the Code's former disclaimer provision (Section 2-801). It also replaces three Uniform Acts promulgated in 1978 (Uniform Disclaimer of Property Interests Act, Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and Uniform Disclaimer of Transfers under Nontestatmentary Instruments Act). The new Act is the most comprehensive disclaimer statute ever written. It is designed to allow every sort of disclaimer, including those that are useful for tax planning purposes. It does not, however, include a specific time limit on the making of any disclaimer. Because a disclaimer is a refusal to accept, the only bar to a disclaimer should be acceptance of the offer. In addition, in almost all jurisdictions disclaimers can be used for more than tax planning. A proper disclaimer will often keep the disclaimed property from the disclaimant's creditors. In short, the new Act is an enabling statute which prescribes all the rules for refusing a proffered interest in or power over property and the effect of that refusal on the power or interest while leaving the effect of the refusal itself to other law. Section 2-1113(e) explicitly states that a disclaimer may be barred or limited by law other than the Act.

The decision not to include a specific time limit- to "decouple" the disclaimer statute from the time requirement applicable to a "qualified disclaimer" under IRC §2518-is also designed to reduce confusion. The older Uniform Acts and almost all the current state statutes (many of which are based on those Acts) were drafted in the wake of the passage of IRC §2518 in 1976. That provision replaced the "reasonable time" requirement of prior law with a requirement that a disclaimer must be made within nine months of the creation of the interest disclaimed if the disclaimer is to be a "qualified disclaimer" which is not regarded as transfer by the disclaimant. The statutes that were written in response to this new provision of tax law reflected the nine month time limit. Under most of these statutes (including the older Uniform Acts and former Section 2-801) a disclaimer must be made within nine months of the creation of a present interest (for example, as disclaimer of an outright gift under a will must be made within nine months of the decedent's death), which corresponds to the requirement of IRC §2518. A future interest, however, may be disclaimed within nine months of the time the interest vests in possession or enjoyment (for example, a remainder whether or not contingent on surviving the holder of the life income interest must be disclaimed within nine months of the death of the life income beneficiary). The time limit for future interests does not correspond to IRC §2518 which generally requires that a qualified disclaimer of a future interest be made within nine months of the interest's creation, no matter how contingent it may then be. The nine-month time limit of the existing statutes really is a trap. While it superficially conforms to IRC §2518, its application to the disclaimer of future interests does not. The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law.

The elimination of the time limit is not the only change from current

statutes. The Act abandons the concept of "relates back" as a proxy for when a disclaimer becomes effective. Instead, by stating specifically when a disclaimer becomes effective and explicitly stating in Section 2-1105(f) that a disclaimer "is not a transfer, assignment, or release," the Act makes clear the results of refusing property or powers through a disclaimer. Second, UDPIA creates rules for several types of disclaimers that have not been explicitly addressed in previous statutes. The Act provides detailed rules for the disclaimer of interests in jointly held property (Section 2-1107). Such disclaimers have important uses especially in tax planning, but their status under current law is not clear. Furthermore, although current statutes mention the disclaimer of jointly held property, they provide no details. Recent developments in the law of qualified disclaimers of jointly held property make fuller treatment of such disclaimers necessary. Section 2-1108 addresses the disclaimer by trustees of property that would otherwise become part of the trust. The disclaimer of powers of appointment and other powers not held in a fiduciary capacity is treated in Section 2-1109 and disclaimers by appointees, objects, and takers in default of exercise of a power of appointment is the subject of Section 2-1110. Finally, Section 2-1111 provides rules for the disclaimer of powers held in a fiduciary capacity.

Section 2-1101. [RESERVED.]

COMMENT

This Section is marked "Reserved" in order to preserve corresponding numbeirng between the free-standing form of the Uniform Disclaimers of Property Interests Act (1999) and it s version as codified in the Uniform Probate Code. The result is that Section 2 of the free-standing act becomes Section 2-1102 of the UPC, and so on.

Section 2-1102. Definitions.

In this Part:

1) "Disclaimant" means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made.

(2) "Disclaimed interest" means the interest that would have passed to the disclaimant had the disclaimer not been made.

(3) "Disclaimer" means the refusal to accept an interest in or power over property.

(4) "Fiduciary" means a personal representative, trustee, agent acting under a power of attorney, or other person authorized to act as a fiduciary with respect to the property of another person.

(5) "Jointly held property" means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation or any legal or commercial entity.

(7) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virigin Islands, or any territory or insular possession subject to the jurisdiction of the United Sates. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a State.

(8) "Trust" means:

(A) an express trust, charitable or noncharitable, with additions thereto, whenever and however created; and

(B) a trust created pursuant to a statute, judgment, or decree which requires the trust to be administered in the manner of an express trust.

COMMENT

The definition of "disclaimant" (paragraph (1)) limits the term to the person who would have received the disclaimed property or power if the disclaimer had not been made. The disclaimant is not necessarily the person making the disclaimer, who may be a guardian, custodian, or other fiduciary acting for the disclaimant or the personal representative of the disclaimant's estate.

The term "disclaimed interest" (paragraph (2)) refers to the subject matter of a disclaimer of an interest in property and provides a compact term the use of which simplifies the drafting of Section 2-1106.

The definition of "disclaimer" (paragraph (3)) expands previous definitions. Prior Uniform Acts provided for a disclaimer of "the right of succession to any property or interest therein" and former Section 2-801 referred to "an interest in or with respect to property or an interest therein." These previously authorized types of disclaimers are continued by the present language referring to "an interest in ... property." The language referring to "power over property" broadens the permissible scope of disclaimers to include any power over property that gives the power-holder a right to control property, whether it be cast in the form of a power of appointment or a fiduciary's management power over property or discretionary power of distribution over income or corpus.

Under the Act, a "fiduciary" (defined in paragrpah (4)) is given the power to disclaim except where specifically prohibited by state law or by the document creating the fiduciary relationship. *See* Section 2-1104(b).

The term "jointly held property" (paragraph (5)) includes not only a traditional joint tenancy but also other property that is "held," but may not be "owned," by two or more persons with a right of survivorship. One form of such property is a joint bank account between parties who are not married to each other which, under the laws of many States, is owned by the

parties in proportion to their deposits. (*See* Section 6-211(b).) This "holding" concept, as opposed to "owning," may also be true with joint brokerage accounts under the law of some States. *See* Treas. Regs. §25.2518-2(c)(4).

Ther terms "person" (paragraph (6)), "State" (paragraph (7)), and "trust" (paragraph (8)) are also defined in Section 1-201 of this Code, but the more modern version of these definitions is included here for ease of reference. For purposes of this Part, the definitions in this Section control.

The term "trust" (paragraph (8)) means an express trust, whether private or charitable, including a trust created by statute, court judgment or decree which is to be administered in the manner of an express trust. Excluded from the Act's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. The Act is directed primarily at express trust which arise in an estate planning or other donative context, but the definition of "trust" is not so limited. A trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained for exchange. The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act, under which the trust is created. Commercial trusts come in various forms, including created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. *See* John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

Section 2-1103. Scope.

This Part applies to disclaimers of any interest in or power over property, whenever created.

Section 2-1104. Part Supplemented By Other Law.

(a) Unless displaced by a provision of this Part, the principles of law and equity supplement this Part.

(b) This Part does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this Part.

Section 2-1105. Power To Disclaim; General Requirements; When Irrevocable.

(a) A person may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

(b) Except to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity. A fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim, or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

(c) To be effective, a disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed in the manner provided in Section 2-1112. In this subsection:

(1) "record" means information that isinscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(2) "signed" means, with present intent to authenticate or adopt a record, to;

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic sound, symbol, or process.

(d) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(e) A disclaimer becomes irrevocable when it is delivered or filed pursuant to Section 2-1112 or when it becomes effective as provided in Sections 2-1106 through 2-1111, whichever occurs later.

(f) A disclaimer made under this Part is not a transfer, assignment, or release.

COMMENT

Subsections (a) and (b) give both persons (as defined in Section 2-1102(6)) and fiduciaries (as defined in Section 2-1102(4)) and other persons a broad power to disclaim both interests in and powers over property. In both instances, the ability to disclaim interests is comprehensive; it does not matter whether the disclaimed interest is vested, either in interest or in possession. For example, Father's will creates a testamentary trust which is to pay income to his descendants and after the running of the traditional perpetuities period is to terminate and be distributed to his descendants then living by representation. If at any time there are no descendants, the trust is to terminate and be distributed to collateral relatives. At the time of Father's death he has many descendants and the possibility of his line dying out and the collateral relatives taking under the trust is remote in the extreme. Nevertheless, under

the Act the collateral relatives may disclaim their contingent remainders. In order to make a qualified disclaimer for tax purposes, however, they must disclaim them within 9 months of Father's death.) Every sort of power may also be disclaimed.

Subsection (a) continues the provisions of current law by making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary power seeks to impose on a person. This provision follows from the principle behind all disclaimers – no one can be forced to accept property – and extends that principle to powers over property.

This Act also gives fiduciaries broad powers to disclaim both interests and powers. A fiduciary who may also be a beneficiary of the fiduciary arrangement may disclaim in either capacity. For example, a trustee who is also one of several beneficiaries of a trust may have the power to invade trust principal for the beneficiaries. The trustee may disclaim the power as trustee under Section 2-1111 or may disclaim as a holder of a power of appointment under Section 2-1109. Subsection (b) also gives fiduciaries the right to disclaim in spite of spendthrift or similar restrictions given, but subjects that right to a restriction applicable only to fiduciaries. As a policy matter, the creator of a trust or other arrangement creating a fiduciary relationship should be able to prevent a fiduciary accepting office under the arrangement from altering the parameters of the relationship. This reasoning also applies to fiduciary relationships created by statute such as those governing conservatorships and guardianships. Subsection (b) therefore does not override express restrictions on disclaimers contained in the instrument creating the fiduciary relationship or in other statutes of the State.

Subsection (c) sets forth the formal requirements for a disclaimer. The definitions of "record" and "signed" in this subsection are derived from the Uniform Electronic Transactions Act §102. The definitions recognize that a disclaimer may be prepared in forms other than typewritten pages with a signature in pen. Because of the novelty of a disclaimer executed in electronic form and the ease with which the term "record" can be confused with recording of documents, the Act does not use the term "record" in isolation but refers to "writing or other record." The delivery requirement is set forth in Section 2-1112.

Subsection (d) specifically allows a partial disclaimer of an interest in property or of a power over property, and gives the disclaimant wide latitude in describing the portion disclaimed. For example, a residuary beneficiary of an estate may disclaim a fraction or percentage of the residue or may disclaim specific property included in the residue (all the shares of X corporation or a specific number of shares). A devisee or donee may disclaim specific acreage or an undivided fraction or carve out a life estate or remainder from a larger interest in real or personal property. (It must be noted, however, that a disclaimer by a devisee or donee which seeks to "carve out" a remainder or life estate is not a "qualified disclaimer" for tax purposes, Treas. Reg. §25.2518-3(b).)

Subsection (e) makes the disclaimer irrevocable on the later to occur of (i) delivery or filing or (ii) its becoming effective under the section governing the disclaimer of the particular power or interest. A disclaimer must be "irrevocable" in order to be a qualified disclaimer for tax purposes. Since a disclaimer under this Act becomes effective at the time

significant for tax purposes, a disclaimer under this Act will always meet the irrevocability requirement for tax qualification. The interaction of the Act and the requirements for a tax qualified disclaimer can be illustrated by analyzing a disclaimer of an interest in a revocable lifetime trust.

Example 1. G creates a revocable lifetime trust which will terminate on G's death and distribute the trust property to G's surviving descendants by representation. G's son, S, determines that he would prefer his share of G's estate to pass to his descendants and executes a disclaimer of his interest in the revocable trust. The disclaimer is then delivered to G (*see* Section 2-1112(e)(3)). The disclaimer is not irrevocable at that time, however, because it will not become effective until G's death when the trust becomes irrevocable (*see* Section 2-1106(b)(1)). Because the disclaimer will not become irrevocable until it becomes effective at G's death, S may recall the disclaimer before G's death and, if he does so, the disclaimer will have no effect.

Subsection (f) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional "relation back" doctrine of prior Acts. It also makes it clear that the disclaimed interest passes without direction by the disclaimant, a requirement of tax qualification.

Section 2-1106. Disclaimer Of Interest In Property.

(a) In this section:

(1) "Future interest" means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation.

(2) "Time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment.

(b) Except for a disclaimer governed by Section 2-1107 or 2-1108, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in paragraph (2), the following rules apply:

(A) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(B) If the disclaimant is an individual, except as otherwise provided in subparagraphs (C) and (D), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(C) If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(D) If the disclaimed interest would pass to the disclaimant's estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died at the time of distribution. However, if the transferor's surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person than the disclaimant takes effect as if the had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

COMMENT

Subsection (a) defines two terms that are used only in Section 2-1106. The first, "future interest," is used in Section 2-1106(b)(4) in connection with the acceleration rule.

The second defined term, "time of distribution," is used in determining to whom the disclaimed interest passes (*see* below). Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and

the owner of the future interest becomes the owner of a present interest. For example, if B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of B's remainder is A's death. At that time the trust terminated and B's ownership of the remainder becomes outright ownership of the trust property.

Section 2-1106(b)(1) makes a disclaimer of an interest in property effective as of the time the instrument creating the interest becomes irrevocable or at the decedent's death if the interest is created by intestate succession. A will and a revocable trust are irrevocable at the testator's or settlor's death. Inter vivos trusts may also be irrevocable at their creation or may become irrevocable before the settlor's death. A beneficiary designation is also irrevocable at death, unless it is made irrevocable at an earlier time. This provision continues the provision of Uniform Acts on this subject, but with different wording. Previous Acts have stated that the disclaimer "relates back" to some time before the disclaimed interest was created. The relation back doctrine gives effect to the special nature of the disclaimer as a refusal to accept. Because the disclaimer "relates back," the disclaimant is regarded as never having had an interest in the disclaimed property. A disclaimer by a devisee against whom there is an outstanding judgment will prevent the creditor from reaching the property the debtor would otherwise inherit. This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean. Sections 2-1102(3) and 2-1105(f) taken together define a disclaimer as a refusal to accept which is not a transfer or release, and subsection (b)(1) of this section makes the disclaimer effective as of the time the creator cannot revoke the interest. Nothing in the statute, however, prevents the legislatures or the courts from limiting the effect of the disclaimer as refusal doctrine in specific situations or generally. *See* the Comments to Section 2-1113 below.

Section 2-1106(b)(2) allows the creator of the instrument to control the disposition of the disclaimed interest by express provision in the instrument. The provision may apply to a particular interest. "I give to my cousin A the sum of ten thousand dollars ($10,000) and should he disclaim any part of this gift, I give the part disclaimed to my cousin B." The provision may also apply to all disclaimed interests. A residuary clause beginning "I give my residuary estate, including all disclaimed interests to.... " is such a provision.

Sections 2-1106(b)(3)(B), (C), and (D) apply if Section 2-1106(b)(2) does not and if the disclaimant is an individual. Because "disclaimant" is defined as the person to whom the disclaimed interest would have passed had the disclaimer not been made (Section 2-1102(1)), these paragraphs would apply to disclaimers by fiduciaries on behalf of individuals. The general rule is that the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution defined in Section 2-1106(a)(2). The application of this general rule to present interests given to named individuals is illustrated by the following examples:

Example 1(a). T's will devised "ten thousand dollars ($10,000) to my brother, B." B disclaims the entire devise. B is deemed to have predeceased T, and, therefore B's gift has lapsed. If the State's antilapse statute applies, it will direct the passing of the disclaimed interest. Under Section 2-603(b)(1), for example, B's descendants who survive T by 120 hours will take the devise by representation.

Example 1(b). T's will devised "ten thousand dollars ($10,000) to my

friend, F." F disclaims the entire devise. F is deemed to predecease T and the gift has lapsed. Few antilapse statutes apply to devises to non-family members. Under Section 2-603(b), which saves from lapse only gifts made to certain relatives, the devise would lapse and pass through the residuary clause of the will.

Example 1(c). T's will devised "ten thousand dollars ($10,000) to my brother, B, but if B does not survive me, to my children." If B disclaims the devise, he will be deemed to have predeceased T and the alternative gift to T's children will dispose of the devise.

Present interests are also given to the surviving members of a class or group of persons. Perhaps the most common example of this gift is a devise of the testator's residuary estate "to my descendants who survive me by representation." Under the system of distribution among multi-generational classes used in Section 2-709, division of the property to be distributed begins in the eldest generation in which there are living people. The following example illustrates a problem that can arise.

Example 2(a). T's will devised "the residue of my estate to my descendants who survive me by representation." T is survived by son S and daughter D. Son has two living children and D has one. S disclaims his interest. The disclaimed interest is one-half of the residuary estate, the interest S would have received had he not disclaimed. Section 2-1106(b)(3)(B) provides that the disclaimed interest passes as if S had predeceased T. If Section 2-1106(b)(3) stopped there, S's children would take one-half of the disclaimed interest and D would take the other half under Section 2-709. S's disclaimer should not have that effect, however, but should pass what he would have taken to his children. Section 2-1106(b)(3)(C) solves the problem. It provides that the entire disclaimed interest passes only to S's descendants because they would share in the interest had S truly predeceased T.

The provision also solves a problem that exists when the disclaimant is the only representative of an older generation.

Example 2(b). Assume the same facts as **Example 2(a)**, but D has predeceased T. T is survived, therefore, by S, S's two children, and D's child. S disclaims. Again, the disclaimed interest is one-half of the residuary estate and it passes as if S had predeceased T. Had S actually predeceased T, the three grandchildren of S would have shared equally in T's residuary estate because they are all in the same generation. Were the three grandchildren to share equally in the disclaimed interest, S's two children would each receive one-third of the one-half while D's child would receive one-third of the one-half in addition to the one-half of the residuary estate received as the representative of his or her late parent. Section 2-1106(b)(3)(C) again applies to insure that S's children receive one-half of the residue, exactly the interest S would have received but for the disclaimer.

The disclaimer of future interests created by will leads to a different problem. The effective date of the disclaimer of the future interest, the testator's death, is earlier in time than the distribution date. This in turn leads to a possible anomaly illustrated by the following example.

Example 3. Father's will creates a testamentary trust for Mother who is to receive all the income for life. At her death, the trust is to be distributed to Father and Mother's surviving descendants by representation. Mother is survived by son S and daughter D. Son has two living children and D

has one. Son decides that he would prefer his share of the trust to pass to his children and disclaims. The disclaimer must be made within nine months of Father's death if it is to be a qualified disclaimer for tax purposes. Under prior Acts and former Section 2-801, the interest would have passed as if Son had predeceased Father. A problem could arise if, at Mother's death, one or more of S's children living at that time were born after Father's death. It would be possible to argue that had S predeceased Father the afterborn children would not exist and that D and S's two children living at the time of Father's death are entitled to all of the trust property.

The problem illustrated in **Example 3** is solved by Section 2-1106(b)(3)(B). The disclaimed interest would have taken effect in possession or enjoyment, that is, Son would be entitled to receive one-half of the trust property, at Mother's death. Under paragraph (3)(B) Son is deemed to have died immediately before Mother's death even though under Section 2-1106(b)(1) the disclaimer is effective as of Father's death. There is no doubt, therefore, that S's children living at the distribution date, whenever born, are entitled to the share of the trust property S would have received and, as **Examples 2(a)** and **2(b)** show, they will take exactly what S would have received but for the disclaimer. Had S actually died before Mother, he would have received nothing at Mother's death whether or not the disclaimer had been made. There is nothing to pass to S's children and they take as representatives of S under the representational scheme in effect.

Future interests may or may not be conditioned on survivorship. The following examples illustrate disclaimers of future interests not expressly conditioned on survival.

Example 4(a). G's revocable trust directs the trustee to pay "ten thousand dollars ($10,000) to the grantor's brother, B" at the termination of the trust on G's death. B disclaims the entire gift immediately after G's death. B is deemed to have predeceased G because it is at G's death that the interest given B will come into possession and enjoyment. Had B not disclaimed he would have received $10,000 at that time. The recipient of the disclaimed interest will be determined by the law that applies to gifts of future interests to persons who die before the interest comes into possession and enjoyment. Traditional analysis would regard the gift to B as a vested interest subject to divestment by G's power to revoke the trust. So long as G has not revoked the gift, the interest would pass through B's estate to B's successors in interest. Yet If B's successors in interest are selected by B's will, the disclaimer cannot be a qualified disclaimer for tax purposes. This problem does not arise in a jurisdiction with Section 2-707(b), because the interest passes not through B's estate but rather to B's descendants who survive G by 120 hours by representation. Because the antilapse mechanism of Section 2-707 is not limited to gifts to relatives, a disclaimer by a friend rather than a brother would have the same result. For jurisdictions without Section 2-707, however, Section 2-1106(b)(3)(D) provides an equivalent solution: a disclaimed interest that would otherwise pass through B's estate instead passes to B's descendants who survive G by representation.

Example 4(b). G's revocable trust directed that on his death the trust property is to be distributed to his three children, A, B, and C. A disclaims immediately after G's death and is deemed to predecease the distribution date, which is G's death. The traditional analysis applies exactly as it does in **Example 4(a).** The only condition on A's gift would be G's not revoking the trust. A is not explicitly required to survive G. (See *First National Bank of Bar Harbor v. Anthony*, 557 A.2d 957 (Me. 1989).) The interest would pass to A's

successors in interest. If those successors are selected by A's will, the disclaimer cannot be a qualified disclaimer for tax purposes. Section 2-707(b) provides that A's interest passes by representation to A's descendants who survive G by 120 hours. For jurisdictions without Section 2-707, Section 2-1106(b)(3)(D) reaches the same result.

Example 4(c). G conveys land "to A for life, remainder to B." B disclaims immediately after the conveyance. Traditional analysis regards B's remainder as vested; it is not contingent on surviving A. This classification is unaffected by whether or not the jurisdiction has adopted Section 2-707, because that section only applies to future interests in trust; it does not apply to future interests not in trust, such as the one in this example created directly in land. To the extent that B's remainder is transmissible through B's estate, B's disclaimer cannot be a qualified disclaimer for tax purposes. Section 2-1106(b)(3)(D) resolves the problem: a disclaimed interest that would otherwise pass through B's estate instead passes as if it were controlled by Sections 2-707 and 2-711. Because Section 2-707 only applies to future interests in trust, jurisdictions enacting Section 2-1106 should enact Section 2-1106(b)(3)(D) whether or not they have enacted Section 2-707.

Section 2-1106(b)(3)(A) provides a rule for the passing of property interests disclaimed by persons other than individuals. Because Section 2-1108 applies to disclaimers by trustees of property that would otherwise pass to the trust, Section 2-1106(b)(3)(A) principally applies to disclaimers by corporations, partnerships, and the other entities listed in the definition of "person" in Section 2-1102(6). A charity, for example, might wish to disclaim property the acceptance of which would be incompatible with its purposes.

Section 2-1106(b)(4) continues the provision of prior Uniform Acts and former Section 2-801 on this subject providing for the acceleration of future interests on the making of the disclaimer, except that future interests in the disclaimant do not accelerate. The workings of Section 2-1106(b)(4) are illustrated by the following examples.

Example 5(a). Father's will creates a testamentary trust to pay income to his son S for his life, and on his death to pay the remainder to S's descendants then living, by representation. If S disclaims his life income interest in the trust, he will be deemed to have died immediately before Father's death. The disclaimed interest, S's income interest, came into possession and enjoyment at Father's death as would any present interest created by will (*see* **Examples 1(a)**, **(b)**, and **(c)**), and, therefore, the time of distribution is Father's death. If at the income beneficiary of a testamentary trust does not survive the testator, the income interest is not created and the next interest in the trust takes effect. Since the next interest in Father's trust is the remainder in S's descendants, the trust property will pass to S's descendants who survive Father by representation. It is immaterial under the statute that the actual situation at the S's death might be different with different descendants entitled to the remainder.

Example 5(b). Mother's will creates a testamentary trust to pay the income to her daughter D until she reaches age 35 at which time the trust is to terminate and the trust property distributed in equal shares to D and her three siblings. D disclaims her income interest. The remainder interests in her three siblings accelerate and they each receive one-fourth of the trust property. D's remainder interest does not accelerate, however, and she must wait until she is 35 to receive her fourth of the trust property.

2006 Technical Amendment. By technical amendment, subsection (b)(3)(D) was added to resolve the problem of future interests transmissible through the disclaimant's estate. The Comment was correspondingly amended. For the prior version, see 8 U.L.A. 65-69 (Supp. 2005).

Legislative Note. Because Section 2-707 only applies to future interests in trust, and does not apply to legal future interests, states that have enacted Section 2-1106 should enact the 2006 technical amendments whether or not they have enacted Section 2-707.

Section 2-1107. Disclaimer Of Rights Of Survivorship In Jointly Held Property.

(a) Upon the death of a holder of jointly held property, a surviving holder may disclaim, in whole or part, the greater of:

(1) a fractional share of the property determined by dividing the number one by the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates; or

(2) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant.

(b) A disclaimer under subsection (a) takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(c) An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

COMMENT

The various forms of ownership in which "joint property," as defined in Section 2-1102(5), can be held include common law joint tenancies and any statutory variation that preserves the right of survivorship. The common law was unsettled whether a surviving joint tenant had any right to renounce his interest in jointly-owned property and if so to what extent. *See* Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B owned real estate or securities as joint tenants with right of survivorship and A died, the problem was whether B might disclaim what was given to him originally upon creation of the estate, or, if not, whether he could nevertheless reject the incremental portion derived through the right of survivorship. There was also a question of whether a joint bank account should be treated differently from jointly-owned securities or real estate for the purpose of disclaimer.

This common law of disclaimers of jointly held property must be set against the rapid developments in the law of tax qualified disclaimers of jointly held property. Since the previous Uniform Acts were drafted, the law regarding tax qualified disclaimers of joint property interests has been clarified. Courts have repeatedly held that a surviving joint tenant may disclaim that portion of the jointly held property to which the survivor succeeds by operation of law on the death of the other joint tenant so long as the joint tenancy was severable

during the life of the joint tenants (*Kennedy v. Commissioner*, 804 F.2d 1332 (7th Cir. 1986), *McDonald v. Commissioner*, 853 F.2d 1494 (9th Cir. 1988), *Dancy v. Commissioner*, 872 F.2d 84 (4th Cir. 1989).) On December 30, 1997 the Service published T.D. 8744 making final proposed amendments of the Regulations under IRC §2518 to reflect the decisions regarding disclaimers of joint property interests.

The amended final Regulations, §25.2518-2(c)(4)(i) allow a surviving joint tenant or tenant by the entireties to disclaim that portion of the tenancy to which he or she succeeds upon the death of the first joint tenant (½ where there are two joint tenants) whether or not the tenancy could have been unilaterally severed under local law and regardless of the proportion of consideration furnished by the disclaimant. The Regulations also create a special rule for joint tenancies between spouses created after July 14, 1988 where the spouse of the donor is not a United States citizen. In that case, the donee spouse may disclaim any portion of the joint tenancy includible in the donor spouse's gross estate under IRC §2040, which creates a contribution rule. Thus the surviving non-citizen spouse may disclaim all of the joint tenancy property if the deceased spouse provided all the consideration for the tenancy's creation.

The amended final Regulations, §25.2518-2(c)(4)(iii) also recognize the unique features of joint bank accounts, and allow the disclaimer by a survivor of that part of the account contributed by the decedent, so long as the decedent could have regained that portion during life by unilateral action, bar the disclaimer of that part of the account attributable to the survivor's contributions, and explicitly extend the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint name.

These developments in the tax law of disclaimers are reflected in subsection (a). The subsection allows a surviving holder of jointly held property to disclaim the greater of the accretive share, the part of the jointly held property which augments the survivor's interest in the property, and all of the property that it not attributable to the disclaimant's contribution to the jointly held property. In the usual joint tenancy or tenancy by the entireties between husband and wife, the survivor will always be able to disclaim one-half the property. If the disclaimer conforms to the requirements of IRC §2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all of the property attributable to the decedent's contribution, a provision which will allow the non-citizen spouse to take advantage of the contribution rule of the final Regulations. The contribution rule of subsection (a)(2) will also allow surviving holders of joint property arrangements other than joint tenancies to make a tax qualified disclaimer under the rules applicable to those joint arrangements. For example, if A contributes 60% and B contributes 40% to a joint bank account and they allow the interest on the funds to accumulate, on B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account. (Note that under subsection (a)(1) A can disclaim up to 50% of the account on B's death because there are two joint account holders, but the disclaimer would not be fully tax qualified. As previously noted, a tax qualified disclaimer is limited to 40% of the account.) If the account belonged to the parties during their joint lives in proportion to their contributions, the disclaimers in this example can be tax qualified disclaimers if all the requirements of IRC §2518 are met.

Subsection (b) provides that the disclaimer is effective as of the death of the joint holder which triggers the survivorship feature of the joint property arrangement. The disclaimant, therefore, has no interest in and has not transferred the disclaimed interest.

Subsection (c) provides that the disclaimed interest passes as if the disclaimant had predeceased the holder to whose death the disclaimer relates. Where there are two joint holders, a disclaimer by the survivor results in the disclaimed property passing as part of the deceased joint holder's estate because under this subsection, the deceased joint holder is the survivor as to the portion disclaimed. If a married couple owns the family home in joint tenancy, therefore, a disclaimer by the survivor under subsection (a)(1) results in one-half the home passing through the decedent's estate. The surviving spouse and whoever receives the interest through the decedent's estate are tenants in common in the house. In the proper circumstances, the disclaimed one-half could help to use up the decedent's unified credit. Without the disclaimer, the interest would automatically qualify for the marital deduction, perhaps wasting part of the decedent's applicable exclusion amount.

In a multiple holder joint property arrangement, the disclaimed interest will belong to the other joint holder or holders.

Example 1. A, B, and C make equal contributions to the purchase of Blackacre, to which they take title as joint tenants with right of survivorship. On partition each would receive 1/3 of Blackacre and any of them could convert his or her interest to a 1/3 tenancy in common by unilateral severance (which, of course, would have to be accomplished in accordance with state law). On A's death, B and C may each, if they wish, disclaim up to 1/3 of the property under section (a)(1). Should one of them disclaim the full 1/3, the disclaimant will be deemed to predecease A.

Assume that B so disclaims. With respect to the 1/3 undivided interest that now no longer belongs to A the only surviving joint holder is C. C therefore owns that 1/3 as tenant in common with the joint tenancy. Should C predecease B, the 1/3 tenancy in common interest will pass through C's estate and B will be the sole owner of an undivided 2/3 interest in Blackacre as the survivor of the joint tenancy. Should B predecease C, C will be the sole owner of Blackacre in fee simple absolute.

Alternatively, assume that both B and C make valid disclaimers after A's death. They are both deemed to predeceased A, A is the sole survivor of the joint tenancy and Blackacre passes through A's estate.

Finally, assume that A provided all the consideration for the purchase of Blackacre. On A's death, B and C can each disclaim the entire property under subsection (a)(2). If they both do so, Blackacre will pass through A's estate. If only one of B or C disclaims the entire property, the one who does not will be the sole owner of Blackacre as the only surviving joint tenant. Such a disclaimer would not be completely tax qualified, however. The Regulations limit a tax qualified disclaimer to no more than 1/3 of the property. If, however, B or C were the first to die, A could still disclaim the 1/3 interest that no longer belongs to the decedent under subsection (a)(1), the disclaimer would be a qualified disclaimer for tax purposes under the Regulations, and the result is that the other surviving joint tenant owns 1/3 of Blackacre as tenant in common with the joint tenancy.

2004 Amendment. This comment was amended in 2004 to correct an error in the joint bank account example and to provide a more complete explanation for the result in Example 1.

Section 2-1108. Disclaimer Of Interest By Trustee.

If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

COMMENT

This section deals with disclaimer of a right to receive property into a trust, and thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary acting on behalf of an individual, such as a personal representative, conservator, guardian, or agent is governed by the section of the statute applicable to the type of interest being disclaimed.) The instrument under which the right to receive the property was created may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not make such a provision, the doctrine of resulting trust will carry the property back to the donor. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees. Every disclaimer by a trustee must be compatible with the trustee's fiduciary obligations.

Section 2-1109. Disclaimer Of Power Of Appointment Or Other Power Not Held In Fiduciary Capacity.

If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1) If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

(3) The instrument creating the power is construed as if the power expired when the disclaimer became effective.

COMMENT

Section 2-1105(a) authorizes a person to disclaim an interest in or power over property. Section 2-1109 provides rules for disclaimers of powers which are not held in a fiduciary capacity. The most common non-fiduciary power is a power of appointment. Section 2-1105(a) also authorizes the partial disclaimer of a power as well as of an interest. For example, the disclaimer could be of a portion of the power to appoint one's self, while retaining the right to appoint to others. The effect of a disclaimer of a power under Section 2-1109 depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaims a power before exercising it, the power expires and can never be exercised. If the power has been exercised, the power is construed as having expired immediately after its last exercise by the holder. The disclaimer affects only the holder of the power and will not affect other

aspects of the power.

Example 1. T creates a testamentary trust to pay the income to A for life, remainder as A shall appoint by will among her descendants living at A's death and four named charities. If A does not exercise her power, the remainder passes to her descendants living at her death by representation. A disclaims the power. The power can no longer be exercised and on A's death the remainder will pass to the takers in default.

Section 2-1110. Disclaimer By Appointee, Object, Or Taker In Of Exercise Of Power Of Appointment.

(a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(b) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

COMMENT

This section governs disclaimers by those who may or do receive an interest in property through the exercise of a power of appointment. At the time of the creation of a power of appointment, the creator of the power, besides giving the power to the holder of the power, can also limit the objects of the power (the permissible appointees of the property subject to the power) and also name those who are to take if the power is not exercised, persons referred to as takers in default.

This section provides rules for disclaimers by all of these persons: subsection (a) is concerned with a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment, and subsection (b) recognizes a disclaimer by a taker in default or permissible appointee before the power is exercised. These two situations are quite different. An appointee is in the same position as any devisee or beneficiary of a trust. He or she may receive a present or future interest depending on how the holder of the power exercises it. Subsection (a) therefore, makes the disclaimer effective as of the time the instrument exercising the power–giving the interest to the disclaimant–becomes irrevocable. If the holder of the power created an interest in the appointee, the effect of the disclaimer is governed by Section 2-1106. If the holder created another power in the appointee, the effect of the disclaimer is governed by Section 2-1109.

Example 1. Mother's will creates a testamentary trust for daughter D. The trustees are to pay all income to D for her life and have discretion to invade principal for D's maintenance. On D's death she may appoint the trust property by will among her then living descendants. In default of appointment the property is to be distributed by representation to D's descendants who survive her. D is the donee, her descendants are the permissible appointees and the takers in default. D exercises her power by appointing the trust property in three equal shares to her children A, B, and C. The three children are the appointees. A disclaims. Under subsection (a) A's disclaimer is effective as of D's death (the time at which the will exercising the power became irrevocable).

Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 2-1106(b). If D's will makes no provisions for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 2-1106(b)(2)), the interest passes as if A predeceased the time of distribution which is D's death. An appointment to a person who is dead at the time of the appointment is ineffective except as provided by an antilapse statute. *See* Restatement, Second, Property (Donative Transfers) §18.5. The Restatement, Second, Property (Donative Transfers), §18.6 suggests that any requirement of the antilapse statute that the deceased devisee be related in some way to the testator be applied as if the appointive property were owned either by the donor or the holder of the power. (See also Restatement, Third, Property (Wills and Other Donative Transfers) §5.5, Comment *l*.) That is the position taken by Section 2-603. Since antilapse statutes usually apply to devises to children and grandchildren, the disclaimed interest would pass to A's descendants by representation.

A taker in default or a permissible object of appointment is traditionally regarded as having a type of future interest. *See* Restatement, Second, Property (Donative Transfers) §11.2, *Comments c* and *d*. The future interest will come into possession and enjoyment when the question of whether or not the power is to be exercised is resolved. For testamentary powers that time is the death of the holder.

Subsection (b) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. Because the disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the disclaimer is governed by Section 2-1106. The effect of these rules is illustrated by the following examples.

Example 2(a). The facts are the same as **Example 1**, except A disclaims before D's death and D's will does not exercise the power. Under subsection (b) A's disclaimer is effective as of Mother's death which is the time when the instrument creating the power, Mother's will, became irrevocable. Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 2-1106(b). If Mother's will makes no provision for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 2-1106(b)(2)), the interest passes and under Section 2-1106(b)(3) as if the disclaimant had died immediately before the time of distribution. Thus, A is deemed to have died immediately before D's death which is the time of distribution. If A actually survives D, the disclaimed interest is one-third of the trust property; it will pass as if A predeceased D, and the result is the same as in **Example 1.** If A does predecease D he would have received nothing and there is no disclaimed interest. The disclaimer has no effect on the passing of the trust property.

Example 2(b). The facts are the same as in **Example 2(a)** except D does exercise her power of appointment to give one-third of the trust property to each of her three children, A, B, and C. A's disclaimer means the disclaimed interest will pass as if he predeceased D and the result is the same as in **Example 1.**

In addition, if all the objects and takers in default disclaim before the power is exercised the power of appointment is destroyed. See Restatement, Second, Property (Donative Transfers) §12.1, Comment g.

Section 2-1111. Disclaimer Of Power Held In Fiduciary Capacity.

(a) If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(b) If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(c) A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

COMMENT

This section governs disclaimers by fiduciaries of powers held in their fiduciary capacity. Examples include a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. Such disclaimers have not been specifically dealt with in prior Uniform Acts although they could prove useful in several situations. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes. A trustee of a trust for the benefit for a surviving spouse who also has the power to invade principal for the decedent's descendants may wish to disclaim the power in order to qualify the trust for the marital deduction. (The use of a disclaimer in just that situation was approved in *Cleaveland v. U.S.*, 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶13,766 (C. D. Ill. 1988).)

The section refers to fiduciary in the singular. It is possible, of course, for a trust to have two or more co-trustees and an estate to have two or more co-personal representatives. This Act leaves the effect of actions of multiple fiduciaries to the general rules in effect in each State relating to multiple fiduciaries. For example, if the general rule is that a majority of trustees can make binding decisions, a disclaimer by two of three co-trustees of a power is effective. A dissenting co-trustee could follow whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee burdened with a power to invade principal for a group of beneficiaries including him or herself who wishes to disclaim the power but yet preserve the possibility of another trustee exercising the power would seek the appointment of a disinterested co-trustee to exercise the power and then disclaim the power for him or herself. The subsection thus makes the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind other fiduciaries, be they co-fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

As with any action by a fiduciary, a disclaimer of fiduciary powers must be compatible with the fiduciary's duties.

Section 2-1112. Delivery Or Filing.

(a) In this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:

(1) an annuity or insurance policy;

(2) an account with a designation for payment on death;

(3) a security registered in beneficiary form;

(4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or

(5) any other nonprobate transfer at death.

(b) Subject to subsections (c) through (l), delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in its receipt.

(c) In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(1) a disclaimer must be delivered to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a Court having jurisdiction to appoint the personal representative.

(d) In the case of an interest in a testamentary trust:

(1) a disclaimer must be delivered to trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate; or

(2) if no personal representative is serving, it must be filed with a Court having jurisdiction to enforce the trust.

(e) In the case of an interest in an inter vivos trust:

(1) a disclaimer must be delivered to the trustee then serving;

(2) if no trustee is then serving, it must be filed with a Court having jurisdiction to enforce the trust; or

(3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.

(f) In the case of an interest created by a beneficiary designation made before the time the designation becomes irrevocable, a disclaimer must be delivered to the person making the beneficiary designation.

(g) In the case of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, a disclaimer must be delivered to the person obligated to distribute the interest.

(h) In the case of a disclaimer by a surviving holder of jointly held

property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.

(i) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a Court having authority to appoint the fiduciary.

(j) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's or to the fiduciary under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a Court having authority to appoint the fiduciary.

(k) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.

(l) In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

COMMENT

The rules set forth in this section are designed so that anyone who has the duty to distribute the disclaimed interest will be notified of the disclaimer. For example, a disclaimer of an interest in an decedent’s estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in Court only when there is no one person or entity to whom delivery can be made.

Section 2-1113. When Disclaimer Barred Or Limited.

(a) A disclaimer is barred by a written waiver of the right to disclaim.

(b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(1) the disclaimant accepts the interest sought to be disclaimed;

(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or

contracts to do so; or

(3) a judicial sale of the interest sought to be disclaimed occurs.

(c) A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(d) A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(e) A disclaimer is barred or limited if so provided by law other than this [Part.]

(f) A disclaimer of a power over property which is barred by this section is ineffective. A disclaimer of an interest in property which is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under this Part had the disclaimer not been barred.

COMMENT

The 1978 Act required that an effective disclaimer be made within nine months of the event giving rise to the right to disclaim (e.g., nine months from the death of the decedent or donee of a power or the vesting of a future interest). The nine month period corresponded in some situations with the Internal Revenue Code provisions governing qualified tax disclaimers. Under the common law an effective disclaimer had to be made only within a "reasonable" time.

This Act specifically rejects a time requirement for making a disclaimer. Recognizing that disclaimers are used for purposes other than tax planning, a disclaimer can be made effectively under the Act so long as the disclaimant is not barred from disclaiming the property or interest or has not waived the right to disclaim. Persons seeking to make tax qualified disclaimers will continue to have to conform to the requirements of the Internal Revenue Code.

The events resulting in a bar to the right to disclaim set forth in this section are similar to those found in the 1978 Acts and former Section 2-801. Subsection (a) provides that a written waiver of the right to disclaim is effective to bar a disclaimer. Such a waiver might be sought, for example, by a creditor who wishes to make sure that property acquired in the future will be available to satisfy the debt.

Whether particular actions by the disclaimant amount to accepting the interest sought to be disclaimed within the meaning of subsection (b)(1) will necessarily be determined by the courts based upon the particular facts. (*See Leipham v. Adams*, 77 Wash. App. 827, 894 P.2d 576 (1995); *Matter of Will of Hall*, 318 S.C. 188, 456 S.E.2d 439 (Ct. App. 1995); *Jordan v. Trower*, 208 Ga. App. 552, 431 S.E.2d 160 (1993); *Matter of Gates*, 189 A.D.2d 427, 595 N.Y.S.2d 194 (3d Dept. 1993); "What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest," 93 ALR2d 8).

The addition in this Act of the word "voluntary" to the list of actions barring a disclaimer which also appears in the earlier Acts reflects the numerous cases holding that only actions by the disclaimant taken after the right to disclaim has arisen will act as a bar. (*See Troy v. Hart*, 116 Md. App. 468, 697 A.2d 113 (1997), *Estate of Opatz*, 554 N.W.2d 813 (N.D. 1996), *Frances Slocum Bank v. Martin*, 666 N.E.2d 411 (Ind. App. 1996), *Brown v. Momar, Inc.*, 201 Ga. App. 542, 411 S.E.2d 718 (1991), *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 130 Ill. Dec. 207, 537 N.E.2d 274 (1989).) An existing lien, therefore, will not prevent a disclaimer, although the disclaimant's actions before the right to disclaim arises may work an estoppel. *See Hale v. Bardouh*, 975 S.W.2d 419 (Tex. Ct. App. 1998). With regard to joint property, the event giving rise to the right to disclaim is the death of a joint holder, not the creation of the joint interest and any benefit received during the deceased joint tenant's life is ignored.

The reference to judicial sale in subsection (b)(3) continues a provision from the earlier Acts and ensures that title gained from a judicial sale by a personal representative will not be clouded by a possible disclaimer.

Subsection (c) rephrases the rules of Section 2-1111 governing the effect of disclaimers of powers.

Subsection (d) is applicable to powers which can be disclaimed under Section 2-1109. It bars the disclaimer of a general power of appointment once it has been exercised. A general power of appointment allows the holder to take the property subject to the power for him or herself, whether outright or by using it to pay

his or her creditors (for estate and gift tax purposes, a general power is one that allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate). The power is presently exercisable if the holder need not wait to some time or for some event to occur before exercising the power. If the holder has exercised such a power, it can no longer be disclaimed.

Subsection (e), unlike the 1978 Act, specifies that "other law" may bar the right to disclaim. Some States, including Minnesota (M.S.A. § 525.532 (c)(6)), Massachusetts (Mass. Gen. Law c. 191A, §8), and Florida (Fla. Stat. §732.801(6)), bar a disclaimer by an insolvent disclaimant. In others a disclaimer by an insolvent debtor is treated as a fraudulent "transfer". *See Stein v. Brown*, 18 Ohio St. 3d 305 (1985); *Pennington v. Bigham*, 512 So.2d 1344 (Ala. 1987). A number of States refuse to recognize a disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These decisions often rely on the definition of "transfer" in the federal Medical Assistance Handbook which includes a "waiver" of the right to receive an inheritance (*see* 42 U.S.C.A. §1396p(e)(1)). *See Hinschberger v. Griggs County Social Services*, 499 N.W.2d 876 (N.D. 1993); *Department of Income Maintenance v. Watts*, 211 Conn. 323 (1989), *Matter of Keuning*, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and *Matter of Molloy*, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), *Troy v. Hart*, 116 Md. App. 468, 697 A.2d 113 (1997), *Tannler v. Wisconsin Dept. of Health & Social Services*, 211 Wis. 2d 179, 564 N.W.2d 735 (1997); *but see*, *Estate of Kirk*, 591 N.W.2d 630 (Iowa, 1999)(valid disclaimer by executor of surviving spouse who was Medicaid beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies will begin to address the question of disclaimers of real property on which an environmental hazard is located in order to avoid saddling the State, as title holder of last resort, with the resulting liability, although the need for fiduciaries to disclaim property subject to environmental liability has probably been diminished by the 1996 amendments to CERCLA by the Asset Conservation Act of 1996 (PL 104-208). These larger policy issues are not addressed in this Act and must, therefore, continue to be addressed by the various States. On the federal level, the United States Supreme Court has held that valid disclaimer does not defeat a federal tax lien levied under IRC §6321, *Dyre, Jr. v. United States*, 528 U.S. 49, 120 S. Ct. 474 (1999).

Subsection (f) provides a rule stating what happens if an attempt is made to disclaim a power or property interest whose disclaimer is barred by this section. A disclaimer of a power is ineffective, but the attempted disclaimer of the property interest, although invalid as a disclaimer, will operate as a transfer of the disclaimed property interest to the person or persons who would have taken the interest had the disclaimer not been barred. This provision removes the ambiguity that would otherwise be caused by an ineffective refusal to accept property. Whoever has control of the property will know to whom to deliver it and the person attempting the disclaimer will bear any transfer tax consequences.

Section 2-1114. Tax Qualified Disclaimer.

Notwithstanding any other provision of this Part, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this Part.

COMMENT

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC §2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if its does not otherwise meet the Act's more specific requirements.

Section 2-1115. Recording Of Disclaimer.

If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

COMMENT

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which only referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice.

Section 2-1116. Application To Existing Relationships.

Except as otherwise provided in Section 2-1113, an interest in or power over property existing on the effective date of this Part as to which the time for delivering or filing a disclaimer under law superseded by this Part has not expired may be disclaimed after the effective date of this Part.

COMMENT

This section deals with the application of the Act to existing interests and powers. It insures that disclaimers barred by the running of a time period under prior law will not be revived by the Act. For example, assume prior law, like the prior Acts and former Section 2-801, allows the disclaimer of present interests within nine months of their creation and the disclaimer of future interests nine months after they are indefeasibly vested. Under T's will, X receives an outright devise of a sum of money and also has a contingent remainder in a trust created under the will. The Act is effective in the jurisdiction governing the administration of T's estate ten months after T's death. X cannot disclaim the general devise, irrespective of the application of Section 2-1113, because the nine months allowed under prior law have run. The contingent remainder, however, may be disclaimed so long as it is not barred under Section 2-1113 without regard to the nine month period of prior law.

Section 2-1117. Relation to Electronic Signatures in Global and National Commerce Act.

This Part modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of the act (15 U.S.C. Section 7003(b)).

COMMENT

This section adopts standard language approved by the Uniform Law Conference that is intended to preempt application of the federal Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign). Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. Not subject to preemption by the state's are E-Sign's consumer consent provisions (Section 101(c)) and its notice provisions (Section 103(b)), neither of which have substantive impact on the Disclaimers Act. The effect of this Section is to reaffirm state authority over the formal requirements for the making of a disclaimer. For these requirements, see Section 2-1105, and, specifically, Section 2-1105(c), which allow a disclaimer to be made by means of a signed record.

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The following free-standing Acts are associated with Article III:

Uniform Succession Without Administration Act

Article III, Sections 3-312 through 3-322 have also been adopted as the Uniform Succession Without Administration Act.

Revised Uniform Estate Tax Apportionment Act

Article III, Section 3-916 has also been adopted as the Revised Uniform Estate Tax Apportionment Act.

GENERAL COMMENT

The provisions of this Article describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying ways and some states may see fit to reframe parts of this Article to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, if the following essential characteristics are carefully protected in the redrafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the Court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the Court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the Court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously barred by non-claim statutes are barred after three years from the decedent's death.

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its

relief to that sought.

PART 1

GENERAL PROVISIONS

Section 3-101. Devolution of Estate at Death; Restrictions.

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

ALTERNATIVE SECTION FOR COMMUNITY PROPERTY STATES

[Section 3-101A. Devolution of Estate at Death; Restrictions.

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his separate property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, and upon the death of a husband or wife, the decedent’s share of their community property devolves to the persons to whom it is devised by his last will, or in the absence of testamentary disposition, to his heirs, but all of their community property which is under the management and control of the decedent is subject to his debts and administration, and that portion of their community property which is not under the management and control of the decedent but which is necessary to carry out the provisions of his will is subject to administration; but the devolution of all the above described property is subject to rights to homestead allowance, exempt property and family allowances, to renunciation, to rights of creditors, [elective share of surviving spouse] and to administration.]

COMMENT

In its present form, this section will not fit existing concepts concerning community property in all states recognizing community ownership. States differ in respect to how much testamentary power a decedent has over the community. Also, some changes of language may be necessary to reflect differing views concerning what estate is subject to "separate" and "community" debts. The reference to certain family rights is not intended to suggest that such rights relate to the survivor's interest in any community property. Rather, the assumption is that such rights relate only to property passing from the decedent at his death; e.g., his half of community property and his separate property.

Section 3-102. Necessity of Order of Probate For Will.

Except as provided in Section 3-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the Court.

COMMENT

The basic idea of this section follows Section 85 of the Model Probate Code. The exception referring to Section 3-1201 relates to affidavit procedures which are authorized for collection of estates worth less than $5,000.

Section 3-107 and various sections in Parts 3 and 4 of this Article make it clear that a will may be probated without appointment of a personal representative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, with *reference to the estate they claim*, either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal

representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will, giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

In 1993, a technical amendment removed a two-pronged exception formerly occupying about 8 lines of text in the official text. The removed language permitted unprobated wills to be admitted in evidence in two limited categories of cases in which failure to probate a will within three years of the testator's death were deemed to be justified. The 1993 technical amendment to 3-108 so limits the three year time bar on probate and appointment proceedings as to make the 3-102 exception unnecessary.

Section 3-103. Necessity of Appointment For Administration.

Except as otherwise provided in Article IV, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the Court or Registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

COMMENT

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in Section 3-601. "Letters" are the subject of Section 1-305. Section 3-701 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

See 3-108 for the time limit on requests for appointment of personal representatives.

In Article IV, Sections 4-204 and 4-205 permit a personal representative from another state to obtain the powers of one appointed locally by filing evidence of his authority with a local Court.

Section 3-104. Claims Against Decedent; Necessity of Administration.

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Article. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 3-1004 or from a former personal representative individually liable as provided in Section 3-1005. This section has no application to a proceeding by a secured creditor of the decedent to

enforce his right to his security except as to any deficiency judgment which might be sought therein.

COMMENT

This and sections of Part 8, Article III, are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (Section 3-301). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (Section 3-203). But, if a personal representative has been appointed and has closed the estate under circumstances which leave a creditor's claim unbarred, the creditor is permitted to enforce his claims against distributees, as well as against the personal representative if any duty owed to creditors under 3-807 or 3-1003 has been breached. The methods for closing estates are outlined in Sections 3-1001 through 3-1003. Termination of appointment under Sections 3-608 et seq. may occur though the estate is *not* closed and so may be irrelevant to the question of whether creditors may pursue distributees.

Section 3-105. Proceedings Affecting Devolution and Administration; Jurisdiction of Subject Matter.

Persons interested in decedents' estates may apply to the Registrar for determination in the informal proceedings provided in this Article, and may petition the Court for orders in formal proceedings within the Court's jurisdiction including but not limited to those described in this Article. The Court has exclusive jurisdiction of formal proceedings to determine how decedents' estates, subject to the laws of this state, are to be administered, expended and distributed. The Court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.

COMMENT

This and other sections of Article III contemplate a non-judicial officer who will act on informal application and a judge who will hear and decide formal petitions. *See* Section 1-307 which permits the judge to perform or delegate the functions of the Registrar. *However, the primary purpose of Article III is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities should be assigned within a given state or county.* Hence, any of several alternatives to the organizational scheme assumed for purposes of this draft would be acceptable.

If separate Courts or offices are not feasible, it may be preferable to concentrate authority for allocating responsibility respecting formal and informal proceedings in the judge. To do so helps fix responsibility for the total operation of the office. This is the assumption of this draft.

It will be up to each adopting state to select the organizational arrangement which best meets its needs.

If the office with jurisdiction to hear and decide formal petitions is the county or district court of general jurisdiction, there will be little basis for objection to the broad statement of concurrent jurisdiction of this section. However, if a more specialized "estates" court is used, there may be pressure to prevent it from hearing negligence and other actions involving jury trials, even though it may be given unlimited power to decide other cases to which a personal representative is a party. A system for certifying matters involving jury trials to the general trial court could be provided, although the alternative of permitting the estates court to empanel juries where necessary might not be unworkable. In any event, the jurisdiction of the "estates" or "probate" Court in regard to negligence litigation would only be concurrent with that of the general trial court. The important point is that the estates court, whatever it is called, should have unlimited power to hear and finally dispose of all matters relevant to determination of the extent of the decedent's estate and of the claims against it. The jury trial question is peripheral.

See the comment to the next section regarding adjustments which might be made in the Code by a state with a single court of general jurisdiction for each county or district.

Section 3-106. Proceedings Within the Exclusive Jurisdiction of Court; Service; Jurisdiction Over Persons.

In proceedings within the exclusive jurisdiction of the Court where notice is required by this Code or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be open for administration, interested persons may be bound by the orders of the Court in respect to property in or subject to the laws of this state, by notice in conformity with Section 1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

COMMENT

The language in this and the preceding section which divides matters coming before the probate Court between those within the Court's "exclusive" jurisdiction and those within its "concurrent" jurisdiction would be inappropriate if probate matters were assigned to a branch of a single Court of general jurisdiction. The Code could be adjusted to an assumption of a single Court in various ways. Any adjusted version should contain a provision permitting the Court to hear and settle certain kinds of matters after notice as provided in 1-401. It might be suitable to combine the second sentence of 3-105 and 3-106 into a single section as follows:

"The Court may hear and determine formal proceedings involving administration and distribution of decedents' estates after notice to interested persons in conformity with Section 1-401. Persons notified are bound though less than all interested persons may have been given notice."

An adjusted version also might provide:

"Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the Court (meaning the probate division) may hear and determine any other controversy concerning a succession or to which an estate through a personal representative, may be a party."

The propriety of this sort of statement would depend upon whether questions of docketing and assignment, including the division of matters between coordinate branches of the Court, should be dealt with by legislation.

The Joint Editorial Board, in 1975, recommended the addition after "rule", of the language "and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration." This addition, coupled with the exceptions to the limitations provisions in Section 3-108 that permit proceedings to construe wills and to determine heirs of intestates to be commenced more than three years after death, clarifies the purpose of the draftsmen to offer a probate proceeding to aid the determination of rights of inheritance of estates that were not opened for administration within the time permitted by Section 3-108.

Section 3-107. Scope of Proceedings; Proceedings Independent; Exception.

Unless supervised administration as described in Part 5 is involved, (1) each proceeding before the Court or Registrar is independent of any other proceeding involving the same estate; (2) petitions for formal orders of the Court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this Article, no petition is defective because it fails to embrace all matters which might then be the subject of a final order (3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and(4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

COMMENT

This section and others in Article III describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 3-501 through 3-505 describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. *See*, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited response that nonjudicial personnel of the probate Court are authorized to make in response to verified application) and filings provided in the remaining Parts of Article III to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not

otherwise prescribed by the Code is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by Sections 3-106 and 3-602. Section 3-201 locates venue for all proceedings at the place where the first proceeding occurred.

Section 3-108. Probate, Testacy and Appointment Proceedings; Ultimate Time Limit.

(a) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred before the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

(2) appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person;

(3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months fromthe informal probate or three years from the decedent's death;

(4) an informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceedings concerning the succession or estate administration has occurred within the three year period after the decedent's death, but the personal representative has no right to possess estate assets as provided in Section 3-709 beyond that necessary to confirm title thereto in the successors to the estate and claims other than expenses of administration may not be presented against the estate; and

(5) a formal testacy proceeding may be commenced at any time after three years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its

transfer is otherwise to be controlled by the terms of the decedent's will.

(b) These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate.

(c) In cases under subsection (a)(1) or (2), the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this Code which relate to the date of death.

COMMENT

As originally approved and read with 3-102's requirement that wills be probated before being admissible in evidence, this section created a three-year-from-death time period within which proceedings concerning a succession (other than a determination of heirs, or will interpretation or construction) must be commenced. Unless certain limited exceptions were met, an estate became conclusively intestate if no formal or informal estate proceeding was commenced within the three year period, and no administration could be opened in order to generate a deed of distribution for purposes of proving a succession.

Several of the original UPC states rejected the three year bar against late-offered wills and the correlated notion that formal proceedings to determine heirs in previously unadministered estates were necessary to generate title muniments locating inherited land in lawful successors. Critics preferred continued availability of UPC's procedures for appointing p.r.'s whose distributive instruments gave protection to purchasers. The 1987 technical amendment to 3-108 reduced, but failed to eliminate, instances in which original probate and appointment proceedings were barred by the 3 year limitation period.

Section 3-109. Statutes of Limitation on Decedent's Cause of Action.

No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of his death, shall apply to bar a cause of action surviving the decedent's death sooner than four months after death. A cause of action which, but for this section, would have been barred less than four months after death, is barred after four months unless tolled.

PART 2

VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

Section 3-201. Venue for First and Subsequent Estate Proceedings; Location of Property.

(a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(1) in the [county]where the decedent had his domicile at the time of his death; or

(2) if the decedent was not domiciled in this state, in any [county] where property of the decedent was located at the time of his death.

(b) Venue for all subsequent proceedings within the exclusive jurisdiction of the Court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 1-303 or (c) of this section.

(c) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the Court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

COMMENT

Sections 1-303 and 3-201 cover the subject of venue for estate proceedings. Sections 3-202, 3-301, 3-303 and 3-309 also may be relevant.

Provisions for transfer of venue appear in Section 1-303.

The interplay of these several sections may be illustrated best by examples.

(1) A formal probate or appointment proceeding is initiated in A County. Interested persons who believe that venue is in B County rather than A County must raise their question about venue in A County, because 1-303 gives the Court in which the proceeding is first commenced authority to resolve disputes over venue. If the Court in A County erroneously determines that it has venue, the remedy is by appeal.

(2) An informal probate or appointment application is filed and granted without notice in A County. If interested persons wish to challenge the Registrar's determination of venue, they may not simply file a formal proceeding in the County of their choice and thus force the proponent in the prior proceeding to debate the question of venue in their County. 3-201(b) locates the venue of any subsequent proceeding where the first proceeding occurred. The function of (b) is obvious when one thinks of subsequent proceedings as those which relate to claims, or accounts, or to efforts to control a personal representative. It is

less obvious when it seems to locate the forum for squabbles over venue at the place accepting the first informal application. Still, the applicant seeking an informal order must be careful about the statements he makes in his application because he may be charged with perjury under Section 1-310 if he is deliberately inaccurate. Moreover, the Registrar must be satisfied that the allegations in the application support a finding of venue. Section 3-201(c) provides a remedy for one who is upset about the venue-locating impact of a prior order in an informal proceeding and who does not wish to engage in full litigation about venue in the forum chosen by the other interested person unless he is forced to do so. Using it, he may succeed in getting the A County Court to transfer the proceedings to the County of his choice. He would be well advised to initiate formal proceedings if he gets the chance, for if he relies on informal proceedings, he, too, may be "bumped" if the judge in B County agrees with some movant that venue was not in B County.

(3) If the decedent's domicile was not in the state, venue is proper under 3-201 and 1-303 in any county where he had assets.

One contemplating starting administration because of the presence of local assets should have several other sections of the Code in mind. First, by use of the recognition provisions in Article IV, it may be possible to avoid administration in any state other than that in which the decedent was domiciled. Second, Section 3-203 may apply to give priority for local appointment to the representative appointed at domicile. Third, under Section 3-309, informal appointment proceedings in this state will be dismissed if it is known that a personal representative has been previously appointed at domicile.

Section 3-202. Appointment or Testacy Proceedings; Conflicting Claim of Domicile in Another State.

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the Court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state.

COMMENT

This section is designed to reduce the possibility that conflicting findings of domicile in two or more states may result in inconsistent administration and distribution of parts of the same estate. Section 3-408 dealing with the effect of adjudications in other states concerning testacy supports the same general purpose to use domiciliary law to unify succession of property located in different states.

Whether testate or intestate, succession should follow the presumed wishes of the decedent whenever possible. Unless a decedent leaves a separate will for the portion of his estate located in each different state, it is highly unlikely that he would want different portions of his estate subject to different rules simply because courts reach conflicting conclusions concerning his domicile. It is pointless to debate whether he would prefer one or the other of the

conflicting rules, when the paramount inference is that the decedent would prefer that his estate be unified under either rule rather than wasted in litigation.

The section adds very little to existing law. If a previous estate proceeding in State A has determined that a decedent was a domiciliary of A, persons who were personally before the court in A would be precluded by the principles of *res judicata* or collateral estoppel (and full faith and credit) from relitigating the issue of domicile in a later proceeding in State B. Probably, it would not matter in this setting that domicile was a jurisdictional fact. *Stoll v. Gottlieb*, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104 (1938). Even if parties to a present proceeding were not personally before the court in an earlier proceeding in State A involving the same decedent, the prior judgment would be binding as to property subject to the power of the courts in A, on persons to whom due notice of the proceeding was given. *Riley v. New York Trust Co.*, 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885 (1942); *Mullane v. Central Hanover Bank and Trust Co.*, 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865 (1950).

Where a court learns that parties before it are also parties to previously initiated litigation involving a common question, traditional judicial reluctance to deciding unnecessary questions, as well as considerations of comity, are likely to lead it to delay the local proceedings to await the result in the other court. A somewhat more troublesome question is involved when one of the parties before the local court manifests a determination not to appear personally in the prior initiated proceedings so that he can preserve his ability to litigate contested points in a more friendly, or convenient, forum. But, the need to preserve all possible advantages available to a particular litigant should be subordinated to the decedent's probable wish that his estate not be wasted in unnecessary litigation. Thus, the section requires that the local claimant either initiate litigation in the forum of his choice before litigation is started somewhere else, or accept the necessity of contesting unwanted views concerning the decedent's domicile offered in litigation pending elsewhere.

It is to be noted, in this connection, that the local suitor always will have a chance to contest the question of domicile in the other state. His locally initiated proceedings may proceed to a valid judgment accepting his theory of the case unless parties who would oppose him appear and defend on the theory that the domicile question is currently being litigated elsewhere. If the litigation in the other state has proceeded to judgment, Section 3-408 rather than the instant section will govern. If this section applies, it will mean that the foreign proceedings are still pending, so that the local person's contention concerning domicile can be made therein even though until the defense of litigation elsewhere is offered in the local proceedings, he may not have been notified of the foreign proceeding.

Section 3-203. Priority Among Persons Seeking Appointment as Personal Representative.

(a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;

(2) the surviving spouse of the decedent who is a devisee of the decedent;

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent;

(6) 45 days after the death of the decedent, any creditor.

(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (a) apply except that (1) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the Court, on petition of creditors, may appoint any qualified person; (2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the Court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value, or, in default of this accord any suitable person.

(c) A person entitled to letters under (2) through (5) of (a) above, and a person aged [18] and over who would be entitled to letters but for his age, may nominate a qualified person to act as personal representative. Any person aged [18] and over may renounce his right to nominate or to an appointment by appropriate writing filed with the Court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment.

(d) Conservators of the estates of protected persons, or if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(e) Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without priority, the Court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

(f) No person is qualified to serve as a personal representative who is:

(1) under the age of [21];

(2) a person whom the Court finds unsuitable in formal proceedings.

(g) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(h) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

COMMENT

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the Court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by 1-201(20) to include fiduciaries. Also, 1-403(2) and 3-912 show a purpose to make trustees serve as representatives of all beneficiaries. The provision in (d) is consistent.

If a state’s statutes recognize a public administrator or public trustee as the appropriate agency to seek administration of estates in which the state may have an interest, it would be appropriate to indicate in this section the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of 2-105.

Subsection (g) was inserted in connection with the decision to abandon the effort to describe ancillary administration in Article IV. Other provisions in Article III which are relevant to administration of assets in a state or other than that of the decedent's domicile are 1-301 (territorial effect), 3-201 (venue), 3-308 (informal appointment for non-resident decedent delayed 30 days), 3-309 (no informal appointment here if a representative has been appointed at domicile), 3-815 (duty of personal representative where administration is in more than one state) and 4-201 to 4-205 (local recognition of foreign personal representatives).

The meaning of "spouse" is determined by Section 2-802.

Section 3-204. Demand for Notice of Order or Filing Concerning Decedent's Estate.

Any person desiring notice of any order or filing pertaining to a decedent's estate in which he has a financial or property interest, may file a demand for notice with the Court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The

clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in Section 1-401 to the demandant or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

COMMENT

The notice required as the result of demand under this section is regulated as far as time and manner requirements are concerned by Section 1-401.

This section would apply to any order which might be made in a supervised administration proceeding.

PART 3

INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS; SUCCESSION WITHOUT ADMINISTRATION

Section 3-301. Informal Probate or Appointment Proceedings; Application; Contents.

(a) Applications for informal probate or informal appointment shall be directed to the Registrar, and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the following information:

(1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

(i) a statement of the interest of the applicant;

(ii) the name, and date of death of the decedent, his age, and the county and state or of his domicile at the time of death, and the names and addresses of the spouse, children, heirs and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(iii) if the decedent was not domiciled in the state at the time of his death, a statement showing venue;

(iv) a statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;

(v) a statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere; and

(vi) that the time limit for informal probate or appointment as provided in this Article has not expired either because 3 years or less have passed since the decedent's death, or, if more than 3 years from death have passed, circumstances as described by Section 3-108 authorizing tardy probate or appointment have occurred.

(2) An application for informal probate of a will shall state the following in addition to the statements required by (1):

(i) that the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

(ii) that the applicant, to the best of his knowledge, believes the will to have been validly executed;

(iii) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.

(3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

(4) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by (1):

(i) that after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this

state under Section 1-301, or, a statement why any such instrument of which he may be aware is not being probated;

(ii) the priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under Section 3-203.

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in 3-610(c), or whose appointment has been terminated by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

(b) By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.

COMMENT

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (*see* Article I). The section is believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section 1-310 deals with verification.

In 1975, the Joint Editorial Board recommended the addition of subsection (b) to reflect an improvement accomplished in the first enactment in Idaho. The addition, which is a form of long-arm provision that affects everyone who acts as an applicant in informal proceedings, in conjunction with Section 1-106 provides a remedy in the Court against anyone who might make known misstatements in an application. The addition is not needed in the case of an applicant who becomes a personal representative as a result of his application for the implied

consent provided in Section 3-602 would cover the matter. Also, the requirement that the applicant state that time limits on informal probate and appointment have not run, formerly appearing as (iv) under paragraph (2) was expanded to refer to informal appointment and moved into (1). Correcting an oversight in the original text, this change coordinates the statements required in an application with the limitations provisions of Section 3-108.

Section 3-302. Informal Probate; Duty of Registrar; Effect of Informal Probate.

Upon receipt of an application requesting informal probate of a will, the Registrar, upon making the findings required by Section 3-303 shall issue a written statement of informal probate if at least 120 hours have elapsed since the decedent's death. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

COMMENT

Model Probate Code Sections 68 and 70 contemplate probate by judicial order as the only method of validating a will. This "umbrella" section and the sections it refers to describe an alternative procedure called "informal probate". It is a statement of probate by the Registrar. A succeeding section describes cases in which informal probate is to be denied. "Informal probate" is subjected to safeguards which seem appropriate to a transaction which has the effect of making a will operative and which *may* be the only official reaction concerning its validity. "Informal probate", it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in *truly* judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

Section 3-303. Informal Probate; Proof and Findings Required.

(a) In an informal proceeding for original probate of a will, the Registrar shall determine whether:

(1) the application is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Section 1-201(23);

(4) on the basis of the statements in the application, venue is proper;

(5) an original, duly executed and apparently unrevoked will is in the Registrar's possession;

(6) any notice required by Section 3-204 has been given and that the application is not within Section 3-304; and

(7) it appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another [county] of this state or except as provided in subsection (d) below, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 2-502, 2-503 or 2-506 have been met shall be probated without further proof. In other cases, the Registrar may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(e) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (a) above, may be probated in this state upon receipt by the Registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

COMMENT

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in Article II, it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. *See* Section 3-402. Under Section 3-401, pendency of formal testacy proceedings blocks informal probate or appointment proceedings.

Section 3-304. Informal Probate; Unavailable in Certain Cases.

Applications for informal probate which relate to one or more of a known series of testamentary instruments (other than a will and one or more codicils thereto), the latest of which does not expressly revoke the earlier, shall be declined.

COMMENT

The Registrar handles the informal proceeding, but is required to decline applications in certain cases where circumstances suggest that formal probate would provide desirable safeguards.

Section 3-305. Informal Probate; Registrar Not Satisfied.

If the Registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of Sections 3-303 and 3-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

COMMENT

The purpose of this section is to recognize that the Registrar should have some authority to deny probate to an instrument even though all stated statutory requirements may be said to have been met. Denial of an application for informal probate cannot be appealed. Rather, the proponent may initiate a formal proceeding so that the matter may be brought before the judge in the normal way for contested matters.

Section 3-306. Informal Probate; Notice Requirements.

[*] The moving party must give notice as described by Section 1-401 of his application for informal probate to any person demanding it pursuant to Section 3-204, and to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required.

[(b) If an informal probate is granted, within 30 days thereafter the applicant shall give written information of the probate to the heirs and devisees. The information shall include the name and address of the applicant, the name and location of the Court granting the informal probate, and the date of the probate. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. No duty to give information is incurred if a personal representative is appointed who is required to give the written information required by Section 3-705. An applicant's failure to give information as required by this section is abreach of his duty to the heirs and devisees but does not affect the validity of the probate.]

*** This paragraph becomes (a) if optional subsection (b) is accepted.**

COMMENT

This provision assumes that there will be a single office within each county or other area of jurisdiction of the probate Court which can be checked for demands for notice relating to estates in that area. If there are or may be several Registrars within a given area, provision would need to be made so that information concerning demands for notice might be obtained from the chief Registrar's place of business.

In 1975, the Joint Editorial Board recommended the addition, as a bracketed, optional provision, of subsection (b). The recommendation was derived from a provision added to the Code in Idaho at the time of original enactment. The Board viewed the addition as interesting, possibly worthwhile, and worth being brought to the attention of enacting states as an optional addition. The Board views the informational notice required by Section 3-705 to be of more importance in preventing injustices under the Code, because the opening of an estate via appointment of a personal representative instantly gives the estate representative powers over estate assets that can be used wrongfully and to the possible detriment of interested persons. Hence, the 3-705 duty is a part of the recommended Code, rather than a bracketed, optional provision. By contrast, the informal probate of a will that is not accompanied or followed by appointment of a personal representative only serves to shift the burden of making the next move to disinterested heirs who, inter alia, may initiate a Section 3-401 formal testacy proceeding to contest the will at any time within the limitations prescribed by Section 3-108.

Section 3-307. Informal Appointment Proceedings; Delay in Order; Duty of Registrar; Effect of Appointment.

(a) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in Section 3-614, if at least 120 hours have elapsed since the decedent's death, the Registrar, after making the findings required by Section 3-308, shall appoint the applicant subject to qualification and acceptance; provided, that if the decedent was a non-resident, the Registrar shall delay the order of appointment until 30 days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

(b) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in Sections 3-608 through 3-612, but is not subject to retroactive vacation.

COMMENT

Section 3-307 describes the duty of a personal representative and the protection available to one who acts under letters issued in informal proceedings. The provision requiring a delay of 30 days from death before appointment of a personal representative for a non-resident decedent is new. It is designed to

permit the first appointment to be at the decedent's domicile. *See* Section 3-203.

Section 3-308. Informal Appointment Proceedings; Proof and Findings Required.

(a) In informal appointment proceedings, the Registrar must determine whether:

(1) the application for informal appointment of a personal representative is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Section 1-201(23);

(4) on the basis of the statements in the application, venue is proper;

(5) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;

(6) any notice required by Section 3-204 has been given;

(7) from the statements in the application, the person whose appointment is sought has priority entitling him to the appointment.

(b) Unless Section 3-612 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in Section 3-610(c) has been appointed in this or another [county] of this state, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a Court in the state of domicile, or that other requirements of this section have not been met.

COMMENT

Sections 3-614 and 3-615 make it clear that a special administrator may be appointed to conserve the estate during any period of delay in probate of a will. Even though the will has not been approved, Section 3-614 gives priority for appointment as special administrator to the person nominated by the will which has been offered for probate. Section 3-203 governs priorities for appointment. Under it, one or more of the same class may receive priority through agreement of the others.

The last sentence of the section is designed to prevent informal appointment of a personal representative in this state when a personal representative has been previously appointed at the decedent's domicile. Sections 4-204 and 4-205 may make local appointment unnecessary. Appointment in formal proceedings is possible, however.

Section 3-309. Informal Appointment Proceedings; Registrar Not Satisfied.

If the Registrar is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of Sections 3-307 and 3-308, or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

COMMENT

Authority to decline an application for appointment is conferred on the Registrar. Appointment of a personal representative confers broad powers over the assets of a decedent's estate. The process of declining a requested appointment for unclassified reasons should be one which a Registrar can use quickly and informally.

Section 3-310. Informal Appointment Proceedings; Notice Requirements.

The moving party must give notice as described by Section 1-401 of his intention to seek an appointment informally: (1) to any person demanding it pursuant to Section 3-204; and (2) to any person having a prior or equal right to appointment not waived in writing and filed with the Court. No other notice of an informal appointment proceeding is required.

Section 3-311. Informal Appointment Unavailable in Certain Cases.

If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this state, and which is not filed for probate in this court, the Registrar shall decline the application.

SUCCESSION WITHOUT ADMINISTRATION

PREFATORY NOTE

This amendment to the Uniform Probate Code is an alternative to other methods of administering a decedent's estate. The Uniform Probate Code otherwise provides procedures for informal administration, formal administration and supervised administration. This amendment adds another alternative to the system of flexible administration provided by the Uniform Probate Code and permits the heirs of an intestate or residuary devisees of a testator to accept the estate

assets without administration by assuming responsibility for discharging those obligations that normally would be discharged by the personal representative.

The concept of succession without administration is drawn from the civil law and is a variation of the method which is followed largely on the Continent in Europe, in Louisiana and in Quebec.

This proposed amendment contains cross-references to the procedures in the Uniform Probate Code and particularly implements the policies and concepts reflected in Sections 1-102, 3-101 and 3-109. These sections of the Uniform Probate Code provide in part:

SECTION 1-102. [Purposes; Rule of Construction.]

(a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Code are:

(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(2) to discover and make effective the intent of a decedent in the distribution of his property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

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SECTION 3-101. [Devolution of Estate at Death; Restrictions.]

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

SECTION 3-901. [Successors' Rights if No Administration.]

In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and

allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

Section 3-312. Universal Succession; In General.

The heirs of an intestate or the residuary devisees under a will, excluding minors and incapacitated, protected, or unascertained persons, may become universal successors to the decedent's estate by assuming personal liability for (1) taxes, (2) debts of the decedent, (3) claims against the decedent or the estate, and (4) distributions due other heirs, devisees, and persons entitled to property of the decedent as provided in Sections 3-313 through 3-322.

COMMENT

This section states the general policy of the Act to permit heirs or residuary legatees to take possession, control and title to a decedent's estate by assuming a personal obligation to pay taxes, debts, claims and distributions due to others entitled to share in the decedent's property by qualifying under the statute. Although the surviving spouse most often will be an heir or residuary devisee, he or she may also be a person otherwise entitled to property of the decedent as when a forced share is claimed.

This Act does not contemplate that assignees of heirs or residuary devisees will have standing to apply for universal succession since this involves undertaking responsibility for obligations of the decedent. Of course, after the statement of universal succession has been issued, persons may assign their beneficial interests as any other asset.

The Act excludes incapacitated and unascertained persons as universal successors because of the need for successors to deal with the property for various purposes. The procedure permits competent heirs and residuary devisees to proceed even where there are some others incompetent or unascertained. If any unascertained or incompetent heir or devisee wishes, they may require bonding or if unprotected they may force the estate into administration. Subsequent sections permit the conservator, guardian ad litem or other fiduciary of unascertained or incompetent heirs or devisees to object. The universal successors' obligations may be enforced by appropriate remedy. In Louisiana the procedure is available even though there are incompetent heirs for whom a tutor or guardian is appointed to act.

In restricting universal succession to competent heirs and residuary legatees, the act makes them responsible to incompetent heirs and legatees. This restriction is deemed appropriate to avoid the problems in dealing with the estate assets vested in an incompetent. This is a variation from the Louisiana practice. The procedure also contemplates that all competent heirs and residuary devisees join and does not permit only part of the heirs to petition for succession without administration. This position means that succession without administration is essentially a consent procedure available when family members are in agreement.

This Act contemplates that known competent successors may proceed under it. Although all competent heirs are required to join in the informal process, the possibility of an unknown heir is not treated as jurisdictional. An unknown heir

who appeared would be able to establish his or her rights as in administration unless barred by adjudication, estoppel or lapse of time.

Section 3-313. Universal Succession; Application; Contents.

(a) An application to become universal successors by the heirs of an intestate or the residuary devisees under a will must be directed to the Registrar, signed by each applicant, and verified to be accurate and complete to the best of the applicant's knowledge and belief as follows:

(1) An application by heirs of an intestate must contain the statements required by Section 3-301(a)(1) and (4)(i) and state that the applicants constitute all the heirs other than minors and incapacitated, protected, or unascertained persons.

(2) An application by residuary devisees under a will must be combined with a petition for informal probate if the will has not been admitted to probate in this State and must contain the statements required by Section 3-301(a)(1) and (2). If the will has been probated in this state, an application by residuary devisees must contain the statements required by Section 3-301(a)(2)(iii). An application by residuary devisees must state that the applicants constitute the residuary devisees of the decedent other than any minors and incapacitated, protected, or unascertained persons. If the estate is partially intestate, all of the heirs other than minors and incapacitated, protected, or unascertained persons must join as applicants.

(b) The application must state whether letters of administration are outstanding, whether a petition for appointment of a personal representative of the decedent is pending in any court of this state, and that the applicants waive their right to seek appointment of a personal representative.

(c) The application may describe in general terms the assets of the estate and must state that the applicants accept responsibility for the estate and assume personal liability for (1) taxes, (2) debts of the decedent, (3) claims against the decedent or the estate and (4) distributions due other heirs, devisees, and persons entitled to property of the decedent as provided in Sections 3-316 through 3-322.

COMMENT

This section spells out in detail the form and requirements for application to the Registrar to become universal successors. The section requires the applicants to inform the Registrar whether the appointment of a personal representative has occurred or is pending in order to assure any administration is terminated before the application can be granted. The section requires applicants to waive their right to seek the appointment of a personal representative. The appointment of an executor would preclude or postpone universal succession by application for appointment unless the executor's appointment is avoided because of lack of interest in the estate. *See* Sections

3-611, 3-912.

The statements in the application are verified by signing and filing and deemed to be under oath as provided in Section 1-310. Like other informal proceedings under the U.P.C., false statements constitute fraud (U.P.C. 1-106).

Even though the presence of residuary devisees would seem to preclude partial intestacy (U.P.C. 2-605, 2-606), the last sentence of 3-313(a) regarding partial intestacy warns all parties that if there is a partial intestacy, the heirs must join. It avoids problems of determining whether the residuary takers are in all instances true residuary legatees, e.g., if a testator provides: "Lastly, I give 1/2 and only 1/2 of the rest of my estate to A." (cf. U.P.C. 2-603).

Section 3-313(c) provides that a general description of the assets may be included appropriate to the assets in the estate and adequate to inform the parties and the Registrar of the nature of the estate involved.

In the event an heir or residuary devisee were to disclaim prior to acceptance of the succession, those who would take in place of the disclaimant would be the successors who could apply to become universal successors. The disclaimant could not become a universal successor as to the disclaimed interest and would not be subject to liability as a universal successor.

Trustees of testamentary trusts have standing as devisees. If the trustee is a pecuniary devisee or a specific devisee other than a residuary devisee, he would administer the trust upon receipt of the assets from the universal successors and as a devisee could enforce distribution from the universal successors.

The trustee who is a residuary legatee has standing to qualify as a universal successor by acceptance of the decedent's assets, then to discharge the obligations of the universal successor, and finally to administer the residue under the trust without appointment of a personal representative. The will would be probated in any event. The residuary trustee could choose to insist on appointment of a personal representative and not seek universal succession. Neither alternative could alter the provisions of the residuary trust.

Section 3-314. Universal Succession; Proof and Findings Required.

(a) The [Registrar] shall grant the application if:

(1) the application is complete in accordance with Section 3-313;

(2) all necessary persons have joined and have verified that the statements contained therein are true, to the best knowledge and belief of each;

(3) venue is proper;

(4) any notice required by Section 3-204 has been given or waived;

(5) the time limit for original probate or appointment proceedings has not expired and the applicants claim under a will;

(6) the application requests informal probate of a will, the application and findings conform with Sections 3-301(a)(2) and 3-303(a)(c)(d) and (e) so the will is admitted to probate; and

(7) none of the applicants is a minor or an incapacitated or protected person.

(b) The [Registrar] shall deny the application if letters of administration are outstanding.

(c) Except as provided in Section 3-322, the [Registrar] shall deny the application if any creditor, heir, or devisee who is qualified by Section 3-605 to demand bond files an objection.

COMMENT

This section outlines the substantive requirements for universal succession and is the guideline to the Registrar for approval of the application. As in U.P.C. 3-303, review of the filed documents is all that is required, with the Registrar expected to determine whether to approve on the basis of information available to the Registrar. There is very little discretion in the Registrar except that if something appears lacking in the application, the Registrar would be able to request additional information. The analogy to U.P.C. 3-303 is rather direct and the authority of the Registrar is somewhat more limited because there is no parallel section to U.P.C. 3-305 as there is in probate. (*See also* U.P.C. 3-309.)

Section 3-314(a)(5) requires that the application for universal succession under a will be made before the time limit for original probate has expired. Against the background of U.P.C. 3-108 which limits administration proceedings after three years except for proof of heirship or will construction, the heirs could take possession of property and prove their title without the universal succession provisions.

The review of the application by the Registrar essentially is a clerical matter to determine if the application exhibits the appropriate circumstance for succession without administration. Hence, if there are letters of administration outstanding, the application must be denied under Section 3-314(b). Even though a disinterested executor under a will should not be able to preclude those interested in the estate from settling the estate without administration, coordination of the Registrar's action with the process of the probate Court is imperative to protect the parties and the public. Consequently, any outstanding letters must be terminated before succession without administration is approved. Under the Uniform Probate Code, those with property interests in the estate are viewed as "interested persons" (U.P.C. 1-201(2)) and may initiate either informal (U.P.C. 3-105) or formal proceedings (U.P.C. 3-401); also the agreement of those interested in the estate is binding on the personal representative (U.P.C. 3-912, 3-1101). These provisions appear adequate to preclude the personal representative who has no other interest in the estate from frustrating those interested from utilizing succession without administration.

There is need for coordination with other process within the probate Court when a petition for letters is pending (i.e., not withdrawn) as when letters were outstanding. The appropriateness of the appointment of the personal representative, i.e., whether administration was necessary, could be determined on an objection to the appointment under U.P.C. Sections 3-414(b); cf., 3-608 to 3-612. If the appointment of a personal representative is denied, then the application for universal succession without administration could be approved in appropriate cases.

Section 3-314 does not require prior notice unless requested under U.P.C. 3-204. Information to other heirs and devisees is provided after approval of the application. *See* Section 3-319.

If, after universal succession is approved, a creditor or devisee were not paid or secured, in addition to suing the successor directly, the creditor or devisee could move for appointment of a personal representative to administer the estate properly. This pressure on the universal successors to perform seems desirable. In view of the availability of informal administration and other flexible alternatives under the U.P.C., if any person properly moves for appointment of a personal representative, succession without administration should be foreclosed or terminated.

Section 3-315. Universal Succession; Duty of Registrar; Effect of Statement of Universal Succession.

Upon receipt of an application under Section 3-313, if at least 120 hours have elapsed since the decedent's death, the Registrar, upon granting the application, shall issue a written statement of universal succession describing the estate as set forth in the application and stating that the applicants (i) are the universal successors to the assets of the estate as provided in Section 3-312, (ii) have assumed liability for the obligations of the decedent, and (iii)have acquired the powers and liabilities of universal successors. The statement of universal succession is evidence of the universal successors' title to the assets of the estate. Upon its issuance, the powers and liabilities of universal successors provided in Sections 3-316 through 3-322 attach and are assumed by the applicants.

COMMENT

This section provides for a written statement issued by the Registrar evidencing the right and power of the universal successors to deal with the property of the decedent and serves as an instrument of distribution to them. Although the application for universal succession may be filed anytime after death, within the time limit for original probate, the Registrar may not act before 120 hours have elapsed since the testator's death. This period parallels provisions for other informal proceedings under the U.P.C., e.g., §§ 2-601, 3-302, 3-307.

Section 3-316. Universal Succession; Universal Successors' Powers.

Upon the [Registrar's] issuance of a statement of universal succession:

(1) Universal successors have full power of ownership to deal with the assets of the estate subject to the limitations and liabilities in this [Act]. The universal successors shall proceed expeditiously to settle and distribute the estate without adjudication but if necessary may invoke the jurisdiction of the court to resolve questions concerning the estate.

(2) Universal successors have the same powers as distributees from a personal representative under Sections 3-908 and 3-909 and third persons with whom they deal are protected as provided in Section 3-910.

(3) For purposes of collecting assets in another state whose law does not provide for universal succession, universal successors have the same standing and power as personal representatives or distributees in this State.

COMMENT

This section is the substantive provision (1) declaring the successors to be distributees and (2) to have the powers of owners so far as dealing with the estate assets subject to the obligations to others.

Details concerning the status of distributees under U.P.C. 3-908 and the power to deal with property are provided in U.P.C. 3-910.

Although one state cannot control the law of another, the universal successor should be recognized in other states as having the standing of either a foreign personal representative or a distributee of the claim to local assets. Paragraph (3) attempts to remove any limitation of this state in such a case.

Section 3-317. Universal Succession; Universal Successors' Liability to Creditors, Other Heirs, Devisees and Persons Entitled to Decedent's Property; Liability of Other Persons Entitled to Property.

(a) In the proportions and subject to limits expressed in Section 3-321, universal successors assume all liabilities of the decedent that were not discharged by reason of death and liability for all taxes, claims against the decedent or the estate, and charges properly incurred after death for the preservation of the estate, to the extent those items, if duly presented, would be valid claims against the decedent's estate.

(b) In the proportions and subject to the limits expressed in Section 3-321, universal successors are personally liable to other heirs, devisees, and persons entitled to property of the decedent for the assets or amounts that would be due those heirs, were the estate administered, but no allowance having priority over devisees may be claimed for attorney's fees or charges for preservation of the estate in excess of reasonable amounts properly incurred.

(c) Universal successors are entitled to their interests in the estate as heirs or devisees subject to priority and abatement pursuant to Section 3-902 and to agreement pursuant to Section 3-912.

(d) Other heirs, devisees, and persons to whom assets have been distributed have the same powers and liabilities as distributees under Sections 3-908, 3-909, and 3-910.

(e) Absent breach of fiduciary obligations or express undertaking, a fiduciary's liability is limited to the assets received by the fiduciary.

COMMENT

The purpose of succession without administration is not to alter the relative property interests of the parties but only to facilitate the family's expeditious settlement of the estate. Consistent with this, the liability arising from the assumption of obligations is stated explicitly here to assist in understanding the coupling of power and liability. Subsection (b) includes an abatement reference that recognizes the possible adjustment that may be necessary by reason of excess claims under U.P.C. 3-902.

In succession without administration, there being no personal representative's notice to creditors, the short non-claim period under U.P.C. Section 3-803(a)(1) does not apply and creditors are subject to the statutes of limitations and the limitation of three years on decedent's creditors when no notice is published under U.P.C. Section 3-803(a)(2). The general statutes of limitation are suspended for four months following the decedent's death but resume thereafter under U.P.C. Section 3-802. The assumption of liability by the universal successors upon the issuance of the Statement of Universal Succession is deemed to be by operation of law and does not operate to extend or renew any statute of limitations that had begun to run against the decedent. The result is that creditors are barred by the general statutes of limitation or 3 years whichever is the shorter.

The obligation of the universal successors to other heirs, devisees and distributees is based on the promise to perform in return for the direct distribution of property and any limitation or laches begins to run on issuance of the statement of universal succession unless otherwise extended by action or assurance of the universal successor.

It should be noted that this statute does not deal with the consequences or obligations that arise under either federal or state tax laws. The universal successors will be subject to obligations for the return and payment of both income and estate taxes in many situations depending upon the tax law and the circumstances of the decedent and the estate. These tax consequences should be determined before electing to utilize succession without administration.

Section 3-318. Universal Succession; Universal Successors' Submission to Jurisdiction; When Heirs or Devisees May Not Seek Administration.

(a) Upon issuance of the statement of universal succession, the universal successors become subject to the personal jurisdiction of the Courts of

this state in any proceeding that may be instituted relating to the estate or to any liability assumed by them.

(b) Any heir or devisee who voluntarily joins in an application under Section 3-313 may not subsequently seek appointment of a personal representative.

COMMENT

This section imposes jurisdiction over the universal successors and bars them from seeking appointment as personal representative.

Section 3-319. Universal Succession; Duty of Universal Successors; Information to Heirs and Devisees.

Not later than thirty days after issuance of the statement of universal succession, each universal successor shall inform the heirs and devisees who did not join in the application of the succession without administration. The information must be delivered or be sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the universal successors. The information must include the names and addresses of the universal successors, indicate that it is being sent to persons who have or may have some interest in the estate, and describe the court where the application and statement of universal succession has been filed. The failure of a universal successor to give this information is a breach of duty to the persons concerned but does not affect the validity of the approval of succession without administration or the powers or liabilities of the universal successors. A universal successor may inform other persons of the succession without administration by delivery or by ordinary first class mail.

COMMENT

The problem of residuary legatees or some of the heirs moving for universal succession without the knowledge of others interested in the estate is similar to that of informal administration. By this provision those devisees and heirs who do not participate in the application are informed of the application and its approval and may move to protect any interest that they perceive. The provision parallels U.P.C. Section 3-705.

Section 3-320. Universal Succession; Universal Successors' Liability For Restitution to Estate.

If a personal representative is subsequently appointed, universal successors are personally liable for restitution of any property of the estate to which they are not entitled as heirs or devisees of the decedent and their liability is the same as a distributee under Section 3-909, subject to the provisions of Sections 3-317 and 3-321 and the limitations of Section 3-1006.

COMMENT

The liability of universal successors for restitution in the event a personal representative is appointed is spelled out in this section and keyed to the parallel sections in the U.P.C.

Section 3-321. Universal Succession; Liability of Universal Successors for Claims, Expenses, Intestate Shares and Devises.

The liability of universal successors is subject to any defenses that would have been available to the decedent. Other than liability arising from fraud, conversion, or other wrongful conduct of a universal successor, the personal liability of each universal successor to any creditor, claimant, other heir, devisee, or person entitled to decedent's property may not exceed the proportion of the claim that the universal successor's share bears to the share of all heirs and residuary devisees.

COMMENT

This is the primary provision for the successor's liability to creditors and others. The theory is that the universal successors as a group are liable in full to the creditors but that none have a greater liability than in proportion to the share of the estate received. Under the U.P.C., since informal administration is available with limited liability for the personal representative, the analogy to the Louisiana system would be to accept full responsibility for debts and claims if succession without administration is desired but to choose informal administration if protection of the inventory is desired.

This definition of liability assumes, first, that the devisees and heirs are subject to the usual priorities for creditors and devisees and abatement for them in §§ 3-316, 3-317. Second, it is assumed that if a creditor or a subsequently appointed personal representative were to proceed against the successors, having jurisdiction by submission, § 3-318, the liability would be on a theory of contribution by the successors with the burden on each universal successor to prove his or her own share of the estate and liability against that share.

Third, it is also assumed that, a creditor who is unprotected or unsecured under § 3-322, can object to universal succession under § 3-314(c) and if the creditor does not object, payments by the successors, like those by the decedent when alive, will be recognized as good without any theory of preferring creditors. Thus, until a creditor takes action to require administration, that creditor should be bound by the successors' non-fraudulent prior payment to other creditors. If a creditor suspects insolvency, he can put the estate into administration and after the appointment of a personal representative would have the usual priority as to remaining assets. This would be subject to the theory of fraud, i.e., a knowing and conscious design on the part of the successors to ignore the priority of the decedent's creditors to the harm of a creditor. This would constitute fraud that would defeat the limits on successor's liability otherwise available under the statute.

Section 3-322. Universal Succession; Remedies of Creditors, Other Heirs, Devisees or Persons Entitled to Decedent's Property.

In addition to remedies otherwise provided by law, any creditor, heir, devisee, or person entitled to decedent's property qualified under Section 3-605, may demand bond of universal successors. If the demand for bond precedes the granting of an application for universal succession, it must be treated as an objection under Section 3-314(c) unless it is withdrawn, the claim satisfied, or the applicants post bond in an amount sufficient to protect the demandant. If the demand for bond follows the granting of an application for universal succession, the universal successors, within 10 days after notice of the demand, upon satisfying the claim or posting bond sufficient to protect the demandant, may disqualify the demandant from seeking administration of the estate.

COMMENT

This section provides necessary protection to creditors and other heirs, devisees or persons entitled to distribution. Any person to whom a universal successor is obligated could pursue any available remedy, e.g., a proceeding to collect a debt or to secure specific performance. By this section, any creditor or other heir, devisee or person entitled to distribution may also demand protection and, if it is not forthcoming, put the estate into administration. This seems adequate to coerce performance from universal successors while assuring creditors their historical preference and other beneficiaries of the estate their rights.

PART 4

FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

Section 3-401. Formal Testacy Proceedings; Nature; When Commenced.

A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in Section 3-402(a) in which he requests that the Court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with Section 3-402(b) for an order that the decedent died intestate.

A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

During the pendency of a formal testacy proceeding, the Registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

COMMENT

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance. *See* Section 1-201(44).

The formal proceedings described by this section may be: (i) an original proceeding to secure "solemn form" probate of a will; (ii) a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward with prima facie proof of due execution. *See* Section 3-407. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with Section 3-703 directing him to abide by the will. "Distribute" and "distribution" do not include payment of claims. See Section 1-201(10), 3-807 and 3-902.

Section 3-402. Formal Testacy or Appointment Proceedings; Petition; Contents.

(a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal

representative, must be directed to the Court, request a judicial order after notice and hearing and contain further statements as indicated in this section. A petition for formal probate of a will (1) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs, (2) contains the statements required for informal applications as stated in the six subparagraphs under Section 3-301(a)(1), the statements required by subparagraphs (ii) and (iii) of Section 3-301(a)(2), and (3) states whether the original of the last will of the decedent is in the possession of the Court or accompanies the petition.

If the original will is neither in the possession of the Court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

(b) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by (1) and (4) of Section 3-301(a) and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subparagraph (ii) of Section 3-301(a)(4) above may be omitted.

COMMENT

If a petitioner seeks an adjudication that a decedent died intestate, he is required also to obtain a finding of heirship. A formal proceeding which is to be effective on all interested persons must follow reasonable notice to such persons. It seems desirable to force the proceedings through a formal determination of heirship because the finding will bolster the order, as well as preclude later questions that might arise at the time of distribution.

Unless an order of supervised administration is sought, there will be little occasion for a formal order concerning appointment of a personal representative which does not also adjudicate the testacy status of the decedent. If a formal order of appointment is sought because of disagreement over who should serve, Section 3-414 describes the appropriate procedure.

The words "otherwise unavailable" in the last paragraph of subsection (a) are not intended to be read restrictively.

Section 1-310 expresses the verification requirement which applies to all documents filed with the Courts.

Section 3-403. Formal Testacy Proceedings; Notice of Hearing on Petition.

(a) Upon commencement of a formal testacy proceeding, the Court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by Section 1-401 by the petitioner to the persons herein

enumerated and to any additional person who has filed a demand for notice under Section 3-204 of this Code.

Notice shall be given to the following persons: the surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the [county], or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(b) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the alleged decedent at his last known address. The Court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable including any or all of the following methods:

(1) by inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) by notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(3) by engaging the services of an investigator.

The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

COMMENT

Provisions governing the time and manner of notice required by this section and other sections in the Code are contained in 1-401.

The provisions concerning search for the alleged decedent are derived from Model Probate Code, Section 71.

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the Court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication. Notice requirements extend also to persons named in a will that is known to the petitioners to exist, irrespective of whether it has been probated or offered for formal or informal probate, if their position may be affected adversely by granting of the petition. But, a rigid statutory requirement relating to such persons might cause undue difficulty. Hence, the

statute merely provides that the petitioner may notify other persons.

It would not be inconsistent with this section for the Court to adopt rules designed to make petitioners exercise reasonable diligence in searching for as yet undiscovered wills.

Section 3-106 provides that an order is valid as to those given notice, though less than all interested persons were given notice. Section 3-1001(b) provides a means of extending a testacy order to previously unnotified persons in connection with a formal closing.

Section 3-404. Formal Testacy Proceedings; Written Objections to Probate.

Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

COMMENT

Model Probate Code section 72 requires a contestant to file written objections to any will he would oppose. The provision prevents potential confusion as to who must file what pleading that can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

Section 3-405. Formal Testacy Proceedings; Uncontested Cases; Hearings and Proof.

If a petition in a testacy proceeding is unopposed, the Court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of Section 3-409 have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

COMMENT

For various reasons, attorneys handling estates may want interested persons to be gathered for a hearing before the Court on the formal allowance of the will. The Court is not required to conduct a hearing, however.
If no hearing is required, uncontested formal probates can be completed on the strength of the pleadings. There is no good reason for summoning attestors when no interested person wants to force the production of evidence on a formal probate. Moreover, there seems to be no valid distinction between litigation to establish a will, and other civil litigation, in respect to whether the Court may enter judgment on the pleadings.

Section 3-406. Formal Testacy Proceedings; Contested Cases; Testimony of Attesting Witnesses.

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

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

COMMENT

Model Probate Code section 76, combined with section 77, is substantially unchanged. The self-proved will is described in Article II. *See* Section 2-504. The "conclusive presumption" described here would foreclose questions like whether the witnesses signed in the presence of the testator. It would not preclude proof of undue influence, lack of testamentary capacity, revocation or any relevant proof that the testator was unaware of the contents of the document. The balance of the section is derived from Model Probate Code sections 76 and 77.

Section 3-407. Formal Testacy Proceedings; Burdens in Contested Cases.

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

COMMENT

This section is designed to clarify the law by stating what is believed to be a fairly standard approach to questions concerning burdens of going forward with evidence in will contest cases.

Section 3-408. Formal Testacy Proceedings; Will Construction; Effect of Final Order in Another Jurisdiction.

A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

COMMENT

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local Court to respect the judgment of another Court when parties who were personally before the other Court also are personally before the local Court. An "authenticated copy" includes copies properly certified under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different jurisdictions, Section 3-202 applies. This section is framed to apply where a formal proceeding elsewhere has been previously concluded. Hence, if a local proceeding is concluded before formal proceedings at domicile are concluded, local law will control.

Informal proceedings by which a will is probated or a personal representative is appointed are not proceedings which must be respected by a local Court under either Section 3-202 or this section.

Nothing in this section bears on questions of what assets are included in a decedent's estate.

This section adds nothing to existing law as applied to cases where the parties before the local Court were also personally before the foreign Court, or where the property involved was subject to the power of the foreign Court. It extends present law so that, for some purposes, the law of another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land. But, choice of law rules frequently produce a similar result. *See* § 240 Restatement of the Law, Second: Conflict of Laws, p. 73, Proposed Official Draft III, 1969.

This section may be easier to justify than familiar choice of law rules, for its application is limited to instances where the protesting party has had notice of, and an opportunity to participate in, previous litigation resolving the question he now seeks to raise.

Section 3-409. Formal Testacy Proceedings; Order; Foreign Will.

After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the Court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by Section 3-108, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will

found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

COMMENT

Model Probate Code section 80(a), slightly changed. If the Court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. *See* Article V of this Code.

Section 3-410. Formal Testacy Proceedings; Probate of More Than One Instrument.

If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of Section 3-412.

COMMENT

Except as otherwise provided in Section 3-412, an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, or to give effect to late-discovered facts concerning heirship. Determination of heirs is not barred by the three year limitation but a judicial determination of heirs is conclusive unless the order may be vacated.

This section authorizes a Court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the Court. If wills are not construed in connection with a judicial probate, they may be subject to construction at any time. *See* Section 3-108.

Section 3-411. Formal Testacy Proceedings; Partial Intestacy.

If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the Court shall enter an order to that effect.

Section 3-412. Formal Testacy Proceedings; Effect of Order; Vacation.

Subject to appeal and subject to vacation as provided in this section and in Section 3-413, a formal testacy order under Sections 3-409 to 3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the Court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The Court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will:

(i) were unaware of its existence at the time of the earlier proceeding: or

(ii) were unaware of the earlier proceeding and were given no notice thereof, except by publication.

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication.

(3) A petition for vacation under paragraph (1) or (2) must be filed prior to the earlier of the following time limits:

(i) if a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement;

(ii) whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 3-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent; or

(iii)twelve months after the entry of the order sought to be vacated.

(4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.

(5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under Section 3-403(b) was made.

If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

COMMENT

The provisions barring proof of late-discovered wills is derived in part from section 81 of Model Probate Code. The same section is the source of the provisions of (5) above. The provisions permitting vacation of an order determining heirs on certain conditions reflect the effort to offer parallel possibilities for adjudications in testate and intestate estates. *See* Section 3-401. An objective is to make it possible to handle an intestate estate exactly as a testate estate may be handled. If this is achieved, some of the pressure on persons to make wills may be relieved.

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate or its proceeds". If neither can be identified through the normal process of tracing assets, their liability depends upon the circumstances. The liability of distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. *See* Sections 3-909 and 3-1004.

1993 technical amendments clarified the conditions intended in (1) and (2).

Section 3-413. Formal Testacy Proceedings; Vacation of Order For Other Cause.

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

COMMENT

See Sections 1-304 and 1-308.

Section 3-414. Formal Proceedings Concerning Appointment of Personal Representative.

(a) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by Section 3-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by Section 3-301(1) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the Court orders otherwise.

(b) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person aving or claiming priority for appointment as personal representative, the Court shall determine who is entitled to appointment under Section 3-203, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under Section 3-611.

COMMENT

A petition raising a controversy concerning the priority or qualifications of a personal representative may be combined with a petition in a formal testacy proceeding. However, it is not necessary to petition formally for the appointment of a personal representative as a part of a formal testacy proceeding. A personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate or no appointment may be desired. *See* Sections 3-107, 3-301(a)(3), (4) and 3-307. Furthermore, procedures for securing the appointment of a new personal representative after a previous assumption as to testacy has been changed are provided by Section 3-612. These may be informal, or related to pending formal proceedings concerning testacy. A formal order relating to appointment may be desired when there is a dispute concerning priority or qualification to serve but no dispute concerning testacy. It is important to distinguish formal proceedings concerning appointment from "supervised administration". The former includes any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding" and may be requested in addition to a ruling concerning testacy or priority or qualifications of a personal representative, but is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. In other words, a personal representative appointed in a "formal" proceeding may or may not be "supervised".

Another point should be noted. The Court may not immediately issue letters even

though a formal proceeding seeking appointment is involved and results in an order authorizing appointment. Rather, Section 3-601 et seq. control the subject of qualification. Section 1-305 deals with letters.

PART 5

SUPERVISED ADMINISTRATION

Section 3-501. Supervised Administration; Nature of Proceeding.

Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the Court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the Court, as well as to the interested parties, and is subject to directions concerning the estate made by the Court on its own motion or on the motion of any interested party. Except as otherwise provided in this Part, or as otherwise ordered by the Court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

COMMENT

This and the following sections of this Part describe an optional procedure for settling an estate in one continuous proceeding in the Court. The proceeding is characterized as "in rem" to align it with the concepts described by the Model Probate Code. *See* Section 62, M.P.C. In cases where supervised administration is not requested or ordered, no compulsion other than self-interest exists to compel use of a formal testacy proceeding to secure an adjudication of a will or no will, because informal probate or appointment of an administrator in intestacy may be used. Similarly, unless administration is supervised, there is no compulsion other than self-interest to use a formal closing proceeding. Thus, even though an estate administration may be begun by use of a *formal* testacy proceeding which may involve an order concerning who is to be appointed personal representative, the proceeding is over when the order concerning testacy and appointment is entered. *See* Section 3-107. Supervised administration, therefore, is appropriate when an interested person desires assurance that the essential steps regarding opening and closing of an estate will be adjudicated. *See* the Comment following the next section.

Section 3-502. Supervised Administration; Petition; Order.

A petition for supervised administration may be filed by any interested person or by a personal representative at any time or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the

notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the Court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. After notice to interested persons, the Court shall order supervised administration of a decedent's estate:

(1) if the decedent's will directs supervised administration, it shall be ordered unless the Court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;

(2) if the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or

(3) in other cases if the Court finds that supervised administration is necessary under the circumstances.

COMMENT

The expressed wishes of a testator regarding supervised administration should bear upon, but not control, the question of whether supervised administration will be ordered. This section is designed to achieve a fair balance between the wishes of the decedent, and the interests of successors in regard to supervised administration.

Since supervised administration normally will result in an adjudicated distribution of the estate, the issue of will or no will must be adjudicated. This section achieves this by forcing a petition for supervised administration to include matters necessary to put the issue of testacy before the Court. It is possible, however, that supervised administration will be requested because administrative complexities warranting it develop after the issue of will or no will has been resolved in a previously concluded formal testacy proceeding.

It should be noted that supervised administration, though it compels a judicial settlement of an estate, is not the only route to obtaining judicial review and settlement at the close of an administration. The procedures described in Sections 3-1101 and 3-1102 are available for use by or against personal representatives who are not supervised. Also efficient remedies for breach of duty by a personal representative who is not supervised are available under Part 6 of this Article. Finally, each personal representative consents to jurisdiction of the Court as invoked by mailed notice of any proceeding relating to the estate which may be initiated by an interested person. Also, persons interested in the estate may be subjected to orders of the Court following mailed notices made in proceedings initiated by the personal representative. In combination, these possibilities mean that supervised administration will be valuable principally to persons who see some advantage in a single judicial proceeding which will produce adjudications on all major points involved in an estate settlement.

Section 3-503. Supervised Administration; Effect on Other Proceedings.

(a) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by Section 3-401.

(c) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the Court restricts the exercise of any of them pending full hearing on the petition.

COMMENT

The duties and powers of personal representative are described in Part 7 of this Article. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, Court order or other circumstances in making the sale. *See* Section 3-715. However, formal proceedings against a personal representative may involve requests for qualification of the power normally possessed by personal representatives which, if granted, would subject the personal representative to the penalties for contempt of Court if he disregarded the restriction. *See* Section 3-607. If a proceeding also involved a demand that particular real estate be kept in the estate pending determination of a petitioner's claim thereto, notice of the pendency of the proceeding could be recorded as is usual under the jurisdiction's system for the lis pendens concept.

The word "restricts" in the last sentence is intended to negate the idea that a judicial order specially qualifying the powers and duties of a personal representative is a restraining order in the usual sense. The section means simply that some supervised personal representatives may receive the same powers and duties as ordinary personal representatives, except that they must obtain a Court order before paying claimants or distributing, while others may receive a more restricted set of powers. Section 3-607 governs petitions which seek to limit the power of a personal representative.

Section 3-504. Supervised Administration; Powers of Personal Representative.

Unless restricted by the Court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this Code, but he shall not exercise his power to make any distribution of the estate without prior order of the Court. Any other restriction on the power of a personal representative which may be ordered by the Court must be endorsed on his letters of

appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

COMMENT

This section provides authority to issue letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and are not affected by provisions in a will or judicial order unless they know of it. But, it is expected that persons dealing with personal representatives will want to see the personal representative's letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. *See* Section 3-715.

Section 3-505. Supervised Administration; Interim Orders; Distribution and Closing Orders.

Unless otherwise ordered by the Court, supervised administration is terminated by order in accordance with time restrictions, notices and contents of orders prescribed for proceedings under Section 3-1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the Court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person.

COMMENT

Since supervised administration is a single proceeding, the notice requirement contained in 3-106 relates to the notice of institution of the proceedings which is described with particularity by Section 3-502. The above section makes it clear that an additional notice is required for a closing order. It was discussed whether provision for notice of interim orders should be included. It was decided to leave the point to be covered by Court order or rule. There was a suggestion for a rule as follows: "Unless otherwise required by order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding." 1-402 permits any person to waive notice by a writing filed in the proceeding.

A demand for notice under Section 3-204 would entitle any interested person to notice of any interim order which might be made in the course of supervised administration.

PART 6

PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

Section 3-601. Qualification.

Prior to receiving letters, a personal representative shall qualify by filing with the appointing Court any required bond and a statement of acceptance of the duties of the office.

COMMENT

This and related sections of this Part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is supervised. Section 1-305 authorizes issuance of copies of letters and prescribes their content. The section should be read with Section 3-504 which directs endorsement on letters of any restrictions of power of a supervised administrator.

Section 3-602. Acceptance of Appointment; Consent to Jurisdiction.

By accepting appointment, a personal representative submits personally to the jurisdiction of the Court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed to him by ordinary first class mail at his address as listed in the application or petition for appointment or as thereafter reported to the Court and to his address as then known to the petitioner.

COMMENT

Except for personal representatives appointed pursuant to Section 3-502, appointees are not deemed to be "officers" of the appointing Court or to be parties in one continuous judicial proceeding that extends until final settlement. *See* Section 3-107. Yet, it is desirable to continue present patterns which prevent a personal representative who might make himself unavailable to service within the state from affecting the power of the appointing Court to enter valid orders affecting him. *See Michigan Trust Co. v. Ferry,* 33 S.Ct. 550, 228 U.S. 346, 57 L.Ed. 867 (1912). The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the Court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

Section 3-603. Bond Not Required Without Court Order, Exceptions.

No bond is required of a personal representative appointed in informal proceedings, except (1) upon the appointment of a special administrator; (2) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond or (3) when bond is required under Section 3-605. Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if

the will relieves the personal representative of bond, unless bond has been requested by an interested party and the Court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the Court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

COMMENT

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the Registrar acting pursuant to applications in informal proceedings, from passing judgment in each case on the need for bond. The point is that the Court and Registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, performance is coerced by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings (Section 3-204), to contest a requested appointment by use of a formal testacy proceeding or by use of a formal proceeding seeking the appointment of another person. Section 3-105 gives general authority to the Court in a formal proceeding to make appropriate orders as desirable incident to estate administration. This should be sufficient to make it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the petition. Furthermore, an interested person has the remedies provided in Sections 3-605 and 3-607. Finally, interested persons have assurance under this Code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

It is believed that the total package of protection thus afforded may represent more real protection than a blanket requirement of bond. Surely, it permits a reduction in the procedures which must occur in uncomplicated estates where interested persons are perfectly willing to trust each other and the fiduciary.

Section 3-604. Bond Amount; Security; Procedure; Reduction.

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the Registrar indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the Registrar, or give other suitable security, in an amount not less than the estimate. The Registrar shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property or other adequate security. The Registrar may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in Section 6-101) in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the Court may excuse a requirement of bond,

increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

COMMENT

This section permits estimates of value needed to fix the amount of required bond to be filed when it becomes necessary. A consequence of this procedure is that estimates of value of estates no longer need appear in the petitions and applications which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved. A co-signature arrangement might constitute adequate security within the meaning of this section.

Section 3-605. Demand For Bond by Interested Person.

Any person apparently having an interest in the estate worth in excess of [$1000], or any creditor having a claim in excess of [$1000], may make a written demand that a personal representative give bond. The demand must be filed with the Registrar and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in Section 3-603 or 3-604. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within 30 days after receipt of notice is cause for his removal and appointment of a successor personal representative.

COMMENT

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that the demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by Section 3-705 to give each beneficiary includes a statement concerning whether bond has been required.

Section 3-606. Terms and Conditions of Bonds.

(a) The following requirements and provisions apply to any bond required by this Part:

(1) Bonds shall name the [state] as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the Court where the bond is filed and to his address as then known to the petitioner.

(4) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the Court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(5) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

COMMENT

Paragraph (2) is based, in part, on Section 109 of the Model Probate Code. Paragraph (3) is derived from Section 118 of the Model Probate Code.

Section 3-607. Order Restraining Personal Representative.

(a) On petition of any person who appears to have an interest in the estate, the Court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the Court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within 10 days unless the parties otherwise agree. Notice as the Court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the petition.

COMMENT

Cf. Section 3-401 which provides for a restraining order against a previously appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the safeguards relating to the process for appointment of a personal representative, permit "control" of a personal representative that is believed to be equal, if not superior to that presently available with respect to "supervised" personal representatives appointed by inferior Courts. The request for a restraining order may mark the beginning of a new proceeding but the personal representative, by the consent provided in Section 3-602, is practically in the position of one who, on motion, may be cited to appear before a judge.

Section 3-608. Termination of Appointment; General.

Termination of appointment of a personal representative occurs as indicated in Sections 3-609 to 3-612, inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this Code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets. Termination does not affect the jurisdiction of the Court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

COMMENT

"Termination", as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by Court Order) terminate.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

It is important to note that "termination" is not "discharge". However, an order of the Court entered under 3-1001 or 3-1002 both terminates the appointment of,

and discharges, a personal representative.

Section 3-609. Termination of Appointment; Death or Disability.

The death of a personal representative or the appointment of a conservator for the estate of a personal representative, terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification.

COMMENT

See Section 3-718, which establishes the rule that a surviving co-executor may exercise all powers incident to the office unless the will provides otherwise. Read together, this section and Section 3-718 mean that the representative of a deceased co-representative would not have any duty or authority in relation to the office held by his decedent.

Section 3-610. Termination of Appointment; Voluntary.

(a) An appointment of a personal representative terminates as provided in Section 3-1003, one year after the filing of a closing statement.

(b) An order closing an estate as provided in Section 3-1001 or 3-1002 terminates an appointment of a personal representative.

(c) A personal representative may resign his position by filing a written statement of resignation with the Registrar after he has given at least 15 days written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him.

COMMENT

Subparagraph (c) above provides a procedure for resignation by a personal representative which may occur without judicial assistance.

Section 3-611. Termination of Appointment by Removal; Cause; Procedure.

(a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the Court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the Court may order. Except as otherwise ordered as provided in Section 3-607, afterreceipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the Court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the Court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

COMMENT

Thought was given to qualifying (a) above so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the Court.

Section 3-612. Termination of Appointment; Change of Testacy Status.

Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in Section 3-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within 30 days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

COMMENT

This section and Section 3-401 describe the relationship between formal or informal proceedings which change a previous assumption concerning the testacy of the decedent, and a previously appointed personal representative. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the decedent's will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for Section 3-703 is broad enough to require him to administer the estate as intestate, or under a later probated will, if either status is established after he was appointed. Under Section 3-403, notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

Section 3-613. Successor Personal Representative.

Parts 3 and 4 of this Article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the Court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

Section 3-614. Special Administrator; Appointment.

A special administrator may be appointed:

(1) informally by the Registrar on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in Section 3-609;

(2) in a formal proceeding by order of the Court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration

including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the Court that an emergency exists, appointment may be ordered without notice.

COMMENT

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the Court. Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by Section 3-715(21).

Section 3-615. Special Administrator; Who May Be Appointed.

(a) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available, and qualified.

(b) In other cases, any proper person may be appointed special administrator.

COMMENT

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The provisions of this Code concerning informal probate should reduce the number of cases in which a fiduciary will need to be appointed pending probate of a will.

Nonetheless, there will be instances where contests begin before probate and where it may be necessary to appoint a special administrator. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Most will contests are not successful. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

Section 3-616. Special Administrator; Appointed Informally; Powers and Duties.

A special administrator appointed by the Registrar in informal proceedings pursuant to Section 3-614(1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under the Code necessary to perform his duties.

Section 3-617. Special Administrator; Formal Proceedings; Power and Duties.

A special administrator appointed by order of the Court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts or on other terms as the Court may direct.

Section 3-618. Termination of Appointment; Special Administrator.

The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in Sections 3-608 through 3-611.

PART 7

DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

Section 3-701. Time of Accrual of Duties and Powers.

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named executor in a will may carry out written instructions of the decedent relating to his body, funeral and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

COMMENT

This section codifies the doctrine that the authority of a personal representative relates back to death from the moment it arises. It also makes it clear that authority of a personal representative stems from his appointment. The sentence concerning ratification is designed to eliminate technical questions that might arise concerning the validity of acts done by others prior to appointment. Section 3-715(21) relates to delegation of authority after appointment. The third sentence accepts an idea found in the Illinois Probate Act, § 79 [S.H.A. ch. 3, § 79].

Section 3-702. Priority Among Different Letters.

A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

COMMENT

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a co-representative or of a special administrator. The sentence concerning erroneous dual appointment is derived from recent New York legislation. *See* Section 704, Surrogate's Court Procedure Act [McKinney's SCPA 704].

Erroneous appointment of a second personal representative is possible if formal proceedings after notice are employed. It might be desirable for a state to promulgate a system whereby a notation of letters issued by each Divisional probate office would be relayed to a central record keeping office which, in turn could indicate to any other office whether letters for a particular decedent, perhaps identified by social security number, had been issued previously. The problem can arise even though notice to known interested persons and by publication is involved.

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 as described by Section 7-302. 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.

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.

The fundamental responsibility 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 (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 effective July 31, 1997, 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 whose claim has not yet 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).

Section 3-704. Personal Representative to Proceed Without Court Order; Exception.

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the Court, but he may invoke the jurisdiction of the Court, in proceedings authorized by this Code, to resolve questions concerning the estate or its administration.

COMMENT

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section 3-105 grants broad subject matter jurisdiction to the probate Court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

Section 3-705. Duty of Personal Representative; Information to Heirs and Devisees.

Not later than 30 days after his appointment every personal representative, except any special administrator, shall give information of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the Court where papers relating to the estate are on file. The information shall state that the estate is being administered by the personal representative under the [State] Probate Code without supervision by the Court but that recipients are entitled to information regarding the administration from the personal representative and can petition the Court in any matter relating to the estate, including distribution of assets and expenses of administration. The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail.

COMMENT

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three year statute of limitations provided in Section 3-108, or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under Section 3-401 or, in connection with a formal closing, as provided by Section 3-1001.

No information or notice is required by this section if no personal representative is appointed.

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. *See* ALI-ABA Monograph, Whitman, Brown and Kramer, Fiduciary Accounting Guide (2nd edition 1990).

Section 3-706. Duty of Personal Representative; Inventory and Appraisement.

Within 3 months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

The personal representative shall send a copy of the inventory to interested persons who request it. He may also file the original of the inventory with the Court.

COMMENT

This and the following sections eliminate the practice now required by many probate statutes under which the judge is involved in the selection of

appraisers. If the personal representative breaches his duty concerning the inventory, he may be removed. Section 3-611. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons who request it, information concerning the assets of the estate need not become a part of the records of the Court. The alternative procedure is to file the inventory with the Court. This procedure would be indicated in estates with large numbers of interested persons, where the burden of sending copies to all would be substantial. The Court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate. *See* 3-204, which permits any interested person to demand notice of any document relating to an estate which may be filed with the Court.

In 1975, the Joint Editorial Board recommended elimination of the word "or" that separated the language dealing with the duty to send a copy of the inventory to interested persons requesting it, from the final part of the paragraph dealing with filing of the original. The purpose of the change was to prevent a literal interpretation of the original text that would have permitted a personal representative who filed the original inventory with the Court to avoid compliance with requests for copies from interested persons.

Section 3-707. Employment of Appraisers.

The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

Section 3-708. Duty of Personal Representative; Supplementary Inventory.

If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisement showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the Court if the original inventory was filed, or furnish copies thereof or information thereof to persons interested in the new information.

Section 3-709. Duty of Personal Representative; Possession of Estate.

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person

presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

COMMENT

Section 3-101 provides for the devolution of title on death. Section 3-711 defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

This Code follows the Model Probate Code in regard to partnership interests. In the introduction to the Model Probate Code, the following appears at p. 22:

"No provisions for the administration of partnership estates when a partner dies have been included. Several states have statutes providing that unless the surviving partner files a bond with the probate Court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. Kan. Gen. Stat. (Supp.1943) §§ 59-1001 to 59-1005; Mo. Rev. Stat. Ann. (1942) §§ 81 to 93 [V.A.M.S. §§ 473.220 to 473.230]. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate Court. While the provisions afford security to parties in interest, they have caused complications in the settlement of partnership estates and have produced much litigation. Woener, *Administration* (3rd ed., 1923) §§ 128 to 130; annotation, 121 A.L.R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act providing for winding up by the surviving partner. *Davis v. Hutchinson* (C.C.A. 9th, 1929) 36 F.(2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. *See* § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it."

Section 3-710. Power to Avoid Transfers.

The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

COMMENT

Model Probate Code section 125, with additions. *See, also,* Section 6-201, which saves creditors' rights in regard to non-testamentary transfers effective at death.

Section 3-711. Powers of Personal Representatives; In General.

Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

COMMENT

The personal representative is given the broadest possible "power over title". He receives a *"power",* rather than title, because the power concept eases the succession of assets which are not possessed by the personal representative. Thus, if the power is unexercised prior to its termination, its lapse clears the title of devisees and heirs. Purchasers from devisees or heirs who are "distributees" may be protected also by Section 3-910. The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change of rights of possession. The relationship of the personal representative to the estate is that of a trustee. Hence, personal creditors or successors of a personal representative cannot avail themselves of his title to any greater extent than is true generally of creditors and successors of trustees. Interested persons who are apprehensive of possible misuse of power by a personal representative may secure themselves by use of the devices implicit in the several sections of Parts 1 and 3 of this Article. *See especially* Sections 3-501, 3-605, 3-607 and 3-611.

Section 3-712. Improper Exercise of Power; Breach of Fiduciary Duty.

If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing

with a personal representative shall be determined as provided in Sections 3-713 and 3-714.

COMMENT

An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty.

(1) Under Section 3-607 he may apply to the Court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration.

(2) Under Section 3-611 he may petition the Court for an order removing the personal representative.

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting title to real property subject to administration, if properly recorded under the laws of this state, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition Sections 1-302 and 3-105 authorize joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under Section 3-607.

Section 3-713. Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable; Exceptions.

Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless (1) the will or a contract entered into by the decedent expressly authorized the transaction; or (2) the transaction is approved by the Court after notice to interested persons.

COMMENT

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty relating to sales of assets will not cloud titles except as to purchasers with actual knowledge of the breach. *See* Section 3-714. The principles of bona fide purchase would protect a purchaser for value without notice of defect in the seller's title arising from conflict of interest.

Section 3-714. Persons Dealing with Personal Representative; Protection.

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative

properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in Section 3-504, no provision in any will or order of Court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

COMMENT

This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject him to surcharge or other remedies of interested persons if he disregards them. *See* Section 3-703. But, the will's prohibition is not relevant to the rights of a purchaser unless he had actual knowledge of its terms. Interested persons who want to prevent a personal representative from having the power described here must use the procedures described in Sections 3-501 to 3-505. Each state will need to identify the relation between this section and other statutory provisions creating liens on estate assets for inheritance and other taxes. The section cannot control whether a purchaser takes free of the lien of unpaid federal estate taxes. Hence, purchasers from personal representatives appointed pursuant to this Code will have to satisfy themselves concerning whether estate taxes are paid, and if not paid, whether the tax lien follows the property they are acquiring. *See* Section 6234, Internal Revenue Code [26 U.S.C.A. § 6324].

The impact of formal recording systems beyond the usual probate procedure depends upon the particular statute. In states in which the recording system provides for recording wills as muniments of title, statutory adaptation should be made to provide that recording of wills should be postponed until the validity has been established by probate or limitation. Statutory limitation to this effect should be added to statutes which do not so provide to avoid conflict with power of the personal representative during administration. The purpose of the Code is to make the deed or instrument of distribution the usual muniment of title. *See* Section 3-907, 3-908, 3-910. However, this is not available when no administration has occurred and in that event reliance upon general recording statutes must be had.

If a state continues to permit wills to be recorded as muniments of title, the above section would need to be qualified to give effect to the notice from recording.

Section 3-715. Transactions Authorized for Personal Representatives; Exceptions.

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Section 3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries, or other sources;

(3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(i) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(ii) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;

(8) subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;

(12) vote stocks or other securities in person or by general or limited proxy;

(13) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;

(16) borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;

(17) effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;

(18) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;

(19) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(20) allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(21) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(22) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(23) sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death (i) in the same business form for a period of not more than 4 months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will, (ii) in the same business form for any additional period of time that may be approved by order of the Court in a formal proceeding to which the persons interested in the estate are parties; or (iii) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;

(27) satisfy and settle claims and distribute the estate as provided in this Code.

COMMENT

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Sub-paragraphs (27) and (18) support the other provisions of the Code, particularly Section 3-704, which contemplates that personal representatives will proceed with all of the business of administration without Court orders.

In part, sub-paragraph (4) involves a substantive question of whether noncontractual charitable pledges of a decedent can be honored by his personal representative. It is believed, however, that it is not desirable from a

practical standpoint to make much turn on whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of subparagraph (4) is to permit the personal representative to discharge pledges where he believes the decedent would have wanted him to do so without exposing himself to surcharge. The holder of a contractual pledge may, of course, pursue the remedies of a creditor. If a pledge provides that the obligation ceases on the death of the pledgor, no personal representative would be safe in assuming that the decedent would want the pledge completed under the circumstances.

Subsection (3) is not intended to affect the right to performance or to damages of any person who contracted with the decedent. To do so would constitute an unreasonable interference with private rights. The intention of the subsection is simply to give a personal representative who is obligated to carry out a decedent's contracts the same alternatives in regard to the contractual duties which the decedent had prior to his death.

Section 3-716. Powers and Duties of Successor Personal Representative.

A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

Section 3-717. Co-representatives; When Joint Action Required.

If two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any co-representative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a co-representative has been delegated to act for the others. Persons dealing with a co-representative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

COMMENT

With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 3-703. Section 3-715 (21) authorizes some limited delegations, which are reasonable and for the benefit of interested persons.

Section 3-718. Powers of Surviving Personal Representative.

Unless the terms of the will otherwise provide, every power exercisable by personal co-representatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of 2 or more nominated as co-executors is not appointed, those appointed may exercise all the powers incident to the office.

COMMENT

Source, Model Probate Code section 102. This section applies where one of two or more co-representatives dies, becomes disabled or is removed. In regard to co-executors, it is based on the assumption that the decedent would not consider the powers of his fiduciaries to be personal, or to be suspended if one or more could not function. In regard to co-administrators in intestacy, it is based on the idea that the reason for appointing more than one ceases on the death or disability of either of them.

Section 3-719. Compensation of Personal Representative.

A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the Court.

COMMENT

This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

Section 3-720. Expenses in Estate Litigation.

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

COMMENT

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will

means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.

Section 3-721. Proceedings for Review of Employment of Agents and Compensation of Personal Representatives and Employees of Estate.

After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the Court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

COMMENT

In view of the broad jurisdiction conferred on the probate Court by Section 3-105, description of the special proceeding authorized by this section might be unnecessary. But, the Code's theory that personal representatives may fix their own fees *and* those of estate attorneys marks an important departure from much existing practice under which fees are determined by the Court in the first instance. Hence, it seemed wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

PART 8

CREDITORS' CLAIMS

GENERAL COMMENT

The need for uniformity of law regarding creditors' claims against estates is especially strong. Commercial and consumer credit depends upon efficient collection procedures. The cost of credit is pushed up by the cost of credit life insurance which becomes a practical necessity for lenders unwilling to bear the expense of understanding or using the cumbersome and provincial collection procedures found in 50 codes of probate.

The sections which follow facilitate collection of claims against decedents in several ways. First, a simple written statement mailed to the personal representative is a sufficient "claim." Allowance of claims is handled by the personal representative and is assumed if a claimant is not advised of disallowance. Also, a personal representative may pay any just claims without presentation and at any time, if he is willing to assume risks which will be minimal in many cases. The period of uncertainty regarding possible claims is only four months from first publication. This should expedite settlement and distribution of estates.

Section 3-801. Notice to Creditors.

(a) Unless notice has already been given under this section, a personal representative upon appointment [may] [shall] publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the [county] announcing the appointment and the personal representative's address and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred.

(b) A personal representative may give written notice by mail or other delivery to a creditor, notifying the creditor to present his [or her] claim within four months after the published notice, if given as provided in subsection (a), or within 60 days after the mailing or other delivery of the notice, whichever is later, or be forever barred. Written notice must be the notice described in subsection (a) above or a similar notice.

(c) The personal representative is not liable to a creditor or to a successor of the decedent for giving or failing to give notice under this section.

COMMENT

Section 3-1203, relating to small estates, contains an important qualification on the duty created by this section.

In 1989, the Joint Editorial Board recommended replacement of the word "shall" with "[may] [shall]" in (a) to signal its approval of a choice between mandatory publication and optional publication of notice to creditors to be made by the legislature in an enacting state. Publication of notice to creditors is quite expensive in some populous areas of the country and, if *Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340, 485 U.S. 478 (1988) applies to this code, is useless except to bar unknown creditors. Even if *Pope* does not apply, personal representatives for estates involving successors willing to assume the risk of unbarred claims should have (and have had under the code as a practical consequence of absence of Court supervision and mandatory closings) the option of failing to publish.

Additional discussion of the impact of *Pope* on the Code appears in the Comment to Section 3-803, infra.

If a state elects to make publication of notice to creditors a duty for personal representatives, failure to advertise for claims would involve a breach of duty on the part of the personal representative. If, as a result of such breach, a claim is later asserted against a distributee under Section 3-1004, the personal representative may be liable to the distributee for costs related to discharge of the claim and the recovery of contribution from other distributees. The protection afforded personal representatives under Section 3-1003 would not be available, for that section applies only if the personal representative truthfully recites that the time limit for presentation of claims has expired.

Putting aside *Pope* case concerns regarding state action under this code, it might be appropriate, by legislation, to channel publications through the personnel of the probate Court. *See* Section 1-401. If notices are controlled by a centralized authority, some assurance could be gained against publication in newspapers of small circulation. Also, the form of notices could be made uniform and certain efficiencies could be achieved. For example, it would be compatible with this section for the Court to publish a single notice each day or each week listing the names of personal representatives appointed since the last publication, with addresses and dates of non-claim.

Section 3-802. Statutes of Limitations.

(a) Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim barred by a statute of limitations at the time of the decedent's death may be allowed or paid.

(b) The running of a statute of limitations measured from an event other than death or the giving of notice to creditors is suspended for four months after the decedent's death, but resumes thereafter as to claims not barred by other sections.

(c) For purposes of a statute of limitations, the presentation of a claim pursuant to Section 3-804 is equivalent to commencement of a proceeding on the claim.

COMMENT

This section means that four months is added to the normal period of limitations by reason of a debtor's death before a debt is barred. It implies also that after the expiration of four months from death, the normal statute of limitations may run and bar a claim even though the non-claim provisions of Section 3-803 have not been triggered. Hence, the non-claim and limitation provisions of Section 3-803 are not mutually exclusive.

It should be noted that under Sections 3-803 and 3-804 it is possible for a claim to be barred by the process of claim, disallowance and failure by the creditor to commence a proceeding to enforce his claim prior to the end of the four month suspension period. Thus, the regular statute of limitations applicable during the debtor's lifetime, the non-claim provisions of Sections 3-803 and 3-804, and the three-year limitation of Section 3-803 all have potential application to a claim. The first of the three to accomplish a bar controls.

In 1975, the Joint Editorial Board recommended a change that makes it clear that only those successors who would be affected thereby, must agree to a waiver of a defense of limitations available to an estate. As the original text stood, the section appeared to require the consent of "all successors," even though this would include some who, under the rules of abatement, could not possibly be affected by allowance and payment of the claim in question.

In 1989, in connection with other amendments recommended in sequel to *Tulsa Professional Collection Services v. Pope,* 108 S.Ct. 1340, 485 U.S. 478 (1988), the Joint Editorial Board recommended the splitting out, into Subsections (b) and (c), of the last two sentences of what formerly was a four-sentence section. The first two sentences now appear as Subsection (a). The rearrangement aids understanding that the section deals with three separable ideas. No other change in language is involved, and the timing of the changes to coincide with *Pope* case amendments is purely coincidental.

Section 3-803. Limitations on Presentation of Claims.

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on, if not barred earlier by another statute, contract, tort, or other legal basis of limitations or non-claim statute, are barred against the estate, the personal representative, the heirs and devisees and non-probate transferees of the decedent, unless presented within the earlier of the following:

(1) one year after the decedent's death; or

(2) the time provided by Section 3-801(b) for creditors who are given actual notice, and within the time provided in Section 3-801(a) for all creditors barred by publication.

(b) A claim described in subsection (a) which is barred by the non-claim statute of the decedent's domicile before the giving of notice to creditors in this State is barred in this State.

(c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative, within four months after performance by the personal representative is due; or

(2) any other claim, within the later of four months after it arises, or the time specified in subsection (a)(1).

(d) Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

COMMENT

There was some disagreement among the Reporters over whether a short period of limitations, or of non-claim, should be provided for claims arising at or after death. Sub-paragraph (b) was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under Section 3-808 a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of subparagraph (d). If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

In 1989, the Joint Editorial Board recommended amendments to Subsection (a). The change in (1) shortens the ultimate limitations period on claims against a decedent from 3 years after death to 1 year after death. Corresponding amendments were recommended for Sections 3-1003(a)(1) and 3-1006. The new one-year from death limitation (which applies without regard to whether or when an estate is opened for administration) is designed to prevent concerns stemming from the possible applicability to this Code of *Tulsa Professional Collection Services v. Pope,* 108 S. Ct. 1340, 485 U.S. 478 (1988) from unduly prolonging estate settlements and closings.

Subsection (a)(2), by reference to 3-801(a) and 3-801(b), adds an additional method of barring a prospective claimant of whom the personal representative is aware. The new bar is available when it is appropriate, under all of the circumstances, to send a mailed warning to one or more known claimants who have not presented claims that the recipient's claim will be barred if not presented within 60 days from the notice. This optional, mailed notice, described in accompanying new text in Section 3-801(b), is designed to enhance the ability of personal representatives to protect distributees against pass-through liability (under Section 3-1004) to possibly unbarred claimants. Personal representatives acting in the best interests of successors to the estate (see Section 3-703(a) and the definition of "successors" in Section 1-201(42)) may determine that successors are willing to assume risks (i) that *Pope,* supra, will be held to apply to this Code in spite of absence of any significant contact between an

agency of the state and the acts of a personal representative operating independently of Court supervision; and (ii) that a possibly unbarred claim is valid and will be pursued by its owner against estate distributees in time to avoid bar via the earliest to run of its own limitation period (which, under Section 3-802(b), resumes running four months after death), or the one-year from death limitation now provided by § 3-803(a)(1). If publication of notice as provided in Section 3-801 has occurred and if *Pope* either is inapplicable to this Code or is applicable but the late-arising claim in question is judged to have been unknown to the personal representative and unlikely to have been discovered by reasonable effort, an earlier, four months from first publication bar will apply.

The Joint Editorial Board recognized that the new bar running one year after death may be used by some sets of successors to avoid payment of claims against their decedents of which they are aware. Successors who are willing to delay receipt and enjoyment of inheritances may consider waiting out the non-claim period running from death simply to avoid any public record of an administration that might alert known and unknown creditors to pursue their claims. The scenario was deemed to be unlikely, however, for unpaid creditors of a decedent are interested persons (Section 1-201(20)) who are qualified to force the opening of an estate for purposes of presenting and enforcing claims. Further, successors who delay opening an administration will suffer from lack of proof of title to estate assets and attendant inability to enjoy their inheritances. Finally, the odds that holders of important claims against the decedent will need help in learning of the death and proper place of administration is rather small. Any benefit to such claimants of additional procedures designed to compel administrations and to locate and warn claimants of an impending non-claim bar, is quite likely to be heavily outweighed by the costs such procedures would impose on all estates, the vast majority of which are routinely applied to quick payment of the decedents' bills and distributed without any creditor controversy.

Note that the new bar described by Section 3-801(b) and Section 3-803(a)(2) is the earlier of one year from death or the period described by reference to § 3-801(b) and § 3-801(a) in § 3-803(a)(2). If publication of notice is made under § 3-801(a), and the personal representative thereafter gives actual notice to a known creditor, when is the creditor barred? If the actual notice is given less than 60 days prior to the expiration of the four months from first publication period, the claim will not be barred four months after first publication because the actual notice given by § 3-801(b) advises the creditor that it has no less than 60 days to present the claim. It is as if the personal representative gave the claimant a written waiver of any benefit the estate may have had by reason of the four month bar following published notice. (c.f., the ability of a personal representative, under § 3-802 to change claims from allowed to disallowed, and vice versa, and the 60 day period given by § 3-806(a) within which a claimant may contest a disallowance). The period ending with the running of 60 days from actual notice replaces the four month from publication period as the "time for original presentation" referred to in Section 3-806(a).

Note, too, that if there is no publication of notice as provided in Section 3-801(a), the giving of actual notice to known creditors establishes separate, 60 days from time of notice, non-claim periods for those so notified. The failure to publish also means that no general non-claim period, other than the one year period running from death, will be working for the estate. If an actual notice to a creditor is given before notice by publication is given, a question arises as to whether the 60 day period from actual notice, or the longer, four-month from publication applies. Subsections 3-801(a) and (b), which are

pulled into Section 3-803(a)(2) by reference, make no distinction between actual notices given before publication and those given after publication. Hence, it would seem that the later time bar would control in either case. This reading also fits more satisfactorily with Section 3-806(a) and other code language referring in various contexts to "the time limit prescribed in § 3-803."

The proviso, formerly appended to 3-803(a)(1), regarding the effect in this state of the prior running of a non-claim statute of the decedent's domicile, has been restated as 3-803(b), and former subsections (b) and (c) have been redesignated as (c) and (d). The relocation of the proviso was made to improve the style of the section. No change of meaning is intended.

The second paragraph of the original comment has been deleted because of inconsistency with amended § 3-803(a).

The 1989 changes recommended by the Joint Editorial Board relating to former § 3-803(b) now designated as 3-803(c) are unrelated to the *Pope* case problem. The original text failed to describe a satisfactory non-claim period for claims arising at or after the decedent's death other than claims based on contract. The four months "after [any other claim] arises" period worked unjustly as to tort claims stemming from accidents causing the decedent's death by snuffing out claims too quickly, sometimes before an estate had been opened. The language added by the 1989 amendment assures such claimants against any bar working prior to the later of one year after death or four months from the time the claim arises.

The other change affecting what is now § 3-803(d) is the addition of a third class of items which are not barred by any time bar running from death, publication of notice to creditors, or any actual notice given to an estate creditor. The addition resembles a modification to the Code as enacted in Arizona.

1997 Technical Amendment. By technical amendment effective July 31, 1997, the words “and nonprobate transferees” were added to subsection (a) to clarify that the Code’s non-claim bar protects probate as well as nonprobate successors against claims of unsatisfied creditors of the decedent. Section 6-101(b) of the original Code, which was replaced by Section 6-102 in 1998, implied that unsatisfied creditors of the decedent had rights to reach nonprobate transferees in payment of allowed claims but imposed no time bar.

Section 3-804. Manner of Presentation of Claims.

Claims against a decedent's estate may be presented as follows:

(1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the Court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the Court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the

nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(2) The claimant may commence a proceeding against the personal representative in any Court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.

(3) If a claim is presented under subsection (1), no proceeding thereon may be commenced more than 60 days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the 60-day period, or to avoid injustice the Court, on petition, may order an extension of the 60-day period, but in no event shall the extension run beyond the applicable statute of limitations.

COMMENT

The filing of a claim with the probate Court under (2) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate Court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it under Section 3-706.

In reading this section it is important to remember that a regular statute of limitation may run to bar a claim before the non-claim provisions run. *See* Section 3-802.

Section 3-805. Classification of Claims.

(a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) costs and expenses of administration;

(2) reasonable funeral expenses;

(3) debts and taxes with preference under federal law;

(4) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

(5) debts and taxes with preference under other laws of this state;

(6) all other claims.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

COMMENT

In 1975, the Joint Editorial Board recommended the separation of funeral expenses from the items now accorded fourth priority. Under federal law, funeral expenses, but not debts incurred by the decedent can be given priority over claims of the United States.

Section 3-806. Allowance of Claims.

(a) As to claims presented in the manner described in Section 3-804 within the time limit prescribed in 3-803, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the Court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

(b) After allowing or disallowing a claim the personal representative may change the allowance or disallowance as hereafter provided. The personal representative may prior to payment change the allowance to a disallowance in whole or in part, but not after allowance by a court order or judgment or an order directing payment of the claim. He shall notify the claimant of the change to disallowance, and the disallowed claim is then subject to bar as provided in subsection (a). The personal representative may change a disallowance to an allowance, in whole or in part, until it is barred under subsection (a); after it is barred, it may be allowed and paid only if the estate is solvent and all successors whose interests would be affected consent.

(c) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the Court may allow in whole or in part any claim or claims presented to the personal representative or filed with the Clerk of Court in due time and not barred by subsection (a) of this section. Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate

as the Court may direct by order entered at the time the proceeding is commenced.

(d) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(e) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing 60 days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

Section 3-807. Payment of Claims.

(a) Upon the expiration of the earlier of the time limitations provided in Section 3-803 for the presentation of claims, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for homestead, family and support allowances, for claims already presented that have not yet been allowed or whose allowance has been appealed, and for unbarred claims that may yet be presented, including costs and expenses of administration. By petition to the Court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid may secure an order directing the personal representative to pay the claim to the extent funds of the estate are available to pay it.

(b) The personal representative at any time may pay any just claim that has not been barred, with or without formal presentation, but is personally liable to any other claimant whose claim is allowed and who is injured by its payment if:

(1) payment was made before the expiration of the time limit stated in subsection (a) and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(2) payment was made, due to negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of priority.

COMMENT

As recommended for amendment in 1989 by the Joint Editorial Board, the section directs the personal representative to pay allowed claims at the earlier of one year from death or the expiration of 4 months from first publication. This interpretation reflects that distribution need not be delayed further on account of creditors' claims once a time bar running from death or publication has run, for known creditors who have failed to present claims by such time may have

received an actual notice leading to a bar 60 days thereafter and in any event can and should be the occasion for withholding or the making of other provision by the personal representative to cover the possibility of later presentation and allowance of such claims. Distribution would also be appropriate whenever competent and solvent distributees expressly agree to indemnify the estate for any claims remaining unbarred and undischarged after the distribution.

Section 3-808. Individual Liability of Personal Representative.

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

COMMENT

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

Section 3-809. Secured Claims.

Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

(1) if the creditor exhausts his security before receiving payment, [unless precluded by other law] upon the amount of the claim allowed less the fair value of the security; or

(2) if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation.

Section 3-810. Claims Not Due and Contingent or Unliquidated Claims.

(a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the Court may provide for payment as follows:

(1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

Section 3-811. Counterclaims.

In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a Court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

Section 3-812. Execution and Levies Prohibited.

No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the

enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

Section 3-813. Compromise of Claims.

When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

Section 3-814. Encumbered Assets.

If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

COMMENT

Section 2-609 establishes a rule of construction against exoneration. Thus, unless the will indicates to the contrary, a specific devisee of mortgaged property takes subject to the lien without right to have other assets applied to discharge the secured obligation.

In 1975, the Joint Editorial Board recommended substitution of the word "presented", in the first sentence, for the word "filed" in the original text. The change aligns this section with Section 3-804, which describes several methods, including mailing or delivery to the personal representative, as methods of protecting a claim against non-claim provisions of the Code.

Section 3-815. Administration in More Than One State; Duty of Personal Representative.

(a) All assets of estates being administered in this state are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.

(b) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims, after satisfaction of the exemptions, allowances and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this state, the

creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(c) In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this state is not the state of the decedent's last domicile, the claims allowed in this state shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

COMMENT

Under Section 3-803(a)(1), if a local (property only) administration is commenced and proceeds to advertisement for claims before non-claim statutes have run at domicile, claimants may prove claims in the local administration at any time before the local non-claim period expires. Section 3-815 has the effect of subjecting all assets of the decedent, wherever they may be located and administered, to claims properly presented in any local administration. It is necessary, however, that the personal representative of any portion of the estate be aware of other administrations in order for him to become responsible for claims and charges established against other administrations.

Section 3-816. Final Distribution to Domiciliary Representative.

The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (1) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile; (2) the personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or (3) the Court orders otherwise in a proceeding for a closing order under Section 3-1001 or incident to the closing of a supervised administration. In other cases, distribution of the estate of a decedent shall be made in accordance with the other Parts of this Article.

PART 9

SPECIAL PROVISIONS RELATING TO DISTRIBUTION

Section 3-901. Successors' Rights if No Administration.

In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

COMMENT

Title to a decedent's property passes to his heirs and devisees at the time of his death. *See* Section 3-101. This section adds little to Section 3-101 except to indicate how successors may establish record title in the absence of administration.

Section 3-902. Distribution; Order in Which Assets Appropriated; Abatement.

(a) Except as provided in subsection (b) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(1) property not disposed of by the will;

(2) residuary devises;

(3) general devises;

(4) specific devises.

For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

COMMENT

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section express rules which may be regarded as approximating what testators generally want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his purpose. Hence, subsection (b) directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

[3-902A. Distribution; Order in Which Assets Appropriated; Abatement.

(addendum for adoption in community property states)

[(a) and (b) as above.]

(c) If an estate of a decedent consists partly of separate property and partly of community property, the debts and expenses of administration shall be apportioned and charged against the different kinds of property in proportion to the relative value thereof.

[(d) same as (c) in common law state.]]

COMMENT

(c) is suggested for inclusion in Section 3-902 in a community property state. Its inclusion causes (c) as drafted for common law states to be redesignated (d). As is the case with other insertions suggested in the Code for community property states, the specific language of this draft is to be taken as illustrative of coverage that is desirable.

Section 3-903. Right of Retainer.

The amount of a non-contingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

Section 3-904. Interest on General Pecuniary Devise.

General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

COMMENT

Unlike the common law, this section provides that a general pecuniary devisee's right to interest begins one year from the time when administration was commenced, rather than one year from death. The rule provided here is similar to the common law rule in that the right to interest for delayed payment does not depend on whether the estate in fact realized income during the period of delay. The section is consistent with Section 5(b) of the Revised Uniform Principal and Income Act which allocates realized net income of an estate between various categories of successors.

Section 3-905. Penalty Clause for Contest.

A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Section 3-906. Distribution in Kind; Valuation; Method.

(a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in Section 2-403 shall receive the items selected.

(2) Any homestead or family allowance or devise of a stated sum of money may be satisfied in kind provided

(i) the person entitled to the payment has not demanded payment in cash;

(ii) the property distributed in kind is valued at fair market value as of the date of its distribution, and

(iii) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(3) For the purpose of valuation under paragraph (2) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like

securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than 30 days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(4) The residuary estate shall be distributed in any equitable manner.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

COMMENT

This section establishes a preference for distribution in kind. It directs a personal representative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so. It provides a reasonable means for determining value of assets distributed in kind. It is implicit in Sections 3-101, 3-901 and this section that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue.

Section 3-907. Distribution in Kind; Evidence.

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

COMMENT

This and sections following should be read with Section 3-709 which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession

of an heir or devisee for purposes of administration.

Under Section 3-711, a personal representative's relationship to assets of the estate is described as the "same power over the title to property of the estate as an absolute owner would have." A personal representative may, however, acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents or others. The language of Section 3-907 is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a release.

Section 3-908. Distribution; Right or Title of Distributee.

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

COMMENT

The purpose of this section is to channel controversies which may arise among successors of a decedent because of improper distributions through the personal representative who made the distribution, or a successor personal representative. Section 3-108 does not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see Section 3-1006.

Section 3-909. Improper Distribution; Liability of Distributee.

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

COMMENT

The term "improperly" as used in this section must be read in light of Section 3-703 and the manifest purpose of this and other sections of the Code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter. Thus, a distribution may be "authorized at the time" as contemplated by Section 3-703, and still be "improper" under this section. Section 3-703 is designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the

basis for the distribution (e.g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

The definition of "distributee" to include the trustee and beneficiary of a testamentary trust in 1-201(10) is important in allocating liabilities that may arise under Sections 3-909 and 3-910 on improper distribution by the personal representative under an informally probated will. The provisions of 3-909 and 3-910 are based on the theory that liability follows the property and the fiduciary is absolved from liability by reliance upon the informally probated will.

Section 3-910. Purchasers from Distributees Protected.

If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution. Any recorded instrument described in this section on which a state documentary fee is noted pursuant to [insert appropriate reference] shall be prima facie evidence that such transfer was made for value.

COMMENT

The words "instrument or deed of distribution" are explained in Section 3-907. The effect of this section may be to make an instrument or deed of distribution a very desirable link in a chain of title involving succession of land. *Cf.* Section 3-901.

In 1975, the Joint Editorial Board recommended additions that strengthen the protection extended by this section to bona fide purchasers from distributees. The additional language was derived from recommendations evolved with respect to the Colorado version of the Code by probate and title authorities who agreed on language to relieve title assurers of doubts they had identified in relation to some cases.

Section 3-911. Partition for Purpose of Distribution.

When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the Court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the Court shall partition the property in the same manner as provided by the law for civil actions of partition. The Court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

COMMENT

Ordinarily heirs or devisees desiring partition of a decedent's property will resolve the issue by agreement without resort to the Courts. (*See* Section 3-912.) If Court determination is necessary, the Court with jurisdiction to administer the estate has jurisdiction to partition the property.

Section 3-912. Private Agreements Among Successors to Decedent Binding on Personal Representative.

Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

COMMENT

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as described by Article II, Part 11 with the effect of agreement under this section. The most obvious difference is that an agreement among successors under this section would involve transfers by some participants to the extent it changed the pattern of distribution from that otherwise applicable.

Differing from a pattern that is familiar in many states, this Code does not

subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. Article VII contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

Section 3-913. Distributions to Trustee.

(a) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in Section 7-303.

(b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate Court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the Court has acted.

(c) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (a) and (b).

COMMENT

This section is concerned with the fiduciary responsibility of the executor to beneficiaries of trusts to which he may deliver. Normally, the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the executor may apprehend that delivery to the trustee may involve risks for the safety of the fund and for him. For example, he may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. He may have doubts about the integrity of the trustee, or about his ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful relevance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself, a conflict of interest problem is involved. If the risk relates to the ability of the trustee to manage prudently, a more troublesome question is posed for the executor. Is he, as executor, not bound to act in the best interests of the beneficiaries?

In many instances involving doubts of this sort, the executor probably will want the protection of a Court Order. Sections 3-1001 and 3-1002 provide ample authority for an appropriate proceeding in the Court which issued the executor's letters.

In other cases, however, the executor may believe that he may be adequately protected if the acceptance of the trust by the devisee is unequivocal, or if the trustee is bonded. The purpose of this section is to make it clear that it is proper for the executor to require the trustee to register the trust and to notify beneficiaries before receiving distribution. Also, the section complements Section 7-304 by providing that the personal representative may

petition an appropriate Court to require that the trustee be bonded.

Status of testamentary trustees under the Uniform Probate Code. Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. Section 1-201's definition of "distributee" limits the distributee liability of the trustee and substitutes that of the trust beneficiaries to the extent of distributions by the trustee.

As a distributee as defined by 1-201, the testamentary trustee or beneficiary of a testamentary trust is liable to claimants like other distributees, would have the right of contribution from other distributees of the decedent's estate and would be protected by the same time limitations as other distributees (3-1006).

Incident to his standing as a distributee of the decedent's estate, the testamentary trustee would be an interested party who could petition for an order of complete settlement by the personal representative or for an order terminating testate administration. He also could appropriately receive the personal representative's account and distribution under a closing statement. As distributee he could represent his beneficiaries in compromise settlements in the decedent's estate which would be binding upon him and his beneficiaries. *See* Section 3-912.

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trustee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

Section 3-914. Disposition of Unclaimed Assets.

(a) If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any, otherwise to the [state treasurer], to become a part of the [state escheat fund].

(b) The money received by [state treasurer] shall be paid to the person entitled on proof of his right thereto or, if the [state treasurer] refuses or fails to pay, the person may petition the Court which appointed the personal representative, whereupon the Court upon notice to the [state treasurer] may determine the person entitled to the money and order the [treasurer] to pay it to him. No interest is allowed thereon and the heir, devisee or claimant shall pay all costs and expenses incident to the proceeding. If no petition is made to the [court] within 8 years after payment to the [state treasurer], the right of recovery is barred.

COMMENT

The foregoing section is bracketed to indicate that the National Conference does not urge the specific content as set forth above over recent comprehensive legislation on the subject which may have been enacted in an adopting state.

This section applies when it is believed that a claimant, heir or distributee exists but he cannot be located. See 2-105.

Section 3-915. Distribution to Person Under Disability.

(a) A personal representative may discharge his obligation to distribute to any person under legal disability by distributing in a manner expressly provided in the will.

(b) Unless contrary to an express provision in the will, the personal representative may discharge his obligation to distribute to a minor or person under other disability as authorized by Section 5-104 or any other statute. If the personal representative knows that a conservator has been appointed or that a proceeding for appointment of a conservator is pending, the personal representative is authorized to distribute only to the conservator.

(c) If the heir or devisee is under disability other than minority, the personal representative is authorized to distribute to:

(1) an attorney in fact who has authority under a power of attorney to receive property for that person; or

(2) the spouse, parent or other close relative with whom the person under disability resides if the distribution is of amounts not exceeding [$10,000] a year, or property not exceeding [$10,000] in value, unless the court authorizes a larger amount or greater value.

Persons receiving money or property for the disabled person are obligated to apply the money or property to the support of that person, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the support of the disabled person. Excess sums must be preserved for future support of the disabled person. The personal representative is not responsible for the proper application of money or property distributed pursuant to this subsection.

COMMENT

Section 5-104 is especially important as a possible source of authority for a valid discharge for payment or distribution made on behalf of a minor.

Section 3-916. [RESERVED]

PART 9A

APPORTIONMENT OF ESTATE TAXES

General Comment

Part 9A incorporates into the Uniform Probate Code the Uniform Estate Tax Apportionment Act as revised in 2003 (UETAA or new UETAA). The new UETAA replaces the Code's former estate tax apportionment provision (Section 3-916), which incorporated into the Code the former UETAA.

The Internal Revenue Code (IRC) places the primary responsibility for paying federal estate taxes on the decedent's executor and empowers, but does not direct, the executor to collect from recipients of certain nonprobate transfers included in the taxable estate a prorated portion of the estate tax attributable to those types of property. In the absence of specific contrary directions of the decedent, the IRC generally provides as to other transfers that taxes are to be borne by the persons who would bear that cost if the taxes were paid by the executor prior to distributing the estate. The determination of who should bear the ultimate burden of the estate taxes is left to state law.

If a state does not have a statutory apportionment law, the burden of the estate taxes generally will fall on residuary beneficiaries of the probate estate. This means that recipients of many types of nonprobate assets (such as beneficiaries of revocable trusts and surviving joint tenants) may be exonerated from paying a portion of the tax. Also, it generates a risk that residual gifts to the spouse or a charity may result in a smaller deduction and a larger tax. A number of states have adopted legislation apportioning the burden of estate taxes among the beneficiaries.

The new UETAA replaces the former UETAA, which was promulgated in 1958 and revised in 1964 and 1982.

The new UETAA continues to advance the principle of the former UETAA that the decedent's expressed intentions govern apportionment of an estate tax. Statutory apportionment applies only to the extent there is no clear and effective decedent's tax burden direction to the contrary. Under the statutory scheme, marital and charitable beneficiaries generally are insulated from bearing any of the estate tax, and a decedent's direction that estate tax be paid from a gift to be shared by a spouse or charity with another is construed to locate the tax burden only on the taxable portion of the gift. The new UETAA provides relief for persons forced to pay estate tax on values passing to others whose interests, though contributing to the tax, are unreachable by the fiduciary. The new UETAA also addresses the allocation of the burden incurred because of several federal transfer tax provisions that did not exist when the former UETAA was adopted.

Section 3-9A-101. Short Title.

This Part may be cited as the Uniform Estate Tax Apportionment Act.

Section 3-9A-102. Definitions.

In this Part:

(1) “Apportionable estate” means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

(A) any claim or expense allowable as a deduction for purposes of the tax;

(B) the value of any interest in property that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and

(C) any amount added to the decedent’s gross estate because of a gift tax on transfers made before death.

(2) "Estate tax" means a federal, state, or foreign tax imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include an inheritance tax, income tax, or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect at death.

(3) "Gross estate" means, with respect to an estate tax, all interests in property subject to the tax.

(4) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(5) “Ratable” means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. “Ratably” has a corresponding meaning.

(6) “Time-limited interest” means an interest in property which terminates on a lapse of time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest.

(7) "Value" means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction for taxes paid or required to be paid or for any special valuation adjustment.

COMMENT

The starting point for calculating the apportionable estate is the value of the gross estate. Since the properties included and deductions allowed for determining different taxes can differ, the apportionable estate figure may not

be the same for different taxes.

Property not included in the apportionable estate for an estate tax typically will not bear any of that tax. However, the donee recipients of such property will bear part of an estate tax to the extent that the available assets of the apportionable estate are insufficient to pay the tax. See Sections 3-9A-106(c) and 3-9A-109(b). Since deductible transfers will not generate any estate tax, it is appropriate to insulate those transfers from the allocation of that tax to the extent that properties of the apportionable estate are sufficient.

A gift tax paid by the decedent on a gift that was made by the decedent or the decedent's spouse within three years of the decedent's death is added back to the decedent's gross estate for federal estate tax purposes by Internal Revenue Code §2035(b). A State or foreign estate tax may have a similar provision or effect. Subparagraph (1)(C) excludes any such gift tax from the apportionable estate.

The value of the apportionable estate is reduced by claims and expenditures that are allowable estate tax deductions whether or not allowed. For example, administrative expenses that could have been claimed as estate tax deductions, but instead are taken as income tax deductions, will reduce the apportionable estate. When a decedent's estate includes property in more than one State, the apportionable estate for each State's estate tax will be reduced by the expenses and claims that are deductible for purposes of that tax. Where an expenditure cannot be identified as pertaining to property in the gross estate of only one State tax, the expenditure is to be apportioned ratably among the taxes of the States in which the relevant properties are located, in accordance with the values of those properties.

A spouse's elective share under Article II, Part 2, or a spouse's share under Section 2-301, is excluded from the apportionable estate to the extent that the spouse's share qualifies for an estate tax deduction. Other statutory claims against a decedent's estate that do not qualify for an estate tax deduction (for example, the claim of an omitted child under Section 2-302) do not reduce the apportionable estate.

The term "estate tax" is defined in the UETAA to include all estate taxes and certain generation-skipping taxes arising because of an individual's death. The term estate tax does not include any inheritance taxes, income taxes, gift taxes, or generation-skipping taxes incurred because of a taxable termination, a taxable distribution, or an inter vivos direct skip. A generation-skipping tax that is incurred because of a direct skip that takes place because of the decedent's death is included in the term "estate tax."

Currently, no United States income tax is imposed on the unrealized appreciation of a decedent's assets at the time of death. While Canada and some other foreign countries impose an income tax at death, those income taxes are not apportioned by the UETAA.

Some States impose an inheritance tax on recipients of property from a decedent. The UETAA does not apportion those taxes.

The UETAA does not provide for the apportionment of the income tax payable on the receipt of Income in Respect of a Decedent (IRD). If a decedent held an installment obligation the payment on which is accelerated by the decedent's death, the income tax incurred thereby is not apportioned by the UETAA.

If a donor pays a gift tax during the donor's life, the amount paid will not be part of the donor's assets when the donor dies; and so the gift tax will not be subject to apportionment among the persons interested in the donor's gross estate. This consequence is consistent with the typical donor's wish that the gifts made during life pass to the donee free of any transfer tax. If all or part of a gift tax was not paid at the time of the donor's death and is subsequently paid by the donor's personal representative, the burden of the gift tax should lie with the same persons who would have borne it if the donor had paid it during life, typically, the residuary beneficiaries. A gift tax liability is not apportioned by the UETAA, but is treated the same as any other debt of the estate. A gift tax deficiency that becomes due after the decedent's death also is treated as a debt of the decedent's estate.

The kinds of death benefits included in a gross estate depend upon the particular estate tax to be apportioned and may not be the same for each tax. For example, some State death taxes will have an exemption for a homestead; some will exclude life insurance proceeds and pensions. In determining the gross estate for such taxes, the property excluded from the tax will also be excluded from the gross estate for that tax. Property that is deductible under an estate tax, such as property that qualifies for a marital or charitable deduction, is nevertheless "subject to" that tax and included in the gross estate. Once the value of the gross estate for an estate tax is determined, the reductions described in Paragraph (1) are applied to ascertain the apportionable estate.

A "time-limited interest" includes a term of years, a life interest, a life income interest, an annuity interest, an interest that is subject to a power of transfer, a unitrust interest, and similar interests, whether present or future, and whether held alone or in cotenancy. The fact that an interest that otherwise is not a time-limited interest is held in cotenancy does not make it a time-limited interest.

If a debt is secured by more than one interest in property, the value of each such interest is the fair market value of that interest less a ratable portion of the debt that it secures.

If the beneficiary of an interest in property is required by the terms of the transfer to make a payment to a third party or to pay a liability of the transferor, that obligation constitutes an encumbrance on the property, but does not necessarily reduce the value of the apportionable estate. If the obligation is to make a transfer or payment to a third party, other than an obligation to satisfy a debt of the decedent based on money or money worth's consideration, the right of the third person constitutes an interest in the apportionable estate and so is subject to apportionment.

A decedent's direction by will or other dispositive instrument that property controlled by that instrument is to be used to pay a debt secured by an interest in property is an additional bequest to the person who is to receive the interest securing the debt.

Taxes imposed on the transfer or receipt of property, regardless of whether a lien on the property or payable by the recipient of the property, do not reduce the value of the property for purposes of apportioning estate taxes by the UETAA.

The date on which gross estate property is to be valued for federal estate tax purposes (and for some other estate tax purposes) is either the date of the decedent's death or an alternate valuation date elected by the decedent's

personal representative pursuant to the estate tax law. An estate tax value that is determined on the alternate valuation date is not, as such, a "special valuation adjustment." A "special valuation adjustment" refers to a reduction of the valuation of an item included in the gross estate pursuant to a provision of the estate tax law. See the Comment to Section 3-9A-107.

If a person has a right by contract or by the decedent's will or other dispositive instrument to purchase gross estate property at a price below its estate tax value, the estate tax value of the property is the amount included in the value of the decedent's gross estate. The difference or discount between the purchase price and the estate tax value of the property can be viewed as an interest which the decedent passed to that person. If the right to purchase is exercised, the amount of the discount is the value of that person's interest in the apportionable estate.

The value of a person's interest in the apportionable estate can depend upon the value of the apportionable estate. So, the value of a residuary interest in a decedent's estate will reflect the amount of allowable deductions which, under the UETAA, reduce the apportionable estate, but will not be reduced by expenditures that are not allowable deductions for that estate tax. The formula for allocating estate taxes in Section 3-9A-104(1) utilizes a fraction of which the numerator is the value of a person's interest in the apportionable estate rather than the value of the person's interest in the net estate or in the taxable estate. Since the denominator of the fraction is the value of the apportionable estate, the sum of the numerators of all persons having an interest in the apportionable estate will equal the denominator, and so 100% of the estate taxes will be apportioned. Consider the following example.

Ex. D died leaving a gross estate with a value of $10,150,000 and made no provision for apportionment of taxes. D's will made pecuniary devises totaling $1,000,000, and gave the residue to A and B equally. There are no claims against the estate and no marital or charitable deductions are allowable. The funeral expenses are $10,000, and the estate incurred administrative expenses of $240,000 of which, while all were allowed as administrative expenses by the State probate court, $100,000 was disallowed by the Service for a federal estate tax deduction on the ground that $100,000 of the expenses was not necessary for the administration of the estate. See Rev. Rul. 77-461 and TAM 7912006. The personal representative elected to deduct the remaining $140,000 of administrative expenses as a federal estate tax deduction. For federal estate tax purposes, the apportionable estate is equal to the difference between the gross estate ($10,150,000) and the allowable deductions of $150,000 ($140,000 deductible administrative expenses and $10,000 deductible funeral expenses); and so the apportionable estate is $10,000,000. The value of the two residuary beneficiaries' interests in the apportionable estate is equal to the difference between the entire apportionable estate of $10,000,000 and the $1,000,000 that was devised to the pecuniary beneficiaries. While the residuary beneficiaries will not receive any part of the $100,000 of administrative expenses for which no federal estate tax deduction is allowable, that expense does not reduce the gross estate in determining the apportionable estate, and so does not affect the value of their residuary interests for the purpose of apportioning the federal estate tax. So, for purposes of apportioning the federal estate taxes, each residuary beneficiary has an interest in the apportionable estate valued at $4,500,000, which constitutes 45% of the apportionable estate of $10,000,000. Forty-five percent of the federal estate taxes is apportioned each to A and B, and 10% of the federal estate taxes is apportioned to the pecuniary beneficiaries.

Section 3-9A-103. Apportionment By Will Or Other Dispositive Instrument

(a) Except as otherwise provided in subsection (c), the following rules apply:

(1) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.

(2) Any portion of an estate tax not apportioned pursuant to paragraph (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:

(A) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(B) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(3) If any portion of an estate tax is not apportioned pursuant to paragraph (1) or (2), and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

(b) Subject to subsection (c), and unless the decedent expressly and unambiguously directs the contrary, the following rules apply:

(1) If an apportionment provision directs that a person receiving an interest in property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest,

(A) the tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument, or

(B) if the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

(2) If an apportionment provision directs that an estate tax is to

be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient.

(3) Except as otherwise provided in paragraph (4), if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under Section 3-9A-107, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(4) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests.

(c) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection, a testamentary power of appointment is a power to transfer the property that is subject to the power.

COMMENT

A decedent's direction will not control the apportionment of taxes unless it explicitly refers to the payment of an estate tax and is specific and unambiguous as to the direction it makes for that payment. For example, a testamentary direction that "all debts and expenses of and claims against me or my estate are to be paid out of the residuary of my probate estate" is not an express direction for the payment of estate taxes and will not control apportionment. While an estate tax is a claim against the estate, a will's direction for payment of claims that does not explicitly mention estate taxes is likely to be a boiler plate that was written with no intention of controlling tax apportionment. To protect against an inadvertent inclusion of estate tax payment in a general provision of that nature, the UETAA requires that the direction explicitly mention estate taxes.

On the other hand, a direction in a will that "all taxes arising as a result of my death, whether attributable to assets passing under this will or otherwise, be paid out of the residue of my probate estate" satisfies the UETAA's requirement for an explicit mention of estate taxes and is specific and unambiguous as to what properties are to bear the payment of those taxes.

Whether other directions of a decedent that explicitly mention estate taxes comply with the UETAA's requirement that they be specific and unambiguous is a

matter for judicial construction. For example, there is a split among judicial decisions as to whether a direction such as "all estate taxes be paid out of the residue of my estate" is ambiguous because it is unclear whether it is intended to apply to taxes attributable to nonprobate assets. To the extent that it is determined that a decedent failed to apportion an estate tax, then the UETAA will apply to apportion that amount of the tax.

If an amendment is made to a revocable trust instrument, and if the amendment itself contains an express and unambiguous provision apportioning an estate tax, the date of the amendment is the date of the revocable trust instrument. However, if an amendment to a revocable trust instrument does not contain an express and unambiguous provision apportioning an estate tax, the date of the revocable trust instrument is the date on which it was executed or the date of the most recent amendment containing an express and unambiguous provision apportioning an estate tax. An express and unambiguous provision apportioning an estate tax includes a provision directing that payment of an estate tax be made from specified property.

The statutory apportionment rules of the UETAA are default rules applicable to the extent that the decedent does not make a valid provision as to how estate taxes are to be apportioned. The decedent has the power to determine which recipients of decedent's property will bear the estate taxes and in what proportion. If provisions conflict, it is necessary to determine which prevails. A possible choice would permit the directions in each of decedent's instruments determine the extent to which property controlled by that instrument bears a share of estate taxes, but having the provisions for an allocation scheme scattered among a number of documents would make decedent's personal representative search multiple instruments to ascertain the decedent's directions. Instead, the UETAA provides an order of priority for a decedent's provisions for estate tax allocations. To the extent that a decedent makes an express and unambiguous provision by will, that provision will trump any competing provision in another instrument. To the extent that the will does not expressly and unambiguously provide for the allocation of some estate taxes, an express and unambiguous provision in a revocable trust instrument will control. If the decedent executed more than one revocable trust instrument, the express provisions in the instrument that was executed most recently will control. In determining which revocable trust instrument was executed most recently, the date of any amendment containing an express and unambiguous apportionment provision will be taken into account. In the event that the allocation of estate taxes is not fully provided for by the decedent's will or revocable trust instrument, an express and unambiguous provision in other instruments executed by the decedent controls to the extent that the provision applies to the property disposed of in that instrument. An example of a provision in an instrument disposing of property, other than a will or revocable trust instrument, is a provision in a designation of a beneficiary of life insurance proceeds either that the proceeds will or will not be used to pay a portion of estate taxes. A designation of that form will be honored if there is no conflicting valid provision in a will or revocable trust instrument.
A provision in decedent's will, revocable trust, or other instrument will not be honored to the extent that it would contravene subsection (c).

The exclusivity of the provisions of this section apply only to apportionment rules; they do not prevent a dispositive instrument from making additional gifts; nor do they prevent a governing instrument of an entity from rearranging the internal division of the assets of that entity.

Ex.(1). On D's death, her will apportioned $100,000 of estate taxes to the

holders of interests in the D Family Trust, an irrevocable trust created by D during her life. The D Family Trust is divided into two separate shares: the William Share, and the Franklin Share, each of which is for a different child of D. The William Share is for the benefit of William, and the Franklin Share is for the benefit of Franklin. The trust instrument provides that any taxes apportioned to the holders of interests in the trust or to any share of the trust are to be paid from the William Share. The effect of that trust provision is to require that taxes reduce the size of the William Share and do not reduce the Franklin Share. The apportionment provision in D's will established the amount of estate tax that the trust must bear; the amount apportioned to the D Family Trust makes all of the assets of that trust liable for that amount. Since the decedent's will did not direct how the trust's burden should be allocated between the two shares of the trust, the direction in the trust instrument is not inconsistent with the will provision and so can control the allocation of taxes between properties disposed of in the trust instrument under subsection (c). Even if the direction in the trust instrument were deemed not to be permitted by subsection (c), the direction would be effective as a disposition of trust assets as explained in Example (2).

Ex. (2). The same facts as those stated in Ex. (1) except that D's will apportioned the $100,000 of estate taxes to the Franklin Share of the D Family Trust. The trust provision placing the burden of the tax on the William Share cannot qualify as an apportionment direction since it is in conflict with the will provision allocating all of the trust's share of the estate tax to the Franklin Share. But the settlor has the power to direct trust assets to whomever the settlor pleases. The direction in the trust instrument that assets of the William Share are to be used to pay any taxes apportioned to the Franklin Share is a gift to Franklin of assets from the William Share. The direction is valid as a provision shifting trust assets from the William Share to the Franklin Share, which is a permissible disposition of a trust instrument.

The federal estate tax laws enable a decedent's personal representative to collect a portion of the decedent's federal estate tax from the recipients of certain nonprobate property that is included in the decedent's gross estate. See e.g., §§2206 to 2207B of the Internal Revenue Code. There is a conflict among the courts as to whether those federal provisions preempt a State law apportionment provision. Choosing the position that there is no federal preemption, the UETAA apportions taxes without regard to the federal provisions. The federal provisions are not apportionment statutes; rather, they simply empower the personal representative to collect a portion of the estate tax that is attributable to the property included in the decedent's gross estate and do not direct use of the collected amounts by the personal representative. The rights granted to the personal representative by federal law for the collection of assets from nonprobate beneficiaries do not conflict either with the apportionment of taxes by State law or with other rights of collection granted by State law. Since there is no conflict, the UETAA does not include a direction as to whether federal or State law takes priority.

The UETAA does not permit anyone other than the decedent to override the allocation provisions of the UETAA. For example, if X created a QTIP trust for Y, the value of the trust assets will be included in Y's gross estate for federal estate tax purposes on Y's death. See §2044 of the Internal Revenue Code of 1986. If X's QTIP trust provided that the trust is not to bear any of the estate taxes imposed at Y's death, the direction would be ineffective under the UETAA because only Y can direct apportionment of taxes on Y's estate. In this regard, it is noteworthy that the right granted to a decedent's estate by §2207A of the Internal Revenue Code to collect a share of the federal estate tax from a

QTIP included in the decedent's gross estate can be waived only by direction of the decedent in a will or revocable trust instrument. Y is in the best position to determine the optimum allocation of Y's estate taxes among the various assets that comprise Y's gross estate. If Y fails to make an allocation, the default provisions of the UETAA are more likely to reflect Y's intentions than would a direction of a third person.

If an instrument transferring property that may be included in the taxable estate of someone other than the transferor directs payment from the transferred property of any part of the estate taxes of the other person, the direction affects the size of the gift, and so is a dispositive rather than an apportionment provision, and is not subject to the UETAA.

If a decedent makes a valid direction that a person receiving property under a particular disposition is exonerated from payment of an estate tax, the tax that would have been borne by that person will, instead, be borne by other persons receiving interests under the instrument directing the exoneration. Thus, if several assets are disposed of by a governing instrument, which exonerates one or more of those assets from bearing an estate tax, the exoneration will not reduce the amount of estate tax to be allocated to all of the assets disposed of by that instrument, including the exonerated assets. For example, if decedent's will directs that all federal estate taxes attributable to decedent's probate estate be paid from the residuary of his estate, the exoneration of the pre-residuary devises will not affect the total amount of federal estate tax apportioned to the beneficiaries of the probate estate, all of which tax will be borne by the residuary beneficiaries if the residuary is sufficient. If the value of the other interests is insufficient to pay the estate taxes, the difference will be payable by other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

If a decedent directs that estate taxes be paid from properties, some of which qualify for a marital or charitable deduction, the provision making that direction may designate the extent to which the charitable or marital interests will or will not bear a portion of the tax. If the decedent makes no provision as to whether the marital or charitable interests bear a portion of the tax, the UETAA provides a default rule that exempts the marital or charitable interests from payment of the tax to the extent that it is feasible to do so. An example of when this circumstance arises is when the decedent's will makes a residuary devise, a portion of which qualifies for a marital or charitable deduction and a portion of which does not. If the decedent provides that estate taxes are to be paid from the residuary, unless directed otherwise, the default provision of the UETAA will require the payment to be made first from the nondeductible interests in the residuary. The default rule does not apply to an allocation of tax to a holder of an interest in property in which there is a time-limited interest; the tax allocated to any interest in that property is to be paid from the principal of the property unless the decedent expressly directed otherwise or unless Section 3-9A-107 applies to the property.

If a decedent created a trust during life the value of which is included in the decedent's gross estate at death, if immediately after decedent's death, there were one or more time-limited interests in the trust that did not qualify for an estate tax deduction, and if one or more charities held a remainder interest in the trust that otherwise qualified for an estate tax charitable deduction, the charitable deduction for the remainder interests may be lost if the estate taxes generated by the nondeductible time-limited interests are to be paid from assets in the trust. See Rev. Rul. 82-128, Rev. Proc. 90-30 (§§ 4 and 5), and Rev. Proc. 90-31 (§§ 5 and 6). It is possible that if the payment of an estate tax is

made from funds that, while directed to be added to the trust's assets, had not been distributed to the trust before payment of the estate tax, the payment will not disqualify the charitable deduction. There are numerous instances in which estate taxes are required to be paid from a charitable remainder trust that was created inter vivos. Subsection (b)(4) is an attempt to protect the deduction in such cases by establishing a rule of construction requiring that funds directed to be added to the trust be used to pay any required estate tax before assets already in the trust itself are used. It seems unlikely that a decedent would wish to negate this construction of decedent's direction, but the decedent has the power to do so by including an express statement to that effect in a will or revocable trust instrument.

If a decedent had made an irrevocable transfer during his life, over which the decedent did not retain a power to make a subsequent transfer, and if that transfer is included in the decedent's gross estate for estate tax purposes, a portion of the estate tax will be apportioned to the transferee unless the decedent effectively provides otherwise in a will, revocable trust or other instrument. While, by an express provision in the appropriate instrument, a decedent can reduce the amount of tax apportioned to such inter vivos transfers, the decedent is not permitted to increase the amount of tax apportioned to such a transferee. If a decedent attempts to do so, whether directly by apportioning more estate tax to the inter vivos transfer or indirectly by insulating some person interested in the gross estate from all or part of that person's share of the estate tax, the amount of estate tax that is apportioned to the transferee of an irrevocable inter vivos transfer will not be greater than the amount that would have been apportioned to that transferee if the decedent had made no provision for apportionment in another instrument.

Subsection (c) does not apply to a decedent's provision that no estate tax be apportioned to the recipient of an interest who would be excluded from apportionment by the UETAA in the absence of a contrary direction by the decedent. For example, a decedent's provision that no estate tax be apportioned to the recipient of property that qualifies for a marital or charitable deduction is not subject to subsection (c).

If a decedent transferred property to a revocable trust prior to executing a will that directs the apportionment of taxes to that trust, the apportionment direction will be valid even if the decedent subsequently released the power of revocation so that the trust became irrevocable prior to the decedent's death. In such a case, Subsection (c) does not invalidate the will's direction.

If, immediately before the decedent's death, the decedent had a power of appointment, whether inter vivos or testamentary, the decedent had the power to transfer the property interest within the meaning of this provision.

Section 3-9A-104. Statutory Apportionment Of Estate Taxes.

To the extent that apportionment of an estate tax is not controlled by an instrument described in Section 3-9A-103 and except as otherwise provided in Sections 3-9A-106 and 3-9A-107, the following rules apply:

(1) Subject to paragraphs (2), (3),and (4), the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.

(2)A generation-skipping transfer tax incurred on a direct skip taking

effect at death is charged to the person to which the interest in property is transferred.

(3) If property is included in the decedent's gross estate because of Section 2044 of the Internal Revenue Code of 1986 or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate is apportioned ratably among the holders of interests in the property. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate.

(4) Except as otherwise provided in Section 3-9A-103(b)(4) and except as to property to which Section 3-9A-107 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property.

COMMENT

The value of an interest in the apportionable estate is determined in accordance with Section 3-9A-102(7) of this Part.

Property values subtracted from the decedent's gross estate in determining the apportionable estate under Section 3-9A-102(1) are excluded from the apportionable estate, and beneficiaries of those properties do not have any estate tax apportioned to them because of their interest in those properties. This treatment is consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers §1.1, comment g (1998). The UETAA adopts a method of equitable apportionment of estate taxes, but does not follow the Restatement method which allocates taxes apportioned to probate assets first to the residuary beneficiaries and invites preferential treatment for beneficiaries of specific and pecuniary gifts by will over beneficiaries of gifts by various non-probate transfer methods.

A "direct skip" currently is defined in §§ 2612(c) and 2613 of the Internal Revenue Code. Section 2603(b) of the Internal Revenue Code states that, unless directed otherwise in the governing instrument, the tax on a generation-skipping transfer is charged to the property constituting the transfer. Section 2603(a)(3) of the Internal Revenue Code imposes the duty of paying the tax on a direct skip on the transferor of the property. Under paragraph (2), the decedent's personal representative will pay the generation-skipping tax on a direct skip out of the transferred property (or the proceeds from a sale of all or some of that property). To the extent that it is not feasible or practical to pay the tax from the transferred property, the transferees are to pay their proportionate share of the shortfall. Paragraph (2) is consistent with the treatment provided by federal law.

The property to which paragraph (3) applies is sometimes referred to as "QTIP property" since § 2044 of the Internal Revenue Code of 1986 deals with "qualified terminable interest property." See §§ 2044(b)(1), 2056(b)(7), and 2523(f) of the Internal Revenue Code of 1986. Although the general rule of apportionment in the UETAA is to apportion estate taxes on the basis of the average rate of tax, the tax apportioned to the holders of interests in QTIP

property by the UETAA is based on the marginal rate of tax. Note that federal estate tax law grants the decedent's fiduciary the power to collect from the holders of the QTIP property the estate tax generated by that property at the marginal estate tax rate of the decedent's estate. The UETAA tracks the federal law in this respect.

It would be harsh to collect the estate tax from persons holding discretionary or contingent interests in property since they may not obtain possession for many years, if at all. Hence, when the tax is apportioned to persons holding interests in property in which there are time-limited interests, paragraph (4) requires the tax to be paid from principal. This provision does not apply to property for which a special elective benefit (as described in Section 3-9A-107) has been elected.

An estate tax that is apportioned to an interest in property that cannot be reached because of legal or practical obstacles but is not subject to a time-limited interest is to be collected from the interest holder to the extent feasible. In that circumstance, since there is no time-limited interest, the tax will not be apportioned to a person who may not receive property for many years if at all.

When some of the interests in property qualify for a charitable or marital deduction and some do not, requiring the tax to be paid from the principal of the property may reduce the amount of marital or charitable deduction that is allowable. Although the likely intent of a decedent would be to maximize the marital and charitable deductions available for the estate, paragraph (4) provides that the estate tax is to be paid from the principal of the property, a choice that avoids administrative complexity.

Section 3-9A-105. Credits And Deferrals.

Except as otherwise provided in Sections 3-9A-106 and 3-9A-107, the following rules apply to credits and deferrals of estate taxes:

(1) A credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned.

(2) A credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of a credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary.

(3) If payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to which the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property.

COMMENT

Section 2013 of the Internal Revenue Code of 1986 allows a credit for federal estate taxes paid on certain properties that were included in the taxable estate of a person who died within a relatively short time of the decedent's death. This credit often is referred to as a credit for property previously taxed.

A beneficiary of property attracting a foreign or State death tax may have paid that tax directly or may have paid it indirectly by virtue of the tax's being paid out of the property passing to that person. If that occurs, while the beneficiary's payment of the foreign or State tax reduces the amount that the beneficiary will receive, it will not reduce the value of the beneficiary's interest in the apportionable estate according to the definition of "value" in the UETAA. See Section 3-9A-102(7). The UETAA mitigates the beneficiary's burden by giving the beneficiary the benefit of any estate tax credit allowed for the foreign or State tax and paid by the beneficiary.

The benefits and burdens described in paragraph (3) are to be allocated ratably among persons in accordance with the amount of deferral or extension attributable to their interests in the apportionable estate.

Section 3-9A-106. Insulated Property: Advancement Of Tax.

(a) In this section:

(1) "Advanced fraction" means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable.

(2) "Advanced tax" means the aggregate amount of estate tax attributable to interests in insulated property which is required to be advanced by uninsulated holders under subsection (c).

(3) "Insulated property" means property subject to a time-limited interest which is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability.

(4) "Uninsulated holder" means a person who has an interest in uninsulated property.

(5) "Uninsulated property" means property included in the apportionable estate other than insulated property.

(b) If an estate tax is to be advanced pursuant to subsection (c) by persons holding interests in uninsulated property subject to a time-limited interest other than property to which Section 3-9A-107 applies, the tax must be advanced, without further apportionment, from the principal of the uninsulated property.

(c) Subject to Section 3-9A-109(b) and (d), an estate tax attributable to interests in insulated property must be advanced ratably by uninsulated

holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably by the persons holding interests in properties that are excluded from the apportionable estate under Section 3-9A-102(1)(B) as if those interests were in uninsulated property.

(d) A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantially more equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

(e) When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced fraction of the total undistributed property.

(f) Upon a distribution of insulated property for which, pursuant to subsection (d), the distributee becomes obligated to make a payment to uninsulated holders, a court may award an uninsulated holder a recordable lien on the distributee's property to secure the distributee's obligation to that uninsulated holder.

COMMENT

The term "time-limited interest" is defined in Section 3-9A-102(6).

Subsection (b) applies to property in which at least one person has a time-limited interest and which property can be reached by the personal representative of the decedent. In such cases, an estate tax that is payable as an advanced tax under subsection (c), is charged against the principal of the property, and is not apportioned among the several interests in that property. While there is no express apportionment of the advanced tax to the time-limited interests in the property, the holders of the time-limited interests will bear a share of the tax burden in that the resulting reduction of the value of the principal will reduce the value of the time-limited interests, except that it will not reduce the value of a dollar annuity interest. So, the holder of a dollar annuity interest will be exonerated from sharing in the burden of estate taxes.

Since the estate tax apportioned to the owners of insulated property cannot be collected from the property, the tax is to be paid (as an advancement) by persons having interests in other assets of the estate (uninsulated holders), provided however that the total tax attributed to and advanced by an uninsulated holder cannot exceed the value of that person's interest in the uninsulated property. See Section 3-9A-109(d). If the amount of the aggregate tax apportioned to and to be advanced by an uninsulated holder exceeds the value of that holder's interest in the uninsulated property, then the deficiency shall be apportioned to the holders of interests in properties that otherwise qualify for charitable or marital deductions. In such cases, those charitable and marital

properties are reclassified as uninsulated properties, and so the beneficiaries of those properties will be uninsulated holders who will have a right of recovery from the distributees of insulated properties for which they paid a portion of the estate tax.

It would be harsh to make persons holding future interests in insulated property pay tax on properties that they will not receive until years later and may never receive. If they were required to pay the tax at the time of decedent's death, that could give rise to widespread disclaimers of interests. Also, it would be difficult to value the interests of discretionary beneficiaries. For that reason, with one exception set forth in subsection (d), the tax attributable to insulated properties is reallocated to uninsulated holders who are required to advance the funds to pay the tax.

The tax attributable to the insulated property that is required to be paid by the uninsulated holders is referred to as an "advanced tax." To permit the uninsulated holders who bear the advanced tax to be reimbursed, the UETAA effectively provides the uninsulated holders with a phantom percentage interest in the property whose transfer is the source of the advanced tax. While the phantom percentage interest of the uninsulated holder remains constant, its value will increase or decrease as the value of the property changes. The phantom percentage interest is determined by dividing the advanced tax by the aggregate value of insulated properties as determined for purposes of the estate tax. When a distribution of insulated property is made, a percentage of that distribution must be paid over to the uninsulated holders; and this is a personal obligation of the distributee. If it were not for this Section, the uninsulated holders would have had a right of reimbursement under Section 3-9A-110 for the amount of their outlay from the distributees; but instead, subsection (e) gives them a right to a fraction of the distributed amount rather than to a fixed dollar amount. The amount collected from a distributee is divided among the uninsulated holders according to the percentage of the advanced tax that they paid.

It is important to note that the uninsulated holders do not have an actual interest in the insulated property and have no lien or security interest in that property while it is in the possession of the trust or fund. The uninsulated holders only have a claim against the persons who receive distributions from the trust or fund which holds the insulated property. The only exception is where previously insulated property loses its insulation so that it can be reached by the uninsulated holders without violating any prohibition against alienation of interests. Once insulated property is in the hands of a distributee, subsection (f) permits the uninsulated holders to seek a lien on the distributee's property for the amount owed to them; but there is no lien or other encumbrance on the insulated property while it is in the possession of the trust or fund.

The operation of this Section is illustrated in the following examples.

Ex. (1) X dies having a gross estate and an apportionable estate of $10M and devises his probate property (with a value of $8M) to A, B and C, with A and B each receiving 40% of the probate estate, and C receiving 20%. In addition to the probate property, X had an interest in a nonqualified pension plan at his death which interest had a value of $2M. X's contract with the plan provides that an annuity of $120,000 per year is to be paid to G for life, and upon G's death the remainder of the corpus is to be paid to L. The only estate tax to which X's estate is subject is the federal estate tax. The federal estate tax on X's $10M gross estate is $4M. So, the average rate of the estate tax is 40%. Under Section 3-9A-104(1), the estate tax that is attributable to the $2M

pension fund is $800,000 -- the value of the property interests that G and L hold in the fund ($2M) is 20% of the $10M value of the entire apportionable estate, and so 20% of the $4M estate tax is attributable to the pension fund. Assume that under local law, the assets of the pension fund cannot be reached by creditors or by the personal representative of X's estate in order to use those funds to pay estate taxes. Under Subsection (c), the personal representative will collect 40% of the $800,000 (i.e., $320,000) from A and a like amount from B; and the personal representative will collect $160,000 from C.

The advanced fraction for the pension fund is $800,000 (the amount of the estate tax that was advanced by A, B, and C) divided by the $2M value of the fund (the insulated property), which division results in a percentage of 40%. Putting it differently, the $800,000 estate tax attributable to the fund but not paid by those interested in the fund constitutes 40% of the $2M value of the fund. To compensate A, B and C for paying the advanced tax, they obtain what amounts to a 40% phantom interest in the fund. Their actual interest arises only when distributions are made from the fund or, in the event that the fund loses its insulation from creditors, when that occurs.

In Year One, the fund pays $120,000 to G pursuant to the terms of the contract. Forty percent of that distribution ($48,000) must be paid by G to A, B and C -- 40% or $19,200 payable to A and another $19,200 payable to B, and 20% or $9,600 payable to C, since that is the proportion in which they bore the advanced tax. The next year, the fund distributes another $120,000 to G, and the same payments must be made to A, B and C. In the third year, G dies, and the fund distributes the remaining principal of $2,400,000 to L; the value of the principal had increased because of an increase in the value of the investments the fund held. A, B, and C are entitled to 40% of that $2,400,000, and so L must pay them $960,000, to be divided among them. A and B will each receive $384,000 (40% of the $960,000), and C will receive $192,000 (20% of $960,000).

Ex. (2) X dies leaving a taxable estate of $10,000,000 on which a federal estate tax of $5,000,000 is payable (for convenience of computation, we treat all of X's estate as subject to a tax at a 50% marginal rate). X's estate has no marital or charitable deductions. X left $4,000,000 of assets in an offshore trust that cannot be reached by X's personal representative and so constitutes insulated property. The federal estate tax attributable to that property is $2,000,000. X had other nonprobate assets having an aggregate value of $2,000,000 and a residuary estate of $4,000,000. The holders of the nonprobate assets will have $1,000,000 in federal estate taxes apportioned to them, and the holders of the residuary interests will have $2,000,000 of federal estate taxes attributed to them. But, the personal representative must also pay the $2,000,000 of federal estate taxes attributable to the offshore assets. If the holders of interests in those assets cannot be reached, and if the UETAA did not apply, the personal representative would have to pay the $2,000,000 from the residuary of the estate, thereby wiping it out completely. Under the UETAA, 1/3 of the $2,000,000 of federal estate tax attributable to the offshore assets ($666,667) will be paid by the holders of the other nonprobate assets, and the remaining $1,333,333 of that tax will be paid by the beneficiaries of the residuary estate. Under the UETAA, the holders of the other nonprobate assets will have to bear their proportionate share of the tax on the offshore assets. When distributions are made of the offshore assets, the distributees will be personally liable to pay a portion of their distribution to the persons who paid the estate tax on the offshore fund.

If undistributed insulated property loses its insulation from claims, the uninsulated holders can collect the balance of their interest from the property

at that time.

In certain circumstances, it would be more equitable to require the beneficiary of an interest in insulated property to bear the tax on that interest than to reapportion it to others. For example, if the beneficiary's interest is one that will become possessory in a short period of time, so that the beneficiary will soon have possession of assets from the fund or trust, it would be more equitable to place personal liability on that beneficiary; and the court has discretion to do so. In determining whether a beneficiary is likely to obtain possession of all or a significant part of the beneficiary's interest in the insulated property, the court can consider not only distributions that are required to be made to the beneficiary, but also distributions that, based on an examination of the history of the administration of the fund or trust, are likely to be made in the near future. Subsection (d) provides the court with the discretion to make that determination. While a beneficiary's receipt of a distribution from the trust or fund would make that beneficiary liable to uninsulated holders who paid the advanced tax, that places a burden of collection on the uninsulated holders; and so, when the distribution is likely to be made to a beneficiary within a short period of time, it would be more equitable to have that beneficiary bear the tax.

Section 3-9A-107. Apportionment And Recapture Of Special Elective Benefits

(a) In this section:

(1) "Special elective benefit" means a reduction in an estate tax obtained by an election for:

(A) a reduced valuation of specified property that is included in the gross estate;

(B) a deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(C) an exclusion from the gross estate of specified property.

(2) "Specified property" means property for which an election has been made for a special elective benefit.

(b) If an election is made for one or more special elective benefits, an initial apportionment of a hypothetical estate tax must be computed as if no election for any of those benefits had been made. The aggregate reduction in estate tax resulting from all elections made must be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced valuations, and exclusions obtained by the decedent's estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

(c) An additional estate tax imposed to recapture all or part of a

special elective benefit must be charged to the persons that are liable for the additional tax under the law providing for the recapture.

COMMENT

The types of special elective benefits at which this provision is aimed are currently set forth in §§ 2031(c), 2032A, and 2057 of the Internal Revenue Code of 1986. Section 2032A provides an election whereby "qualified real property" (real property that is used for a specified purpose and is held by certain parties related to the decedent) will be given a lower valuation for federal estate tax purposes than otherwise would have been true. Under § 2032A(c), if within 10 years after the decedent's death the qualified heir disposes of an interest in the qualified realty or ceases to use it for its required purpose, an additional estate tax will be imposed to recapture some of the estate tax reduction that was obtained through the election. The purpose of this Section is to define how the benefit of an estate tax reduction of this or a similar type will be allocated and how any additional estate tax imposed to recapture some of that tax benefit will be allocated.

Another federal estate tax provision to which this Section applies is § 2057 of the Internal Revenue Code of 1986. That provision grants an election to receive a special estate tax deduction for a "qualified family-owned business interest." Under § 2057(f), if, within 10 years after the decedent's death, one of four listed events occurs, an additional federal estate tax will be imposed in order to recapture some of the tax reduction obtained by electing to take the deduction. This Section defines how the benefits of the election and the burden of an additional tax will be apportioned. The Economic Growth and Tax Relief Reconciliation Act of 2001 repealed § 2057 for the estates of decedent's dying after the year 2003. However, the 2001 Act retains the 10-year recapture provision, and the sunset provision will reinstate § 2057 in the year 2011 unless the repeal is made permanent.

Section 2031(c) of the Internal Revenue Code of 1986 provides an election whereby a portion of the value of land that is subject to a qualified conservation easement, as defined in § 2031(c)(8), is excluded from the gross estate. The exclusion does not apply to the value of a retained development right; but if, prior to the date for filing the estate tax return, all the persons who have an interest in the land execute an agreement to extinguish some or all of the development rights, an additional estate tax deduction will be allowed by § 2031(c)(5). A failure to implement that agreement within a specified time will cause the imposition of an additional estate tax to recapture that deduction. The allocation of the benefits of the exclusion and of the deduction for making the agreement, and the allocation of any additional estate tax, is determined by this Section.

The allocation of the aggregate tax reduction obtained from all special elective benefits is made among the holders of interests in the specified properties in accordance with the reduction of the decedent's taxable estate that is attributable to each holder's interest. Since the determination of the amount of estate tax benefit is made by applying the marginal rate of estate tax to the reduced value of the gross estate, it is necessary to aggregate the tax reduction obtained from all of the special election benefits so that the greater tax reduction obtained from using a marginal rate is not duplicated by applying that rate to several distinct reductions.

Once the amount of estate tax that is apportioned to the holder of an interest

in specified property is determined, it will have to be paid. The holders of interests in a specified property may have difficulty paying that tax. To pay the tax, the holders will have to sell the property, borrow against it, use other funds to pay the tax, or defer the payment of the tax under tax deferral provisions and pay the tax in installments with income produced by the property. If they were to sell the property, the special elective benefit would be lost; so a sale is not a viable option. Accordingly, the requirement of Sections 3-9A-103(b)(3), 3-9A-104(4), and 3-9A-106(b) that the estate tax or an advanced tax be paid from the principal of property subject to a time-limited interest does not apply to properties for which an election for a special elective benefit is made. The solution chosen in Section 3-9A-106(c) and (e) of having other persons interested in the apportionable estate pay the tax and then collect reimbursement from distributees of the property is not practical here because there would be difficulty in determining what income was derived from the property itself, and there would be no trustee or other fiduciary to see that the amounts were turned over to the persons who paid the tax. So, that approach was not adopted. Instead, Sections 3-9A-104(1) and this section apportion the estate tax to the holders of the interests in the properties who, facing the obligation to pay, can determine the best method for obtaining the funds to make that payment.

If additional estate taxes are imposed to recapture some or all of a special elective benefit, Section 3-9A-107 follows the allocation of liability imposed by the estate tax law that generated the additional tax. The burden of the additional estate tax will be borne by the persons who hold interests in the specified property at the time that the additional tax payment is made, and those persons may not be the same ones who held the specified property when the special elective benefit was allowed and so derived the benefit of that election.

Section 3-9A-108. Securing Payment Of Estate Tax From Property In Possession Of Fiduciary

(a) A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

(b) A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

(c) As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee.

COMMENT

Section 3-9A-108 grants a fiduciary discretion either to retain funds or to require a distributee to provide security for payment of that distributee's share of the estate tax. The fiduciary's exercise of that discretion and use of retained properties are subject to the fiduciary's duty to treat the parties fairly.

Section 3-9A-109. Collection Of Estate Tax By Fiduciary

(a) A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by the person.

(b) Except as otherwise provided in Section 3-9A-106, any estate tax due from a person that cannot be collected from the person may be collected by the fiduciary from other persons in the following order of priority:

(1) any person having an interest in the apportionable estate which is not exonerated from the tax;

(2) any other person having an interest in the apportionable estate;

(3) any person having an interest in the gross estate.

(c) A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned to the property controlled by the ancillary personal representative.

(d) The total tax collected from a person pursuant to this Part may not exceed the value of the person's interest.

COMMENT

If a fiduciary is unable to collect from a person the estate tax apportioned to that person or to be advanced by that person, the fiduciary is authorized to collect the deficiency from any person interested in the apportionable estate whose interest is not exonerated from tax apportionment. The fiduciary is not obliged to collect the deficiency ratably from such persons. At the fiduciary's discretion, the fiduciary is authorized to collect all of the deficiency from one person or from several persons in any proportion that the fiduciary chooses. The reason that the fiduciary is not required to collect a deficiency ratably is that the payment of the estate tax should not be delayed because of difficulties in collecting from a number of persons.

If the amount collected from persons whose interests in the apportionable estate is not exonerated from tax apportionment is insufficient to make up the deficiency, the fiduciary can then collect any remaining deficiency from persons interested in the apportionable estate whose interests are exonerated from tax apportionment. This class excludes persons holding interests in property that qualified for a marital or charitable deduction since those interests are excluded from the apportionable estate. Again, the fiduciary is not required to collect the remaining deficiency ratably from the persons holding exonerated interests.

Finally, if the amount collected from persons holding exonerated interests is insufficient, the fiduciary can collect the balance from persons holding interests that qualify for a marital or charitable deduction. The fiduciary is not required to make that collection ratably.

Anyone who pays more than his share of an estate tax or an advanced tax has a ratable right of reimbursement from those who did not pay their share. If requested, the fiduciary may assist in collecting that reimbursement.

Section 3-9A-110. Right Of Reimbursement

(a) A person required under Section 3-9A-109 to pay an estate tax greater than the amount due from the person under Section 3-9A-103 or 3-9A-104 has a right to reimbursement from another person to the extent that the other person has not paid the tax required by Section 3-9A-103 or 3-9A-104 and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under Section 3-9A-109(b).

(b) A fiduciary may enforce the right of reimbursement under subsection (a) on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if requested by the person.

COMMENT

The UETAA does not include a provision for interest on the collection of a reimbursement, and the question of whether interest will be payable is left to the courts to decide.

Section 3-9A-111. Action To Determine Or Enforce Part.

A fiduciary, transferee, or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and enforce this Part.

Section 3-9A-112. [Reserved.]

Section 3-9A-113. [Reserved.]

Section 3-9A-114. Delayed Application

(a) Sections 3-9A-103 through 3-9A-107 do not apply to the estate of a decedent who dies on or within [three] years after [the effective date of this Part], nor to the estate of a decedent who dies more than [three] years after [the effective date of this Part] if the decedent continuously lacked testamentary capacity from the expiration of the [three-year] period until the date of death.

(b) For the estate of a decedent who dies on or after [the effective date of this Part] to which Sections 3-9A-103 through 3-9A-107 do not apply, estate taxes must be apportioned pursuant to the law in effect immediately before [the effective date of this Part].

COMMENT

Testamentary capacity was chosen as the standard for determining whether the preclusion for applying the UETAA's apportionment rules is extended beyond the statutory period despite the fact that a different standard is employed to determine whether a person has the capacity to execute non-testamentary instruments. Testamentary capacity is employed in the UETAA because it has a well established meaning and will provide a uniform standard. See Restatement (Third) of Property: Wills and Other Donative Transfers, Section 8.1 (2003).

Section 3-9A-115. Effective Date.

This Part takes effect…

PART 10

CLOSING ESTATES

Section 3-1001. Formal Proceedings Terminating Administration; Testate or Intestate; Order of General Protection.

(a) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the Court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the Court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

(b) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the Court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to

probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

COMMENT

Subsection (b) is derived from § 64(b) of the Illinois Probate Act (1967) [S.H.A. ch. 3, § 64(b)]. Section 3-106 specifies that an order is binding as to all who are given notice even though less than all interested persons were notified. This section provides a method of curing an oversight in regard to notice which may come to light before the estate is finally settled. If the person who failed to receive notice of the earlier proceeding succeeds in obtaining entry of a different order from that previously made, others who received notice of the earlier proceeding may be benefitted. Still, they are not entitled to notice of the curative proceeding, nor should they be permitted to appear.

See, also, Comment following section 3-1002.

Section 3-1002. Formal Proceedings Terminating Testate Administration; Order Construing Will Without Adjudicating Testacy.

A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year, from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the Court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the Court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of Section 3-1001.

COMMENT

Section 3-1002 permits a final determination of the rights between each other and against the personal representative of the devisees under a will when there has been no formal proceeding in regard to testacy. Hence, the heirs in intestacy need not be made parties. Section 3-1001 permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate. If supervised administration is used, Section 3-505 directs that the estate be closed by use of procedures like those

described in Section 3-1001. Of course, testacy will have been adjudicated before time for the closing proceeding if supervised administration is used.

Section 3-1003. Closing Estates; By Sworn Statement of Personal Representative.

(a) Unless prohibited by order of the Court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than six months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representatives or a previous personal representative, has:

(1) determined that the time limited for presentation of creditors' claims has expired.

(2) fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement must state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or state in detail other arrangements that have been made to accommodate outstanding liabilities; and

(3) sent a copy of the statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the personal representative's administration to the distributees whose interests are affected thereby.

(b) If no proceedings involving the personal representative are pending in the Court one year after the closing statement is filed, the appointment of the personal representative terminates.

COMMENT

The Code uses "termination" to refer to events which end a personal representative's authority. *See* Sections 3-608, et seq. The word "closing" refers to circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up. If the affairs of the personal representative are reviewed and adjudicated under either Sections 3-1001 or 3-1002, the judicial conclusion that the estate is wound up serves also to terminate the personal representative's authority. *See* Section 3-610(b). On the other hand, a "closing" statement under 3-1003 is only an affirmation by the personal representative that he believes the affairs of the estate to be completed. The statement is significant because it reflects that assets have been distributed. Any creditor whose claim has not been barred and

who has not been paid is permitted by Section 3-1004 to assert his claim against distributees. The personal representative is also still fully subject to suit under Sections 3-602 and 3-608, for his authority is not "terminated" under Section 3-610(a) until one year after a closing statement is filed. Even if his authority is "terminated," he remains liable to suit unless protected by limitation or unless an adjudication settling his accounts is the reason for "termination". *See* Sections 3-1005 and 3-608.

From a slightly different viewpoint, a personal representative may obtain a complete discharge of his fiduciary obligations through a judicial proceeding after notice. Sections 3-1001 and 3-1002 describe two proceedings which enable a personal representative to gain protection from all persons or from devisees only. A personal representative who neither obtains a judicial order of protection nor files a closing statement, is protected by 3-703 in regard to acts or distributions which were authorized when done but which become doubtful thereafter because of a change in testacy status. On the other questions, the personal representative who does not take any of the steps described by the Code to gain more protection, has no protection against later claims of breach of his fiduciary obligation other than any arising from consent or waiver of individual distributees who may have bound themselves by receipts given to the personal representative.

This section increases the prospects of full discharge of a personal representative who uses the closing statement route over those of a personal representative who relies on receipts. Full protection follows from the running of the six months limitations period described in 3-1005. But, 3-1005's protection does not prevent distributees from claiming lack of full disclosure. Hence, it offers little more protection than a receipt. Still, it may be useful to decrease the likelihood of later claim of non-disclosure. Its more significant function, however, is to provide a means for terminating the office of personal representative in a way that will be obvious to third persons.

In 1989 the Joint Editorial Board recommended changing subparagraph (a)(1) to make the time reference correspond to changes recommended for Section 3-803.

Section 3-1004. Liability of Distributees to Claimants.

After assets of an estate have been distributed and subject to Section 3-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property, homestead or family allowances, or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

COMMENT

This section creates a ceiling on the liability of a distributee of "the value of his distribution" as of the time of distribution. The section indicates that

each distributee is liable for all that a claimant may prove to be due, provided the claim does not exceed the value of the defendant's distribution from the estate. But, each distributee may preserve a right of contribution against other distributees. The risk of insolvency of one or more, but less than all distributees is on the distributee rather than on the claimant.

In 1975, the Joint Editorial Board recommended the addition, after "claimants for amounts" in the second sentence, of "received as exempt property, homestead or family allowances, or for amounts . . ." The purpose of the addition was to prevent unpaid creditors of a decedent from attempting to enforce their claims against a spouse or child who had received a distribution of exempt values.

Section 3-1005. Limitations on Proceedings Against Personal Representative.

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within 6 months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

COMMENT

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternative remedies when an estate has been distributed subject to his claim. Under this section, he has six months to prosecute an action against the personal representative if the latter breached any duty to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of Section 3-807. The preceding section describes the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees, gains no protection from the period described here. A personal representative may, however, use Section 3-1001, or, where appropriate, 3-1002 to secure greater protection.

Section 3-1006. Limitations on Actions and Proceedings Against Distributees.

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of a claimant to recover from a distributee who is liable to pay the claim, and the right of an heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or its value from any distributee is forever barred at the later of three years after the decedent's death or one year after the time of its distribution thereof, but all claims of creditors of the decedent, are barred one year after the decedent's death.

This section does not bar an action to recover property or value received as a result of fraud.

COMMENT

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section 3-108 imposes a general limit of three years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of 3-108 may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. *See* Section 3-412. (3) The limitation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in Sections 3-1005 and 3-1008. If there have been no adjudications under Section 3-409, or possibly 3-1001 or 3-1002, estate of the decedent which is discovered after administration has been closed may be the subject of different distribution than that attending the estate originally administered.

The last sentence excepting actions or suits to recover property kept from one by the fraud of another may be unnecessary in view of the blanket provision concerning fraud in Article I. *See* Section 1-106.

In 1989, the Joint Editorial Board recommended changing the section so as to separate proceedings involving claims by claimants barred one year after decedent's death by Section 3-803(a)(1), and other proceedings by unbarred claimants or by omitted heirs or devisees.

Section 3-1007. Certificate Discharging Liens Securing Fiduciary Performance.

After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the Registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

COMMENT

This section does not affect the liability of the personal representative, or of any surety, but merely permits a release of security given by a personal representative, or his surety, when, from the passage of time and other conditions, it seems highly unlikely that there will be any liability remaining undischarged. *See* Section 3-607.

Section 3-1008. Subsequent Administration.

If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, the Court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the Court orders otherwise, the provisions of this Code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

COMMENT

This section is consistent with Section 3-108 which provides a general period of limitations of three years from death for appointment proceedings, but makes appropriate exception for subsequent administration.

PART 11

COMPROMISE OF CONTROVERSIES

Section 3-1101. Effect of Approval of Agreements Involving Trusts, Inalienable Interests, or Interests of Third Persons.

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any governing instrument, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the Court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

COMMENT

1993 technical amendments to this and the following section clarified original intention that the described procedure would be available to resolve controversies other than those concerning a will.

Section 3-1102. Procedure for Securing Court Approval of Compromise.

The procedure for securing Court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise.

Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative, if any, or a trustee, then may submit the agreement to the Court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) After notice to all interested persons or their representatives, including the personal representative of any estate and all affected trustees of trusts, the Court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

COMMENT

This section and the one preceding it outline a procedure which may be initiated by competent parties having beneficial interests in a decedent's estate as a means of resolving controversy concerning the estate. If all competent persons with beneficial interests or claims which might be affected by the proposal and parents *properly* representing interests of their children concur, a settlement scheme differing from that otherwise governing the devolution may be substituted. The procedure for securing representation of minors and unknown or missing persons with interests must be followed. *See* Section 1-403. The ultimate control of the question of whether the substitute proposal shall be accepted is with the Court which must find: "that the contest or controversy is in good faith and that the effect of the agreement upon the interests of parties represented by fiduciaries is just and reasonable."

The thrust of the procedure is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, and to prevent executors and testamentary trustees from vetoing any such proposal. The only reason for approving a scheme of devolution which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation. Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out testator's intention, the judgment of the Court is substituted for that of such fiduciaries in appropriate cases. A controversy which the Court may find to be in good faith, as well as concurrence of all beneficially interested and competent persons and parent-representatives provide prerequisites which should prevent the procedure from being abused. Thus, the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan.

See Section 1-403 for rules governing representatives and appointment of guardians ad litem.

These sections are modeled after Section 93 of the Model Probate Code. Comparable legislative provisions have proved quite useful in Michigan. *See* M.C.L.A. §§ 702.45-702.49.

PART 12

COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

GENERAL COMMENT

The four sections which follow include two designed to facilitate transfer of small estates without use of a personal representative, and two designed to simplify the duties of a personal representative, who is appointed to handle a small estate.

The Flexible System of Administration described by earlier portions of Article III lends itself well to situations involving small estates. Letters may be obtained quickly without notice or judicial involvement. Immediately, the personal representative is in a position to distribute to successors whose deeds or transfers will protect purchasers. This route accommodates the need for quick and inexpensive transfers of land of small value as well as other assets. Consequently, it was unnecessary to frame complex provisions extending the affidavit procedures to land.

Indeed, transfers via letters of administration may prove to be less troublesome than use of the affidavit procedure. Still, it seemed desirable to provide a quick collection mechanism which avoids all necessity to visit the probate Court. For one thing, unpredictable local variations in probate practice may produce situations where the alternative procedure will be very useful. For another, the provision of alternatives is in line with the overall philosophy of Article III to provide maximum flexibility.

Figures gleaned from a recent authoritative report of a major survey of probated estates in Cleveland, Ohio, demonstrate that more than one-half of all estates in probate had a gross value of less than $15,000. This means that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate sized estates. Here is the area where probate affects most people.

Section 3-1201. Collection of Personal Property by Affidavit.

(a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the

successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed $5,000;

(2) 30 days have elapsed since the death of the decedent;

(3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(4) the claiming successor is entitled to payment or delivery of the property.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

COMMENT

This section provides for an easy method for collecting the personal property of a decedent by affidavit prior to any formal disposition. Existing legislation generally permits the surviving widow or children to collect wages and other small amounts of liquid funds. Section 3-1201 goes further in that it allows the collection of personal property as well as money and permits any devisee or heir to make the collection. Since the appointment of a personal representative may be obtained easily under the Code, it is unnecessary to make the provisions regarding small estates applicable to realty.

Section 3-1202. Effect of Affidavit.

The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

COMMENT

Sections 3-1201 and 3-1202 apply to any personal property located in this state whether or not the decedent died domiciled in this state, to any successor to

personal property located in this state whether or not a resident of this state, and, to the extent that the laws of this state may control the succession to personal property, to personal property wherever located of a decedent who died domiciled in this state.

Section 3-1203. Small Estates; Summary Administration Procedure.

If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 3-1204.

COMMENT

This section makes it possible for the personal representative to make a summary distribution of a small estate without the necessity of giving notice to creditors. Since the probate estate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates.

Section 3-1204. Small Estates; Closing by Sworn Statement of Personal Representative.

(a) Unless prohibited by order of the Court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of Section 3-1203 by filing with the Court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent;

(2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(3) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(b) If no actions or proceedings involving the personal representative are pending in the Court one year after the closing statement is filed, the appointment of the personal representative terminates.

(c) A closing statement filed under this section has the same effect as one filed under Section 3-1003.

COMMENT

The personal representative may elect to close the estate under Section 3-1002 in order to secure the greater protection offered by that procedure.

The remedies for fraudulent statement provided in Section 1-106 of course would apply to any intentional misstatements by a personal representative.

ARTICLE IV

FOREIGN PERSONAL REPRESENTATIVES; ANCILLARY ADMINISTRATION

PART 1

DEFINITIONS

Section
4-101. Definitions.

PART 2

POWERS OF FOREIGN PERSONAL REPRESENTATIVES

Section
4-201. Payment of Debt and Delivery of Property to Domiciliary Foreign Personal Representative Without Local Administration.
4-202. Payment or Delivery Discharges.
4-203. Resident Creditor Notice.
4-204. Proof of Authority-Bond.
4-205. Powers.
4-206. Power of Representatives in Transition.
4-207. Ancillary and Other Local Administrations; Provisions Governing

PART 3

JURISDICTION OVER FOREIGN REPRESENTATIVES

Section
4-301. Jurisdiction by Act of Foreign Personal Representative.
4-302. Jurisdiction by Act of Decedent.
4-303. Service on Foreign Personal Representative.

PART 4

JUDGMENTS AND PERSONAL REPRESENTATIVE

Section
4-401. Effect of Adjudication For or Against Personal Representative.

GENERAL COMMENT

This Article concerns the law applicable in estate problems which involve more than a single state. It covers the powers and responsibilities in the adopting state of personal representatives appointed in other states.

Some provisions of the Code covering local appointment of personal representatives for non-residents appear in Article III. These include the following: 3-201 (venue), 3-202 (resolution of conflicting claims regarding domicile), 3-203 (priority as

personal representative of representative previously appointed at domicile), 3-307(a) (30 days delay required before appointment of a local representative for a non-resident), 3-803(a) (claims barred by non-claim at domicile before local administration commenced are barred locally) and 3-815 (duty of personal representative in regard to claims where estate is being administered in more than one state. *See also* 3-308, 3-611(a) and 3-816. *Also, see* Section 4-207.

The recognition provisions contained in Article IV and the various provisions of Article III which relate to administration of estates of non-residents are designed to coerce respect for domiciliary procedures and administrative acts to the extent possible.

The first part of Article IV contains some definitions of particular relevance to estates located in two or more states.

The second part of Article IV deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. First, a foreign personal representative has the power under Section 4-201 to receive payments of debts owed to the decedent or to accept delivery of property belonging to the decedent. The foreign personal representative provides an affidavit indicating the date of death of the non-resident decedent, that no local administration has been commenced and that the foreign personal representative is entitled to payment or delivery. Payment under this provision can be made any time more than 60 days after the death of the decedent. When made in good faith the payment operates as a discharge of the debtor. A protection for local creditors of the decedent is provided in Section 4-203, under which local debtors of the non-resident decedent can be notified of the claims which local creditors have against the estate. This notification will prevent payment under this provision.

A second type of power is provided in Sections 4-204 to 4-206. Under these provisions a foreign personal representative can file with the appropriate Court a copy of his appointment and official bond if he has one. Upon so filing, the foreign personal representative has all of the powers of a personal representative appointed by the local Court. This would be all of the powers provided for in an unsupervised administration as provided in Article III of the Code.

The third type of power which may be obtained by a foreign personal representative is conferred by the priority the domiciliary personal representative enjoys in respect to local appointment. This is covered by Section 3-203. *Also, see* Section 3.611(b).

Part 3 provides for power in the local Court over foreign personal representatives who act locally. If a local or ancillary administration has been started, provisions in Article III subject the appointee to the power of the Court. *See* Section 3-602. In Part 3 of this Article, it is provided that a foreign personal representative submits himself to the jurisdiction of the local Court by filing a copy of his appointment to get the powers provided in Section 4-205 or by doing any act which would give the state jurisdiction over him as an individual. In addition, the collection of funds as provided in Section 4-201 gives the Court quasi-in-rem jurisdiction over the foreign personal representative to the extent of the funds collected.

Finally, Section 4-303 provides that the foreign personal representative is subject to the jurisdiction of the local Court "to the same extent that his decedent was subject

to jurisdiction immediately prior to death." This is similar to the typical non-resident motorist provision that provides for jurisdiction over the personal representative of a deceased non-resident motorist, *see* Note, 44 Iowa L. Rev. 384 (1959). It is, however, a much broader provision. Section 4-304 provides for the mechanical steps to be taken in serving the foreign personal representatives.

Part 4 of the Article deals with the res judicata effect to be given adjudications for or against a foreign personal representative. Any such adjudication is to be conclusive on a local personal representative "unless it resulted from fraud or collusion . . . to the prejudice of the estate." This provision must be read with Section 3-408 which deals with certain out-of-state findings concerning a decedent's estate.

PART 1

DEFINITIONS

Section 4-101. Definitions.

In this Article:

(1) "local administration" means administration by a personal representative appointed in this state pursuant to appointment proceedings described in Article III.

(2) "local personal representative" includes any personal representative appointed in this State pursuant to appointment proceedings described in Article III and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to Section 4-205.

(3) "resident creditor" means a person domiciled in, or doing business in this State, who is, or could be, a claimant against an estate of a non-resident decedent.

COMMENT

Section 1-201 includes definitions of "foreign personal representative", "personal representative" and "non-resident decedent".

PART 2

POWERS OF FOREIGN PERSONAL REPRESENTATIVES

Section 4-201. Payment of Debt and Delivery of Propertyto Domiciliary Foreign Personal Representative Without Local Administration.

At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident

decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

(1) the date of the death of the nonresident decedent,

(2) that no local administration, or application or petition therefor, is pending in this state,

(3) that the domiciliary foreign personal representative is entitled to payment or delivery.

COMMENT

Section 3-201(d) refers to the location of tangible personal estate and intangible personal estate which may be evidenced by an instrument. The instant section includes both categories. Transfer of securities is not covered by this section since that is adequately covered by Section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers.

Section 4-202. Payment or Delivery Discharges.

Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

Section 4-203. Resident Creditor Notice.

Payment or delivery under Section 4-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

COMMENT

Similar to provision in Colorado Revised Statute, 153-6-9.

Section 4-204. Proof of Authority-Bond.

If no local administration or application or petition therefor is pending

in this state, a domiciliary foreign personal representative may file with a Court in this State in a [county] in which property belonging to the decedent is located, authenticated copies of his appointment and of any official bond he has given.

Section 4-205. Powers.

A domiciliary foreign personal representative who has complied with Section 4-204 may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally.

Section 4-206. Power of Representatives in Transition.

The power of a domiciliary foreign personal representative under Section 4-201 or 4-205 shall be exercised only if there is no administration or application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under Section 4-205, but the local Court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state.

Section 4-207. Ancillary and Other Local Administrations; Provisions Governing.

In respect to a nonresident decedent, the provisions of Article III of this Code govern: (1) proceedings, if any, in a Court of this state for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties and liabilities of any local personal representative and the rights of claimants, purchasers, distributees and others in regard to a local administration.

COMMENT

The purpose of this section is to direct attention to Article III for sections controlling local probates and administrations. See in particular, 1-301, 3-201, 3-202, 3-203, 3-307(a), 3-308, 3-611(b), 3-803(a), 3-815 and 3-816.

PART 3

JURISDICTION OVER FOREIGN REPRESENTATIVES

Section 4-301. Jurisdiction by Act of Foreign Personal Representative.

A foreign personal representative submits personally to the jurisdiction of the Courts of this state in any proceeding relating to the estate by (1) filing authenticated copies of his appointment as provided in Section 4-204, (2) receiving payment of money or taking delivery of personal property under Section 4-201, or (3) doing any act as a personal representative in this state which would have given the state jurisdiction over him as an individual. Jurisdiction under (2) is limited to the money or value of personal property collected.

COMMENT

The words "courts of this state" are sufficient under federal legislation to include a federal court having jurisdiction in the adopting state.

A foreign personal representative appointed at the decedent's domicile has priority for appointment in any local administration proceeding. *See* Section 3-203(g). Once appointed, a local personal representative remains subject to the jurisdiction of the appointing Court under Section 3-602.

In 1975, the Joint Editorial Board recommended substitution of the word "personally" for "himself", in the preliminary language of the first sentence. Also, language restricting the submission to jurisdiction to cases involving the estate was added in 1975.

Section 4-302. Jurisdiction by Act of Decedent.

In addition to jurisdiction conferred by Section 4-301, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.

Section 4-303. Service on Foreign Personal Representative.

(a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(b) If service is made upon a foreign personal representative as provided

in subsection (a), he shall be allowed at least [30] days within which to appear or respond.

COMMENT

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec. 51.3(c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5(c) (rural delivery) and (d) (star route delivery.)

PART 4

JUDGMENTS AND PERSONAL REPRESENTATIVES

Section 4-401. Effect of Adjudication For or Against Personal Representative.

An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication.

COMMENT

Adapted from Uniform Ancillary Administration of Estates Act, Section 8.

ARTICLE V

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

PART 1

GENERAL PROVISIONS

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5-101. Short Title.
5-102. Definitions.
5-103. [Reserved].
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5-113. Notice.
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PART 2

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5-206. Judicial Appointment of Guardian: Priority of Minor's Nominee; Limited Guardianship.
5-207. Duties of Guardian.
5-208. Powers of Guardian.
5-209. Rights and Immunities of Guardian.
5-210. Termination of Guardianship; Other Proceedings After Appointment.

PART 3

GUARDIANSHIP OF INCAPACITATED PERSON

Section

5-301. Appointment and Status of Guardian.
5-302. Appointment of Guardian By Will or Other Writing.
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Acceptance; Confirmation.
5-304. Judicial Appointment of Guardian: Petition.
5-305. udicial Appointment of Guardian: Preliminaries to Hearing.
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The following free-standing Acts are associated with Article V:

Uniform Guardianship and Protective Proceedings Act (1997)

Article V, Parts 1 through 4, have also been adopted as the Uniform Guardianship and Protective Proceedings Act (1997).

Uniform Durable Power of Attorney Act

Article V, Part 5, has also been adopted as the Uniform Durable Power of Attorney Act.

Adoption of Uniform Guardianship and Protective Proceedings Act (1997)

Reproduced in Parts 1-4 of this article is the Uniform Guardianship and Protective Proceedings Act (1997), which replaces the 1982 Act of the same name. Similar to the 1982 Act, the 1997 revision can be enacted either as a free-standing act or as part of the Uniform Probate Code.

Approval of the 1997 Act necessitated technical amendments elsewhere in the UPC, consisting of correction of definitions and cross-references. The following sections were amended: 1-201, 3-303, 3-308, and 3-915.

In addition, UGPPA (1997) Sections 103 (Supplemental General Principles of Law Applicable) and 109 (Practice in Court) are not incorporated into the UPC because they duplicate provisions in UPC Article 1. To preserve comparable numbering of sections between UPGGA (1997) and the UPC, UPC Sections 5-103 and 5-109 are titled "Reserved."

PREFATORY NOTE TO PARTS 1-4

The topics covered in UPC Article V, Parts 1-4 include minors' guardianships, adults' guardianships, and conservatorships of both minors and adults. Part 1 contains definitions and general provisions applicable to both guardianships and conservatorships, including provisions that relate to the office of guardian and conservator and to the jurisdiction of the courts, many of which were previously scattered throughout Article V. Part 2 contains provisions on guardianships for minors, whether by the court or the parent. Part 3 contains provisions for guardianships for incapacitated persons, who will most often be adults, but who may also be minors whose need for guardianship is unrelated to their age. Part 4 covers conservatorships and other protective arrangements for both minors and adults, including the procedures for appointment of conservators and the process for implementing a protective arrangement.

The Code's provisions on guardianship and conservatorship codified in Parts 1-4 of this article are copied from the 1997 revision of the Uniform Guardianship and Protective Proceedings Act (UGPPA). These provisions replace the 1982 UGPPA, which in turn replaced the guardianship and protective provisions of the original UPC.

The 1997 revisions were precipitated by a two year study by the A.B.A. Senior Lawyers Division Task Force on Guardianship Reform. The Task Force consisted of representatives not only of the Senior Lawyers Division, but also of other A.B.A. entities, including the Real Property Probate and Trust Law Section and the Commissions on Legal Problems of the Elderly and Mental and Physical Disability Law, as well as a variety of other groups interested in guardianship, such as AARP and the National Senior Citizens Law Center. The Task Force generated a report that served as the starting point for the redrafting of the Uniform Guardianship and Protective Proceedings Act. The drafting committee of the Uniform Law Commissioners began the drafting of the revision in 1995. The revised Act was approved at the 1997 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, with amendments to the provisions on appointment of counsel approved at the 1998 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, and subsequently approved by the A.B.A. House of Delegates at its 1998 annual meeting. The National Conference, at its 1998 Annual Meeting, also approved the 1997 Act for integration into the UPC.

Significant developments in the areas of guardianship and conservatorship occurred in the late 1980s and early 1990s, as states revised their guardianship and conservatorship statutes. The 1982 UGPPA, with its emphasis on limited guardianship and conservatorship, was groundbreaking in its support of autonomy. The 1997 revision builds on this and on developments occurring in the states, by providing that guardianship and conservatorship should be viewed as a last resort, that limited guardianships or conservatorships should be used whenever possible, and that the guardian or conservator should consult with the ward or protected person, to the extent feasible, when making decisions.

The 1997 revision makes other substantial changes. The following discussion summarizes those of most significance.

The 1997 revision bases the definition of incapacitated person on functional abilities, recognizing that a person may have the capacity to do some things while needing help with others. Before a guardian may be appointed for an adult or a minor for reasons other than age, the individual must be determined to be incapacitated, that is, the individual must be "unable to receive and evaluate information or make or communicate decisions to such an extent that the

individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." Section 5-102(4)). If assistive technology is available that may enable the individual to receive and evaluate information or to make or communicate decisions, then the individual may not be an "incapacitated person."

A parent or spouse may appoint a guardian to take office immediately upon the need. Parts 2 and 3 contain provisions for a parental or spousal appointment of a "standby" guardian: by a parent for a minor child under Part 2 and by a parent for an adult disabled child or by a spouse for an incapacitated spouse under Part 3. The addition of these provisions was spurred by the increasing number of single-parent families in the United States as well as by the recognition that adults are living longer and may need assistance in their later lives. The standby provisions are available in a wide variety of situations where there is a need for a guardian to step in immediately upon the occurrence of an event, without seeking prior court approval. The appointment may be used by all parents of minor children as well as for the spouse of an incapacitated adult or the parent of an adult disabled child.

A guardian or a conservator should be appointed only if there are no other lesser restrictive alternatives that will meet the respondent's needs. The Code encourages the use of alternatives to guardianship or conservatorship and views the appointment of a guardian or a conservator as a last resort. The court may not appoint a guardian for an incapacitated person unless the court makes a finding that the respondent's needs cannot be met by any less restrictive means. Section 5-311(a)(1)(B). The visitor appointed by the court to investigate the appropriateness of the guardianship or conservatorship requested for an adult, must investigate whether alternatives are available and report this to the court. Sections 5-305(e), 5-406(e).

Additionally, procedural steps are specified which must be met before a guardian for an incapacitated person or conservator may be appointed or a protective order entered. Specific information is required in the petition (Sections 5-304, 5-403), the respondent must be personally served with the notice of the hearing and the petition at least fourteen days in advance of the hearing and others must receive copies (Sections 5-113, 5-309, 5-404), and the court must appoint a visitor (Sections 5-305, 5-406). Enacting jurisdictions must choose between requiring counsel if requested by the respondent, recommended by the visitor, or if the court otherwise orders (Alternative 1 to Sections 5-305(b) and 5-406(b)), or requiring counsel for the respondent in all cases (Alternative 2 to Sections 5-305(b) and 5-406(b)). In guardianships, the court must order a professional evaluation of the respondent if the respondent requests one or the court determines one to be appropriate (Section 5-306), while in a conservatorship proceeding, the court may order a professional evaluation. Section 5-406(f). The respondent and proposed guardian or conservator must attend the hearing unless excused by the court for good cause. Sections 5-308(a),5-408(a).

The committee which drafted UGPPA (1997) preferred Alternative 1 to Sections 5-305(b) and 5-406(b). Under the committee's preferred process, a visitor is appointed in every proceeding for appointment of a guardian under Part 3, with counsel appointed on the respondent's request, the visitor's recommendation, or the court's determination that a counsel is needed. *See* Section 5-305. Concomitantly, in Part 4, a visitor is appointed in every case where a petition for appointment of conservator is filed and may be appointed when a protective arrangement is sought and the respondent is not already represented by counsel. *See* Section
5-406.

Alternative 2 for Sections 5-305(b) and 5-406(b) was included at the request of the American Bar Association (A.B.A.) Commission on Legal Problems of the Elderly.

Emphasized throughout Parts 1-4 of this article are the concepts of limited guardianship and limited conservatorship. Only when no alternative to guardianship or conservatorship is available should the court create a guardianship or conservatorship. Courts are directed to tailor the guardianship or conservatorship to fit the needs of the incapacitated person and only remove those rights that the incapacitated person no longer can exercise or manage. Sections 5-311(b), 5-409(b). If an unlimited guardianship or conservatorship is requested, the petition must state why a limited guardianship or conservatorship is not being sought. Sections 5-304(b)(8), 5-403(c)(3). The guardian or conservator must take the views of the ward or protected person into account when making decisions. The guardian must maintain sufficient contact with the ward so that the guardian knows of the capabilities, limitations, needs and opportunities of the ward (Sections 5-207(b)(1), 5-314(b)(1)). The guardian or conservator must encourage the ward or protected person to participate in decisions, to act on his or her own behalf, and to develop or regain capacity to manage personal or financial affairs. Sections 5-314(a), 5-418(b). The guardian must consider the ward's expressed desires and personal values when making decisions (Section 5-314(a)), while the conservator, in making decisions with respect to the protected person's estate plan, or the court, in deciding on a protective arrangement, must rely, when possible, on the decision the protected person would have made. Sections 5-411(c), 5-412(b).

The position of the drafting committee is that appointment of counsel should not be mandated in every guardianship under Part 3 or every conservatorship under Part 4. Alternative provisions are instead provided. Sections 5-305(b) and 5-406(b). The enacting jurisdiction must choose between requiring counsel only when requested by the respondent, recommended by the visitor, or otherwise ordered by the court, or requiring counsel for the respondent in all cases. The appointment of counsel is in addition to the requirement that a visitor be appointed, a requirement in all proceedings where a guardian for an incapacitated person is requested or where the appointment of a conservator is sought. (Sections 5-305(a) and 5-406(a)).

The burden of proof in establishing a guardianship or conservatorship is clear and convincing evidence (*see* Sections 5-311, 5-401) while the burden of proof for terminating a guardianship or conservatorship is prima facie evidence. *See* Sections 5-318(c), 5-431(d). This distinction was made in recognition that a guardianship or conservatorship, as vehicles that take away from individuals their rights, should require a higher burden of proof (and thus more protections) to establish than should be required to restore rights to an individual.

Monitoring of guardianships and conservatorships is critical. Guardians must present a written report to the court within thirty days of appointment and annually thereafter (Section 5-317), while the conservator is required to file a plan and an inventory with the court within sixty days of appointment and annual reports thereafter. Sections 5-418(c), 5-419, 5-420. Both the guardian and the conservator, in their reports, make recommendations as to whether the guardianship or conservatorship should be continued or modified. The court is required to establish a monitoring system. Sections 5-317(c), 5-420(d). The court may use visitors as part of the monitoring system. Sections 5-317(b), 5-420(c). Suggestions on what an effective monitoring system should contain can be

found in Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* (A.B.A. 1991).

PART 1

GENERAL PROVISIONS

Section 5-101 Short Title.

Parts 1-4 of this Article may be cited as the Uniform Guardianship and Protective Proceedings Act.

Section 5-102 Definitions.

In Parts 1-4 of this Article:

(1) "Conservator" means a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.

(2) "Court" means the [designate appropriate court].

(3) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

(4) "Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

(5) "Legal representative" includes a representative payee, a guardian or conservator acting for a respondent in this State or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, and an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.

(6) "Minor" means an unemancipated individual who has not attained [18] years of age.

(7) "Parent" means a parent whose parental rights have not been terminated.

(8) "Protected person" means a minor or other individual for whom a conservator has been appointed or other protective order has been made.

(9) "Respondent" means an individual for whom the appointment of a

guardian or conservator other protective order is sought.

(10) "Ward" means an individual for whom a guardian has been appointed.

COMMENT

The concepts of limited guardian and limited conservator embraced in this article are reflected in the definitions of “guardian” (see paragraph (3)) and “conservator” (see paragraph (1)).

While Part 4 authorizes the appointment of a conservator with limited powers, no provision is made for the appointment of an emergency or temporary conservator, a type of conservatorship usually denoting an appointment of limited duration. In situations where other statutes might permit the appointment of a temporary, emergency or special conservator, Part 4 instead allows the Court to appoint a “master.” *See* Sections 5-405(b), 5-406(g) and 5-412(c). This is a departure from the 1982 UGPPA, which provided for the appointment of special conservators, but not of temporary or emergency conservators. *See, e.g.,* UPC Section 5-408(c) (1982).

Like the 1982 UGPPA, the 1997 revision allows the appointment of a guardian by a parent or spouse by will or other signed writing, but subjects the appointment to significantly different requirements. *See* Sections 5-202 and 5-302. The definition of guardian (*see* paragraph (3)) includes a limited guardian, an emergency guardian, or a temporary substitute guardian. *See* Sections 5-204, 5-311, 5-312, and 5-313. There is a distinction between an emergency guardian and a temporary substitute guardian. *Compare* Sections 5-312 and 5-313. Guardian ad litem is specifically excluded from the definition of guardian, as a guardian ad litem is generally viewed as having a separate and limited role in the proceedings.

A finding that a person is an “incapacitated person” is required before a guardian may be appointed for reasons other than that the respondent is a minor. The definition of “incapacitated person” (*see* paragraph (4)) requires that the respondent have an inability to receive and evaluate information or to make or communicate decisions to the point that the person’s ability to care for his or her health, safety or self is compromised. This definition emphasizes the importance of functional assessment and recognizes that the more appropriate measure of a person’s incapacity is a measurement of the person’s abilities. Like other areas of the law where the concept of capacity is used, the required incapacity for the appointment of a guardian is no longer considered an all or nothing proposition but instead it is recognized as having varying degrees. This definition is designed to work with the concepts of least restrictive alternative and limited guardianship or conservatorship-only removing those rights that the incapacitated person cannot exercise, and not establishing a guardianship or conservatorship if a lesser restrictive alternative exists. *See* Sections 5-311 and 5-409 for examples. These concepts are carried throughout the article.

The definition of incapacitated person differs significantly from the definition in the 1982 UGPPA. The requirement that the person be unable to make “responsible” decisions is deleted, as is the requirement that the person have an impairment by reason of a specified disability or other cause, a requirement which may have led the trier of fact to focus unduly on the type of the respondent’s disabling condition, as opposed to the respondent’s actual ability to function. The revised definition is based on recommendations of the 1988

Wingspread conference on guardianship reform, the report of which should be referred to for additional background. *See Guardianship: An Agenda For Reform* 15 (A.B.A. 1989). *See also* Stephen J. Anderer, *Determining Competency in Guardianship Proceedings* (A.B.A. 1990). Courts seeking guidance on particular factors to consider should also consult the California Due Process in Competency Determination Act, California Probate Code Section 811.

The definition of "legal representative" (*see* paragraph (5)) expands beyond the traditional lawyer to include as well those who act in a legally recognized representative capacity, such as a representative payee, trustee, custodian, and agent, as well as those who hold Court appointments, such as the traditional guardian and conservator. This definition serves to identify those persons who must receive notice of both guardianship and protective proceedings, the lawyer, if any, as well as those others holding nominated positions. *See* Sections 5-304, 5-403.

The definition of "minor" (paragraph (6)) excludes a minor who has been emancipated. The effect of this definition is to preclude the appointment of either a guardian or conservator for an emancipated minor unless the appointment is made for reasons other than the minor's age. A guardianship or conservatorship for a minor also terminates upon the minor's emancipation. *See* Sections 5-210, 5-431. Under the 1982 UGPPA, the appointment of a guardian terminated upon the minor's marriage but not other emancipation, and the appointment of a conservator could continue until the minor attained age 21, without regard to marriage or other emancipating event.

The drafters of the 1997 revision intentionally chose not to define parent (other than as those whose parental rights have not been terminated), instead leaving the definition up to the enacting state's probate code. Thus, the definition of "parent" (see paragraph (7)) may or may not include a step-parent. A parent whose parental rights have been terminated, however, is not a parent as so defined even if the parent is allowed to inherit from the child under the enacting state's probate code. Because such a parent has been found to be unfit, the parent is denied a continued role in determining the child's custody, including the appointment of a guardian, whether by parental or Court appointment. *See* Sections 5-202, 5-204, 5-205 and 5-403.

The person who is the subject of a proceeding is referred to as the "respondent." *See* paragraph (9). Once a guardianship is established, the incapacitated person or minor is referred to as the "ward." *See* paragraph (10). Once the conservatorship is established or other protective order entered, the respondent who was the subject of the proceeding is referred to as the "protected person." *See* paragraph (8). A person for whom a guardian and a conservator has been appointed or other protective order made is both a ward and a protected person.

Section 5-103. [**Reserved.**]

COMMENT

Section 103 of the 1997 UGPPA, which is titled "Supplemental General Principles of Law Applicable," is identical to Section 1-103 of this Code and therefore need not be duplicated here. Section 1-103 provides in its entirety, " Unless displaced by the particular provisions of this Code, the principles of law and

equity supplement its provisions." The Section is marked as reserved in order to preserve the comparable numbering of sections between the UGPPA and Parts 1-4 of this article.

Section 5-104. Facility Of Transfer.

(a) Unless a person required to transfer money or personal property to a minor knows that a conservator has been appointed or that a proceeding for appointment of a conservator of the estate of the minor is pending, the person may do so, as to an amount or value not exceeding [$5,000] a year, by transferring it to:

(1) a person who has the care and custody of the minor and with whom the minor resides;

(2) a guardian of the minor;

(3) a custodian under the Uniform Transfers To Minors Act or custodial trustee under the Uniform Custodial Trust Act; or

(4) a financial institution as a deposit in an interest-bearing account or certificate in the sole name of the minor and giving notice of the deposit to the minor.

(b) A person who transfers money or property in compliance with this section is not responsible for its proper application.

(c) A guardian or other person who receives money or property for a minor under subsection (a)(1) or (2) may only apply it to the support, care, education, health, and welfare of the minor, and may not derive a personal financial benefit except for reimbursement for necessary expenses. Any excess must be preserved for the future support, care, education, health, and welfare of the minor, and any balance must be transferred to the minor upon emancipation or attaining majority.

COMMENT

When a minor annually receives from a specific payer property or cash of $5,000 or less, in all likelihood it will be expended for the ward's support within the year and it would be cumbersome and unnecessarily expensive to require the establishment of a conservatorship to handle the payments. This section allows the person required to transfer the property to do so in a more expeditious way.

The person required to transfer the property has the option of making the transfer to the person having care and custody of the minor when the minor resides with that person, or may instead make payments to the minor's guardian, a custodian under the Uniform Transfers to Minors Act or the custodial trustee under the Uniform Custodial Trust Act, or to a financial institution where an interest-bearing account or certificate in only the minor's name is located.

The protections of this section do not apply if the person required to make the transfer knows that a conservator has been appointed or that there is a

proceeding pending for the appointment of a conservator. Consequently, the fact that a guardian has been appointed does not require that payment be made to that guardian. A guardian of a minor may receive payments but has no power to compel payment from a third person. *See* Section 5-208. Should a guardian desire such authority, the appropriate course is for the guardian to petition the Court to be appointed as conservator.

Although the person making the transfer has no duty or obligation to see that the money or property is properly applied, this section is a default statute and does not override any specific provisions in a will or trust instrument relating to monies to be paid to a minor. In those cases, the duty of the person making the transfer would be dictated by the terms of the instrument. This section also does not override the provisions of other statutes in the enacting jurisdiction such as the Uniform Transfers to Minors Act, which allow payment by alternative means based on the size of the minor's estate, as opposed to this section, which allows payment based on the annual payment obligation of the person making the payment.

The section limits the use of the money or property to the minor's support, care, education, health or welfare. Only necessary expenses may be reimbursed from this money or property, with the balance being preserved for the minor's future education, health, support, care or welfare. This section is not applicable to child support payments made pursuant to a Court order because child support payments are made to another for the minor's benefit.

While a recipient of funds is not a fiduciary in the normally understood sense of a person appointed by the Court or by written instrument, a recipient under this section is subject to fiduciary obligations. Under subsection (c), the recipient may not derive any personal benefit from the transfer and must preserve funds not used for the minor's benefit and transfer any balance to the minor upon emancipation or attainment of majority. Should the recipient misapply the funds or property transferred, the recipient, given this fiduciary role, would be liable for breach of trust.

The person receiving the monies may consider, in appropriate cases, the purchase of an annuity or some other financial arrangement whereby payout occurs at a time subsequent to the minor's attainment of majority. But to provide more certainty for the transaction, the recipient should consider petitioning the Court under Section 5-412 for approval of the purchase as a protective arrangement.

This section is derived from the UGPPA (1982) Section 1-106 (UPC Section 5-101 (1982)).

Section 5-105. Delegation Of Power By Parent Or Guardian.

A parent or guardian of a minor or incapacitated person, by a power of attorney, may delegate to another person, for a period not exceeding six months, any power regarding care, custody, or property of the minor or ward, except the power to consent to marriage or adoption.

COMMENT

This section provides for a temporary delegation of powers by the parent or

guardian. This section does *not* create a guardianship or grant a parent powers not previously possessed – it merely allows delegation of the powers that the individual *already* has. Thus, the ability to make a delegation under this section may be quite limited for a divorced parent without day-to-day custody of a child and, depending on the state's other laws, may not exist at all for a parent of an adult child. But this section could be useful, for example, in other types of situations when a parent or a guardian becomes ill or has to be away from home for less than six months. The parent or guardian under this section could execute a power of attorney delegating to another some or all of the powers of the parent or guardian. For example, a single parent in the military who has to go on a tour of duty that will not exceed six months could use this section to grant a power of attorney relating to the care of the parent's minor children. Should the tour of duty exceed six months, the parent would then need to renew the power. Also, this section may be used when consent to emergency treatment is needed.

This section does not supersede the rights of persons, prior to their incapacity, to delegate powers relating to their own financial or health-care decisions. This section only authorizes the delegation of powers that are held by other persons, and then only powers held by parents or guardians.

In appropriate circumstances, a parent may wish to use a delegation under this section in lieu of a standby appointment of a guardian under Sections 5-202 and 5-302. Because no preconditions are imposed, a delegation under this section is easier to accomplish, although a renewal every six months will be required. A parent with a potential personal incapacity may conclude that it is better to secure the more permanent appointment of a guardian under Parts 2 or 3 rather than to rely on a temporary delegation to an agent under this section.

Although this section refers to a delegation of power over property, the application of this section to management of property is in fact quite limited. Parts 2 and 3 of this article grant a guardian only limited powers over a ward's property, and the powers of a parent are similarly restricted. Should it become necessary to secure powers over a minor's or ward's property, the appropriate step is to petition the Court for appointment of a conservator. In particular, this section does not grant a guardian appointed in the enacting jurisdiction authority to manage the property of a ward located in another state. A conservator would have such authority, however. *See* Sections 5-425(b)(1) and 5-433.

This provision is based on UGPPA (1982) Section 1-107 (UPC Section 5-102 (1982)).

Section 5-106. Subject-Matter Jurisdiction.

Parts 1-4 of this Article apply to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this State, protective proceedings for individuals domiciled in or having property located in this State, and property coming into the control of a guardian or conservator who is subject to the laws of this State.

COMMENT

This section provides a clear delineation of jurisdiction over guardianships and protective proceedings. Under the Act, jurisdiction over an individual's person is based on the person's domicile or person's physical location while jurisdiction over a person's property is based on the person's domicile or the property's location. Consequently, location of property alone does not grant a Court the authority to appoint a guardian for the person who owns the property. The person must also be domiciled or physically located in the jurisdiction. Nor does the physical location of a person alone grant the Court authority to appoint a conservator or enter another protective order. The person must also be domiciled in or have property located in the jurisdiction.

This section should be read in conjunction with Sections 5-107 and 5-108. Section 5-107 allows for transfer of jurisdiction to a Court in another state or foreign country, whether or not the Court in the other governmental unit originally had jurisdiction to appoint a guardian or conservator or make another protective order. Section 5-108, which contains the rules on venue, acts as a restraint on the expansive jurisdiction granted under this section. While the presence of property alone grants the Courts of a particular state the jurisdiction to appoint a conservator, should the respondent be a resident of a particular county within that state, only that county has authority to make the appointment. Also, while physical presence alone generally grants the Courts of a particular place jurisdiction to appoint a guardian, only the place where an incapacitated person permanently resides has authority to appoint a guardian on other than an emergency or temporary basis. Physical presence alone merely grants the Court of the person's location the authority to appoint an emergency or temporary guardian.

This section is pre-empted in part by the Parental Kidnaping Prevention Act (PKPA) which, despite its name, is a comprehensive federal statute regulating all types of interstate custody issues for minors, including appointment of guardians. Under PKPA, the Court supervising a minor's guardianship will normally lose jurisdiction six months after the minor's removal from the state, even if the Court was not consulted about the transfer. The federal statute, however, does not apply with respect to proceedings relating to property or to any proceeding involving an adult. For a discussion of the impact of PKPA and related legislation on minors' guardianships, *see* David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 Inst. on Est. Plan. ¶ 500 *et seq* (1995).

Section 5-107. Transfer Of Jurisdiction.

(a) After the appointment of a guardian or conservator entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another [county] in this State or to another State if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(b) If a guardianship or protective proceeding is pending in another state or foreign country and a petition for guardianship or protective proceeding is filed in a court in this State, the court in this State shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(c) A guardian, conservator, or like fiduciary appointed in another State

may petition the court for appointment as a guardian or conservator in this State if venue in this State is or will be established. The appointment may be made upon proof of appointment in the other State and presentation of a certified copy of the portion of the court record in the other State specified by the court in this State. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained 14 years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this Article were applicable. The court shall make the appointment in this State unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained 14 years of age, and to all persons given notice of the hearing on the petition.

COMMENT

This section is based on South Dakota Codified Laws Sections 29A-5-109 and 29A-5-114. This section sets out the process for transferring cases to another county, state, or foreign country and the procedures by which a case transferred in from another state or foreign country is to be received. In the case of a guardianship for a minor under Part 2, the Uniform Child Custody Jurisdiction and Enforcement Act should be consulted for additional rules on when a case may be transferred and the procedures to be used when more than one Court is involved in making these determinations.

This section, and Section 5-108, which addresses the appropriate venue for the appointment of a guardian or conservator, are designed to limit forum shopping in which some guardians and conservators have engaged and also assist the Courts in keeping track of guardianships and conservatorships. Some guardians and conservators have attempted to thwart a Court's authority by moving the ward or protected person to another county, state, or foreign country. The standard for transferring a guardianship or protective proceeding under this section is always the best interest of the ward or protected person.

The use of a best interest of the ward or protected person standard may be differentiated for adults and minors. When dealing with an adult, the personal values and current and past expressed desires of the ward or protected person should be considered. To the extent that these personal values and expressed desires are unknown, the guardian or conservator should make an effort to learn the ward's or protected person's values and ask about the ward's or protected person's desires. Considering the personal values and expressed desires of the ward or protected person is also a priority for decision making by guardians and conservators in general. *See* Sections 5-314(a), 5-411(c), and 5-418(b).

Once the guardianship is established, the Court does not lose jurisdiction because of a change in location of the guardian or the ward. *See* Sections 5-201 and 5-301.

In the case of intra-state transfer of proceedings, transfers should be made only when the best interest of the ward or protected person will be advanced,

and care should be used by the Court to determine that this is not an attempt to secure more favorable venue for other reasons. Under subsection (a), Courts should be particularly cognizant in minors' guardianships of attempts to use such transfers to circumvent school district assignments or tuition payment rules.

When a guardianship or protective proceeding is started in one state and a guardianship or conservatorship already exists in another state, the Courts from those two states should communicate with each other. For purposes of subsection (b), the original Court is the Court where the petition is first filed, not necessarily where the appointment was first made. The second Court, only after consultation with the first Court, should take or decline jurisdiction only if doing so is in the best interest of the ward or protected person. The burden is on the second Court to contact the original Court because the second Court would be informed of the existence of the guardianship or conservatorship as well as the contents of the petition and have access to other information of which the original Court most likely would be unaware. In making this determination, the second Court would ordinarily grant deference to the determination of the original Court, but the granting of such deference is not specifically required by this section nor should such deference be given when the determination of the original Court is clearly contrary to the current best interest of the ward or protected person.

Should a transfer of jurisdiction be appropriate, subsection (c) provides a simplified procedure for transferring the case. The subsection assumes that the appointment in the prior jurisdiction is appropriate and that there is consequently no need to duplicate the documentation and evaluations required in the original proceeding. The establishment of the new guardianship or protective proceeding is not automatic, however. In addition to the authority to decide that jurisdiction should not be transferred, the Court may also determine that the appointment is no longer in the best interest of the ward or protected person. The procedure made available in subsection (c) will most often be used for the appointment of a guardian when both the guardian and ward no longer reside in the state of the original appointment. The procedure will also prove useful when the appointment of an ancillary conservator is needed to administer property located in a state other than the state of the protected person's domicile. The appointment of a guardian in the second state would be ineffective in such circumstances because a guardian does not have general authority to manage the ward's property. Should a guardian discover that the ward has property located in another state, the guardian should explore the possibility of being appointed conservator in that or state.

Section 5-108. Venue.

(a) Venue for a guardianship proceeding for a minor is in the [county] of this State in which the minor resides or is present at the time the proceeding is commenced.

(b) Venue for a guardianship proceeding for an incapacitated person is in the [county] of this State in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the [county] in which the court is located. Venue for the appointment of an emergency or a temporary substitute guardian of an incapacitated person is also in the [county] in which the respondent is present.

(c) Venue for a protective proceeding is in the [county] of this State in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this state, in any [county] of this State in which property of the respondent is located.

(d) If a proceeding under Parts 1-4 of this Article brought in more than one [county] of this State, the court of the [county] in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

COMMENT

This section consolidates but otherwise generally follows the venue provisions of the 1982 UGPPA except that it allows for the appointment of a permanent guardian for an incapacitated person only in the place where the incapacitated person resides. A Court in the place where the incapacitated person is currently located but not a resident is not prohibited from taking action, however, such action is limited to the appointment of an emergency or temporary substitute guardian. This revision was made in direct response to the growing number of cases where older individuals have been moved across state lines and a guardianship then used to confirm custody rights in the new state. The drafters concluded that while it is always appropriate for a Court on the scene to issue temporary orders to protect the person's welfare, only the Court in the place where the person has the most significant contacts should be allowed to make what could turn out to be a permanent custody order. This requirement that only a Court in the place where the respondent resides may appoint a permanent guardian applies not only to proceedings brought in different states, but also to multiple proceedings brought in different counties within a particular state. Subsection (d) provides that when there is more than one proceeding brought within a state, the first Court decides where venue is appropriate. The first Court does not automatically proceed; it should decide where proper venue lies and enter an order accordingly.

While the venue provisions are generally consolidated in this section, there is one exception. The venue provisions for the appointment of a guardian by a parent or spouse without prior Court approval are contained in Sections 5-202 and 5-303. However, the subsequent petition to the Court to confirm the parental or spousal appointment is subject to the venue requirements of this section.

Section 5-109. [Reserved.]

COMMENT

Section 109 of the 1997 UGPPA, which is titled "Practice in Court," is similar to Sections 1-302(d) and 1-304 of this Code and therefore need not be duplicated here. The Section is marked as "reserved" in order to preserve the comparable numbering of sections between the UGPPA and Parts 1-4 of this article.

Section 1-302(d) provides: "If both guardianship and protective proceedings as to the same person are commenced or pending in the same Court, the proceedings

may be consolidated."

Section 1-304 provides, "Unless specifically provided to the contrary in this Code or unless inconsistent with its provisions, the rules of civil procedure, including the rules concerning of vacation of orders and appellate review govern formal proceedings under this Code." Guardianship and conservatorship proceedings, because they are conducted in front of a judge with notice to interested persons, are classified as formal proceedings under the Code. *See* Section 1-201(17).

Section 5-110. Letters Of Office.

Upon the guardian's filing of an acceptance of office, the court shall issue appropriate letters of guardianship. Upon the conservator's filing of an acceptance of office and any required bond, the court shall issue appropriate letters of conservatorship. Letters of guardianship must indicate whether the guardian was appointed by the court, a parent, or the spouse. Any limitation on the powers of a guardian or conservator or of the assets subject to a conservatorship must be endorsed on the guardian's or conservator's letters.

COMMENT

A guardian must file an acceptance of office while a conservator must file an acceptance of office as well as any required bond. Any limits on the powers of the guardian or conservator must be stated in the letters. This requirement helps to secure the recognition and honoring of limited guardianships and conservatorships.

Under Section 5-424(a), third persons are charged with knowledge of the restrictions endorsed on the letters of office and are subject to possible liability for failing to act in accordance with those restrictions. Either a certified or authenticated copy of the letters may serve as proof of authority by appointment.

Section 5-111. Effect Of Acceptance Of Appointment.

By accepting appointment, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship. The petitioner shall send or deliver notice of any proceeding to the guardian or conservator at the guardian's or conservator's address shown in the court records and at any other address then known to the petitioner.

COMMENT

Once the guardian or conservator accepts the appointment, the court has jurisdiction over the guardian or conservator in any proceeding relating to the guardianship or conservatorship. Regardless of where the guardian or conservator may move, jurisdiction over the guardian or conservator continues. *See* Sections 5-201 and 5-301. For purposes of giving notice of proceedings to a

guardian or conservator, petitioners may use the address of the guardian or conservator that is in the court file, any other address known to the petitioner, or any other procedure available under the enacting state's rules of civil procedure. It is incumbent on the guardian and the conservator to keep their current addresses in the Court file.

Section 5-112. Termination Of Or Change In Guardian's Or Conservator's Appointment.

(a) The appointment of a guardian or conservator terminates upon the death, resignation, or removal of the guardian or conservator or upon termination of the guardianship or conservatorship. A resignation of a guardian or conservator is effective when approved by the court. [A parental or spousal appointment as guardian under an informally probated will terminates if the will is later denied probate in a formal proceeding.] Termination of the appointment of a guardian or conservator does not affect the liability of either for previous acts or the obligation to account for money and other assets of the ward or protected person.

(b) A ward, protected person, or person interested in the welfare of a ward or protected person may petition for removal of a guardian or conservator on the ground that removal would be in the best interest of the ward or protected person or for other good cause. A guardian or conservator may petition for permission to resign. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(c) The court may appoint an additional guardian or conservator at any time, to serve immediately or upon some other designated event, and may appoint a successor guardian or conservator in the event of a vacancy or make the appointment in contemplation of a vacancy, to serve if a vacancy occurs. An additional or successor guardian or conservator may file an acceptance of appointment at any time after the appointment, but not later than 30 days after the occurrence of the vacancy or other designated event. The additional or successor guardian or conservator becomes eligible to act on the occurrence of the vacancy or designated event, or the filing of the acceptance of appointment, whichever last occurs. A successor guardian or conservator succeeds to the predecessor's powers, and a successor conservator succeeds to the predecessor's title to the protected person's assets.

COMMENT

Although a guardian or conservator may submit a resignation at any time, the resignation is not effective until the Court has approved it. A guardian or conservator, regardless of how the appointment ended, is still liable for previous acts as well as the duty to account for the money and assets of the ward or protected person. In the event of a termination of appointment due to the guardian's or conservator's death, the duty to account is normally performed by the personal representative of the guardian or conservator. In the event of

the removal of a guardian or conservator due to the guardian's or conservator's own incapacity, the duty to account will normally be performed by the guardian's or conservator's own guardian, conservator or other legal representative.

Those who may petition for removal of the guardian or conservator are the incapacitated person, the protected person or a person interested in the welfare of the incapacitated or protected person. Under subsection (b), the ground for removal is the best interest of the ward or the protected person. In determining whether it is in the best interest of the ward or protected person for the guardian or conservator to be removed, the use of a best interest of the ward or protected person standard in relation to an adult may be differentiated from that used in reference to minors. When dealing with an adult, every effort should be made to determine the wishes of the ward or protected person regarding the removal of the guardian or conservator. In determining the best interest of the adult ward or protected person, the ward's or protected person's personal values and expressed desires, past or present, should be considered. Considering the personal values and expressed desires of the ward or protected person is also a priority consideration for decision making by guardians and conservators in general. *See* Sections 5-314(a), 5-411(c) and 5-418(b).

While the section adopts a best interest of the ward or protected person standard, Courts seeking more precisely stated reasons for removal may wish to consult their state's law on removal of a trustee. For a statutory list of reasons directed specifically at removal of guardians or conservators, *see* South Dakota Codified Laws Section 29A-5-504.

Among the reasons justifying removal under the South Dakota statute are: (1) securing of the letters by material misrepresentation or mistake; (2) incapacity or illness, including substance abuse, affecting fitness for office; (3) conviction of a crime reflecting on fitness; (4) wasting or mismanagement of the estate; (5) neglecting the care and custody of the ward, protected person or legal dependents; (6) having an adverse interest that poses a substantial risk that the guardian or conservator will fail to properly perform duties; (7) failure to timely file a required account or report or otherwise comply with a Court order; and (8) avoidance of service of process or notice.

Under subsection (c), the Court can appoint an additional guardian or conservator, effective either upon appointment or upon a future contingency. A Court can also appoint a successor guardian or conservator to fill an existing or potential vacancy. In either case, eligibility to act occurs on the last to occur of the vacancy, the occurrence of the contingency or the filing of the acceptance of appointment. The ability to appoint a guardian or conservator to act upon some specified future event will usually be used to preplan the filling of a vacancy in office. This provision, in the states that have enacted it, has proven useful in situations involving adults with developmental disabilities. The initial guardian or conservator appointed will usually be a parent of the ward or protected person, but the child's need for guardianship or conservatorship is likely to be lifelong. The ability to appoint a successor guardian or conservator at the time of the initial appointment therefore provides the parent with assurance of mind that upon the parent's death someone will be available to step in and assure continuity of care.

The ability to appoint a successor or additional guardian to take office in the future is different from the type of standby appointments authorized in Sections 5-202 and 5-302. Those types of appointments permit a guardian to be appointed to take office in the future even though no guardian is currently in office. Under this section, only the appointment of a successor or additional guardian

or conservator is allowed.

Section 5-113. Notice.

(a) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice must be given in compliance with [insert the applicable rule of civil procedure], at least 14 days before the hearing.

(b) Proof of notice must be made before or at the hearing and filed in the proceeding.

(c) A notice under Parts 1-4 of this Article must be given in plain language.

COMMENT

Notice may be provided by mail as well as by private courier or delivery service. If the adopting states's rules allow, a faxed copy of the notice may be an appropriate method of providing notice. This section does not supersede specific notice requirements provided elsewhere in this article. Special notice requirements apply to a petition for the appointment of an emergency guardian and to service on the respondent of a petition for the appointment of a guardian or conservator or other protective order. *See* Sections 5-309, 5-312, and 5-404. The requirement of at least fourteen days' prior notice is copied from the 1982 UGPPA. A fourteen day prior notice provision has also been part of the UPC, including its provisions on guardianships and protective proceedings, since the inception of the Code. Under this section, notice should be given using the method of notice provided in the enacting jurisdiction's applicable rule of civil procedure. However, the time limit for notice contained in subsection (a) should be applied, even if different from that in the state's applicable rule.

Subsection (c) provides that the notice be in plain language. The requirement that all notices be given in plain language is based on a recommendation of the Wingspread conference on guardianship reform. *See Guardianship: An Agenda for Reform* 9 (A.B.A. 1989). Although this section does not require it, if English is not the respondent's primary language, best practice and due process would direct that a copy of the notice be provided in the respondent's primary language.

Section 5-114. Waiver Of Notice.

A person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. However, a respondent, ward, or protected person may not waive notice.

COMMENT

Waivers in this section include both specific and general waivers. Under no

circumstances may the respondent, ward, or protected person waive notice. The protection provided by this section applies to all petitions brought under Parts 1-4 of this article but is particularly pertinent to original petitions for appointment of a guardian or conservator or other protective order. *See* Sections 5-309 and 5-404. In consequence, except as ordered by the Court under Section 5-113 for good cause, a period of at least fourteen days must elapse between the filing of the petition and the hearing whenever notice to a respondent, ward, or protected person is required. The source of this section in UGGPPA (1992) Section 1-402.

Section 5-115. Guardian Ad Litem.

At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

COMMENT

Appointments under this section will be infrequent. If the respondent is currently represented, the attorney representing the respondent should not be appointed as the guardian ad litem because of the conflict of interest, since there is a distinct difference between the role of the attorney as an advocate and as a guardian ad litem. It is important that the Court, when appointing a guardian ad litem, advise the guardian ad litem of his or her role. This section encourages the giving of such advice by requiring that the Court record the duties of the guardian ad litem and its reasons for the appointment. The source of this section is UGPPA (1982) Section 1-403 (UPC Section 1-403(4) (1982)).

Section 5-116. Request For Notice; Interested Persons.

An interested person not otherwise entitled to notice who desires to be notified before any order is made in a guardianship proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending. The clerk shall send or deliver a copy of the request to the guardian and to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or a lawyer to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits to the respondent or protected person is an interested person in a protective proceeding.

COMMENT

This section allows an interested person not otherwise entitled to notice to file a request for special notice with the guardian or conservator. For purposes of this section, an interested person in a protective proceeding includes a

creditor, secured or otherwise. The section also specifically provides that an interested person in a protective proceeding includes a governmental agency that is or will be paying benefits to the respondent or protected person. Whether a creditor, governmental agency or other person is an interested person as the term is used elsewhere in Parts 1-4 of this article must be determined according to the particular issue involved. For example, under certain circumstances an interested person could include a member of the media or a "watch-dog" agency. For a request for special notice to be effective, a statement of the person's interest must be contained in the request.

This section is based on UGPPA (1982) Section 1-404 (UPC Section 5-104 (1982)).

Section 5-117. Multiple Appointments Or Nominations.

If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls.

COMMENT

The most recent appointment or nomination would be the one with the most recent date during the period when the respondent had capacity to make the appointment or nomination. If the most recent appointment is determined invalid due to the respondent's lack of capacity, the prior appointment would control.

PART 2

GUARDIANSHIP OF MINOR

Section 5-201. Appointment And Status Of Guardian.

A person becomes a guardian of a minor by parental appointment or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or minor ward.

COMMENT

This part provides for the creation and administration of guardianship over minors. The Court's ability to appoint a guardian for a minor under this part is in certain cases partially or wholly superseded by special legislation relating to custody of minors. Reference should also be made to the Uniform Child Custody Jurisdiction and Enforcement Act, the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A, and the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. For a discussion of the jurisdictional limitations, *see* David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 Inst. on Est. Plan. ¶¶ 500, 502 (1995).

This section recognizes the creation of a guardianship by parental appointment under Section 5-202 as well as those created by the Court under Section 5-205. A guardian or the ward can move from the jurisdiction in which the Court is located, yet the guardianship will continue until terminated and remains under

the Court's jurisdiction. *See* Section 5-107 regarding transfers of jurisdiction and Section 5-111 regarding the effect of acceptance of appointment.

This section is the same as UGPPA (1992) Section 2-101 (UPC Section 5-201 (1982)).

Section 5-202. Parental Appointment Of Guardian.

(a) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. The appointment may specify the desired limitations on the powers to be given to the guardian. The appointing parent may revoke or amend the appointment before confirmation by the court.

(b) Upon petition of an appointing parent and a finding that the appointing parent will likely become unable to care for the child within [two] years, and after notice as provided in Section 5-205(a), the court, before the appointment becomes effective, may confirm the parent's selection of a guardian and terminate the rights of others to object.

(c) Subject to Section 5-203, the appointment of a guardian becomes effective upon the appointing parent's death, an adjudication that the parent is an incapacitated person, or a written determination by a physician who has examined the parent that the parent is no longer able to care for the child, whichever first occurs.

(d) The guardian becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

(1) file the acceptance of appointment and a copy of the will with the court of the [county] in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court of the [county] in which the minor resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing parent, if living, the minor, if the minor has attained 14 years of age, and a person other than the parent having care and custody of the minor.

(e) Unless the appointment was previously confirmed by the court, the notice given under subsection (d)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection in the court as provided in Section 5-203.

(f) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument, a guardian shall petition the court for confirmation of the appointment, giving notice in the manner provided in Section 5-205(a).

(g) The appointment of a guardian by a parent does not supersede the

parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who died or was adjudged incapacitated has priority. An appointment by a parent which is effected by filing the guardian's acceptance under a will probated in the State of the testator's domicile is effective in this State.

(h) The powers of a guardian who timely complies with the requirements of subsections (d) and (f) relate back to give acts by the guardian which are of benefit to the minor and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of the appointment.

(i) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 5-203.

COMMENT

This section enables a parent to make an advance appointment of a "standby" guardian whose powers become effective upon the occurrence of certain specified contingencies. The standby appointment procedure under this section is available to all parents, but is particularly beneficial for parents with pending incapacities which will likely render them unable to care for their children at some point prior to their deaths. The section, like UGPPA (1982) Section 2-102 (UPC Section 5-202 (1982)), allows for the appointment of a guardian effective upon a parent's death or adjudication of incapacity. Additionally, following the lead of a growing number of free-standing standby guardianship statutes enacted by several states, it allows for an appointment to become effective upon a determination that the parent is no longer able to provide care. For analysis of these state]\ statutes, *see* Joshua S. Rubenstein, *Standby Guardianship Legislation: Preparing Before the Tidal Wave Hits*, 22 ACTEC Notes 60 (1996). The parent can make either type of appointment in a will or other signed writing, including a power of attorney, a trust or a document executed for the sole purpose of appointing the guardian.

Under subsection (c), the contingencies upon which the authority of the standby guardian will become effective are the parent's death, adjudication of incapacity or written determination by a physician who has examined the parent that the parent is no longer able to care for a minor child. The physician making the written determination should be the parent's treating physician whenever possible, to avoid the possibility of the other parent manipulating this process in a custody battle.

In the case of a parent who has disappeared, the appointment of an emergency guardian should be sought under Section 5-204(e). Under that section, preference will be given to the nominated guardian absent a showing that it is not in the best interest of the minor child for that person to be appointed.

Subsection (a) recognizes that the appointing parent may have additional children after making the appointment, so the provision allows a parent to appoint a guardian for children who may later be born, adopted or whose custody may be given to the appointing parent, without the need to re-execute the nomination.

The appointment of a person as guardian under this section creates a rebuttable presumption that the appointed person should be appointed as guardian and that the Court should not disregard the appointment without good cause. A person who chooses not to accept the appointment is not liable for failing to act.

Under subsection (b), the appointing parent may petition the Court prior to the triggering event for advance confirmation of the appointment. Advance Court confirmation terminates both the right of others to object, including an objection by the child's other parent, and the right of the appointing parent to revoke the appointment. Subsection (b) provides that a petition for advance Court confirmation may be made at anytime within the recommended two years from the date of the likely need, but this time limit is placed in brackets to indicate that the enacting jurisdiction is free to select a different time period. Depending on the length of time set by the enacting states, Courts may need to show flexibility regarding the time limit. It may be difficult for the appointing parent to prove with absolute certainty that the appointing parent will become unable to care for the child within the specified period of time. Courts should liberally construe this provision in favor of the appointing parent. For this reason, subsection (b) does not require absolute certainty, and instead uses the standard that it is "likely" that the guardian will be needed within the time period. If the Court confirms the guardian in advance and the stated deadline (e.g., two years) has passed without the guardian's filing the acceptance of appointment required under subsection (d), the Court should hold a hearing to determine the appointing parent's status and whether the advance confirmation should continue.

While this section allows the Court to confirm an appointment in advance, more typically the guardian will assume duties based solely on the parent's written appointment. A guardian so appointed must then seek Court confirmation, thereby turning the standby appointment into a regular guardianship. Allowing the guardian's appointment to become effective immediately upon the triggering event avoids gaps in the care and custody of the child. The purpose of the confirmation of appointment process contained in subsections (d)-(f) is to convert a nominated guardianship into a regular guardianship as soon as possible. The Court should develop procedures to monitor the conversions.

The section does not specifically enumerate the contents of the petition for confirmation of appointment to be filed by the guardian. In order for the Court to make an informed review, the petition should include the name and address of the minor; the identity and whereabouts of all persons having parental rights or serving as guardian; the petitioner's name and address, relationship to the parent and child, interest in the appointment, and a statement of the petitioner's willingness to serve; information about any custody orders; any limitations the appointing parent has placed on the powers of the appointed guardian, the powers to be given the guardian, and if an unlimited guardianship, a statement why a limited guardianship would not work; and reasons why the appointment should be confirmed. The petition should be accompanied by a death certificate, an order of adjudication of incapacity or a written statement by the physician who has examined the appointing parent that the appointing parent is no longer able to care for the minor child. In this last case, the written statement should include the prognosis and diagnosis of the parent's condition, as well as the date of the doctor's examination of the parent. The petition should be accompanied by a copy of the appointing instrument, as well as any other relevant documents, such as a custody order or an order terminating parental rights. If the selection as guardian was previously confirmed pursuant to subsection (b), a copy of the order of confirmation should accompany the

required notice.

Under subsection (g), the appointment of a guardian by a parent does not supersede the parental rights of either parent. Until the appointment is confirmed by the Court, the rights of the parent and the rights of the guardian coexist. While parental rights are not terminated, at least in theory, the guardian will often supersede the parental rights in fact. The parent making the appointment will no longer be able to provide care for the child, even though not yet legally incapacitated, and the other parent may be uninterested or unable to provide care for the child. To provide more certainty to the situation, the appointee should seek Court confirmation of the parental appointment as soon as possible.

At the hearing on the petition for confirmation, if the Court finds that the appointing parent will not regain the ability to care for the minor child, the Court should enter an order confirming the appointment, absent evidence rebutting the presumption that the appointment is in the child's best interest. If the Court finds that the parent may regain ability to care for the minor child, the Court should enter an order confirming the appointment for a period of time deemed appropriate by the Court. An order of confirmation cuts off the right to object of the minor, the other parent, or a person other than a parent having care and custody of the minor. The confirmation also supersedes the rights of the non-appointing parent.

Until the parental appointment is confirmed by the Court, the minor, the other parent or the person other than the parent having care and custody of the minor may file an objection to the appointment under Section 5-203. *See* subsections (c) and (e). If an objection is filed, the appointed guardian has no authority to act and instead must petition the Court for appointment as guardian under Section 5-205.

Section (h) provides that the timely performance of the requirements for the guardian's acceptance of office relate back to give any acts performed between the appointment becoming effective and the guardian's filing of the notice of acceptance the same effect as those occurring after the filing of the notice of acceptance, as long as the prior acts are beneficial to the minor. In the event of a dispute regarding whether a guardian's prior act should be validated, the Court first determines whether the act was beneficial to the minor, and if the Court determines the act was beneficial, then subsection (h) will apply.

Unless stated to the contrary in this section, the other provisions of this article relating to guardians apply to a guardian appointed under this section, including the provisions relating to the duties and powers of guardians.

Section 5-203. Objection By Minor Or Others To Parental Appointment.

Until the court has confirmed an appointee under Section 5-202, a minor who is the subject of an appointment by a parent and who has attained 14 years of age, the other parent, or a person other than a parent or guardian having care or custody of the minor may prevent or terminate the appointment at any time by filing a written objection in the court in which the appointing instrument is filed and giving notice of the objection to the guardian and any other persons entitled to notice of the acceptance of the appointment. An objection may be withdrawn, and if withdrawn is of no effect. The objection does not preclude judicial

appointment of the person selected by the parent. The court may treat the filing of an objection as a petition for the appointment of an emergency or a temporary guardian under Section 5-204, and proceed accordingly.

COMMENT

This section provides a mechanism for a listed group of individuals to object to a parental appointment made under Section 5-202 and to turn the appointment into a contested proceeding. The individuals who may object include the minor, if at least fourteen years old, as well as the other parent or a person other than a parent or guardian who has care or custody of the minor. The objection must be in writing and can be filed at any time prior to the Court's confirmation of the appointment.

If an objection is filed, the appointee has no authority to act and instead must file a petition for appointment as guardian under Section 5-205. Although the minor, the other parent, or the person who has care or custody of the minor may object to the appointment, the Court still may appoint the person selected by the parent over the objection. An objection that is not timely filed will not prevent the appointment.

When an objection is filed, the Court may choose to treat the objection as a petition for the appointment of an emergency (or in appropriate cases, temporary) guardian under Section 5-204, and use the expedited process contained therein.

This section is based on UGPPA (1982) Section 2-103 (UPC Section 5-203 (1982)).

Section 5-204. Judicial Appointment Of Guardian: Conditions For Appointment.

(a) A minor or a person interested in the welfare of a minor may petition for appointment of a guardian.

(b) The court may appoint a guardian for a minor if the court finds the appointment is in the minor's best interest, and:

(i) the parents consent;

(ii) all parental rights have been terminated; or

(iii) the parents are unwilling or unable to exercise their parental rights.

(c) If a guardian is appointed by a parent pursuant to Section 5-202 and the appointment has not been prevented or terminated under Section 5-203, that appointee has priority for appointment. However, the court may proceed with another appointment upon a finding that the appointee under Section 5-202 has failed to accept the appointment within 30 days after notice of the guardianship proceeding.

(d) If necessary and on petition or motion and whether or not the conditions of subsection (b) have been established, the court may appoint

a temporary guardian for a minor upon a showing that an immediate need exists and that the appointment would be in the best interest of the minor. Notice in the manner provided in Section 5-113 must be given to the parents and to a minor who has attained 14 years of age. Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship may not exceed six months. Within five days after the appointment, the temporary guardian shall send or deliver a copy of the order to all individuals who would be entitled to notice of hearing under Section 5-205.

(e) If the court finds that following the procedures of this part will likely result in substantial harm to a minor's health or safety and that no other person appears to have authority to act in the circumstances, the court, on appropriate petition, may appoint an emergency guardian for the minor. The duration of the guardian's authority may not exceed [30] days and the guardian may exercise only the powers specified in the order. Reasonable notice of the time and place of a hearing on the petition for appointment of an emergency guardian must be given to the minor, if the minor has attained 14 years of age, to each living parent of the minor, and a person having care or custody of the minor, if other than a parent. The court may dispense with the notice if it finds from affidavit or testimony that the minor will be substantially harmed before a hearing can be held on the petition. If the guardian is appointed without notice, notice of the appointment must be given within 48 hours after the appointment and a hearing on the appropriateness of the appointment held within [five] days after the appointment.

COMMENT

The Court, in order to make an informed decision on a petition for appointment, must have as much information as possible. The Court should require that the following specific information be contained in a petition filed under subsection (a): the name, age and address of the minor; the name and address of the petitioner and the petitioner's relationship to the minor; the name and address of the proposed guardian, the proposed guardian's relationship to the minor and the proposed guardian's qualifications to serve as guardian; whether the minor's school district would change if a guardian is appointed; and information about the parents of the minor, their whereabouts, and if missing or absent, the circumstances surrounding their absence and whether any Court has entered any order regarding their parental rights. The petition should also include information about the minor's property and, if the guardian is appointed, where the minor would live, as well as any other information that the Court would deem relevant. The Court should examine the petition to make sure this information has been supplied as fully as possible and should reject any petitions that provide insufficient information.

Subsection (a) allows a petition to be filed either by the minor or by any person interested in the minor's welfare. A person interested in the minor's welfare is any person with a serious interest or concern for the minor's welfare, including both relatives and non-relatives having knowledge of the circumstances, as well as public officials from relevant agencies. Should the

Court determine that the petitioner's concerns stem from interests other than the welfare and best interest of the minor, the Court may dismiss the petition.

Under this section, the appointment can be made in one of three situations: when the parents consent, when all parental rights have been terminated or when the parents are unable or unwilling to exercise their parental rights. In the last situation, the Court must decide whether a parent is unwilling or unable to act. *See* David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 Inst. on Est. Plan. ¶¶ 500, 503 (1995), for a discussion of criteria applied in determining unwillingness or unfitness of a parent to care for a minor child. This section is not to be used to resolve custody disputes between parents that are more appropriately resolved in a family law proceeding. *See* comments to UGPPA (1982) Section 2-104 (UPC Section 5-204 (1982)).

If the parent has made an appointment pursuant to Section 5-202, this section provides the parental appointee with priority for appointment if a petition for appointment of guardian of the minor is subsequently filed. Where, however, the appointee failed to timely accept the appointment as required in Section 5-202, the Court can appoint another to serve as the guardian. The parental appointee has priority for appointment by the Court even over the nominee of a minor age fourteen or older.

On occasion, parents have established a guardianship for their minor child in order to change the child's school district. Allowing for such use of guardianship is inconsistent with the intent of this section. For that reason, the recommended information to be contained in the petition includes a statement as to whether the child's school district will change. This information puts the Court on notice that the parents may be attempting to use a guardianship to manipulate a school assignment. The Court should inquire whether there will be a change in the minor's school assignment if a guardian is appointed. Even when a change of school districts is not mentioned, the Court should inquire whether there will be a change in the minor's school district if a guardian is appointed.

Subsection (d) provides for the appointment of a temporary guardian on appropriate petition or motion, when the Court finds that an immediate need exists and it is in the minor's best interest for a temporary guardian to be appointed. The temporary guardianship provision is based on South Dakota Codified Laws Section 29A-5-210. Notice is required as provided in Section 5-113. The temporary guardian has the same authority as an unlimited guardian, but the guardianship may not last for more than six months. If the need for a guardian continues beyond six months, then the temporary guardian should file a petition under Section 5-205 to be appointed as unlimited guardian.

All individuals listed in Section 5-205(a) are required to receive notice in a temporary guardianship proceeding under subsection (d). The six month limitation on the temporary guardianship does not prevent the renewal or extension of the guardianship by Court order at the expiration of the six months.

However, if the duration needs to be extended, the Court should examine whether a regular guardianship of the minor would be more appropriate.

Under subsection (e), in emergencies, where following the procedures specified in Section 5-205 would result in serious harm to the minor's health or safety and where there is no one with authority or who is willing to act, the Court, on petition, may appoint an emergency guardian for up to thirty days. Prior notice is required unless the Court finds from affidavit or testimony that the minor

will be seriously harmed during the time needed to give notice. Only then may the Court act without notice. A Court should have a process established to provide notice on an emergency basis. Proceedings without prior notice should be the *rare exception* rather than the rule. However, subsection (e) recognizes that occasionally there will be situations where giving prior notice on an emergency guardianship petition is simply not feasible. Thus, when an emergency guardianship is established without notice, notice has to be given within forty-eight hours of the appointment and a return hearing held within five days of the appointment. For both temporary and emergency guardianships, it is possible that one or both parents may have authority to act but are absent, refusing to act or unable to act. The emergency provision may be used when the minor is having a health care crisis and the parents are absent or dead. In cases where the parents are missing and presumed dead, a temporary guardianship might be used, although this is a situation where the conditions for a permanent appointment of a guardian would likely be met. Use of a temporary or emergency appointment may also be appropriate where the parents are absent for a set period of time. In some jurisdictions, it may be more appropriate to get an order of custody through the juvenile Court rather than establishing a temporary guardianship.

Section 5-205. Judicial Appointment Of Guardian: Procedure.

(a) After a petition for appointment of a guardian is filed, the court shall schedule a hearing, and the petitioner shall give notice of the time and place of the hearing, together with a copy of the petition, to:

(1) the minor, if the minor has attained 14 years of age and is not the petitioner;

(2) any person alleged to have had the primary care and custody of the minor during the 60 days before the filing of the petition;

(3) each living parent of the minor or, if there is none, the adult nearest in kinship that can be found;

(4) any person nominated as guardian by the minor if the minor has attained 14 years of age;

(5) any appointee of a parent whose appointment has not been prevented or terminated under Section 5-203; and

(6) any guardian or conservator currently acting for the minor in this State or elsewhere.

(b) The court, upon hearing, shall make the appointment if it finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of Section 5-204(b) have been met, and the best interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceeding or make any other disposition of the matter that will serve the best interest of the minor.

(c) If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor,

giving consideration to the choice of the minor if the minor has attained 14 years of age.

COMMENT

If the conditions for appointment set out in subsection (b) have not been met, or if the appointment is not in the minor's best interest, the Court should dismiss the petition or make any other order that serves the minor's best interest, including, where appropriate, treating the petition as one for the appointment of a conservator or other protective order under Part 4.

Under subsection (a)(3), if both parents are dead, notice and a copy of the petition must be given to the adult nearest in kinship. Where there is more than one adult in the same class, notice to one is sufficient.

The Court may, at any stage of the proceeding, appoint a lawyer to represent the minor if the conditions in subsection (c) are met. If the minor is at least fourteen years old, the minor's preference for a lawyer must be considered by the Court in appointing counsel.

This section is based on UGPPA (1982) Section 2-106 (UPC Section 5-206 (1982)).

Section 5-206. Judicial Appointment Of Guardian: Priority Of Minor's Nominee; Limited Guardianship.

(a) The court shall appoint as guardian a person whose appointment will be in the best interest of the minor. The court shall appoint a person nominated by the minor, if the minor has attained 14 years of age, unless the court finds the appointment will be contrary to the best interest of the minor.

(b) In the interest of developing self-reliance of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor ward or other interested person, may limit thereby create a limited guardianship. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.

COMMENT

Absent a parental appointment, the only person having preference for appointment as guardian under this section is the person nominated by a minor age fourteen or older, as long as that person's appointment would be in the minor's best interest. The priority granted under this section does not override the preference given to the parental appointee under Section 5-204(c). Regardless of the preference granted, the standard used by the Court in determining whom to appoint as guardian is the minor's best interest.

Subsection (b) applies the concept of limited guardianship to minors. A Court, whenever possible, should only grant to the guardian those powers actually needed. The Court should be specific about identifying the powers of the guardian regarding the minor's education, care, health, safety, and welfare.

This section gives the Court flexibility to design the guardianship in a way to empower the minor as much as possible to make the minor's own decisions, either at the time of appointment or at a later date. Subsection (b) can be used by the Court to either expand or limit the guardian's powers. Although the Court can grant additional powers, the Court cannot grant powers beyond those provided in Part 2.

Subsection (a) is based on UGPPA (1982) Section 2-107 (UPC Section 5-207 (1982)). Subsection (b) is based on UGPPA (1982) Section 2-109(e) (UPC Section 5-209(e) (1982)).

Section 5-207. Duties Of Guardian.

(a) Except as otherwise limited by the court, a guardian of a minor ward has the duties and responsibilities of a parent regarding the ward's support, care, education, health, and welfare. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

(1) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the ward's personal effects and bring a protective proceeding if necessary to protect other property of the ward;

(3) expend money of the ward which has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

(4) conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money at least quarterly to the conservator to be conserved for the ward's future needs;

(5) report the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule; and

(6) inform the court of any change in the ward's custodial dwelling or address.

COMMENT

A guardian of a minor is basically a substitute parent, but without the personal financial responsibility for the minor's support. The standard of care for the guardian is contained in subsection (a). As provided in subsection (a), the

duties of a parent to which the guardian succeeds are those relating to the minor's support, care, education, health, and welfare. A guardian also has certain fiduciary responsibilities. A guardian must at all times act in the minor's best interest and exercise reasonable care, diligence, and prudence. Subsection (b) of this section, and Sections 5-208 and 5-209 are in substantial part expansions on these underlying responsibilities, specifying subsidiary duties and the powers and immunities necessary to properly implement this role.

A guardian is more than a caretaker. To properly perform the office of guardian, it is essential that the guardian, as required by subsection (b)(1), become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the capacities, limitations, needs, opportunities, and physical and mental health of the ward. Such contact is also essential if the guardian is to act in the best interest of the ward.

The development of the self-reliance of the ward is one of the major themes of the Code, as demonstrated by the emphasis on limited guardianship, both for minors and adults. *See* Section 5-206(b). To develop the self-reliance of the minor, whether the guardianship for the minor ward is limited or unlimited, it is essential that the minor be involved in decision making, that the guardian ascertain the minor's views and that the guardian, whenever appropriate, make decisions in line with the minor's expressed preferences. In line with this philosophy, Section 5-208(b)(6) permits the guardian, if reasonable under all of the circumstances, to delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

A guardian's powers with respect to the property of the ward are very limited. If the ward has significant property that requires management, the guardian should petition the court for the appointment of a conservator or other protective order as provided in subsection (b)(2). However, subsection (b)(3) requires that the guardian use the ward's funds, including government benefits received for the ward, for the ward's support, care, education, health, and welfare. The guardian must conserve any excess funds not expended for the ward's future needs, and periodically turn over the excess to the conservator, if one has been appointed. *See* subsection (b)(4). A guardian may also be required to report the ward's condition to the court as well as to account for money and other assets in the guardian's possession or subject to the guardian's control. *See* subsection (b)(5).

Subsection (b)(6), which is new to the Act, requires that the court be informed whenever there is a change in the custodial dwelling or address of the ward. Temporary absences, such as for vacations, need not be reported. This required reporting to the court is consistent with the recommendation in *National Probate Court Standards*, Standard 3.3.14 "Reports by the Guardian" (1993). Keeping the court informed of the minor ward's location will enable the court to exercise appropriate oversight of the guardianship. If the ward is removed to another state, it will also prevent the court from losing jurisdiction over the case without the court's knowledge. *See also* Section 5-208(b)(2), which requires the permission of the court before the ward may be relocated to another state.

This section is based on UGPPA (1982) Section 2-109(a)-(b) (UPC Section 5-209(a)-(b) (1982)).

Section 5-208. Powers Of Guardian.

(a) Except as otherwise limited by the court, a guardian of a minor ward

has the powers of a parent regarding the ward's support, care, education, health, and welfare.

(b) A guardian may:

(1) apply for and receive money for the support of the ward otherwise payable to the ward's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the State upon express authorization of the court;

(3) if a conservator for the estate of a ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(4) consent to medical or other care, treatment, or service for the ward;

(5) consent to the marriage of the ward; and

(6) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(c) The court may specifically authorize the guardian to consent to the adoption of the ward.

COMMENT

This section should be read with Section 5-207. Section 5-207 sets out the duties of the guardian: those responsibilities which a guardian may not ignore. This section sets out the guardian's powers, the grant of which are necessary in order for the guardian to carry out the duties specified in Section 5-207.

Section 5-207(a) imposes on the guardian certain of the duties of a parent. To enable the guardian to properly carry out those duties, subsection (a) of this section grants the guardian corresponding powers of a parent with regard to the support, care, education, health, and welfare of the ward. Subsection (b) then lays out specific applications of the general powers granted in subsection (a).

Subsections (b)(1) and (b)(3) enable the guardian to carry out the guardian's limited duties with respect to the management of the property of the ward. For these duties, *see* subsections (b)(2)-(5) of Section 5-207. The powers of the guardian over the minor ward's property are quite limited, recognizing that a conservator should be appointed or other protective order sought for the minor in appropriate circumstances. The guardian is authorized under subsection (b)(1)

to apply for government benefits to which the ward is entitled. Under Section 5-207(b)(3), the guardian must use those benefits for the ward's support, care, education, health, and welfare. Upon appointment, a guardian should also investigate whether proper application has been made for all governmental benefits to which the ward may be entitled. It may also be necessary for the guardian to seek appointment as a representative payee, should the governmental agency in question use a representative payee mechanism for making payments on behalf of beneficiaries without legal capacity.

Subsection (b)(2) recognizes that other courts may have a role in determining the custody of the ward. While a guardian generally has a right to take custody of the ward, the guardian is denied this power if to assume custody would be inconsistent with the custody order of a court of competent jurisdiction. Such an order may have been entered by a juvenile court, by a court responsible for making involuntary mental health commitments, or even by the court supervising the guardianship.

Subsection (b)(2) also prevents the guardian from moving the minor out of the state without the court's prior approval. The court must determine whether such move would be in the best interest of the minor ward. The court should make certain that this provision is not used to circumvent a custody order or to avoid a determination of custody by an appropriate court. Under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, the courts of the former state will generally lose jurisdiction over custody of a minor six months following the minor's removal from the state. If there is no conservator, subsection (b)(3) authorizes the guardian to file a proceeding to collect child support. In implementing this power, the guardian should consult the state's applicable child support statutes, which should be read as if incorporated into this section.

Under subsection (b)(4), the guardian may consent to the medical or other care, treatment or service for the ward. The guardian may ordinarily make health-care decisions for the ward without prior court authorization, but for certain types of health-care decisions, prior court approval may be required or at least be considered. For example, a guardian may ordinarily consent to elective surgery for the ward, but the guardian is strongly advised to consider seeking prior court authorization before consenting to experimental medical treatment. While this Code does not specifically require that a guardian seek prior court approval before making a particular health-care decision, such prior court approval may be required by other statute, especially when the minor's constitutional rights are in question. For example, a guardian may not be able to place a minor ward in a mental health care facility or consent to electroconvulsive therapy (ECT) or other types of shock therapy without the court's order. State statutes may require that specific procedures be followed before a guardian can consent to an abortion or certain medical treatment for the minor ward. Because of the important and competing interests at stake, a guardian should at least consult with, and may need to obtain an order from, the court if the guardian plans to refuse medical treatment on behalf of the minor ward on the grounds of the minor ward's religious beliefs.

Under subsection (c), the court may specifically authorize the guardian to consent to the ward's adoption. This section conforms to the requirements of the Uniform Adoption Act that the guardian be given specific authority from a court in order to consent to the minor ward's adoption. The applicable section of the Uniform Adoption Act, Section 2-101 provides:

(a) The only persons who may place a minor for adoption are:

. . .

(2) a guardian expressly authorized by the court to place the minor for adoption . . . ,

which the comment to that section of the Uniform Adoption Act then notes is intended to refer to the court supervising the guardianship. This court is chosen because under Section 5-210 adoption of the ward will have the effect of terminating the guardianship. If the enacting jurisdiction has not enacted the Uniform Adoption Act, the state should verify that subsection (c) is in harmony with the state's existing adoption laws.

Like the adoption of the minor ward, a guardianship also terminates upon the marriage of the ward. But unlike an adoption, the guardian's consent and the court's approval is not necessarily required. Whether such consent is required will depend on the state's laws on the requirements of marriage. But to the extent that the guardian's consent may be necessary, subsection (b)(5) does allow a guardian to consent to the marriage of the ward.

This section is based on UGPPA (1982) Section 2-109(c) (UPC Section 5-209(c) (1982)).

Section 5-209. Rights And Immunities Of Guardian.

(a) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, and clothing provided by the guardian to the ward, but only as approved by the court. If a conservator, other than the guardian or a person who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the guardianship. A guardian is not liable for injury to the ward resulting from the negligence or act of a third person providing medical or other care, treatment, or service for the ward except to the extent that a parent would be liable under the circumstances.

COMMENT

Subsection (a) recognizes that a guardian has a right to reasonable compensation. The amount determined to be reasonable may vary from state to state and from one geographical area to another within a state. In addition, factors to be considered by the Court in setting compensation will vary. *See* the comments to Section 5-417 for a thorough discussion on the factors to be considered by the Court in determining compensation.

If there is a conservator appointed, the conservator, without the necessity of prior Court approval, may pay the guardian reasonable compensation as well as reimburse the guardian for room, board and clothing the guardian has provided to the ward. However, if the Court determines that the compensation paid to the guardian is excessive or the expenses reimbursed were inappropriate, the Court

may order the guardian to repay the excessive or inappropriate amount to the estate. *See* Section 5-417.

Under subsection (b), the guardian has no duty to use the guardian's personal funds for the ward. Nor is a guardian liable for the acts of a third person, including negligent medical care, treatment or service provided to the ward except if a parent would be liable in the same circumstances. The guardian is not liable, just by reason of being the guardian, if the ward harms a third person. The guardian is liable only if personally at fault.

This section is based on subsections (a) and (d) of the 1982 UGPPA Section 2-109 (subsections (a) and (d) of UPC Section 5-209 (1982)).

Section 5-210. Termination Of Guardianship; Other Proceedings After Appointment.

(a) A guardianship of a minor terminates upon the minor's death, adoption, emancipation or attainment of majority or as ordered by the court.

(b) A ward or a person interested in the welfare of a ward may petition for any order that is in the best interest of the ward. The petitioner shall give notice of the hearing on the petition to the ward, if the ward has attained 14 years of age and is not the petitioner, the guardian, and any other person as ordered by the court.

COMMENT

Subsection (a) lists the traditional grounds for terminating a guardianship for a minor created by reasons of the minor's age. Guardianships created because the minor is also an incapacitated person are governed by Part 3 and may last into adulthood. While a guardianship terminates upon emancipation of a minor, the grounds of emancipation are left to the state's law on the subject, but in many states a minor is emancipated by marriage, military service, or order of emancipation. Even though the guardianship is terminated, the guardian is still liable for previous acts and the obligation to account for the funds of the ward within the guardian's possession or control. *See* Section 5-112.

Subsection (b) can be used to seek termination of the guardianship or to expand or restrict the guardian's powers, in furthering the ward's self-reliance. *See* Section 5-206.

Subsection (a) is based on UGPPA (1982) Section 2-110 (UPC Section 5-210 (1982)), but has been broadened to allow termination by any act of emancipation, not merely marriage. Subsection (b) is based on UPC Section 5-212 (1982).

PART 3

GUARDIANSHIP OF INCAPACITATED PERSON

Section 5-301. Appointment And Status Of Guardian.

A person becomes a guardian of an incapacitated person by a parental or spousal appointment or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.

COMMENT

This part provides for the creation and administration of guardianships for incapacitated persons. The definition of incapacitated person is found in Section 5-102(4). While an incapacitated person will typically be an adult, appointment can be made for a minor under this part if the reason for the appointment is an incapacity other than the minor's age. If an appointment is made under this part for a minor, there is no need to petition for a new guardianship upon the minor's attainment of majority.

This section is new, although it has a counterpart in Section 5-201. This section recognizes the ability of the spouse or parent of an adult individual who meets the definition of incapacitated person to appoint a guardian by spousal or parental appointment under Section 5-302, as well as that of the Court to appoint a guardian under Section 5-311. A guardian or the ward can move from the jurisdiction in which the Court is located, yet the guardianship will continue until terminated and remains under the Court's jurisdiction. *See* Section 5-107 regarding transfers of jurisdiction and Section 5-112 regarding termination of appointments.

Section 5-302. Appointment Of Guardian By Will Or Other Writing.

(a) A parent, by will or other signed writing, may appoint a guardian for an unmarried child who the parent believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court.

(b) An individual, by will or other signed writing, may appoint a guardian for the individual's spouse who the appointing spouse believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court.

(c) The incapacitated person, the person having care or custody of the incapacitated person if other than the appointing parent or spouse, or the adult nearest kinship to the incapacitated person may file a written objection to an appointment, unless the court has confirmed the appointment under subsection (d). The filing of the written objection terminates the appointment. An objection may be withdrawn and, if withdrawn, is of no effect. The objection does not preclude judicial

appointment of the person selected by the parent or spouse. Notice of the objection must be given to the guardian and any other person entitled to notice of the acceptance of the appointment. The court may treat the filing of an objection as a petition for the appointment of an emergency guardian under Section 5-312 or for the appointment of a limited or unlimited guardian under Section 5-304 and proceed accordingly.

(d) Upon petition of the appointing parent or spouse, and a finding that the appointing parent or spouse will likely become unable to care for the incapacitated person within [two] years, and after notice as provided in this section, the court, before the appointment becomes effective, may confirm the appointing parent's or spouse's selection of a guardian and terminate the rights of others to object.

COMMENT

This section enables a parent or spouse to make an advance appointment of a "standby" guardian whose powers become effective upon the occurrence of certain specified contingencies. The appointment can be made by will or other instrument, which can include a durable power of attorney, a trust instrument or a specific document for the spousal or parental appointment of the guardian. The appointment is temporary. Section 5-303(e) requires that a guardian appointed under this section seek Court confirmation no more than thirty days following the filing of notice of acceptance of office.

Sections 5-302 and 5-303 together are comparable to the standby guardianship provisions for minors in Section 5-202. The provisions for incapacitated persons are more tentative, since adults, unlike minors, are presumed to have the legal capacity to make their own decisions. For this reason, an appointment under this section is easily terminable. *See* subsection (c). Also, an appointment under this section is not a determination of the person's incapacity. *See* Section 5-303(g).

Despite these limitations, this section is very useful, especially for parents of developmentally disabled children. For such parents, the need for a guardian for the developmentally disabled child often arises only on the parent's death or other event that necessitates that care be transferred to another. This section, by allowing a guardian of the parent's selection to step in immediately upon the necessitating event, can provide the parents with assurance of mind that care of their children will not be neglected. This section is also useful for a spouse of an individual stricken by Alzheimer's disease, when the spouse no longer is able to care for the Alzheimer's victim.

A parent of an adult unmarried child whom the parent believes is incapacitated may make an appointment under this section as may a spouse for the other spouse whom the appointing spouse believes to be incapacitated. Under subsection (c), the adult disabled child or the incapacitated spouse as well as the person having care or custody of the child or spouse or the adult nearest in kinship have the right to object to the guardian's appointment. If an objection is filed, the guardian's authority terminates, and the guardian must file a petition for appointment of guardian by the Court under Section 5-304. If an objection is withdrawn, it has no effect. An objection does not prohibit the Court from appointing the parental or spousal appointee as the guardian.

The appointing spouse or parent may petition the Court prior to the triggering

event for advance confirmation of the appointment. Advance Court confirmation terminates the right to object and the right of the appointing spouse or parent to revoke the appointment. Advance Court confirmation is available in situations where the appointment is needed due to the pending incapacity of the appointing spouse or parent. This process provides appointing spouses and parents with peace of mind, knowing that the Court has confirmed their selection of guardian.

A petition for advance Court confirmation may be made at any time within a recommended two years from the date of likely need, but this time limit is placed in brackets to indicate that the enacting jurisdiction is free to select a different period. Depending on the length of time set by the enacting state, Courts may need to show flexibility regarding the time limit. It may be difficult for the appointing spouse or parent to prove with absolute certainty that the appointing spouse or parent will likely become unable to care for the incapacitated spouse or the adult disabled child within the stated period of time. Courts should liberally construe this provision in favor of the appointing spouse or parent. For this reason, subsection (d) does not require absolute certainty, only that the need for a guardian within the specified time frame is "likely." If the Court confirms the guardian in advance and the stated deadline (two years) has passed without the guardian's filing the acceptance of appointment required under Section 5-303(b), the Court should hold a hearing to determine the status of the appointing spouse or parent and whether the advance confirmation should continue.

Unless otherwise specified in this section, the other provisions of this Act, including the provisions relating to the duties and powers of guardians, apply to a guardian appointed by a will or other writing.

This section is based on UGPPA (1982) Section 2-201 (UPC Section 5-301 (1982)). However, the 1982 UGPPA did not require court confirmation of the appointment.

Section 5-303. Appointment Of Guardian By Will Or Other Writing: Effectiveness; Acceptance; Confirmation.

(a) The appointment of a guardian under Section 5-302 becomes effective upon the death of the appointing parent or spouse, the adjudication of incapacity of the appointing parent or spouse, or a written determination by a physician who has examined the appointing parent or spouse that the appointing parent or spouse is no longer able to care for the incapacitated person, whichever first occurs.

(b) A guardian appointed under Section 5-302 becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

(1) file the notice of acceptance of appointment and a copy of the will with the court of the [county] in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court in the [county] in which the incapacitated person resides or is present; and

(2) give written notice of the acceptance of appointment to the

appointing parent or spouse if living, the incapacitated person, a person having care or custody of the incapacitated person other than the appointing parent or spouse, and the adult nearest in kinship.

(c) Unless the appointment was previously confirmed by the court, the notice given under subsection (b)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection as provided in Section 5-302.

(d) An appointment effected by filing the guardian's acceptance under a will probated in the State of the testator's domicile is effective in this State.

(e) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument, a guardian appointed under Section 5-302 shall file a petition in the court for confirmation of the appointment. Notice of the filing must be given in the manner provided in Section 5-309.

(f) The authority of a guardian appointed under Section 5-302 terminates upon the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 5-302, whichever first occurs.

(g) The appointment of a guardian under this section is not a determination of incapacity.

(h) The powers of a guardian who timely complies with the requirements of subsections (b) and (e) relate back to give acts by the guardian which are of benefit to the incapacitated person and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of appointment.

COMMENT

The appointment of a guardian for an incapacitated person by will or other writing becomes effective on the first to occur of: the death of the appointing parent or spouse; adjudication of incapacity of that parent or spouse; or a written determination by a doctor who has examined the appointing parent or spouse that the appointing parent or spouse can no longer care for the adult disabled child or the incapacitated spouse.

The guardian's authority terminates upon the timely filing of an objection or upon the appointing parent or spouse regaining the ability to care for the incapacitated person, or if a guardian is appointed for the incapacitated person.

Within thirty days of the contingency giving rise to the guardianship, the guardian must file a notice of acceptance of appointment along with the appointing instrument. If the appointment was not previously confirmed by the Court, the guardian also must give written notice of the acceptance and of the right to file an objection to the appointing parent or spouse, if living, the incapacitated person for whom the appointment was made, the person having care

or custody of the incapacitated person, if other than the appointing parent or spouse, and to an adult nearest in kinship.

Subsection (e) requires that the guardian file for confirmation of the appointment no more than thirty days following the filing of the notice of acceptance. Also, because an appointment under Sections 5-302 and 5-303 is based on a belief as to the person's incapacity, in seeking confirmation of the appointment by the Court, the regular procedures for the appointment of a guardian will apply. *See* Sections 5-304 through 5-310.

The petition for confirmation of appointment to be filed by a guardian must comply with the requirements of Section 5-304 but should be tailored to reflect the special circumstances of the prior parental or spousal appointment. The petition should include: the name and address of the incapacitated spouse or the adult disabled child, the identity and whereabouts of the adult children of the incapacitated spouse, if any, or if none, then the living parents of the incapacitated spouse, if any, or if none, then the living siblings of the incapacitated spouse; the living parents, if any, or if none, the living siblings of the adult disabled child; all persons serving as guardian; the petitioner's name and address, relationship to the married couple or to the parent and the adult disabled child, interest in the appointment, and a statement of the petitioner's willingness to serve; any limitations placed by the appointing spouse or parent on the powers of the appointed guardian; information about the petitioner; and reasons why the appointment should be confirmed.

The petition should also indicate any limitations placed on the appointed guardian and the powers to be given to the guardian, and if an unlimited guardianship, why a limited guardianship would not work. The petition should be accompanied by a death certificate, an order of adjudication of incapacity or a written statement by the physician who has examined the appointing spouse or parent that the appointing spouse or parent is no longer able to care for the incapacitated spouse or the adult disabled child. The written statement should be made by the treating physician of the appointing parent or spouse and the statement should include the prognosis and diagnosis for the spouse or parent as well as the date of the physician's examination of the appointing parent or spouse. The petition should be accompanied by a copy of the appointing instrument, as well as any other relevant documents. If the selection as guardian was previously confirmed pursuant to Section 5-302(d), a copy of the order of confirmation should accompany the required notice.

In the hearing on the petition for confirmation, if the Court finds that the appointing spouse or parent will not regain the ability to care for the incapacitated spouse or adult disabled child, the Court should enter an order confirming the appointment, absent evidence rebutting the presumption of appointment. If the Court finds that the appointing spouse or parent may regain ability to care for the incapacitated spouse or adult disabled child, the Court should enter an order confirming the appointment for a period of time deemed appropriate by the Court. An order of confirmation cuts off the rights of others, including the incapacitated adult or the adult disabled child, to object.

The determination of whether the parental or spousal appointment should be converted into a regular guardianship should be made as soon as possible. The Court should develop procedures for monitoring the conversions.

Subsection (h) provides that the timely performance of the requirements for the

guardian's acceptance of office relate back to give any acts performed between the appointment becoming effective and the guardian's filing of the notice of acceptance the same effect as those occurring after the filing of the notice of acceptance, as long as those prior acts are beneficial to the incapacitated person. In the event of a dispute regarding whether a guardian's prior act should be validated, the Court first determines whether the act was beneficial to the incapacitated person, and if the Court determines that the act was beneficial, then subsection (h) will apply.

Section 5-304. Judicial Appointment Of Guardian: Petition.

(a) An individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian for the individual.

(b) The petition must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;

(2) the name and address of the respondent's:

(A) spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters, or if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(3) the name and address of any person responsible for care or custody of the respondent;

(4) the name and address of any legal representative of the respondent;

(5) the name and address of any person nominated as guardian by the respondent;

(6) the name and address of any proposed guardian and the reason why the proposed guardian should be selected;

(7) the reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity;

(8) if an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and

(9) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

COMMENT

This section lists the information that must be contained in the petition for appointment of a guardian. Although the section allows a prospective ward to petition for appointment of a guardian, the court should scrutinize such a petition closely to confirm that the petition is truly voluntary, and that the petitioner has the requisite capacity to file a petition. Normally, in such a case it would be better for the individual to execute a durable power of attorney.

Specifying the required contents of the petition is in accordance with the recommendations of both the Wingspread conference on guardianship reform and the Commission on National Probate Court Standards. *See Guardianship: An Agenda For Reform* 9 (A.B.A. 1989); *National Probate Court Standards*, Standard 3.3.1, "Petition" (1993).

Subsections (b)(2)-(6) require the listing in the petition of family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 5-309(b). These persons will likely have the greatest interest in protecting the respondent and in making certain that the proposed guardianship is appropriate.

Subsection (b)(2)(A) requires that the petition contain the name and address of the spouse or, if none, then an adult with whom the respondent has resided for more than six months before the petition is filed. Included among the persons with whom the respondent may have resided are domestic partners and companions. Note that there is no requirement that the respondent have resided for more than six months *immediately prior* to the filing of the petition, just that the requirement have been met at some point in time before the petition was filed. In applying this provision, the court should focus on the purpose of this provision - *i.e.*, to obtain a list of persons who likely have a significant interest in the respondent's welfare. Courts should use a reasonableness standard so that the petitioner does not have to give the name of every person with whom the respondent has resided in the respondent's entire life and whose current interest in the respondent's welfare may be quite remote. Also, in interpreting what is meant by "resided," the closeness of the relationship to the respondent should be taken into account-for example, the on-site manager of a 50-apartment complex whose contact with the respondent was limited to collecting the rent should not be considered as fitting within the definition. However, for a nursing home resident, the term might include her best friend who resides on the next floor.

Courts should consider whether they wish to exclude persons providing care for a fee from the class of persons with whom it is considered that the respondent resided. This would limit the application of subsection (b)(2)(A) to individuals with whom the respondent has a close personal relationship, a relative, or to a domestic partner or companion, and would eliminate a professional relationship such as that of a housekeeper, landlord, or owner of a board and care facility.

The committee that drafted Parts 1-4 of this article originally used the language "domestic partner or companion," and intended to limit the application of this section to the spouse, domestic partner or companion, but at the 1997 Annual Meeting of the Uniform Law Commissioners, where the most recent revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this article) was approved, this phrase was replaced by the phrase "with whom the respondent has resided for more than six months." The intent behind this amendment was not to substantially broaden the concept but only to expand it to include other individuals who have had an enduring relationship with the respondent for at least a six-month period and who, because of this relationship, should be given notice.

Subsection (b)(2)(B) requires that the petition contain the names and addresses of the respondent's adult children or, if none, parents and adult brothers and sisters or, if none, a relative of nearest degree in which a relation can be found. However, if there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, not the names and addresses of the members of the entire class.

Under subsection (b)(4), if the respondent has a legal representative, the representative's name and address must be included in the petition. A "legal representative" is defined in Section 5-102(5). Notice to such representative, as required by Section 5-309(b), is especially critical for ascertaining whether a guardianship is really necessary. For example, the court may conclude that there is no need to appoint a guardian if a guardian has already been appointed elsewhere or the respondent has executed a durable power of attorney with authority in the agent to make health and personal care decisions.

Subsection (b)(8) emphasizes the importance of limited guardianship, the encouragement of which is a major theme of the Act. The petitioner, when requesting an unlimited guardianship, must state in the petition why a limited guardianship would not work. If a limited guardianship is requested, the petition must set out the recommended powers to be granted to the guardian.

Subsection (b)(9) requires the petitioner to include a general statement of the respondent's property, including an estimated value, insurance and pension information and information about other anticipated income or receipts. This information should be as detailed as possible to enable the visitor to expeditiously complete the required report (*see* Section 5-305), and to enable the court to determine whether a protective order will be needed. *See* Section 5-311.

Section 5-305. Judicial Appointment Of Guardian: Preliminaries To Hearing.

(a) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a [visitor]. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

ALTERNATE PROVISIONS ON APPOINTMENT OF A LAWYER

ALTERNATIVE 1

[(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(1) requested by the respondent;
(2) recommended by the [visitor]; or
(3) the court determines that the respondent needs representation.]

ALTERNATIVE 2

[(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding.]

END OF ALTERNATE PROVISIONS

(c) The [visitor] shall interview the respondent in person and, to the extent that the respondent is able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;

(2) determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;

(3) inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the [visitor] shall:

(1) interview the petitioner and the proposed guardian;

(2) visit the respondent's present dwelling and any dwelling in which the respondent will live if the appointment is made;

(3) obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and

(4) make any other investigation the court directs.

(e) The [visitor] shall promptly file a report in writing with the court, which must include:

(1) a recommendation as to whether a lawyer should be appointed to represent the respondent;

(2) a summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;

(3) recommendations regarding the appropriateness of guardianship, including as to whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;

(4) a statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of the guardian, and the powers and duties proposed or the scope of the guardianship;

(5) a statement as to whether the proposed dwelling meets the respondent's individual needs;

(6) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(7) any other matters the court directs.

Legislative Note: *Those states that enact Alternative 2 of subsection (b) which requires appointment of counsel for the respondent in all proceedings for appointment of a guardian should not enact subsection (e)(1).*

COMMENT

Alternative provisions are offered for subsection (b). Alternative 1 was favored by the drafting committee. Alternative 1 relies on an expanded role for the "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointments of a lawyer, nevertheless, is *required* under Alternative 1 when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor.

Alternative 2 is derived from UGPPA (1982) Section 2-203 (UPC Section 5-303 (1982)). It is expected that in states enacting Alternative [2] of subsection (b), counsel will be appointed in virtually all of the cases. Alternative 2 was favored by the A.B.A. Commission on Legal Problems of the Elderly, which attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative 2 should be enacted.

In Alternative 1 for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the visitor, or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. *National Probate Court Standards*, Standard 3.3.5 "Appointment of Counsel" (1993), which provides:

(a) Counsel should be appointed by the probate court to represent the respondent when:

(1) requested by an unrepresented respondent;

(2) recommended by a court visitor;

(3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or

(4) otherwise required by law.

(b) The role of counsel should be that of an advocate for the respondent.

Alternative 1 of subsection (b) follows the National Probate Court Standards, Standard 3.3.5(a)(1) through (a)(3). Alternative 2 perhaps may be said to be in accord with the National Probate Court Standards, Standard 3.3.5(a)(4).

The drafting committee for the 1997 UGPPA (Parts 1-4 of this article) debated at length whether to mandate appointment of counsel or to expand the role of the visitor. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court. The committee was concerned that including mandatory appointment of counsel would cause many to view the Act as a "lawyer's bill" and thus severely handicap the Act's acceptance and adoption. It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, such as when the respondent is clearly incapacitated.

For jurisdictions enacting Alternative 1 under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent's rights and appoint counsel in most cases.

Appointment of a visitor is mandatory (subsection (a)), regardless of which alternative is enacted under subsection (b). The visitor serves as the information gathering arm of the court. The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise. It is imperative that the visitor have training or experience in the type of incapacity alleged. The visitor must individually meet with the respondent, the petitioner and the proposed guardian. The visitor's report must contain information and recommendations to the court regarding the appropriateness of the guardianship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the guardian, and the appointment of counsel. If the petition is withdrawn prior to the appointment of the visitor, no appointment of the visitor is necessary.

National Probate Court Standards, Standard 3.3.4 "Court Visitor" (1993) provides:

The probate court should require a court appointee to visit with the respondent in a guardianship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and

consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

The visitor must visit the respondent in person and explain a number of items to the respondent to the extent the respondent can understand. If the respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent's primary language, but good practice and due process protections dictate the use of interpreters when needed for the respondent to understand. The phrase "to the extent that the respondent is able to understand" is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices. The visitor is also charged with confirming compliance with the Americans With Disabilities Act when visiting the respondent's dwelling and the proposed dwelling in which it is expected that the respondent will reside.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting jurisdiction has made other arrangements. If a conservatorship exists, payment is made pursuant to the procedures provided in Section 5-417, otherwise the guardian must file a fee petition. *See* Section 5-316.

The visitor must talk with the physician or other person who is known to have assessed, treated or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in making a determination of whether to grant the petition, since a professional evaluation will no longer be required in every case. *See* Section 5-306. If the doctor refuses to talk to the visitor, the visitor may need to seek from the appointing court an order authorizing the release of the information.

The visitor's report must be in writing and include a list of recommendations or statements. For states enacting Alternative 1 to subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should include in the report the reasons why a lawyer should not be appointed. States enacting Parts 1-4 of this article should consider developing a checklist for the items enumerated in subsection (e).

"Visitor" is bracketed in recognition that states use and may wish to substitute different words to refer to this position.

Section 5-306. Judicial Appointment Of Guardian: Professional Evaluation.

At or before a hearing under this part, the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with

the court. Unless otherwise directed by the court, the report must contain:

(1) a description of the nature, type, and extent of the respondent's specific cognitive and functional limitations;

(2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and

(4) the date of any assessment or examination upon which the report is based.

COMMENT

Under the 1982 UGPPA, a professional evaluation was mandatory. *See* UGPPA (1982) Section 2-203(b) (UPC Section 5-303(b) (1982)). This section is a major departure. The Court *may* order a professional evaluation but *shall* order the evaluation *only* if the respondent demands it. If an evaluation is ordered, then it must be performed by a professional who is qualified to evaluate the alleged impairment of the respondent. When counsel is appointed, the respondent may demand the evaluation through counsel. If the respondent is truly incapacitated and not represented by counsel, it is unlikely that the respondent will demand an evaluation. The Court still has the ability to order a professional evaluation either on the visitor's recommendation or on its own motion. Although a reading of this section may leave the impression that a professional evaluation will be ordered sparingly, the converse is true. A Court should order a professional evaluation any time it is not absolutely clear, based on its own assessment or on the visitor's report, that the respondent is incapacitated. Further, by providing the Court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation will be crucial to the Court in establishing a limited guardianship.

The evaluation of the respondent's physical and mental condition referred to in paragraph (2) should include a summary of the consultation with the respondent's treating physician. Even though the visitor's report required by Section 5-305 may contain information from the treating physician, it is crucial for the accuracy of the evaluation that the professional evaluator consult about the respondent's treatment, and include in the evaluation a summary of the information received and relied upon and the date of the consultation.

Section 5-307. Confidentiality Of Records.

The written report of a [visitor] and any professional evaluation are confidential and must be sealed upon filing, but are available to:

(1) the court;

(2) the respondent without limitation as to use;

(3) the petitioner, the [visitor], and the petitioner's and respondent's lawyers, for purposes of the proceeding; and

(4) other persons for such purposes as the court may order for good cause.

COMMENT

This section is new, although a number of states have a comparable provision. This section is designed to protect the respondent's privacy, but still make records accessible when needed, to any of the involved parties or to others on a showing of good cause. The drafting committee recognized that the media and "watch-dog" groups perform essential functions of deterring abuse and facilitating reform, and in drafting this provision balanced the need to protect the respondent's privacy with the need to access to the information.

Section 5-308. Judicial Appointment Of Guardian: Presence And Rights At Hearing.

(a) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The respondent shall attend and participate in the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the [visitor]; and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent and may be closed upon the request of the respondent and a showing of good cause.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

COMMENT

The proposed guardian is required to attend the hearing, although the Court may excuse the proposed guardian's attendance on a showing of good cause. This provision is based on a recommendation from *National Probate Court Standards*, Standard 3.3.8(c), "Hearing" (1993). The guardian's presence at the hearing gives the Court the opportunity to determine the guardian's appropriateness for appointment and to make any other inquiry of the guardian that the Court deems to be appropriate as well as to emphasize to the guardian the gravity of the guardian's responsibilities.

Also new is the requirement that the respondent must attend the hearing unless excused by the Court on a showing of good cause. The respondent has the right to take an active role in the hearing. There may be instances where circumstances dictate that the Court hold the hearing where the respondent is located.

The respondent can request that the hearing be closed, but good cause must again be shown for this to occur. Others may make a request to participate, which can

be granted by the Court without a hearing if the Court finds that the respondent's best interest is served by the participation. The Court's order granting the request to participate should indicate the extent to which participation will be allowed.

This section contains elements of subsections (c) and (d) of UGPPA (1982) Section 2-303 (subsections (c) and (d) of UPC Section 5-303 (1982)).

Section 5-309. Notice.

(a) A copy of a petition for guardianship and notice of the hearing on the petition must be served personally on the respondent. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a guardianship, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a guardian or the making of a protective order.

(c) Notice of the hearing on a petition for an order after appointment of a guardian, together with a copy of the petition, must be given to the ward, the guardian, and any other person the court directs.

(d) A guardian shall give notice of the filing of the guardian's report, together with a copy of the report, to the ward and any other person the court directs. The notice must be delivered or sent within 14 days after the filing of the report.

COMMENT

Personal service of the petition and notice of hearing on the respondent is required. A failure to personally serve the respondent is jurisdictional, as is a notice that does not substantially comply with the requirements of subsection (a). Notice of hearing must be given to the persons who are listed in the petition but failing to give notice to those listed (other than the respondent) is not jurisdictional.

Subsection (c) addresses the notice requirements on hearings on petitions for orders subsequent to the appointment of a guardian - the ward and the guardian, as well as anyone else the Court directs, must be given copies of any notice of hearing and a copy of any petition. This provision, along with subsection (d), requiring that the ward receive a copy of the guardian's report and a copy of the notice of filing of the report, ensures that the ward is kept informed of developments in the guardianship.

The *National Probate Court Standards*, Standard 3.3.7 "Notice" (1993), provides that the respondent should receive timely notice prior to the hearing and that written notice should be in both plain language and in large type, indicating,

at a minimum, the place and time of the hearing, the nature and possible consequences of the hearing, and the respondent's rights. Similar recommendations are contained in the report of the Wingspread conference on guardianship reform, which also recommends, in line with Section 5-113 of this Act, that the respondent be given at least fourteen days notice of hearing on a petition for the appointment of a guardian. *See Guardianship: An Agenda for Reform* 9-12 (A.B.A. 1989).

This section is based on UGPPA (1982) Section 2-204 (UPC Section 5-304 (1982)).

Section 5-310. Who May Be Guardian: Priorities.

(a) Subject to subsection (c), the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:

(1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in this State or elsewhere;

(2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference;

(3) an agent appointed by the respondent under [a durable power of attorney for health care] [the Uniform Health-Care Decisions Act];

(4) the spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;

(5) an adult child of the respondent;

(6) a parent of the respondent, or an individual nominated by will or other signed writing of a deceased parent; and

(7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(c) An owner, operator, or employee of [a long-term-care institution] at which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.

COMMENT

This section gives top priority for appointment as guardian to existing guardians appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing guardians are granted a first priority for two reasons. First, many of these cases will involve transfers of a

guardianship from another state. To assure a smooth transition, the currently appointed guardian, whether appointed in this state or another, should have the right to the appointment at the new location. Second, other cases will involve situations where a guardianship appointment is sought despite the appointment in another place. Granting the existing guardian priority will deter such forum shopping. If the existing guardian is inappropriate for some reason, subsection (b) permits the Court to pass over the existing guardian and appoint another with or without priority. While an existing guardian is generally granted a first priority for appointment, a temporary substitute and an emergency guardian are excluded from priority because of the short-term nature of their involvement.

A guardian or individual nominated by the respondent or the agent named in the respondent's health care power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference. The nomination may also be made by a separate document. While it is generally good practice for an individual to nominate as the guardian the agent named in a durable power of attorney, the section grants such an agent a preference even in the absence of a specific nomination. The agent is granted a preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a guardianship to thwart the authority of the agent. To assure that the agent will be in a position to assert this priority, Sections 5-304(b)(4) and 5-309(b) require that the agent receive notice of the proceeding. Also, until the Court has acted to approve the revocation of that authority, Section 5-316(c) provides that the authority of an agent for health-care decisions takes precedence over that of the guardian.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note that there is no requirement that the respondent had resided with the adult for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, see the comment to Section 5-304, which discusses the interpretation of the phrase "an adult with whom the respondent has resided for more than six months before the filing of the petition" within the context of the persons required to be listed in the petition for appointment. Note that although the phrase can be interpreted quite broadly, it is intended to be descriptive of those individuals who have had an enduring relationship with the respondent for at least a six month period and who, because of this relationship, should be given a priority for consideration as guardian.

Subsection (c) prohibits anyone affiliated with a long-term care institution at which the respondent is receiving care from being appointed as guardian absent a blood, marital or adoptive relationship. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the ward. Each state enacting Parts 1-4 of this article needs to insert the particular term or terms used in the state for those facilities considered to be long-term care institutions.

A professional guardian, including a public agency or nonprofit corporation, was specifically not given priority for appointment as guardian because those given priority are limited to individuals with whom the ward has a close relationship.

The committee which drafted the 1997 revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this article) recognized the valuable service that a professional guardian, a public agency or nonprofit corporation provides. A professional guardian can still be appointed guardian if no one else with priority is available and willing to serve or if the Court, acting in the respondent's best interest, declines to appoint a person having priority. A public agency or nonprofit corporation is eligible to be appointed guardian as long as it can provide an active and suitable guardianship program and is not otherwise providing substantial services or assistance to the respondent, but is not entitled to statutory priority in appointment as guardian.

This section is based on UGPPA (1982) Section 2-205 (UPC Section 5-305 (1982)).

Section 5-311. Findings; Order Of Appointment.

(a) The court may:

(1) appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:

(A) the respondent is an incapacitated person; and

(B) the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance; or

(2) with appropriate findings, treat the petition as one for a protective order under Section 5-401, enter any other appropriate order, or dismiss the proceeding.

(b) The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.

(c) Within 14 days after an appointment, a guardian shall send or deliver to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

COMMENT

A guardian may be appointed only when no less restrictive alternative will meet the respondent's identified needs. The clear and convincing evidence standard for the appointment of a guardian is new to the Act, but mandated by the Constitution and strongly recommended by many commentators on guardianship. *See*, e.g., *Sabrosky v. Denver Dep't Social Services*, 781 P.2d 106 (Colo. Ct. App. 1989); *In re Guardianship of Reyes*, 731 P.2d 130 (Ariz. Ct. App. 1986); *In re Estate of Boyer*, 636 P.2d 1085 (Utah 1981), all three of which involve the interpretation of the predecessor version of this Act. *See* also *Guardianship: An Agenda for Reform* 16 (A.B.A. 1989).

The use of limited guardianship is emphasized in this section. If a guardian is

to be appointed, the guardian shall be given only those powers needed to meet the ward's needs and limitations. The Court must specify the powers granted to the guardian and the limits on the incapacitated person's rights. The Act's emphasis on less restrictive alternatives, a high evidentiary standard and the use of limited guardianship is consistent with the Act's philosophy that a guardian should be appointed only when necessary, only for as long as necessary, and with only those powers as are necessary. The concept of limited guardianship is also emphasized in the *National Probate Court Standards*, Standard 3.3.10, "Less Intrusive Alternatives" (1993), requiring a finding of no less intrusive alternative before appointing a guardian and mandating the consideration and utilization of limited guardianships.

If appropriate technological assistance is available to meet the respondent's needs, then the respondent is not an "incapacitated person" within the meaning of Section 5-102(4) and no guardianship may be established. The drafting committee discussed whether to put any modification or limitation on the technological assistance, such as that which is reasonably available or a limitation on availability based on cost. Given the importance of the respondent's rights, the committee decided to reject any modification or limitation whatsoever on required consideration of technological assistance. Therefore, if appropriate technological assistance exists that can meet the respondent's needs, regardless of the cost, then that assistance must be treated by the Court as meeting the respondent's identified needs by a less restrictive means, and the guardianship petition must be denied.

Subsection (a)(2) allows the Court to consider the petition as a petition for a protective order and either proceed appropriately under Part 4 or dismiss the Part 3 proceeding. To guarantee the respondent the maximum possible personal liberty, the Court should proceed under this subsection whenever it concludes that the respondent's needs can be met by the entry of orders with respect to the respondent's property without the need to limit the respondent's freedom.

In keeping with the concept of limited guardianship, subsection (c) requires the guardian to provide the ward and all those persons given notice of the hearing a copy of the order of appointment along with a notice of the right to request a termination or a modification of the guardianship. The reason for requiring notice to persons other than the ward is to make certain that those who were originally notified of the petition will also be notified of the results because they are the ones most likely to have a continuing interest in the ward's welfare. The modification contemplated by this subsection only applies to reduction of the guardian's powers from those originally granted, not their enlargement.

Section 5-312. Emergency Guardian.

(a) If the court finds that compliance with the procedures of this part will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed [60] days and who may exercise only the powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship, the court shall appoint a lawyer to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a

hearing on the petition must be given to the respondent and any other persons as the court directs.

(b) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from affidavit or testimony that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within [five] days after the appointment.

(c) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of this article concerning guardians apply to an emergency guardian.

COMMENT

There are limited circumstances where there is no one else willing or able to act when following the normal process for appointment of a guardian would, due to the time involved to follow the procedures, likely lead to substantial harm to the respondent's health, safety or welfare. The classic example of when an emergency guardianship is needed is when the respondent needs a medical procedure, lacks capacity to consent, has no health care power of attorney, and no one else is willing or in a position to make the health-care decision. This section requires appointment of counsel for the respondent.

An emergency guardian may only be appointed without prior notice when there is testimony that the respondent would be immediately and substantially harmed before the hearing on the appointment. In such case, notice must be given within forty-eight hours and a hearing held within five days. (Section 5-113 provides the procedures for giving notice.)

States enacting Parts 1-4 of this article should look at their requirements for an ex parte hearing and determine whether to adopt the time limit contained in this section or whether to impose different time limits. Five days seems to be the most common time period for a return hearing following an ex parte appointment. If the enacting state uses a different time period for a hearing following an ex parte appointment of a guardian, the time period used should be relatively short.

The *National Probate Court Standards*, Standard 3.3.6 "Emergency Appointment of a Temporary Guardian" (1993) provides:

(a) Ex parte appointment of a temporary guardian by the probate Court should occur only:

(1) upon the showing of an emergency;

(2) in connection with the filing of a petition for a permanent

guardianship;

(3) where the petition is set for hearing on the proposed permanent guardianship on an expedited basis; and

(4) when notice of the temporary appointment is promptly provided to the respondent.

This section deviates from the above standard by permitting an emergency guardian to be appointed without the need of filing a petition for a permanent appointment. The drafting committee was concerned that requiring the filing of a petition for a permanent appointment would lend an air of inevitability that a permanent guardian should be appointed. Frequently, the need for an emergency guardian is temporary only and the respondent's long-term needs can be met by mechanisms other than guardianship. Consistent with this, subsection (c) provides that the appointment of an emergency guardian is in no way a finding of incapacity. For purposes of appointing a regular guardian, the same quantum of proof is required whether or not an emergency guardian has been appointed.

Unless stated to the contrary in this section, other sections of Part 3 apply to an emergency guardian appointed under this section, including the provisions relating to the duties of guardians.

Section 5-313. Temporary Substitute Guardian.

(a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, the court, within five days after appointment, shall inform the ward or guardian of the appointment.

(b) The court may remove a temporary substitute guardian at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of this Article concerning guardians apply to a temporary substitute guardian.

COMMENT

This section differs from Section 5-312 since this section is used when there is a guardian, but the guardian is not discharging the functions of office. The role of the temporary substitute guardian, as the name implies, is to literally fill in for the regular guardian, whose powers are suspended for the duration of the appointment. This section also differs from Section 5-204(d). A temporary guardian for a minor is appointed under Section 5-204(d) in situations where there is no guardian, whereas under this section, the temporary substitute guardian is temporarily substituted for another non-performing guardian.

The standard for appointment under this section is that the ward's welfare requires immediate action and that the appointed guardian is not effectively performing the duties of office. This is not the same as the best interest standard applied in the selection of the original guardian. The standard instead invokes the sense of urgency usually involved in these cases, most of which involve possible abuse by the regularly-appointed guardian.

If, at the end of the six months, the ward still needs a guardian, the Court should appoint a permanent guardian rather than granting an extension to the temporary substitute guardian. A temporary substitute guardian does not automatically have preference to be appointed as guardian in such cases.

In some cases, circumstances may dictate the appointment of the temporary substitute guardian without notice being given to the ward or current guardian. If that occurs, within five days of the appointment of the temporary substitute guardian, the Court must inform either the ward or the guardian. Since the authority of the regularly-appointed guardian is suspended by the appointment of the temporary substitute guardian, the Court should make every effort to inform the guardian of the appointment. In keeping with the concept of limited guardianship and empowerment of the ward, the Court should also notify the ward of the appointment of the temporary substitute guardian if the ward has the ability to understand.

States adopting Parts 1-4 of this Article are free to enact a notice period of less than five days but are encouraged to not enact a notice period of more than five days.

This section is based on UGPPA (1982) Section 2-208(b) (UPC Section 5-308(b) (1982)).

Section 5-314. Duties Of Guardian.

(a) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

(1) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

(3) expend money of the ward that has been received by the guardian

for the ward's current needs for support, care, education, health, and welfare;

(4) conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs;

(5) immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed; and

(6) inform the court of any change in the ward's custodial dwelling or address.

COMMENT

Under Section 2-209 of the 1982 UGPPA (UPC. Section 5-309 (1982)), the guardian of an incapacitated person was simply granted the powers of guardian of a minor. As a result of the 1997 revision, this and the sections which follow now list the guardian's powers and duties in detail instead of referring to the provisions on minor's guardianship. The general duty of the guardian of an incapacitated person, as expressed in subsection (a), also differs significantly from that for a guardian of a minor.

Subsection (a) sets out the guardian's reasonable standard of care. Subsection (b) of this Section, and Sections 5-315 and 5-316 are in substantial part expansions on the fundamental responsibilities stated in subsection (a), specifying subsidiary duties and the powers and immunities necessary to properly implement this role. For a discussion of the duties listed in subsection (b), *see* the comment to Section 5-207.

Subsection (a) emphasizes the importance of the concept of limited guardianship by directing that the guardian only exercise the authority needed due to the ward's limitations. In the 1982 UGPPA, the phrase "encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations" was used as a standard to encourage the use of limited guardianships. That phrase may still be useful for Courts in tailoring a guardianship to the needs of the incapacitated person. The guardian is admonished to encourage the ward's participation in decisions and in developing or regaining capacity to act without a guardian. The ward's personal values and expressed desires, whether past or present, are to be considered when making decisions. Although the guardian only need consider the ward's desires and values "to the extent known to the guardian," that phrase should not be read as an escape or excuse for the guardian. Instead, the guardian needs to make an effort to learn the ward's personal values and ask the ward about the ward's desires before the guardian makes a decision. Subsection (a) requires the guardian to act in the ward's best interest. In determining the best interest of the ward, the guardian should again consider the ward's personal values and expressed desires.

In furtherance of the limited guardianship and least restrictive alternative concepts, subsection (b)(5) requires the guardian to immediately notify the Court if the ward's condition has improved, so that the ward may have rights

restored. The guardian is *not* to wait until the next reporting period.

Section 5-315. Powers Of Guardian.

(a) Except as otherwise limited by the court, a guardian may:

(1) apply for and receive money payable to the ward or the ward's guardian or custodian for the support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's place of dwelling outside this State upon express authorization of the court;

(3) if a conservator for the estate of the ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(4) consent to medical or other care, treatment, or service for the ward;

(5) consent to the marriage [or divorce] of the ward; and

(6) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(b) The court may specifically authorize the guardian to consent to the adoption of the ward.

COMMENT

Subsection (a)(1) authorizes the guardian to apply for or receive the ward's government benefits. Subsection (a)(2) prohibits the guardian from moving the ward out of the state without the Court's prior express authorization. This provision should be strictly applied for the protection of the ward and to prevent forum shopping.

Although subsection (a)(4) gives the guardian the power to consent to medical treatment, the guardian must ascertain whether a health care directive is in effect. If there is a valid health-care power of attorney, the decision of the health care agent takes precedence over that of the guardian, absent a Court order to the contrary. Further, the guardian may not revoke a health-care power of attorney except on Court order. *See* Section 5-316(c). If the health-care directive does not appoint an agent, the guardian may proceed to make a health-care decision but must follow the ward's wishes as expressed in the directive.

Additionally, statutes in many states prohibit a guardian from consenting to certain procedures without prior Court order or without first complying with detailed statutory requirements, especially procedures which implicate the incapacitated person's constitutional rights. For example, a guardian may not commit a ward to a mental health-care institution without following the state's statute on civil commitment. *See* Section 5-316(d). There may be similar requirements regarding a guardian's consent to electroconvulsive therapy (ECT) or other shock treatment, experimental treatment, sterilization, forced medication with psychotropic drugs, or abortion.

The phrase "or divorce" in subsection (a)(5) is placed in brackets in recognition of the split among the jurisdictions over whether a guardian has power to initiate a divorce for the ward. Jurisdictions that do not allow the guardian to initiate a divorce generally base that policy on the very personal nature of marriage. Enacting states that have not yet addressed this issue should decide whether to give the guardian the power. Statutes dealing with the dissolution of marriage should be reviewed to determine whether this issue is addressed.

Consistent with the Act's encouragement of limited guardianship, subsection (a)(6) gives the guardian the power, if reasonable under the circumstances, to delegate certain decision making responsibility to the ward.

Subsection (b) provides the guardian with the authority to consent to the ward's adoption only on express authorization of the Court. There may be circumstances when it would be appropriate for the ward, even though an adult, to be adopted by another.

Section 5-316. Rights And Immunities Of Guardian; Limitations.

(a) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, and clothing provided to the ward, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the wrongful conduct of the third party.

(c) A guardian, without authorization of the court, may not revoke a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act] of which the ward is the principal. If a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act] is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(d) A guardian may not initiate the commitment of a ward to a [mental

health-care] institution except in accordance with the State's procedure for involuntary civil commitment.

COMMENT

Subsection (a) recognizes that a guardian has a right to reasonable compensation. The amount determined to be reasonable may vary from state to state and from one geographical area to another within a state. In addition, factors to be considered by the Court in setting compensation will vary. *See* the comments to Section 5-417 for a thorough discussion on the factors to be considered by the Court in determining compensation.

If there is a conservator appointed, the conservator, without the necessity of prior Court approval, may pay the guardian reasonable compensation as well as reimburse the guardian for room, board and clothing the guardian has provided to the ward. However, if the Court determines that the compensation paid to the guardian is excessive or the expenses reimbursed were inappropriate, the Court may order the guardian to repay the excessive or inappropriate amount to the estate. *See* Section 5-417. If there is no conservator, the guardian must file a fee petition.

Under subsection (b), the guardian has no duty to use the guardian's personal funds for the ward. Nor is a guardian liable for the acts of a third person, including negligent medical care, treatment or service provided to the ward except if a parent would be liable in the same circumstances. The guardian is not liable, just by reason of being guardian, if the ward harms a third person. The guardian is liable only if personally at fault.

If the ward had made a power of attorney for health care, the guardian cannot revoke it without Court order. Further, the agent's decision takes priority over that of the guardian unless the power of attorney has been revoked. For states which have enacted the Uniform Health-Care Decisions Act, a "mental health-care institution" includes those institutions or treatment facilities defined in the state's version of that Act. Commitment by a guardian to a mental health-care institution may not occur without following the state's procedures for civil commitment. Although a guardian may not commit a ward to a mental health-care institution, the guardian may initiate proceedings in accordance with the state's applicable mental health care statutes for civil commitment, outpatient treatment, or involuntary medication for mental health treatment.

Section 5-317. Reports; Monitoring Of Guardianship.

(a) Within 30 days after appointment, a guardian shall report to the court in writing on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control. A guardian shall report at least annually thereafter and whenever ordered by the court. A report must state or contain:

(1) the current mental, physical, and social condition of the ward;

(2) the living arrangements for all addresses of the ward during the reporting period;

(3) the medical, educational, vocational, and other services

provided to the ward and the guardian's opinion as to the adequacy of the ward's care;

(4) a summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

(5) if the ward is institutionalized, whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;

(6) plans for future care; and

(7) a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(b) The court may appoint a [visitor] to review a report, interview the ward or guardian, and make any other investigation the court directs.

(c) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports.

COMMENT

Under subsection (a), the report must contain the current mental, physical and social condition of the ward. Letters from the treating physician should accompany the report. Emphasizing the importance of limited guardianship, even if no limited guardian was appointed, subsections (a)(4), (6), and (7) require the guardian to report information regarding the ward's participation in decisions, future care plans and the need for continuing the guardianship. Compliance with subsection (a)(7) should not be read as relieving the guardian of the duty under Section 5-314(b)(5) to immediately notify the court that the ward's condition has changed.

Each state enacting Parts 1-4 of this article should establish a system for monitoring guardianships, which would include, but not be limited to, mechanisms for assuring that annual reports are timely filed and reviewed. An independent monitoring system is crucial for a court to adequately safeguard against abuses in the guardianship cases. Monitors can be paid court personnel, Court appointees or volunteers. For a comprehensive discussion of the various methods for monitoring guardianships, *see Sally Balch Hurme, Steps to Enhance Guardianship Monitoring* (A.B.A. 1991).

The National Probate Court Standards also provide for the filing of reports and procedures for monitoring guardianships. *See National Probate Court Standards*, Standards 3.3.14 "Reports by the Guardian," and 3.3.15 "Monitoring of the Guardian" (1993). The National Probate Court Standards additionally contain recommendations relating to the need for periodic review of guardianships and sanctions for failures of guardians to comply with reporting requirements. *See National Probate Court Standards*, Standards 3.3.16 "Revaluation of Necessity for Guardianship," and 3.3.17 "Enforcement."

Section 5-318. Termination Or Modification Of Guardianship.

(a) A guardianship terminates upon the death of the ward or upon order of the court.

(b) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court may terminate a guardianship if the ward no longer needs the assistance or protection of a guardian. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

(c) Except as otherwise ordered by the court for good cause, the court, before terminating a guardianship, shall follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship. Upon presentation by the petitioner of evidence establishing a prima facie case for termination, the court shall order the termination unless it is proven that continuation of the guardianship is in the best interest of the ward.

COMMENT

If the ward's condition changes so that the guardian believes that the ward is capable of exercising some or all of the rights that were previously removed, Section 5-314(b)(5) requires the guardian to immediately notify the Court and not wait until the due date of the next report to be filed under Section 5-317.

Subsection (b) can be used by the Court not only to terminate a guardianship but also to remove powers or add powers granted to the guardian.

Subsection (c) requires the Court in terminating a guardianship to follow the same procedures to safeguard the ward's rights as apply to a petition for appointment of a guardian. This includes the appointment of a visitor and, in appropriate circumstances, counsel.

Although clear and convincing evidence is required to establish a guardianship, the petitioner need only present a prima facie case for termination. Once the petitioner has made out a prima facie case, the burden then shifts to the party opposing the petition to establish by clear and convincing evidence that continuation of the guardianship is in the best interest of the ward. Given the constriction on rights involved in a guardianship, the burden of establishing a guardianship should be greater than that for restoring rights. In determining whether it is in the ward's best interest for the guardianship to continue, every effort should be made to determine the ward's wishes and expressed preferences regarding the termination of the guardianship. In determining the best interest of the ward, the ward's personal values and expressed desires should be considered.

To initiate proceedings under this section, the ward or person interested in the ward's welfare need not present a formal document prepared with legal assistance. A request to the Court may always be made informally.

Unlike the 1982 UGPPA, this section does not limit the frequency with which petitions for termination may be made to the Court, preferring instead to leave that issue up to general statutes and rules addressing Court management in general. *Compare* UPC Section 5-311(b) (1982).

Termination of the guardianship does not relieve the guardian of liability for prior acts. *See* Section 5-112.

PART 4

PROTECTION OF PROPERTY OF PROTECTED PERSON

Section 5-401. Protective Proceeding.

Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this part in relation to the estate and affairs of:

(1) a minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money; or

(2) any individual, including a minor, if the court determines that, for reasons other than age:

(A) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance, or because the individual is missing, detained, or unable to return to the United States; and

(B) by a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection isnecessary or desirable to obtain or provide money.

COMMENT

This section sets out the basic standard for appointment of a conservator or entry of another protective order. Paragraph (1) states the standard for minors for orders entered by reason of the minor's age. Paragraph (2), while principally focused on the standard for adults, also applies to a protective order entered for a minor for reasons other than the minor's age. A conservatorship created for a minor for reasons other than age need not terminate at age eighteen. *See* Section 5-431(a).

This section continues the emphasis on limiting assistance expressed in Part 3 by providing that conservatorship includes both limited and unlimited conservatorships. This part, like Part 3, encourages the Court to appoint a limited conservator whenever possible.

Note the differing evidentiary standards contained in subparagraphs (A) and (B) of paragraph (2). Paragraph (2) establishes a two-part test for the entry of a protective order for an adult, or for a minor for reasons other than age. First, unless it is alleged that the respondent is missing or is an absentee or detainee, the petitioner must show by clear and convincing evidence that the respondent has an impairment and that as a result of the impairment, the respondent is unable to manage the respondent's property and business affairs even with appropriate technological assistance. In addition, the petitioner must show, by a preponderance of evidence, that the respondent's property will be dissipated or wasted without management, or that money is needed to care for the respondent or those entitled to the respondent's support and that protection is needed to provide or receive the money. Under paragraph (2), the requisite impairment for the appointment of a conservator or entry of another protective order is similar to the test for the appointment of a guardian, which relies on the definition of "incapacitated person." *See* Section 5-102(4).

Under paragraph (2)(A), if appropriate technological assistance is available to meet the respondent's needs, then no conservatorship may be established or other protective order entered. The drafting committee discussed whether to put any modification or limitation on the technological assistance, such as that which is reasonably available or a limitation on availability based on cost. Given the importance of the respondent's rights, the committee decided to reject any modification or limitation whatsoever on the required consideration of technological assistance. Therefore, if appropriate technological assistance exists that can meet the respondent's needs, regardless of the cost, then that assistance must be treated by the Court as meeting the respondent's identified needs by a less restrictive means, and the petition for a protective proceeding must be denied.

This section is based on UGPPA (1982) Section 2-301 (UPC Section 5-401 (1982)).

Section 5-402. Jurisdiction Over Business Affairs Of Protected Person.

After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for a conservatorship or other protective order;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this State must be managed, expended, or distributed to or for the use of the protected person, individuals who are in fact dependent upon the protected person, or other claimants; and

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and questions of title concerning assets of the estate.

COMMENT

While a majority of all proceedings involving a conservatorship will be held in the Court supervising the conservatorship, third parties may bring suit against the conservator or protected person in other Courts to determine the validity of claims and questions of title concerning estate assets. For the procedures for filing claims against a conservatorship, *see* Section 5-429.

The source of this section is UGPPA (1982) Section 2-302 (UPC Section 5-402 (1982)) with slight changes.

Section 5-403. Original Petition For Appointment Of Conservator Or Other Protective Order.

(a) The following may petition for the appointment of a conservator or for any other appropriate protective order:

(1) the person to be protected;

(2) an individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or

(3) a person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(b) A petition under subsection (a) must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;

(2) if the petition alleges impairment in the respondent's ability to receive and evaluate information, a brief description of the nature and extent of the respondent's alleged impairment;

(3) if the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning the respondent'swhereabouts;

(4) the name and address of the respondent's:

(A) spouse or, if the respondent has none, an adult with whom the respondent has resided for more than six months before the

filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters or, if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(5) the name and address of the person responsible for care or custody of the respondent;

(6) the name and address of any legal representative of the respondent;

(7) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts; and

(8) the reason why a conservatorship or other protective order is in the best interest of the respondent.

(c) If a conservatorship is requested, the petition must also set forth to the extent known:

(1) the name and address of any proposed conservator and the reason why the proposed conservator should be selected;

(2) the name and address of any person nominated as conservator by the respondent if the respondent has attained 14 years of age; and

(3) the type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties.

COMMENT

This section lists the information that must be contained in the petition for appointment of a conservator or other protective order. Although subsection (a) allows a petition for appointment to be filed by the person to be protected, the court should scrutinize such a petition closely to confirm that the petition is truly voluntary and that the petitioner has the requisite capacity to file a petition. Normally in such a case it would be better for the individual to execute a durable power of attorney instead of utilizing the more invasive conservatorship.

Subsection (a) specifically provides that a petition for appointment of a conservator or other protective order may be filed by the respondent's guardian. The process for appointing a guardian is more detailed than the appointment of a conservator because of the rights involved and because other mechanisms are available to protect the respondent's property besides a conservatorship. However, in many cases a conservatorship may also be necessary, and so it is incumbent on a guardian to determine whether there is a need for a

conservatorship, and if so, petition for an appointment.

Subsections (b)(4)-(6) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 5-404(b). These persons will likely also have the greatest interest in protecting the respondent and in making certain that the proposed conservatorship is appropriate.

Subsection (b)(4)(A) requires that the petition contain the name and address of the spouse or, if none, then an adult with whom the respondent has resided for more than six months before the petition was filed. Included among the persons with whom the respondent may have resided are a domestic partner and companions. Note that there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requirement has been met at some point in time before the petition was filed. In applying this provision, the court should keep the purpose of this provision in mind – to obtain a list of person who likely have a significant interest in the respondent's welfare. Courts should use a reasonableness standard so that the petitioner does not have to give the name of every person the respondent has resided with in the respondent's entire life and whose current interest in the respondent may be quite remote. Also, in interpreting what is meant by "resided," the closeness of the relationship to the respondent should be taken into account.

Courts should consider whether they wish to exclude persons providing care for a fee from the class of persons with whom it is considered that the respondent resided. This would limit the application of subsection (b)(4)(A) to individuals with whom the respondent has a close personal relationship, a relative, or to a domestic partner or companion, and would eliminate a professional relationship such as that of a housekeeper, landlord, or owner of a board and care facility.

The drafters originally used the language "domestic partner or companion," and intended to limit the application of subsection (b)(4)(A) to the spouse, domestic partner or companion, but at the 1997 Annual Meeting of the Uniform Law Commissioners where the revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this article) was finalized, this phrase was replaced by the phrase "adult with whom the respondent has resided for more than six months." The intent behind this amendment was not to substantially broaden the concept but only to expand it to include other individuals who have had an enduring relationship with the respondent for at least a six-month period and who, because of this relationship, should be given notice.

Subsection (b)(4)(B) requires the names and addresses of the respondent's adult children or, if none, parent and adult brothers and sisters or, if none, a relative of the nearest degree in which a relation can be found. However, if there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, rather than the names and addresses of the members of the entire class.

Under subsection (b)(6), if the respondent has a legal representative, the representative's name and address must be included in the petition. A "legal representative" is defined in Section 5-102(5). Notice to such a representative, as required by Section 5-404(b), is especially critical for ascertaining whether a conservatorship or other protective order is really necessary. For example, should a conservator have already been appointed elsewhere or the respondent have executed a durable power of attorney with authority in the agent to make financial decisions, the court may conclude that there may be no need for it to

appoint a conservator.

Subsection (b)(7) requires the petitioner to make a general statement of the respondent's property, including an estimated value, insurance and pension information and information about other anticipated income or receipts. This information should be as detailed as possible to enable the visitor to better complete the report required by Section 5-406, and to enable the court to determine whether a protective order is really needed.

Subsection (c)(3) emphasizes the importance of limited conservatorship, the encouragement of which is a major theme of this article. The petitioner must state in the petition why a limited conservatorship is not sufficient when requesting an unlimited conservatorship. If a limited conservatorship is requested, the petition must set out the property requested to be placed under the conservator's control.

This section differs slightly from the *National Probate Court Standards*, Standard 3.4.1, "Petition" (1993), which also requires that a petition for conservatorship include a description of the respondent's functional limitations and a statement that less intrusive alternatives have been considered.

This section is based on UGPPA (1982) Section 2-304 (UPC Section 5-404) (1982)).

Section 5-404. Notice.

(a) A copy of the petition and the notice of hearing on a petition for conservatorship or other protective order must be served personally on the respondent, but if the respondent's whereabouts is unknown or personal service cannot be made, service on the respondent must be made by [substituted service] [or] [publication]. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a conservatorship or for another protective order, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude theappointment of a conservator or the making of another protective order.

(c) Notice of the hearing on a petition for an order after appointment of a conservator or making of another protective order, together with a copy of the petition, must be given to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

(d) A conservator shall give notice of the filing of the conservator's inventory, report, or plan of conservatorship, together with a copy of the inventory, report, or plan of conservatorship to the protected person and

any other person the court directs. The notice must be delivered or sent within 14 days after the filing of the inventory, report, or plan of conservatorship.

COMMENT

Personal service of the petition and notice of hearing on the respondent is required unless the respondent is missing or personal service cannot be made, in which event the state's method for substituted service must be used. A failure to serve the respondent is jurisdictional, as is a notice that does not substantially comply with the requirements of subsection (a). Where appropriate, the court should hold the hearing where the respondent is located. If the respondent's presence is impossible because the respondent is missing or absent, then the court should excuse the respondent's presence.

Subsection (b) requires that notice of hearing be given to the people listed in the petition but failing to give notice to those listed (other than the respondent) is not jurisdictional.

Subsection (c) addresses the notice requirements for hearings on petitions for orders after the establishment of the conservatorship. The protected person and the conservator as well as anyone else the court directs must be given copies of the notice of hearing and a copy of any petition. This provision, along with subsection (d), requiring that the protected person be given a copy of the conservator's plan, report, and inventory and a copy of the notice of filing, ensures that the protected person is kept informed of developments.

This section should be read in conjunction with Section 5-113, which requires that notice be given at least fourteen days prior to the hearing unless the court or other provisions of this article establish a different time period.

National Probate Court Standards, Standard 3.4.7, "Notice" (1993), provides that the respondent must receive timely notice prior to the hearing on the conservatorship and that written notice should be in both plain language and in large type. The notice, at a minimum, must indicate the place and time of the hearing, the nature and consequences of the hearing as well as the respondent's rights.

This section is based on UGPPA (1982) Section 2-305 (UPC Section 5-405 (1982)).

Section 5-405. Original Petition: Minors; Preliminaries To Hearing.

(a) Upon the filing of a petition to establish a conservatorship or for another protective order for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age.

(b) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of

the minor as may be required for the support of the minor or individuals who are in fact dependent upon the minor. The court may appoint a [master] to assist in that task.

COMMENT

Subsection (a) gives the Court the authority to appoint counsel for the minor at any stage of the proceeding. Subsection (b) allows the Court to appoint a master to assist the Court in preserving and appropriately applying the minor's property pending the hearing on the petition. This article provides for the appointment of "masters" instead of either "emergency" or "special" conservators. The role of the master is to carry out only those tasks that are specifically ordered by the Court. The terms "emergency" or "special conservator" seemed to be inappropriate because those terms imply that the person appointed would have all of the powers and duties of a conservator, which is a characterization that is too broad for the limited role contemplated. The word "master" is bracketed, recognizing that different states use different words to refer to the same position. The enacting state that uses a different word should substitute its own term.

This section is based on UGPPA (1982) Sections 2-306(a) and 2-307(b)(1) (UPC Sections 5-406(a) and 5-407(b)(1) (1982)).

Section 5-406. Original Petition: Preliminaries To Hearing.

(a) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court shall appoint a [visitor] unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

ALTERNATE PROVISIONS ON APPOINTMENT OF A LAWYER

ALTERNATIVE 1

[(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(1) requested by the respondent;

(2) recommended by the [visitor]; or

(3) the court determines that the respondent needs representation.]

ALTERNATIVE 2

[(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding.]

END OF ALTERNATE PROVISIONS

(c) The [visitor] shall interview the respondent in person and, to the extent that the respondent is able to understand:

(1) explain to the respondent the substance of the petition and the nature, purpose, and effect of the proceeding;

(2) if the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;

(3) inform the respondent of the respondent's rights, including the right to employ and consult with a lawyer at the respondent's own expense, and the right to request a court-appointed lawyer; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the [visitor] shall:

(1) interview the petitioner and the proposed conservator, if any; and

(2) make any other investigation the court directs.

(e) The [visitor] shall promptly file a report with the court, which must include:

(1) a recommendation as to whether a lawyer should be appointed to represent the respondent;

(2) recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the limited conservator, and the assets over which the conservator should be granted authority;

(3) a statement of the qualifications of the proposed conservator, together with a statement as to whether the respondent approves or disapproves of the proposed conservator, and a statement of the powers and duties proposed or the scope of the conservatorship;

(4) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(5) any other matters the court directs.

(f) The court may also appoint a physician, psychologist, or other individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

(g) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may issue orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent. The court may appoint a [master] to assist in that task.

Legislative Note: *Those states that enact Alternative 2 of subsection (b) which requires appointment of counsel for the respondent in all protective proceedings should not enact subsection (e)(1).*

COMMENT

Alternative provisions are offered for subsection (b). Alternative 1 is the drafting committee's position. Alternative 1 relies on an expanded role for the "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of a lawyer, nevertheless, is *required* under Alternative 1 when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor.

Alternative 2 is derived from UGPPA (1982) Section 2-306 (UPC Section 5-406 (1982)). It is expected that in states enacting Alternative 1 of subsection (b), counsel will be appointed in most of the cases. However, the A.B.A. Commission on Legal Problems of the Elderly attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative 2 should be enacted.

In Alternative 1 for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the [visitor], or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. *National Probate Court Standards*, Standard 3.4.5 "Appointment of Counsel" (1993), like subsection (b) of this section, provides for appointment of counsel in a conservatorship proceeding when the unrepresented respondent requests it, the [visitor] recommends it, the law otherwise requires it, or the court determines that the respondent needs representation.

The drafting committee for the 1997 revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this Article) debated at length whether to mandate appointment of counsel or to expand the role of the visitor. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court. The committee was concerned that including mandatory appointment of counsel would cause many to view the Uniform Guardianship and Protective Proceedings Act as a "lawyer's bill" and thus severely handicap the Act's acceptance and adoption. It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, where all are in agreement regarding the need for a conservatorship or protective order as well as the proposed conservator. For jurisdictions enacting

Alternative 1 under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent's rights and appoint counsel in most cases.

Appointment of a visitor is mandatory when a conservatorship is sought for reasons other than minority even if the respondent is represented by a lawyer (subsection (a)), and regardless of which alternative is enacted under subsection (b). Only when the respondent is represented by counsel and the petitioner is seeking a protective order other than the appointment of a conservator is the appointment of a visitor waived. Although a lawyer, if qualified, may be appointed as a visitor, the attorney's role is that of a visitor and not that of an attorney for the respondent. The visitor serves as the information gathering arm of the court. The role of the attorney is to act as the respondent's advocate. *See National Probate Court Standards*, Standard 3.4.5(b) "Appointment of Counsel" (1993).

The role of a visitor in a conservatorship proceeding is addressed in *National Probate Court Standard* 3.4.4 "Court visitor" (1993):

The probate court should require a court appointee to visit with the respondent in a conservatorship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

The visitor may be any qualified individual with "training or experience in the type of incapacity alleged." Under subsection (c), the visitor must visit the respondent in person and explain to the respondent a number of items, to the extent the respondent can understand. If the respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent's primary language, but good practice and due process protections dictate the use of interpreters where needed for the respondent to understand. The phrase "to the extent that the respondent is able to understand" is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting state has made other arrangements. Payment is made pursuant to the procedures provided in Section 5-417.

If the relief sought is a protective order other than the appointment of a conservator, the visitor's powers and duties relate only to the relief sought in the protective order. When the relief sought is a conservatorship, the visitor has an expanded list of duties. The visitor's report must contain information and recommendations to the court regarding the appropriateness of the conservatorship, whether lesser restrictive alternatives might meet the

respondent's needs, recommendations about further evaluations, powers to be given the conservator, and the appointment of counsel. The visitor's recommendation about the assets over which the conservator should be granted authority should also include a recommendation of the amount of the bond that should be required of the conservator. For states enacting Alternative 1 under subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should explain in the report the reasons why the visitor is recommending that a lawyer should not be appointed.

States enacting the guardianship and conservatorship provisions of this article should consider developing a checklist for the items enumerated in subsection (e).

Subsection (f) authorizes the court to order a professional evaluation of the respondent when recommended by the visitor, requested by counsel, or the court otherwise believes it to be necessary. Subsection (g) authorizes the court to use a master to help in the preservation and application of the respondent's property while a petition for appointment of a conservator or other protective order is pending. For an explanation of why a "master" is appointed instead of a temporary conservator, *see* the comment to Section 5-405.

"Visitor" is bracketed in recognition that states use different words to refer to this position. States enacting Parts 1-4 of this Article should insert the term used in their states.

If there is an estate, the visitor would be paid from it. If there is no estate, the visitor will ordinarily be compensated from the county general fund unless the enacting jurisdiction has made other arrangements. Payment is made pursuant to the procedures provided in Section 5-417.

This section is based on UGPPA (1982) Section 2-306 (UPC Sections 5-406 (1982)).

Section 5-407. Confidentiality Of Records.

The written report of a [visitor] and any professional evaluation are confidential and must be sealed upon filing, but are available to:

(1) the court;

(2) the respondent without limitation as to use;

(3) the petitioner, the [visitor], and the petitioner's and respondent's lawyers, for purposes of the proceeding; and

(4) other persons for such purposes as the court may order for good cause.

COMMENT

This section is new, although a number of states have a comparable provision. This section is designed to protect the respondent's privacy, but still make the records accessible when needed to any of the involved parties or to others on a showing of good cause. The drafting committee recognized that "watch-dog" groups, the media, and others can perform essential functions of deterring abuse

and facilitating reform, and in drafting this provision balanced the need to protect the respondent's privacy with the need of others to access this information.

Section 5-408. Original Petition: Procedure At Hearing.

(a) Unless excused by the court for good cause, a proposed conservator shall attend the hearing. The respondent shall attend and participate in the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents, examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the [visitor], and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent and may be closed upon request of the respondent and a showing of good cause.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

COMMENT

The provision requiring the conservator to attend the hearing is new, although based on a recommendation from *National Probate Court Standards*, Standard 3.4.8(c) "Hearing" (1993). While the Court may waive the proposed conservator's attendance for good cause, in all but the most unusual of circumstances the proposed conservator should be required to attend to give the Court the opportunity to assess the conservator's qualifications for appointment and to make any other inquiry of the conservator that the Court determines necessary. Additionally, the respondent's attendance is required unless excused for good cause or the respondent's attendance is impossible. The respondent has the right to take an active role in the proceeding.

There may be occasions when the Court needs to hold the hearing at a location other than the Court, if convenient to the respondent. The respondent may request that the hearing be closed, and if the respondent shows good cause, the Court will close the hearing. Others may make a request to participate, which may be granted by the Court without a hearing if the Court finds that the respondent's best interest is served by the participation. The Court's order granting the request to participate should indicate the extent participation will be allowed.

This section is based on subsections (d) and (e) of UGPPA (1982) Section 2-306 (subsections (d) and (e) of UPC Section 5-406 (1982)).

Section 5-409. Original Petition: Orders.

(a) If a proceeding is brought for the reason that the respondent is a minor, after a hearing on the petition, upon finding that the appointment of a conservator or other protective order is in the best interest of the minor, the court shall make an appointment or other appropriate protective

order.

(b) If a proceeding is brought for reasons other than that the respondent is a minor, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.

(c) Within 14 days after an appointment, the conservator shall deliver or send a copy of the order of appointment, together with a statement of the right to seek termination or modification, to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition.

(d) The appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person.

COMMENT

This section emphasizes the related concepts of least restrictive alternative and limited conservatorship, both of which accord with the philosophy of this article that a conservator should be appointed only when necessary, and then with only those powers that are necessitated by the respondent's actual limitations. The Court, in ordering the creation of the conservatorship, shall, in its order, grant the conservator only those powers that are absolutely essential for the conservator to exercise. The Court, in its order, must also ensure that the protected person's self-reliance and independence are maximized.

In keeping with the concept of limited conservatorship, subsection (c) requires the guardian to provide the ward and all those persons given notice of the hearing a copy of the order of appointment along with a notice of the right to request a termination or a modification of the guardianship. This makes certain that those who were originally notified of the petition will also be notified of the results because they are the ones most likely to have a continuing interest in the protected person's welfare.

Per subsection (d), the fact that a conservator is appointed or another protective order is entered is not a determination of the protected person's incapacity under Part 3 for any other purpose.

This section is based on UGPPA (1982) Sections 2-306(f) and 2-307(a) and (d) (UPC Sections 5-406(f) and 5-407(a) and (d) (1982)).

Section 5-410. Powers Of Court.

(a) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:

(1) with respect to a minor for reasons of age, all the powers over the estate and business affairs of the minor which may be necessary for the best interest of the minor and members of the minor's immediate family; and

(2) with respect to an adult, or to a minor for reasons other than age, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person which the person could exercise if the person were an adult, present, and not under conservatorship or other protective order.

(b) Subject to Section 5-110 requiring endorsement of limitations on the letters of office, the court may limit at any time the powers of a conservator otherwise conferred and may remove or modify any limitation.

COMMENT

Subsection (a) gives the Court supervising a conservatorship all of the powers the protected person would have been able to exercise directly were the protected person of full capacity and the conservatorship or other protective order not in effect. While these powers may be exercised directly by the Court, the powers will most often be exercised by a conservator without prior Court approval. Sections 5-425 and 5-427 list distributive and administrative powers that a conservator may exercise without prior Court approval. Section 5-411 lists powers, nearly all related to estate planning, that may be exercised only with prior Court approval.

Subsection (a)(1) gives the Court the power to protect the assets of a minor by withholding distribution from the minor on attainment of majority when continued supervision of the assets is needed. Before ordering such a continuation, however, the Court must be convinced, for reasons other than the minor's age, that a basis exists under Section 5-401(2) for the appointment of a conservator or other protective order.

Subsection (b) authorizes the Court at any time to limit the powers of the conservator, subject to any limitations contained in the letters of conservatorship. Formal procedures for enlarging or restricting the powers of a conservator are provided in Section 5-414. Such formal procedures *must* be utilized in order to grant a conservator additional powers. Such procedures *may* be utilized to limit the powers of a conservator previously granted, or the Court may elect instead to proceed under this section. Per Section 5-110, any restrictions on the conservator's powers must be endorsed on the letters of conservatorship. Under Section 5-424(a), third persons are charged with knowledge of and subject to possible liability for failing to act in accordance with restrictions endorsed on the letters of office.

This section is based on UGPPA (1982) Sections 2-307(b) and 2-325 (UPC Sections 5-407(b) and 5-425 (1982)).

Section 5-411. Required Court Approval.

(a) After notice to interested persons and upon express authorization of

the court, a conservator may:

(1) make gifts, except as otherwise provided in Section 5-427(b);

(2) convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties;

(3) exercise or release a power of appointment;

(4) create a revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected person;

(5) exercise rights to elect options and change beneficiaries under insurance policies and annuities or surrender the policies and annuities for their cash value;

(6) exercise any right to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and

(7) make, amend, or revoke the protected person's will.

(b) A conservator, in making, amending, or revoking the protected person's will, shall comply with [the State's statute for executing wills].

(c) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained. The court shall also consider:

(1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;

(2) possible reduction of income, estate, inheritance, or other tax liabilities;

(3) eligibility for governmental assistance;

(4) the protected person's previous pattern of giving or level of support;

(5) the existing estate plan;

(6) the protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and

(7) any other factors the court considers relevant.

(d) Without authorization of the court, a conservator may not revoke or amend a durable power of attorney of which the protected person is the principal. If a durable power of attorney is in effect, absent a court order to the contrary, a decision of the agent takes precedence over that of a conservator.

COMMENT

This section lists actions for which a conservator must obtain prior court approval. The actions for which court approval is required all relate to the protected person's estate plan. Except for the power to make, amend, or revoke the protect person's will, this section duplicates the list of transactions found at UGPPA (1982), Section 2-307(b)(3)(UPC Section 5-407(b)(3) (1982)). The section should be read together with Section 5-418(d), which authorizes the conservator to examine the protected person's estate planning documents.

The power to make, amend, or revoke the protected person's will is taken from the California and South Dakota statutes. *See* Cal. Prob. Code Sections 2580, 6100.5(c), 6110(c); S. D. Codified Laws Ann. Section 29A-2-520. In subsection (b), the enacting jurisdiction should insert the citation for its statute on the execution requirements for ordinary attested wills. Subsection (b) follows the approach taken by the South Dakota statute. The other approach, followed by California, is to amend the statute on execution of wills to specifically allow execution by a conservator.

Pursuant to subsection (c), decisions by the conservator under this section must be based primarily on the decision that the protected person would have made, if of full capacity. The protected person's personal values and expressed desires, past and present, are to be considered when making decisions. Carrying out the protected person's intent or probable intent is a major theme of this article. In this regard, this section probably confirms what is already the law. Even in the absence of a statute, the conservator should consider the protected person's probable wishes, particularly with respect to gifts and other estate planning related transactions. For an overview of the history of this judicially-created doctrine and a sampling of representative cases, *see* Restatement (Third) of the Law of Trusts, § 11, reporter's note to cmt. f (Tentative Draft No. 1, 1996). The authority of a court to authorize a conservator to engage in estate planning related transactions is also expressly confirmed by statute in a majority of states.

While not so limited, the authority confirmed by this section will most often be used to minimize tax liabilities. For example, by making annual exclusion gifts, the federal estate tax liability at the protected person's death may be substantially reduced. Also quite valuable is the ability, with court approval, to amend the protected person's estate planning documents. For example, failures to meet the technical requirements for the federal estate tax marital or charitable deduction can be corrected.

This section can also be used for non-tax transactions. Transfers may be made to qualify the protected person for governmental programs, or the court may continue the protected person's prior pattern or giving to charities and others. Per Section 5-427(b), court approval is required for gifts exceeding 20% of the estate's annual income.

Under subsection (d), prior court approval is required before a conservator may revoke or amend the protected person's durable power of attorney. Also, if a durable power of attorney is in effect, the decision of the agent takes precedence over that of the conservator, absent a court order to the contrary. The purpose of this provision is to make certain that the court has been made aware of the durable power of attorney and has determined that the power should be revoked. For this reason the petition for the appointment of a conservator must state whether the respondent has executed a power of attorney and list the name and address of the agent, if known. Also, the agent must be given notice of the proceeding. *See* Sections 5-403(b)(6) and 5-404(b).

The persons who must be given notice of hearing on a petition under this Section are as determined under Section 5-404(c), which prescribes the notice requirements for petitions for orders subsequent to the appointment of a conservator. Notice of the hearing, together with a copy of the petition, must be given to the protected person, if the protected person has attained fourteen years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

Both California and South Dakota have enacted more specific notice requirements with respect to their statutes authorizing conservators, with court approval, to engage in a variety of estate planning related transactions. California requires that notice be given to the conservator, the conservatee, the conservatee's spouse, any person who has made a request for special notice, any other persons required to be named in a petition for the appointment of a conservator, and, so far as known to the petitioner, the conservatee's heirs and beneficiaries under any purported wills. Cal. Prob. Code Sections 1460, 2581. South Dakota requires notice to the protected person, to the beneficiaries of the protected person's estate plan, to the protected person's presumptive heirs and, if known, to any attorney or financial advisor who advised the protected person within the previous five years. Should the petition request amendment or revocation of a trust or the protected person's will, notice must also be given to the trustee and the nominated executor. *See* S.D. Codified Laws Section 29A-5-420.

Subsection (a) of this section is based on UGPPA (1982) Section 2-307(b) (UPC Section 5-407(b) (1982)). Subsections (b)-(d) are new.

Section 5-412. Protective Arrangements And Single Transactions.

(a) If a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may:

(1) authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including:

(A) payment, delivery, deposit, or retention of funds or property;

(B) sale, mortgage, lease, or other transfer of property;

(C) purchase of an annuity;

(D) making a contract for life care, deposit contract, or

contract for training and education; or

(E) addition to or establishment of a suitable trust[, including a trust created under the Uniform Custodial Trust Act], and

(2) authorize, direct, or ratify any other contract, trust, will, or transaction relating to the protected person's property and business affairs, including a settlement of a claim, upon determining that it is in the best interest of the protected person.

(b) In deciding whether to approve a protective arrangement or other transaction under this section, the court shall consider the factors described in Section 5-411(c).

(c) The court may appoint a [master] to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. The [master] has the authority conferred by the order and shall serve until discharged by order after report to the court.

COMMENT

Consistent with the philosophy of this article that a conservator be appointed only as a last resort, this section authorizes the court, in lieu of appointing a conservator, to order a variety of less intrusive "protective arrangements." A protective arrangement typically involves a single transaction such as a sale of land or the entry of a contract for care. The procedure for obtaining a protective arrangement is similar to that required for the appointment of a conservator. A petition must be filed (Section 5-403), notice must be given to those listed in the petition (Section 5-404), the court must appoint a visitor unless the respondent is represented by counsel and the relief sought is a protective proceeding (Section 5-406(a)), and the court must appoint a lawyer for the respondent if requested by the respondent, if recommended by the visitor, or if the court determines that the respondent needs representation (Alternative 1 of Section 5-406(b)), or if otherwise required by statute (Alternative 2 of Section 5-406(b)). The procedure to be followed at the hearing is also identical. Sections 5-408 and 5-409. At the hearing, the court, applying the standards of Section 5-401, must determine that a basis for the protective order exists. Finally, the protective arrangement ordered must be consistent with the least restrictive order consistent with the court's findings. Section 5-409(b).

While the guardianship and conservatorship statutes of many states do not specifically authorize protective arrangements, such arrangements are often ordered, usually under the guise of a temporary or emergency conservatorship. This part deliberately avoids the use of emergency conservatorships and allows the appointment of a temporary conservator only as a replacement for a conservator who holds a regular appointment. *See* Section 5-414(a)(4). This article instead prefers the less intrusive and more precisely defined protective arrangement. But to effectuate a protective arrangement under this section, the temporary appointment by the court of someone to implement the protective arrangement will often be required. To avoid the implication that such appointee is a type of conservator, this part provides for the appointment of "masters" instead of either "emergency" or "special" conservators. The role of the master is to carry out only those tasks that are specifically ordered by the court. The

drafting committee concluded that the terms "emergency" or "special" conservator were inappropriate because they imply that the person appointed would have all of the powers and duties of a conservator, which is much too broad a characterization of the limited role contemplated. The word "master" is bracketed, recognizing that different states use different words to refer to the same position. The enacting state that uses a different word should substitute its own term.

Under subsection (a)(2), the settlement of a claim includes the settlement of a personal injury lawsuit brought on behalf of the minor. One of the more important protective arrangements listed in subsection (a)(1), and also in the 1982 UGPPA, is the authority to enter into a contract for life care.

This section is based on UGPPA (1982) Section 2-308 (UPC Section 5-408 (1982)).

Section 5-413. Who May Be Conservator: Priorities.

(a) Except as otherwise provided in subsection (d), the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

(1) a conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;

(2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if the respondent has attained 14 years of age and at the time of the nomination had sufficient capacity to express a preference;

(3) an agent appointed by the respondent to manage the respondent's property under a durable power of attorney;

(4) the spouse of the respondent;

(5) an adult child of the respondent;

(6) a parent of the respondent; and

(7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) A person having priority under subsection (a)(1), (4), (5), or (6) may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

(c) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(d) An owner, operator, or employee of [a long-term care institution] at

which the respondent is receiving care may not be appointed as conservator unless related to the respondent by blood, marriage, or adoption.

COMMENT

This section gives top priority for appointment to existing conservators appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing conservators are granted a first priority for two reasons. First, many of these cases will involve transfers of a conservatorship from another state. To assure a smooth transition, the currently appointed conservator appointed in this state or another should have the right to the appointment at the new location. Second, many cases may involve situations where a conservatorship appointment is sought despite the appointment in another place. Granting the existing conservator priority will deter such forum shopping. Should the existing conservator be inappropriate for some reason, subsection (c) permits the court to skip over the existing conservator and appoint someone with lower priority or even no priority.

A conservator or individual nominated by the respondent or the agent named in the respondent's durable power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference. The nomination may also be made by separate document. While it is generally good practice for an individual to nominate as conservator the agent named in a durable power of attorney, the section grants such an agent a preference in the absence of a specific nomination. The agent is granted preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a conservatorship to thwart the agent's authority. To assure that the agent will be in a position to assert his priority, Section 5-404(b) requires that the agent receive notice of the proceeding. Also, until the court has acted to approve the revocation of that authority, Section 5-411(d) provides that the authority of an agent takes precedence over that of the conservator.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, *see* the detailed comment to Section 5-304.

While this section substantially overlaps with Section 5-310, the comparable provision on selection of guardians, there are some differences. For example, Section 5-310 denies a priority to an emergency or temporary guardian, but this section does not expressly deny a priority for appointment to an emergency or temporary conservator appointed in another state. But the failure in subsection (a)(1) to expressly exclude these categories of conservator does not mean that they enjoy a priority for appointment. Unlike the case with guardians, emergency or temporary conservators are not included within the definition of "conservator" found in Section 5-102(1).

Subsection (d) prohibits anyone affiliated with a long-term care facility at

which the respondent is receiving care from being appointed as conservator absent a blood, marital or adoptive arrangement. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the protected person from potential financial exploitation. Each state enacting Parts 1-4 of this article needs to insert the particular term or terms used in the state for facilities considered to be long-term care institutions.

National Probate Court Standards, Standard 3.4.11 "Qualifications and Appointments of Conservators" (1993), recognizes that the court should appoint as conservator one who is both willing and suitable to manage the respondent's finances and property, based on the nature of the respondent's estate and the respondent's incapacity. The standard provides a preference in appointment to one known by, related to, or requested by the respondent.

This section is based on UGPPA (1982) Section 2-309 (UPC Section 5-409 (1982)).

Section 5-414. Petition For Order Subsequent To Appointment.

(a) A protected person or a person interested in the welfare of a protected person may file a petition in the appointing court for an order:

(1) requiring bond or collateral or additional bond or collateral, or reducing bond;

(2) requiring an accounting for the administration of the protected person's estate;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator;

(5) modifying the type of appointment or powers granted to the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to manage the estate and business affairs has so changed as to warrant the action; or

(6) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(c) Upon notice and hearing the petition, the court may give appropriate instructions and make any appropriate order.

COMMENT

Once a conservator has been appointed, the Court supervising the conservatorship will ordinarily act only following the request of some moving party. This section lists the most common types of petitions. Subsection (a)(6) allows for petitions for "other appropriate relief" to be brought.

It is essential that the protected person have the right to petition for appropriate relief. While such a petition was not forbidden under the 1982 UGPPA, neither was it expressly authorized. The lead-in language to subsection (a) has been revised to clarify that a petition may be filed by the protected person.

While a limited conservatorship should be ordered, whenever feasible, at the time of the original appointment, such appointments may also be made at a later date. Perhaps the possibility of a limited conservatorship was not even considered, or perhaps the protected person's situation has improved to the point that a limited conservatorship is now realistic. Also, even when a limited conservatorship is ordered in the first instance, it is sometimes necessary to grant the conservator additional powers or control over additional property. Subsection (a)(5), which is new, authorizes petitions to increase or decrease the powers granted to the conservator or property subject to the conservatorship. Should a request for increased powers require additional proof of the protected person's impairment, such impairment must be proved by clear and convincing evidence. *See* Section 5-401(2)(A).

This section is based on UGPPA (1982) Section 2-315 (UPC Section 5-415 (1982)).

Section 5-415. Bond.

The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship according to law, with sureties as it may specify. Unless otherwise directed by the court, the bond must be in the amount of the aggregate capital value of the property of the estate in the conservator's control, plus one year's estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation, lacks power to sell or convey without court authorization. The court, in place of sureties on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

COMMENT

Bond for a conservator is required under this section only if ordered by the Court. The bond may be set pursuant to an order entered on the Court's own motion or a petition by the protected person or an individual interested in the protected person's welfare. The bond should be in an amount adequate to guard against financial exploitation of the protected person's assets by the conservator. The statute assumes the amount will normally equal the value of the estate plus one year's estimated income. The Court is free, however, to set either a lesser or greater amount. The bond should be adequate in all cases, even in cases where the well-meaning relative or friend is appointed as conservator.

Bond may be ordered either at the time of the original appointment or at any later time. The bond requirements for conservators in this section are somewhat more strict than those for personal representatives under Article III, Part 6 of the UPC. Under the UPC, a personal representative usually need file a bond only if an interested person makes a demand.

While this section does not specify factors for the Court to consider in deciding whether to require bond, some of the states have enacted such lists.

For example, the South Dakota statute requires the Court to consider the following factors in determining the necessity for or amount of a conservator's bond: (1) the value of the personal estate and annual gross income and other receipts with the conservator's control; (2) the extent to which the estate has been deposited under an arrangement requiring an order of Court for its removal; (3) whether an order has been entered waiving the requirement that accountings be filed and presented or permitting accountings to be filed less frequently than annually; (4) the extent to which the income and receipts are payable directly to a facility responsible for or which has assumed responsibility for the care or custody of the minor or protected person; (5) whether a guardian has been appointed, and if so, whether the guardian has presented reports as required; and (6) whether the conservator was appointed pursuant to a nomination which requested that bond be waived. *See* S.D. Codified Laws Section 29A-5-111.

This section is based on UGPPA (1982) Section 2-310 (UPC Section 5-410 (1982)).

Section 5-416. Terms And Requirements Of Bond.

(a) The following rules apply to any bond required:

(1) Except as otherwise provided by the terms of the bond, sureties and the conservator are jointly and severally liable.

(2) By executing the bond of a conservator, a surety submits to the jurisdiction of the court that issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator in which the surety is named as a party. Notice of any proceeding must be sent or delivered to the surety at the address shown in the court records at the place where the bond is filed and to any other address then known to the petitioner.

(3) On petition of a successor conservator or any interested person, a proceeding may be brought against a surety for breach of the obligation of the bond of the conservator.

(4) The bond of the conservator may be proceeded against until liability under the bond is exhausted.

(b) A proceeding may not be brought against a surety on any matter as to which an action or proceeding against the primary obligor is barred.

COMMENT

This section specifies various technical requirements that apply when bond is required. The cost of the bond is payable from the protected person's estate.

This section is based on UGPPA (1982) Section 2-311 (UPC Section 5-411 (1982)).

Section 5-417. Compensation And Expenses.

If not otherwise compensated for services rendered, a guardian, conservator, lawyer for the respondent, lawyer whose services resulted in a protective order or in an order beneficial to a protected person's estate, or any other person appointed by the court is entitled to reasonable compensation from the estate. Compensation may be paid and expenses reimbursed without court order. If the court determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount must be repaid to the estate.

COMMENT

This section establishes a standard of reasonable compensation for both guardians and conservators as well as for the respondent's lawyer and any one else appointed by the Court in a guardianship or protective proceeding. Factors to be considered by the Court in setting compensation will vary depending on the professional or fiduciary role filled by the person making the request. Rates of compensation may also vary from state to state and at different locales within particular states.

This section is derived from UGPPA (1982) Section 2-313 (UPC Section 5-413 (1982)), but a number of matters left open in the prior version now have been addressed. First, guardians are expressly added to the list of those who are entitled to compensation from the estate. Previously, the guardian's right to compensation was mentioned only in Parts 2 and 3. *See* Sections 5-209(a), 5-316(a). Second, the section sets out more clearly which lawyers are entitled to compensation. The respondent's lawyer, as well as the lawyer whose services resulted in a protective order or any other order of benefit to the estate are entitled to compensation and reimbursement for costs advanced. For example, a lawyer whose services resulted in the removal of an abusive conservator might be entitled to compensation under this provision. Third, while compensation may be paid from the estate without Court order, excessive or inappropriate payments must be repaid to the estate.

While the size of the estate is an important factor in setting compensation, in many cases there will be no estate or the estate will not be sufficient to pay the costs of the initial proceeding. In that event the Court, without appointing a conservator, may simply divide the estate among those entitled to compensation or reimbursement. Sections 5-305 and 5-406 require a visitor to inform the respondent that attorney's fees and other expenses of the proceeding will be paid from the respondent's estate. If the respondent is found to be indigent, compensation and expenses authorized by this section typically will be paid from the general fund of county, or from whatever funding exists in the enacting state for indigent representation, such as legal aid, with the compensation most likely at a fixed rate.

For a list of factors relevant in determining a conservator's compensation, *see* Restatement (Third) of Trusts, § 38 cmt. c (Tentative Draft No. 2, 1999). Among the factors listed are skill, experience and time devoted to duties; the amount and character of the property; the degree of difficulty; responsibility and risk assumed; the nature and cost of services rendered by others; and the quality of the performance. *See also* Restatement (Second) of Trusts § 242 (1959). In setting compensation, the services actually performed and responsibilities assumed by the conservator should be closely examined. For example, an adjustment in compensation may be appropriate if the conservator had delegated

significant duties. On the other hand, a conservator with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft No. 2, 1999).

The standard of reasonable compensation also applies if the estate has multiple conservators. The mere fact that the estate has more than one conservator does not mean that the conservators together are entitled to more compensation than had either one acted alone. Nor does the appointment of multiple conservators mean that the conservators are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it should be divided depend on the totality of the circumstances. Factors to be considered include the Court's reasons for appointing multiple conservators and the level of responsibility assumed and exact services performed by each.

This section authorizes the payment of compensation from the respondent's estate even if no guardian or conservator is appointed or other protective order entered. Those entitled to compensation in that case are persons appointed by the Court in connection with the proceeding, including the [visitor], the respondent's lawyer, and the doctor or other professional appointed to perform an evaluation. However, other law in the enacting jurisdiction may grant the respondent a right to reimbursement should the petition be totally without merit.

A guardian or conservator acting as a representative payee of the ward's or protected person's Social Security benefits may not be paid a fee from Social Security funds. Both Titles II and XVI of the Social Security Act limit the use of the funds to basic necessities. The only time that a fee may be taken is if the guardian or conservator is an "organizational payee" approved by the Social Security Administration.

Section 5-418. General Duties Of Conservator; Plan.

(a) A conservator, in relation to powers conferred by this part or implicit in the title acquired by virtue of the proceeding, is a fiduciary and shall observe the standards of care applicable to a trustee.

(b) A conservator may exercise authority only as necessitated by the limitations of the protected person, and to the extent possible, shall encourage the person to participate in decisions, act in the person's own behalf, and develop or regain the ability to manage the person's estate and business affairs.

(c) Within 60 days after appointment, a conservator shall file with the appointing court a plan for protecting, managing, expending, and distributing the assets of the protected person's estate. The plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the plan steps to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections of expenses and resources.

(d) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available

for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator and may examine the will and any other donative, nominative, or other appointive instrument of the person.

COMMENT

This section reflects the dual role of a conservator. On the one hand, a conservator is a fiduciary charged with management of another's property. Consequently, subsection (a) requires a conservator to observe the standard of care applicable to trustees. On the other hand, a conservator, like a guardian, also owes obligations directly to the protected person, obligations emphasized in subsection (b). Subsection (b) emphasizes the concept of limited conservatorship by limiting the exercise of the conservator's authority and requiring the participation of the protected person in decision making. The conservator must encourage the participation of the protected person in decisions as well as encourage the protected person to develop or regain the capacity to act without a conservator. Before making a decision, the conservator should also make an effort to learn the personal values of the protected person and ask the protected person about the protected person's desires. The conservator should be particularly cognizant of the views expressed by the protected person prior to the conservator's appointment.

Under subsection (c), the conservator must file a plan with the Court within sixty days after appointment. In addition to plans for expenditures, investments, and distributions, the plan must list the steps that will be taken to develop or restore the protected person's ability to manage the person's property and an estimate of the length of the conservatorship. The filing of a plan will help the conservator perform more effectively and reduce the need to take action to recover improper expenditures. While a conservator need not request a hearing on the plan, Section 5-404(d) does require that the conservator, within fourteen days after its filing, give notice of the filing of the plan to the protected person and any other person the Court directs. Should those notified have concerns about the plan, a hearing on the plan may be requested pursuant to Section 5-414.

Subsection (c) of this section, and many of the sections in Part 4 which follow, are in substantial part specific applications of the fundamental responsibilities stated in subsections (a) and (b), specifying subsidiary duties and the powers and immunities necessary to properly implement the conservator's role. Subsection (c) is derived from *National Probate Court Standards*, Standard 3.4.15 "Reports by the Conservator" (1993).

Subsection (d), contrary to at least some case law, allows a conservator access to and the right to examine the protected person's will and other documents comprising the protected person's estate plan. Such access is essential for the conservator to carry out the obligation, as stated in subsection (b), to consider the protected person's views when making decisions. For example, by allowing the conservator access to the estate plan, the risk of inadvertent sales of specifically devised property and the difficult ademption problems such sales often create may be avoided. Access to the estate plan also facilitates, where appropriate, the filing of a petition with respect to the protected person's estate plan as authorized by Section 5-411.

Subsection (a) is based on UGPPA (1982) Section 2-316 (UPC Section 5-416 (1982)), and subsection (d) on UGPPA (1982) Section 2-326 (UPC Section 5-426

(1982)). Subsections (b) and (c) are new.

Section 5-419. Inventory; Records.

(a) Within 60 days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) A conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person.

COMMENT

The time limit for the filing of the inventory has been reduced to sixty days from the ninety days provided in the 1982 UGPPA in order to coordinate with the filing of the conservatorship plan required by Section 5-418. While technically separate documents, the conservatorship plan and inventory should ideally be prepared in tandem, with the inventory providing backup data for the course of action recommended in the conservatorship plan.

The requirement in the 1982 UGPPA that the conservator provide certain individuals with a copy of the inventory has been revised and moved to Section 5-404(d). The conservator is no longer allowed to unilaterally decide whether the protected person is competent to understand the inventory and to withhold the protected person's copy. The inventory, like all other documents of which notice is required, must be provided to the protected person regardless of competency.

This section is based on UGPPA (1982) Section 2-317 (UPC Section 5-417 (1982)).

Section 5-420. Reports; Appointment Of Visitor; Monitoring.

(a) A conservator shall report to the court for administration of the estate annually unless the court otherwise directs, upon resignation or removal, upon termination of the conservatorship, and at other times as the court directs. An order, after notice and hearing, allowing an intermediate report of a conservator adjudicates liabilities concerning the matters adequately disclosed in the accounting. An order, after notice and hearing, allowing a final report adjudicates all previously unsettled liabilities relating to the conservatorship.

(b) A report must state or contain:

(1) a list of the assets of the estate under the conservator's control and a list of the receipts, disbursements, and distributions during the period for which the report is made;

(2) a list of the services provided to the protected person; and

(3) any recommended changes in the plan for the conservatorship as well as a recommendation as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship.

(c) The court may appoint a [visitor] to review a report or plan, interview the protected person or conservator, and make any other investigation the court directs. In connection with a report, the court may order a conservator to submit the assets of the estate to an appropriate examination to be made in a manner the court directs.

(d) The court shall establish a system for monitoring conservatorships, including the filing and review of conservators' reports and plans.

COMMENT

Similar to previous versions, this section requires a conservator to periodically account except that the requirement to "account" has been changed to the requirement to "report." This change was made because a proper assessment of the conservator's performance requires more than the mere verification of receipts and disbursements. A conservator is more than a manager of property. To assess the conservator's compliance with the general duties stated in Section 5-418, the court must also determine whether the conservator has acted in accordance with the conservatorship plan, whether the conservator, to the extent feasible, has attempted to involve the protected person in decision making, and whether the conservatorship or its current scope is still appropriate.

The reporting requirements in this section are consistent with those in Section 5-317 for guardians of incapacitated persons. Enforcement of the reporting requirements under this section is a critical component of court oversight of conservatorships to prevent abuses. This includes the right of the court under subsection (a) to modify the reporting requirements as dictated by the circumstances of a specific conservatorship.

States are required under subsection (d) to establish a system for monitoring conservatorships, which would include, but not be limited to, mechanisms for assuring that annual reports are timely filed and reviewed. An independent monitoring system is crucial so that the court can adequately safeguard against possible abuses. Monitors can be paid court personnel, court appointees, or volunteers. For a comprehensive discussion of the various methods for monitoring conservatorships, *see Sally Balch Hurme, Steps to Enhance Guardianship Monitoring* (A.B.A. 1991). *See also* AARP VOLUNTEERS: A RESOURCE FOR STRENGTHENING GUARDIANSHIPS (AARP 1991).

States should also establish a plan for payment for the monitoring. In some states, the monitor may be a court employee or a volunteer. If the estate has sufficient funds to pay the monitoring fee, the estate should be charged accordingly. Only when an estate has insufficient assets to pay for monitoring should public funds be used to cover the cost of monitoring.

The National Probate Standards also provide for the filing of reports and procedures for monitoring conservatorships. *See National Probate Court Standards*, Standards 3.4.15 "Reports by the Conservator," and 3.4.16 "Monitoring of the Conservator" (1993). The National Probate Court Standards additionally contains recommendations relating to the need for periodic review of

conservatorships and sanctions for failure of conservators to comply with reporting requirements. *See National Probate Court Standards*, Standards 3.4.17 "Revaluation of Necessity for Conservatorship," and 3.4.18 "Enforcement."

Subsection (a) of this section is derived from UGPPA (1982) Section 2-318 (UPC Section 5-418 (1982)). Subsections (b)-(d) are new.

Section 5-421. Title By Appointment.

(a) The appointment of a conservator vests title in the conservator as trustee to all property of the protected person, or to the part thereof specified in the order, held at the time of appointment or thereafter acquired. An order vesting title in the conservator to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order.

(b) Letters of conservatorship are evidence of vesting title of the protected person's assets in the conservator. An order terminating a conservatorship transfers title to assets remaining subject to the conservatorship, including any described in the order, to the formerly protected person or the person's successors.

(c) Subject to the requirements of other statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give notice of title as between the conservator and the protected person.

COMMENT

Subsection (a) of this section should be read in conjunction with Section 5-409(d), which provides that the appointment of a conservator or entry of another protective order is not a determination of incapacity. Consequently, the appointment of a conservator under Part 4 does not itself affect the protected person's ability to enter into contracts or engage in other transactions. Instead, protection against possibly improvident contracts is provided by vesting in the conservator legal title to the protected person's assets, the same as if the conservator were acting as a trustee. This allows for administration of the property independent of the actions of the protected person except to the extent the conservator is required to consult with the protected person as required by Section 5-418. *See* Section 5-422 for possible remedies for third parties who deal with a protected person without knowledge of the conservatorship.

The order appointing a conservator does not necessarily vest title in the conservator to all assets of the protected person, but only to assets subject to the conservatorship. Should the order of appointment list the assets subject to the conservatorship, only title to those assets is transferred to the conservator. Ordinarily, in the absence of an order limiting the scope of the conservatorship, title to all of the protected person's assets will be transferred to the conservator. However, if the protected person has executed a durable power of attorney, title to assets within the agent's control are not transferred to the conservator until such time as the power of attorney is

revoked and the assets subject to the agency come within the conservator's control. *See* Section 5-411(d).

The appointment of the conservator gives the conservator the authority over the protected person's property, or, if a limited conservator, to that property specified in the Court's order. The letters of conservatorship are evidence of the conservator's authority and can be recorded to give notice.

The phrase "other property" in subsection (c) refers only to property title to which is ordinarily transferred by delivery of possession.

This section is based on UGPPA (1982) Sections 2-319(a) and 2-320 (UPC Setions 5-419(a) and 5-420 (1982)), modified to delete the former language that title to assets subject to a power of attorney vests automatically in the conservator.

Section 5-422. Protected Person's Interest Inalienable.

(a) Except as otherwise provided in subsections (c) and (d), the interest of a protected person in property vested in a conservator is not transferable or assignable by the protected person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied as provided in Section 5-429.

(b) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed under Section 5-429.

(c) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery from a protected person of tangible personal property of a type normally transferred by delivery of possession, is protected as if the protected person or transferee had valid title.

(d) A third party who deals with the protected person with respect to property vested in a conservator is entitled to any protection provided in other law.

COMMENT

This section provides a spendthrift effect for property of the protected person vested in the conservator. The section, like Section 5-421, is designed to allow the estate to be administered with a minimum of interference, and to make clear that the conservator, with respect to the property of the conservatorship, occupies a role similar to that of a trustee. The section is also designed to protect the estate, and hence the protected person, against possibly abusive or improvident claims. But some significant exceptions are recognized to protect the rights of third parties. An attempted transfer or assignment by the protected person, while ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied pursuant to the claims procedure

provided in Section 5-429. In addition, a creditor of the protected person, while forbidden to directly levy upon or garnish property held in the conservatorship, may be similarly entitled to relief under the claims procedures.

Subsection (c) addresses a special situation. While title to certain tangible personal property, such as an automobile, is transferred by means of a document of title, title to most tangible personal property is transferred simply by delivery of possession. Sales of such property are often casual, and purchasers do not usually inquire into the source of the seller's title. Upon the conservator's appointment, title to a protected person's tangible personal property, like title to the protected person's other assets, is transferred from the protected person to the conservator. But this transfer of title will normally not be known to a prospective purchaser, particularly if the tangible personal property is still in the protected person's possession. The effect of this subsection is to generally validate the title of such casual purchasers. The conservator may contest the purchaser's title only if the purchaser failed to pay full value, the purchaser knew of the conservatorship, or the purchaser, based on the circumstances, should have inquired into the conservatorship's existence.

Subsection (d) clarifies that this section does not supersede protections third parties may have under other law, such as under the statutes regulating commercial transactions.

Subsections (a) and (b) are based on subsections (b) and (c) of UGPPA (1982) Section 2-319 (subsections (b) and (c) of UPC Section 5-419 (1982)). Subsections (c) and (d) are new.

Section 5-423. Sale, Encumbrance, Or Other Transaction Involving Conflict Of Interest.

Any transaction involving the conservatorship estate which is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is expressly authorized by the court after notice to interested persons. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse, descendant, agent, or lawyer of a conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.

COMMENT

Transactions involving conservatorship assets entered into by the conservator or by persons with close business or personal ties to the conservator have the potential to be tainted by conflict of interest. Because of this serious risk, a transaction involving the conservatorship property entered into by the conservator or with persons having close ties to the conservator is voidable without further proof. But while this principle is well-established, the exact parameters of the principle are less certain. This section, which is based on comparable provisions of the UPC, articulates the doctrine with more precision. *Compare* UPC Section 3-713. Under this section, a transaction involving the conservatorship property which was entered into by the conservator or specified

relatives or business associates of the conservator is presumed to be premised on an impermissible advantage based on conflict of interest. However, transactions involving conservatorship property with parties not on the list are not necessarily valid. While transactions involving other parties are not presumed to be invalid, a transaction may still be voided if it is proven that a substantial conflict between personal and fiduciary interests exists and that the transaction was affected by the conflict. Also, the fact that the transaction is voidable does not extinguish any action for breach of fiduciary duty or for damages, separate and apart from voiding the transaction. The section intentionally does *not* provide any limitation of time on when an action to void the transaction may be brought. Instead, a laches test will be applied.

Per Section 5-414, a petition to void a transaction may be filed either by the protected person or by any person interested in the protected person's welfare. Whether the Court should grant or deny the petition will typically depend on the financial outcome of the conservatorship estate. Should the transaction have proven unprofitable to the conservator or related party, the Court will likely allow the transaction to stand.

Conservators considering entering into transactions that might implicate this section should consider obtaining prior Court approval. Under this section, a transaction is not voidable if approved by the Court following notice to interested persons.

This section is based on UGPPA (1982) Section 2-321 (UPC Section 5-421 (1982)).

Section 5-424. Protection Of Person Dealing With Conservator.

(a) A person who assists or deals with a conservator in good faith and for value in any transaction other than one requiring a court order under Section 5-410 or 5-411 is protected as though the conservator properly exercised the power. That a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators which are endorsed on letters as provided in Section 5-110 are effective as to third persons. A person who pays or delivers assets to a conservator is not responsible for their proper application.

(b) Protection provided by this section extends to any procedural irregularity or jurisdictional defect that occurred in proceedings leading to the issuance of letters and is not a substitute for protection provided to persons assisting or dealing with a conservator by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.

COMMENT

The purpose of this section is to facilitate commercial transactions by negating the traditional duty of inquiry found under the common law of trusts. Even the third party's actual knowledge that the third party is dealing with a conservator does not require that the third party inquire into the possession of or propriety of the conservator's exercise of a power. Nor is the third party, contrary to the common law, responsible for the proper application of funds or

property delivered to the conservator. But consistent with the emphasis on limited conservatorship, the protection extended to third parties is not unlimited. Third parties are charged with knowledge of restrictions on the authority of limited conservators. Pursuant to Section 5-110, any limitation on the assets subject to a conservatorship must be endorsed on the conservator's letters.

The protections provided by this section are of limited application. As provided in subsection (b), for many transactions this section will be superseded by statutes relating to commercial transactions, such as the Uniform Commercial Code, or by statutes relating to the transfer of securities, such as the state's version of the Uniform Simplification of Fiduciary Security Transfers Act.

For background on Section 7 of the Uniform Trustees' Powers Act, upon which this section is ultimately based, *see* Jerome H. Curtis, Jr., *Transmogrification of the American Trust*, 31 Real Prop. Prob. & Tr. J. 251 (1996).

This section is based on UGPPA (1982) Section 2-322 (UPC Section 5-422 (1982)).

Section 5-425. Powers Of Conservator In Administration.

(a) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers granted in this section and any additional powers granted by law to a trustee in this State.

(b) A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:

(1) collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another State, until the conservator considers that disposition of an asset should be made;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest assets of the estate as though the conservator were a trustee;

(6) deposit money of the estate in a financial institution, including one operated by the conservator;

(7) acquire or dispose of an asset of the estate, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition,

change the character of, or abandon an asset of the estate;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights;

(16) consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(17) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;

(18) insure the assets of the estate against damage or loss and the conservator against liability with respect to a third person;

(19) borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

(20) pay or contest any claim, settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;

(21) pay taxes, assessments, compensation of the conservator and any guardian, and other expenses incurred in the collection, care, administration, and protection of the estate;

(22) allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or other natural resources;

(23) pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee:

(A) to the guardian of the distributee;

(B) to a distributee's custodian under [the Uniform Transfers to Minors Act] or custodial trustee or [the Uniform Custodial Trust Act]; or

(C) if there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;

(24) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties; and

(25) execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

COMMENT

This section is based on UGPPA (1982) Section 2-323 (UPC Section 5-423 (1982)) with some changes. For example, the provision authorizing delegation is now stated as a separate section. *See* Section 5-426. Also, subsection (b)(23) is revised to expand the list of individuals to whom the conservator may pay sums otherwise distributable to the protected person. The list now includes custodians under the Uniform Transfers to Minors Act and trustees under the Uniform Custodial Trust Act. But the most significant change to this section is the deletion of the language of former subsection (a) that allowed a conservator of a minor to exercise the powers of a guardian without seeking formal appointment to that office.

While subsection (b)(7) authorizes a conservator to deal with real property located in another state, before disposing of the property in the other state, local law may require that the conservator have some contact with or supervision by a Court in that state.

In recent years, structured settlements have become more common. While the term "structured settlement" is not expressly used in this section, subsection (b)(20) would authorize a conservator to enter into such an agreement. The Court, by means of a protective arrangement, may also approve a structured settlement without appointing a conservator. *See* Section 5-412(a)(2).

Section 5-426. Delegation.

(a) A conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.

(b) The conservator shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;

(3) periodically reviewing an agent's overall performance and compliance with the terms of the delegation; and

(4) redressing an action or decision of an agent which would constitute a breach of trust if performed by the conservator.

(c) A conservator who complies with subsections (a) and (b) is not liable to the protected person or to the estate for the decisions or actions of the agent to whom a function was delegated.

(d) In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.

(e) By accepting a delegation from a conservator subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

COMMENT

This new section is based on Section 9 of the Uniform Prudent Investor Act, which itself was derived from the Restatement (Third) of Trusts: Prudent Investor Rule Section 171 (1992). The Uniform Prudent Investor Act, despite its title, addresses more than investment of trust assets. It also covers a variety of topics, including delegation, relating to the general management of trusts. Section 9 of the Act is designed to replace Section 3(24) of the Uniform Trustee Powers Act (1964) on which the former delegation provision was based. Unlike UGPPA (1982) Section 2-323(c)(24) (UPC Section 5-423(c)(24) (1982)), which merely authorized delegation without specifying standards, this section subjects delegation to a standard of care.

The purpose of this section is to encourage and protect the trustee in making delegations appropriate to the facts and circumstances of the particular conservatorship. This section is designed to strike the appropriate balance between the advantages and hazards of delegation. The standard for whether a particular function is delegable by a conservator is whether it is a function that a prudent conservator might delegate under similar circumstances. This section does not mandate delegation or hold a conservator liable for failing to

delegate. However, such liability may be imposed under some other section if the conservator, due to a failure to delegate, is unable to perform required duties. *See, e.g.,* Section 5-418 (general duties of conservator).

This section applies to delegation both to agents and co-conservators. Whether a conservator may delegate to a co-conservator functions which may not be delegated to an agent and vice versa will depend on the facts and circumstances of the particular conservatorship.

Under subsection (b)(3), the duty to review the agent's performance includes the periodic evaluation of the continued need for and appropriateness of the delegation, including the need to possibly terminate the relationship. The conservator's compliance with this duty should also protect the protected person against the risks of an overly broad delegation.

Although subsection (c) exonerates the conservator from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection (a), subsection (d) makes the agent responsible to the conservatorship.

Section 5-427. Principles Of Distribution By Conservator.

(a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the plan filed pursuant to Section 5-418, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child or spousal support, in accordance with the following rules:

(1) A conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or an individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent.

(2) A conservator may not be surcharged for money paid to persons furnishing support, care, education, or benefit to a protected person, or an individual who is in fact dependent on the protected person, in accordance with the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives personal financial benefit therefrom, including relief from any personal duty of support, or the recommendations are not in the best interest of the protected person.

(3) In making distributions under this subsection, the conservator shall consider:

(A) the size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to

manage business affairs and the estate;

(B) the accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and

(C) other money or sources used for the support of the protected person.

(4) Money expended under this subsection may be paid by the conservator to any person, including the protected person, as reimbursement for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(b) If an estate is ample to provide for the distributions authorized by subsection (a), a conservator for a protected person other than a minor may make gifts that the protected person might have been expected to make, in amounts that do not exceed in the aggregate for any calendar year 20 percent of the income of the estate in that year.

COMMENT

This section sets forth a conservator's specific duties and powers with respect to ongoing distributions. Distributions upon termination of the conservatorship are addressed in Section 5-431. Special rules with respect to a termination due to the death of the protected person are covered in Section 5-428. Distributions under this section may be made without Court authorization or confirmation.

This section is based on subsections (a) and (b) of UGPPA (1982) Section 2-324 (subsections (a) and (b) of UPC Section 5-424 (1982)) but with several changes. The categories for which distributions can be made have been expanded to include health and welfare. The authority to make distributions for the protected person's dependents has been clarified. "Dependents" is not limited to dependents whom the protected person is legally obligated to support, but refers to individuals who are in fact dependent on the protected person, such as children in college and adult children with developmental disabilities. Child and spousal support payments are now specifically included within permitted distributions to dependents. Although Section 5-411 allows the making of a gift, it may only be done pursuant to Court order. Under this section, a conservator may make a gift without Court order if the gift meets the stated limitations.

Section 5-428. Death Of Protected Person.

[(a)]If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the protected person which may have come into the conservator's possession, inform the personal representative or beneficiary named in the will of the delivery, and retain the estate for delivery to the personal representative of the decedent or to another person entitled to it.

[(b) If a personal representative has not been appointed within 40 days after the death of a protected person and an application or petition for appointment is not before the court, the conservator may apply to exercise powers and duties of a personal representative in order to administer and distribute the decedent's estate. Upon application for an order conferring upon the conservator the powers of a personal representative, after notice given by the conservator to any person nominated as personal representative by any will of which the applicant is aware, the court may grant the application upon determining that there is no objection and endorse the letters of conservatorship to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative.

(c) The issuance of an order under this section has the effect of an order of appointment of a personal representative [as provided in Section 3-308 and Parts 6 through 10 of Article III]. However, the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without retransfer to the conservator as personal representative.]

COMMENT

Subsection (a) lists the required duties of a conservator incident to the death of the protected person. The conservator must deliver to the Court for safekeeping any will of the protected person which may have come into the conservator's possession, inform the personal representative or a devisee named in the will that the will has been delivered, and retain the conservatorship estate for delivery to the personal representative or to another person entitled to it.

Subsections (b) and (c) address the particular problems that can arise if the estate beneficiaries fail to take action to appoint a personal representative for the protected person's estate. The conservator will then be unable to close the conservatorship because there is no "successor" to whom to deliver the protected person's assets. To enable the conservator to expeditiously close the conservatorship, this section specifies a streamlined process whereby the conservator can secure appointment as personal representative. These subsections are bracketed for several reasons. First, the enacting jurisdiction's probate code may already specifically address the right of the conservator to petition for appointment as personal representative or the right of the conservator to distribute the conservatorship assets directly to the estate beneficiaries. Second, subsections (b) and (c) are not essential and may be omitted if the enacting jurisdiction so chooses. Even though the state's statute may not specifically authorize a conservator to petition for appointment as personal representative, a conservator, like any other holder of a decedent's assets, may eventually take action to effect a distribution. Finally, subsection (b) is specifically tailored for states, such as states which have enacted the Uniform Probate Code, that allow the appointment of a personal representative without prior notice to the estate beneficiaries. For example, under the Code, the conservator-personal representative would be required to give notice of the appointment within thirty days. *See* Section 3-705. States which require notice to interested persons prior to the appointment of a personal representative should modify subsection (b) accordingly.

This section is based on UGPPA (1982) Section 2-324(e) (UPC Section 3-434(e) (1982)).

Section 5-429. Presentation And Allowance Of Claims.

(a) A conservator may pay, or secure by encumbering assets of the estate, claims against the estate or against the protected person arising before or during the conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (d). A claimant may present a claim by:

(1) sending or delivering to the conservator a written statement of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(2) filing a written statement of the claim, in a form acceptable to the court, with the clerk of court and sending or delivering a copy of the statement to the conservator.

(b) A claim is deemed presented on receipt of the written statement of claim by the conservator or the filing of the claim with the court, whichever first occurs. A presented claim is allowed if it is not disallowed by written statement sent or delivered by the conservator to the claimant within 60 days after its presentation. The conservator before payment may change an allowance to a disallowance in whole or in part, but not after allowance under a court order or judgment or an order directing payment of the claim. The presentation of a claim tolls the running of any statute of limitations relating to the claim until 30 days after its disallowance.

(c) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute of limitations and, upon due proof, procure an order for its allowance, payment, or security by encumbering assets of the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give to the conservator notice of any proceeding that could result in creating a claim against the estate.

(d) If it appears that the estate is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

(1) costs and expenses of administration;

(2) claims of the federal or state government having priority under other law;

(3) claims incurred by the conservator for support, care, education, health, and welfare previously provided to the protected person or individuals who are in fact dependent on the protected person;

(4) claims arising before the conservatorship; and

(5) all other claims.

(e) Preference may not be given in the payment of a claim over any other claim of the same class, and a claim dueand payable may not be preferred over a claim not due.

(f) If assets of the conservatorship are adequate to meet all existing claims, the court, acting in the best interest of the protected person, may order the conservator to grant a security interest in the conservatorship estate for the payment of any or all claims at a future date.

COMMENT

This section provides a procedure for the expeditious payment and resolution of claims. Should the estate be insufficient to satisfy all claims, payment will be made in accordance with the priorities specified in subsection (d). Subsection (a) provides for the conservator's payment of appropriate claims and the method by which claims can be presented.

Subsection (d), which should be read in conjunction with the applicable bankruptcy law, is not intended to preclude the filing of a petition for bankruptcy if the protected person is otherwise eligible.

This section is based on UGPPA (1982) Section 2-327 of the 1982 Act (UPC Section 5-427 (1982)), which in turn was drawn from the claims procedure contained in Article III, Part 8 of the UPC, except that the priorities in subsection (d) are designed for a conservatorship as opposed to a decedent's estate. The principal update is to incorporate into this section a 1987 amendment made to UPC Section 3-806. The effect of this change is to clarify that a conservator may change an allowance of claim to a disallowance at any time prior to payment or Court order. In addition, subsection (d)(3) has been revised to conform it to the revisions of the distribution standards under Section 5-427.

Section 5-430. Personal Liability Of Conservator.

(a) Except as otherwise agreed, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

(b) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by

proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(d) A question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or in another appropriate proceeding or action.

[(e) A conservator is not personally liable for any environmental condition on or injury resulting from any environmental condition on land solely by reason of an acquisition of title under Section 5-421.]

COMMENT

Subsection (a) is significant in that it provides that the conservator is generally *not personally liable* for contracts entered into as the conservator as long as the conservator discloses the representative capacity in the contract as well as identifies the estate. Liability in such cases is limited to the estate assets. But the conservator will be personally liable if the contract expressly so provides.

Subsection (b) reverses the common law rule that a conservator, as a fiduciary is liable for torts committed in the course of administering the conservatorship property regardless of the conservator's personal fault. The protection from liability provided by this subsection does not apply, however, if the conservator is "personally at fault," meaning that the conservator committed the tort either intentionally or negligently.

Subsection (c) confirms the intent of this section, that absent special agreement or other circumstances, a conservator is liable only in a representative capacity.

Subsection (e) is new, in recognition of the growing issue of environmental conditions on land that must be dealt with by the conservator. The effect of this subsection is to protect a conservator from possible liability due to the automatic transfer of title to the protected person's assets accruing upon the conservator's appointment pursuant to Section 5-421. For actions taken as conservator, the conservator's liability under state or federal environmental provision or regulation is generally limited to those assets held in the capacity as conservator. The conservator may be liable if the conservator's negligence causes or contributes to an environmental problem or potential environmental problem. Whether the conservator might be liable for actions or failures to act with respect to an environmental condition depends on state and federal environmental regulations, including CERCLA (Comprehensive Environmental Response, Compensation and Liability Act), found at 42 U.S.C. § 9601 et seq.

This section is placed in brackets to signal to the enacting jurisdiction that it should expand on and conform the language of subsection (e) to whatever provisions it may have enacted with respect to liability of other types of fiduciaries for environmental conditions.

This section is based on UGPPA (1982) Section 2-328 (UPC Section 5-428 (1982)). This section, with the exception of subsection (e), is also similar to UPC Sections 3-808 (personal representatives) and 7-306 (trustees).

Section 5-431. Termination Of Proceedings.

(a) A conservatorship terminates upon the death of the protected person or upon order of the court. Unless created for reasons other than that the protected person is a minor, a conservatorship created for a minor also terminates when the protected person attains majority or is emancipated.

(b) Upon the death of a protected person, the conservator shall conclude the administration of the estate by distribution to the person's successors. The conservator shall file a final report and petition for discharge within [30] days after distribution.

(c) On petition of a protected person, a conservator, or another person interested in a protected person's welfare, the court may terminate the conservatorship if the protected person no longer needs the assistance or protection of a conservator. Termination of the conservatorship does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(d) Except as otherwise ordered by the court for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for conservatorship. Upon the establishment of a prima facie case for termination, the court shall order termination unless it is proved that continuation of the conservatorship is in the best interest of the protected person.

(e) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person or the person's successors. The order of termination must provide for expenses of administration and direct the conservator to execute appropriate instruments to evidence the transfer of title or confirm a distribution previously made and to file a final report and a petition for discharge upon approval of the final report.

(f) The court shall enter a final order of discharge upon the approval of the final report and satisfaction by the conservator of any other conditions placed by the court on the conservator's discharge.

COMMENT

This section is new.

Termination of a conservatorship must be distinguished from termination of a particular conservator's appointment. For the provisions on termination of a conservator's appointment, *see* Section 5-112. This section does not apply to modification of a conservatorship, which is addressed in Section 5-414.

Upon termination of a conservatorship, a conservator is not entitled to an order of discharge until the Court approves the conservator's final report. A "report" in subsection (b) refers to a full and detailed accounting of monies received and expended, as well as other matters, including a description of the conservator's activities. *See* Section 5-420 for the required contents. A report

lacking in sufficient detail will preclude entry of the final order of discharge. Until the final order of discharge is entered, a conservator remains liable for previous acts as well as the obligation to account for the protected person's assets and funds. After notice and hearing, an order allowing a final report adjudicates all previously unsettled liabilities relating to the conservatorship. *See* Section 5-420(a).

If an enacting state chooses to use a different time period for the filing of the final report and petition for discharge than that contained in subsection (b), the time period used should not be significantly longer than the thirty days contained in subsection (b).

Subsection (d) requires the Court to follow the same procedures for a petition to terminate a conservatorship as apply to the petition for conservatorship, which may include the appointment of a [visitor] and counsel in some cases. The standard to terminate a conservatorship is prima facie evidence, intentionally a lower standard than the standard for creating a conservatorship. Once the petitioner has made out a prima facie case, the burden then shifts to the party opposing the petition to establish by clear and convincing evidence that continuation of the conservatorship is in the best interest of the protected person. A similar standard applies to the termination of a guardianship for an incapacitated person. *See* Section 5-318(c) and comment.

Prior to entering a final order of discharge, the Court should confirm that the conservator has accounted sufficiently for the assets and other property and executed the appropriate documents and delivered the property under the conservator's control.

To initiate proceedings under this section, the protected person or person interested in the protected person's welfare need not present a formal document prepared with legal assistance. A request to the Court may always be made informally.

The termination provision of the 1982 UGPPA, which was quite abbreviated, was located at Section 2-329 (UPC Section 5-429 (1982)).

Section 5-432. Payment Of Debt And Delivery Of Property To Foreign Conservator Without Local Proceeding.

(a) A person who is indebted to or has the possession of tangible or intangible property of a protected person may pay the debt or deliver the property to a foreign conservator, guardian of the estate, or other court-appointed fiduciary of the State of residence of the protected person. Payment or delivery may be made only upon proof of appointment and presentation of an affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the protected person is not pending in this State and the foreign fiduciary is entitled to payment or to receive delivery.

(b) Payment or delivery in accordance with subsection (a) discharges the debtor or possessor, absent knowledge of any protective proceeding pending in this State.

COMMENT

This section confirms that a person holding personal property of a protected person may deliver it to a conservator appointed in another state or foreign country without concern about liability. The protection does not apply, however, if the person holding the property is aware that a protective proceeding is pending in this state. Unlike UGPPA (1982) Section 2-330 (UPC Section 5-430 (1982)), upon which this section was derived, the conservator need no longer present a special affidavit in order to obtain the protection of this section. The third party may of course always demand an affidavit or other proof in order to make certain that the foreign conservator does indeed have the requisite authority.

Should it become necessary to appoint a conservator in the enacting state, the conservator has priority for appointment under Section 5-413(a)(1). The conservator may also petition for ancillary powers as provided under Section 5-433.

Section 5-433. Foreign Conservator: Proof Of Authority; Bond; Powers.

If a conservator has not been appointed in this State and a petition in a protective proceeding is not pending in this State, a conservator appointed in the jurisdiction in which the protected person resides may file in a court of this State, in a [county] in which property belonging to the protected person is located, authenticated copies of letters of appointment and of any bond. Thereafter, the conservator may exercise all powers of a conservator appointed in this State as to property in this State and may maintain actions and proceedings in this State subject to any conditions otherwise imposed upon nonresident parties.

COMMENT

This section allows a conservator appointed in another state or foreign country to exercise powers with respect to assets located in the enacting state. This section is particularly useful should the protected person own real estate in the enacting jurisdiction. Personal property can ordinarily be disposed of pursuant to the authority conferred by Section 5-432.

This section should be contrasted with Section 5-107, which contains the procedure for transferring jurisdiction over the conservatorship from another state or foreign country. Unlike Section 5-107, the Court in the other state or foreign country retains continuing authority over the conservatorship and the conservator remains accountable to that Court. This section merely allows the conservator to exercise management powers with respect to assets located in the enacting jurisdiction.

This section is based on UGPPA (1982) Section 2-331 (UPC Section 5-431 (1982)).

PART 5

DURABLE POWER OF ATTORNEY

Adoption of Uniform Durable Power of Attorney Act

Part 5 of Article V of the Uniform Probate Code was amended by the National Conference of Commissioners on Uniform State Laws in 1979. Sections 5-501 to 5-505, as enacted in 1979, are identical to sections 1 to 5 of the Uniform Durable Power of Attorney Act (see Volume 8A Uniform Laws Annotated, Master Edition or ULA Database on WESTLAW), also approved by the National Conference in 1979 as an alternative to Part 5 of Article V of the Uniform Probate Code. See Prefatory Note, post.

PREFATORY NOTE

The National Conference included Sections 5-501 and 5-502 in Uniform Probate Code (1969) (1975) concerning powers of attorney to assist persons interested in establishing non-Court regimes for the management of their affairs in the event of later incompetency or disability. The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust.

The provisions included in the original UPC modify two principles that have controlled written powers of attorney. Section 5-501 (UPC (1969) (1975)), creating what has come to be known as a "durable power of attorney," permits a principal to create an agency in another that continues in spite of the principal's later loss of capacity to contract. The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency.

Section 5-502 (UPC (1969) (1975)) alters the common law rule that a principal's death ends the authority of his agents and voids all acts occurring thereafter including any done in complete ignorance of the death. The new view, applicable to durable and nondurable, written powers of attorney, validates post-mortem exercise of authority by agents who act in good faith and without actual knowledge of the principal's death. The idea here was to encourage use of powers of attorney by removing a potential trap for agents in fact and third persons who decide to rely on a power at a time when they cannot be certain that the principal is then alive.

To the knowledge of the Joint Editorial Board for the Uniform Probate Code, the only statutes resembling the power of attorney sections of the UPC (1969) (1975) that had been enacted prior to the approval and promulgation of the Code were Sections 11-9.1 and 11-9.2 of Code of Virginia [1950]. Since then, a variety of UPC inspired statutes adjusting agency rules have been enacted in more than thirty states.

This [Act] [Section] originated in 1977 with a suggestion from within the National Conference that a new free-standing uniform act, designed to make powers of attorney more useful, would be welcome in many states. For states that have yet to adopt durable power legislation, this new National Conference product represents a respected, collective judgment, identifying the best of the ideas reflected in the recent flurry of new state laws on the subject;

additional enactments of a new and improved uniform act should result. For other states that have acted already, this new act offers a reason to consider amendments, including elimination of restrictions that no longer appear necessary.

In the course of preparing this Section, the Joint Editorial Board for the Uniform Probate Code, acting as a Special Committee on the new project, evolved what it considers to be improvements in §§ 5-501 and 5-502 of the 1969 and 1975 versions of the Code. In the main, the changes reflect stylistic matters. However, the idea reflected in Section 3(a)-that draftsmen of powers of attorney may wish to anticipate the appointment of a conservator or guardian for the principal-is new, and a brief explanation is in order.

When the Code was originally drafted, the dominant idea was that durable powers would be used as alternatives to Court-oriented, protective procedures. Hence, the draftsmen merely provided that appointment of a conservator for a principal who had granted a durable power to another did not automatically revoke the agency; rather, it would be up to the Court's appointee to determine whether revocation was appropriate. The provision was designed to discourage the institution of Court proceedings by persons interested solely in ending an agent's authority. It later appeared sensible to adjust the durable power concept so that it may be used either as an alternative to a protective procedure, or as a designed supplement enabling nomination of the principal's choice for guardian to an appointing Court and continuing to authorize efficient estate management under the direction of a Court appointee.

The sponsoring committee considered and rejected the suggestion that the word "durable" be omitted from the title. While it is true that the act describes "durable" and "non-durable" powers of attorney, this is merely the result of use of language to accomplish a purpose of making both categories of power more reliable for use than formerly. In the case of non-durable powers, the act extends validity by the provisions in Section [4] [5-504] protecting agents in fact and third persons who rely in good faith on a power of attorney when, unknown to them, the principal is incompetent or deceased. The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death. The act does not purport to deal with other aspects of powers of attorney, and a label that would result from dropping "durable" would be misleading to the extent that it suggested otherwise.

Section 5-501. Definition.

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

COMMENT

This section, derived from the first sentence of UPC 5-501 (1969) (1975), is a definitional section that supports use of the term "durable power of attorney" in the sections that follow. The second quoted expression was designed to emphasize that a durable power with postponed effectiveness is permitted. Some UPC critics have been bothered by the reference here to a later condition of "disability or incapacity," a circumstance that may be difficult to ascertain if it can be established without a Court order. The answer, of course, is that draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of the agent in fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney in fact.

In this and following sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law.

Section 5-502. Durable Power Of Attorney Not Affected By Lapse Of Time,Disability Or Incapacity.

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.

COMMENT

This section is derived from the second sentence of UPC 5-501 (1969) (1975) modified by deleting reference to the effect on a durable power of the principal's death, a matter that is now covered in Section [4] [5-504] which provides a single standard for durable and non-durable powers.

The words "any period of disability or incapacity of the principal" are intended to include periods during which the principal is legally incompetent, but are not intended to be limited to such periods. In the Uniform Probate Code, the word "disability" is defined, and the term "incapacitated person" is defined. In the context of this section, however, the important point is that the terms embrace "legal incompetence," as well as less grievous disadvantages.

Section 5-503. Relation Of Attorney In Fact To Court-Appointed Fiduciary.

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney

in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

COMMENT

Subsection (a) closely resembles the last two sentences of UPC § 5-501 (1969) (1975); most of the changes are stylistic. One change going beyond style states that an agent in fact is accountable both to the principal and a conservator or guardian if a Court has appointed a fiduciary; the earlier version described accountability only to the fiduciary.

As explained in the introductory comment, the purpose of subsection (b) is to emphasize that agencies under durable powers and guardians or conservators may co-exist. It is not the purpose of the act to encourage resort to Court for a fiduciary appointment that should be largely unnecessary when an alternative regime has been provided via a durable power. Indeed, the best reason for permitting a principal to use a durable power to express his preference regarding any future Court appointee charged with the care and protection of his person or estate may be to secure the authority of the attorney in fact against upset by arranging matters so that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans. However, the evolution of a free-standing durable power act increases the prospects that UPC-type statutes covering protective proceedings will not apply when a protective proceeding is commenced for one who has created a durable power. This means that a receiving a petition for a guardian or conservator may not be governed by standards like those in UPC § 5-304 (personal guardians) and § 5-401(2) and related sections which are designed to deter unnecessary protective proceedings. Finally, attorneys and others may find various good uses for a regime in which a conservator directs exercise of an agent's authority under a durable power. For example, the combination would confer jurisdiction on the Court handling the protective proceeding to approve or ratify a desirable transaction that might not be possible without the protection of a Court order. The alternative of a declaratory judgment proceeding might be difficult or impossible in some states.

It is to be noted that the "fiduciary" described in subsection (a), to whom an attorney in fact under a durable power is accountable and who may revoke or amend the durable power, does not include a guardian of the person only. In subsection (b), however, the authority of a principal to nominate extends to a guardian of the person as well as to conservators and guardians of estates.

Discussion of this section in NCCUSL's Committee of the Whole involved the question of whether an agent's accountability, as described here, might be effectively countermanded by appropriate language in a power of attorney. The response was negative. The reference is to basic accountability like that owed by every fiduciary to his beneficiary and that distinguishes a fiduciary relationship from those involving gifts or general powers of appointment. The section is not intended to describe a particular form of accounting. Hence, the

context differs from those involving statutory duties to account in Court, or with specified frequency, where draftsmen of controlling instruments may be able to excuse statutory details relating to accountings without affecting the general principle of accountability.

Section 5-504. Power Of Attorney Not Revoked Until Notice.

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

COMMENT

UPC §§ 5-501 and 5-502 (1969) (1975) are flawed by different standards for durable and nondurable powers vis a vis the protection of an attorney in fact who purports to exercise a power after the principal has died. Section 5-501 (1969) (1975), applicable only to durable powers, expresses a most unsatisfactory standard; i.e. the attorney in fact is protected if the exercise occurs "during any period of uncertainty as to whether the principal is dead or alive ...." Section 5-502 (1969) (1975), applicable only to non-durable powers, protects the agent who "without actual knowledge of the death ... of the principal, acts in good faith under the power of attorney...." Section [4] [5-504](a) expresses as a single test the standard now contained in § 5-502 (1969) (1975).

Subsection (b), applicable only to nondurable powers that are controlled by the traditional view that a principal's loss of capacity ends the authority of his agents, embodies the substance of UPC § 5-502 (1969) (1975).

The discussion in the Committee of the Whole established that the language "or other person" in subsections (a) and (b) is intended to refer to persons who transact business with the attorney in fact under the authority conferred by the power. Consequently, persons in this category who act in good faith and without the actual knowledge described in the subsections are protected by the statute.

Also, there was discussion of possible conflict between the actual knowledge test here prescribed for protection of persons relying on the continuance of a power and constructive notice concepts under statutes governing the recording of instruments affecting real estate. The view was expressed in the Committee of the Whole that the recording statutes would continue to control since those statutes are specifically designed to encourage public recording of documents affecting land titles. It was also suggested that "good faith," as required by this section, might be lacking in the unlikely case of one who, without actual

knowledge of the principal's death or incompetency, accepted a conveyance executed by an attorney in fact without checking the public record where he would have found an instrument disclosing the principal's death or incompetency. If so, there would be no conflict between this act and recording statutes.

It is to be noted, also, that this section deals only with the effect of a principal's death or incompetency as a revocation of a power of attorney; it does not relate to an express revocation of a power or to the expiration of a power according to its terms. Further, since a durable power is not revoked by incapacity, the section's coverage of revocation of powers of attorney by the principal's incapacity is restricted to powers that are not durable. The only effect of the Act on rules governing express revocations of powers of attorney is as described in Section [5] [5-505].

Section 5-505. Proof Of Continuance Of Durable And Other Powers Of Attorney By Affidavit.

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

COMMENT

This section, embodying the substance and form of UPC 5-502(b)(1969) (1975), has been extended to apply to durable powers. It is unclear whether UPC 5-502(b) (1969) (1975) applies to durable powers. Affidavits protecting persons dealing with attorneys in fact extend the utility of powers of attorney and plainly should be available for use by all attorneys in fact.

The matters stated in an affidavit that are strengthened by this section are limited to the revocation of a power by the principal's voluntary act, his death, or, in the case of non-durable power, by his incompetence. With one possible exception, other matters, including circumstances made relevant by the terms of the instrument to the commencement of the agency or to its termination by other circumstances, are not covered. The exception concerns the case of a power created to begin on "incapacity." The affidavit of the agent in fact that all conditions necessary to the valid exercise of the power might be aided by the statute in relation to the fact of incapacity. An affidavit as to the existence or nonexistence of facts and circumstances not covered by this section nonetheless may be useful in establishing good faith reliance.

ARTICLE VI

NONPROBATE TRANSFERS ON DEATH (1989)

PART 1

PROVISIONS RELATING TO EFFECT OF DEATH

Section

6-101. Nonprobate Transfers on Death.
6-102. Liability of Nonprobate Tranferees for Creditor Claims and Statutory Allowances.

PART 2

MULTIPLE-PERSON ACCOUNTS

Subpart 1. Definitions And General Provisions

Section

6-201. Definitions.
6-202. Limitation on Scope of Part.
6-203. Types of Account; Existing Accounts.
6-204. Forms.
6-205. Designation of Agent.
6-206. Applicability of Part.

Subpart 2. Ownership As Between Parties And Others

Section

6-211. Ownership During Lifetime.
6-212. Rights at Death.
6-213. Alteration of Rights.
6-214. Accounts and Transfers Nontestamentary.
6-215. [Reserved].
6-216. Community Property and Tenancy by the Entireties.

Subpart 3. Protection Of Financial Institutions

Section

6-221. Authority of Financial Institution.
6-222. Payment on Multiple-Party Account.
6-223. Payment on POD Designation.
6-224. Payment to Designated Agent.
6-225. Payment to Minor.
6-226. Discharge.
6-227. Set-off.

PART 3

UNIFORM TOD SECURITY REGISTRATION ACT

Section

6-301. Definitions.
6-302. Registration in Beneficiary Form; Sole or Joint Tenancy Ownership.

6-303. Registration in Beneficiary Form; Applicable Law.
6-304. Origination of Registration in Beneficiary Form.
6-305. Form of Registration in Beneficiary Form.
6-306. Effect of Registration in Beneficiary Form.
6-307. Ownership on Death of Owner.
6-308. Protection of Registering Entity.
6-309. Nontestamentary Transfer on Death.
6-310. Terms, Conditions, and Forms for Registration.
6-311. Application of Part.

The following free-standing Acts are associated with Article VI:

Uniform Multiple-Person Accounts Act

Article VI, Part 2 has also been adopted as the Uniform Multiple-Person Accounts Act.

Uniform Nonprobate Transfers on Death Act

Article VI, Part 1 has also been adopted as the Uniform Nonprobate Transfers on Death Act.

Uniform TOD Security Registration Act.

Article VI, Part 3 has also been adopted as the Uniform TOD Security Registration Act.

PREFATORY NOTE

This amendment of Uniform Probate Code Article VI (nonprobate transfers) replaces former Article VI with a revised article. Part 1 (provisions relating to effect of death) of the revised article is amended and relocated from former Part 2. Part 2 (multiple-person accounts) of the revised article is amended and relocated from former Part 1. Part 3 (Uniform TOD Security Registration Act) of the revised article is new. This reorganization allows for general provisions at the beginning of the article, and permits parts to be divided into subparts that group related provisions together.

Multiple-Person Accounts

The amendment of Part 2 (multiple-person accounts) of the revised article simplifies drafting and terminology. It consolidates treatment of POD accounts and trust accounts so that the same rules apply to both, since both types of account operate identically and serve the same function of passing property to a beneficiary at the death of the account owner. The amendment likewise eliminates references to "joint" accounts, since the statute treats joint tenancy accounts and tenancy in common accounts the same for all purposes other than survivorship. Other terminological and drafting simplifications and standardizations are made throughout the statute. Treatment of existing accounts is included.

The amendment makes a few substantive changes in rules previously established in the multiple-person account statute. The changes include recognition of checks issued by an account owner before death and presented for payment after death, revision of the creditor rights procedure to enable a survivor or beneficiary to spread the burden among survivors and beneficiaries of other accounts of the decedent and to provide a uniform one-year limitation period for creditors, and a provision that a financial institution must have received notice at the appropriate office and have had a reasonable time to act before it is charged with knowledge that any change in account circumstances has occurred. A provision is also added that on the death of a married person, beneficial ownership of the decedent's share in a survivorship account passes to the surviving spouse who is an account party in preference to other surviving account parties.

The amendment includes a number of important improvements designed to make multiple-person accounts more useful. An agency designation is authorized to enable an account owner to add another person to the account as a convenience in making withdrawals without creating any ownership or survivorship interest in the person identified as an agent. Optional statutory forms for multiple-person accounts are provided for the convenience and protection of financial institutions. Payment to a minor who is an account beneficiary is authorized pursuant to the Uniform Transfers to Minors Act. A provision is added to make clear that marital funds deposited in an account retain any community property incidents, and the law governing tenancy by the entireties is preserved where applicable.

The drafting committee believes that this amendment of the multiple-person account statute is a substantial improvement in an already successful law. This part of the Uniform Probate Code is one of the most broadly accepted, having been adopted either as part of the code or independently by over half the states. This amendment draws on useful improvements made by various states that have enacted the statute, and should make the statute even more attractive.

Uniform TOD Security Registration Act

The purpose of Part 3 (Uniform TOD Security Registration Act) of the revised article is to allow the owner of securities to register the title in transfer-on-death (TOD) form. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered. The legislation enables an issuer, transfer agent, broker, or other such intermediary to transfer the securities directly to the designated transferee on the owner's death. Thus, TOD registration achieves for securities a certain parity with existing TOD and pay-on-death (POD) facilities for bank deposits and other assets passing at death outside the probate process.

The TOD registration under this part is designed to give the owner of securities who wishes to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only so long as the co-owners cooperate. Difficulties arise when co-owners fall into disagreement, or when one becomes

afflicted or insolvent.

Use of the TOD registration form encouraged by this legislation has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred, or whenever the owner otherwise complies with the issuer's conditions for changing the title form of the investment. The part recognizes, in Section 6-302, that co-owners with right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as he or she sees fit after the other's death.

Implementation of the part is wholly optional with issuers. The drafting committee received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that this part takes full account of the practical requirements for efficient transfer within the securities industry.

Section 6-303 invites application of the legislation to locally owned securities though the statute may not have been locally enacted, so long as the part or similar legislation is in force in a jurisdiction of the issuer or transfer agent. Thus, if the principal jurisdictions in which securities issuers and transfer agents are sited enact the measure, its benefits will become generally available to persons domiciled in states that do not at once enact the statute.

The legislation has been drafted as a separate part, hence not interpolated as an expansion of the former UPC Article VI, Part 1, treating bank accounts ("multiple-party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities. By virtue either of statute or of account terms (contract), multiple-party bank accounts allow any one cotenant to consume or transfer account balances. *See* R. Brown, *The Law of Personal Property* § 65, at 217 (2d ed. 1955); Langbein, *The Nonprobate Revolution and the Future of the Law of Succession,* 97 Harv.L.Rev. 1108, 1112 (1984). The rule for securities, however, has been the rule that applies to real property: all cotenants must act together in transferring the securities. This difference in the legal regime reflects differences in function among the types of assets. Multiple-party bank accounts typically arise as convenience accounts, to facilitate frequent small transactions, often on an agency basis (as when spouses or relatives share an account). Securities resemble real estate in that the values are typically large and the transactions relatively infrequent, which is why the legal regime requires the concurrence of all concurrent owners for transfers affecting such assets.

Recently, of course, this distinction between bank accounts and securities has begun to crumble. Banks are offering certificates of deposit of large value under the same account forms that were devised for low-value convenience accounts. Meanwhile, brokerage houses with their so-called cash management accounts and mutual funds with their money market accounts have rendered securities subject to small recurrent transactions. In the latest developments, even the line between real estate and bank accounts is becoming indistinct, as

the "home equity line of credit" creates a check-writing conduit to real estate values.

Nevertheless, even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules. True co-owners of securities, like owners of realty, should act together in transferring the asset.

The joint bank account and the Totten trust originated in ambiguous lifetime ownership forms, which required former UPC § 6-103 or comparable state legislation to clarity that an inter vivos transfer was not intended. In the securities field, by contrast, we start with unambiguous lifetime ownership rules. The sole purpose of the present statute is to facilitate a nonprobate TOD mechanism as an option for those owners.

For a comprehensive discussion of the issues entailed in this legislation, *see* Wellman, *Transfer-on-Death Securities Registration: A New Title Form,* 21 Ga. L. Rev. 709 (1987).

PART 1

PROVISIONS RELATING TO EFFECT OF DEATH

Section 6-101. Nonprobate Transfers On Death.

A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection includes awritten provision that:

(1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

COMMENT

This section is a revised version of former Section 6-201 of the original Uniform Probate Code, which authorized a variety of contractual arrangements that had sometimes been treated as testamentary in prior law. For example, most Courts treated as testamentary a provision in a promissory note that if the payee died before making payment, the note should be paid to another named person; or a provision in a land contract that if the seller died before completing payment, the balance should be canceled and the property should belong to the vendee. These provisions often occurred in family arrangements. The result of holding such provisions testamentary was usually to invalidate them because not executed in accordance with the statute of wills. On the other hand, the same Courts for years upheld beneficiary designations in life insurance contracts. The drafters of the original Uniform Probate Code declared in the Comment that they were unable to identify policy reasons for continuing to treat these varied arrangements as testamentary. The drafters said that the benign experience with such familiar will substitutes as the revocable inter vivos trust, the multiple-party bank account, and United States government bonds payable on death to named beneficiaries all demonstrated that the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize. The Comment also observed that because these provisions often are part of a business transaction and are evidenced by a writing, the danger of fraud is largely eliminated.

Because the modes of transfer authorized by an instrument under this section are declared to be nontestamentary, the instrument does not have to be executed in compliance with the formalities for wills prescribed under Section 2-502; nor does the instrument have to be probated, nor does the personal representative have any power or duty with respect to the assets.

The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary. This section does not invalidate other arrangements by negative implication. Thus, this section does not speak to the phenomenon of the oral trust to hold property at death for named persons, an arrangement already generally enforceable under trust law.

The reference to a "marital property agreement" in the introductory portion of subsection (a) of Section 6-101 includes an agreement made during marriage as well as a premarital contract.

The term "or other written instrument of a similar nature" in the introductory portion of subsection (a) replaces the former language "or any other written instrument effective as a contract, gift, conveyance or trust" in the original Section 6-201. The Supreme Court of Washington read that language to relieve against the delivery requirement of the law of deeds, a result that was not intended. *Estate of O'Brien v. Woodhouse,* 109 Wash.2d 913, 749 P.2d 154 (1988). The point was correctly decided in *First National Bank in Minot v. Bloom,* 264 N.W.2d 208, 212 (N.D.1978), in which the Supreme Court of North Dakota held that "nothing in [former Section 6-201] of the Uniform Probate Code . . . eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another."

Section 6-102. Liability Of Nonprobate Transferees For Creditor Claims And Statutory Allowances.

(a) In this section, "nonprobate transfer" means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate.

(b) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent's probate that estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order of priority:

(1) a transferee designated in the decedent's will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;

(3) other nonprobate transferees, in proportion to the values received.

(d) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devises under it.

(e) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

(f) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State, whether or not the transferee is located in this State.

(g) A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after

demand, a person making demand may commence the proceeding in the name of the decedent’s estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(h) A proceeding under this section must be commenced within one year after the decedent’s death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.

(i) Unless a written notice asserting that a decedent’s probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent’s personal representative, the following rules apply:

(1) Payment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(2) A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust’s beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee’s liability attributable to assets received by the beneficiary.

COMMENT

1. Added to the Code in 1998, this section clarifies that the recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate. The maximum liability for a single nonprobate transferee is the value of the transfer. Values are determined under subsection (b) as of the time when the benefits are "received or controlled by the transferee." This would be the date of the decedent's death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers. Two or more transferees are severally liable for the proportion of the liability based on the value of transfers received by each.

This section replaces Section 6-107 of the original Code, and its 1989 sequel, 6-215. To the extent a deceased party’s probate estate was insufficient, these sections made a deceased party’s interest in multiple name accounts in financial institutions passing outside probate liable for the deceased party’s statutory allowances and creditor claims. Assets passing at death by revocable trust or TOD asset registration agreements were not covered by these sections. Also, Section 6-201(b) of the original Code and its 1989 sequel, 6-101(b), provided merely that the section did not limit any other rights that might exist. Neither section created any rights.

If there are no probate assets, a creditor or other person seeking to use this Section 6-102 would first need to secure appointment of a personal

representative to invoke Code procedures for establishing a creditor's claim as "allowed." The use of probate proceedings as a prerequisite to gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI since originally approved in 1969. It works well in practice. The Article III procedures for opening estates, satisfying probate exemptions, and presenting claims are very efficient.

2. Section 6-102 replaces Section 6-215 with coverage designed to extend the principle of Section 6-215 to transfers at death by revocable trust, TOD security registration agreements and similar death benefits not insulated from decedents' creditors or statutory allowances by other legislation. The initial clause of subsection (b), "Except as otherwise provided by statute," is designed to prevent a conflict with and to clarify that this section does not supersede existing legislation protecting death benefits in life insurance, retirement plans or IRAs from claims by creditors.

If a state's insurance laws do not exempt or protect a particular insurance death benefit, the insured's creditors would not be able to establish a "nonprobate transfer" under (a) except to the extent of any cash surrender value generated by premiums paid by the insured that the insured could have obtained immediately before death. Note, also, that (i)(1) would protect a life insurance company that paid a death benefit before receiving written notice from the decedent's personal representative.

3. The definition of "nonprobate transfer" in subsection (a) includes revocable transfers by a decedent; it does not include a transfer at death incident to a decedent's exercise or non-exercise of a presently exercisable general power of appointment created by another person. The drafters decided against including such powers even though presently exercisable general powers of appointment are subject to the Code's augmented estate provisions dealing with protection of a surviving spouse from disinheritance. Spousal protection against disinheritance by the other spouse supports the institution of marriage; creditors are better able to fend for themselves than financially disadvantaged surviving spouses. In addition, a presently exercisable general power of appointment created by another person is commonly viewed as a provision in the trust creator's instrument designed to provide flexibility in the estate plan rather than as a gift to the donee.

4. The required ability to revoke or otherwise prevent a nonprobate transfer at death that is vital to application of subsection (a) is described as a "power," a word intended by the drafters to signify legal authority rather than capacity or practical ability. This corresponds to the definition in Code Section 2-201(6).

5. The exclusion of a "survivorship interest in joint tenancy of real estate" from the definition of "nonprobate transfer" in subsection (a) is contrary to the law of some states (e.g., South Dakota) that allow an insolvent decedent's creditors to reach the share the decedent could have received prior to death by unilateral severance of the joint tenancy. The law in most other states is to the contrary. By excluding real estate joint tenancies, stability of title and ease of title examination is preserved. Moreover, real estate joint tenancies have served for generations to keep the share of a couples' real estate owned by the first to die out of probate and away from estate creditors. This familiar arrangement need not be disturbed incident to expanding the ability of decedents' creditors to reach newly recognized nonprobate transfers at death.

No view is expressed as to whether a survivorship interest in personal or intangible property registered in two or more names as joint tenants with right of survivorship would come within 6-102(a). The outcome might depend on who originated the registration and whether severance by any co-owner acting alone was possible immediately preceding a co-owner's death.

6. A feature of replaced Section 6-215 that was clarified by 1991 technical amendment protects a survivor beneficiary of a joint account from liability to the probate estate of a deceased co-depositor for funds in the account owned by the survivor prior to decedent's death. Subsection (a) continues this protection by use of the language "valid transfer effective at death ... by a transferor ... [who] had power, acting alone, to prevent the transfer by revocation or withdrawal and instead use the property for the benefit of the transferor..." Section 6-211 and related sections of the Code make it clear that parties to a joint and survivor account separately own values in the account in proportion to net contributions. Hence, a surviving joint account depositor who had contributed to the balance on deposit prior to the death of the other party is subject to the remedies described in this section only to the extent of new account values gained through survival of the decedent.

7. Transferees of nonprobate transfers subject to the possible liability described in subsection (b) include trustees of revocable trusts to the extent of assets transferred to the trust before death that were subject to the decedent's sole power to revoke. Such assets would be valued as of the date of death. While the trustee of an irrevocable trust, or of a trust that may be revoked only by the settlor and another person would ordinarily not be subject to this section, this section could apply if the trust is named as a beneficiary of a nonprobate transfer, such as of securities registered in TOD form. Under subsection (b), such a transfer would involve a possibility of trust liability based on the value of the TOD transfer as of the time of its receipt. Liability under this section incurred by a trustee is a trust liability for which the trustee does not incur personal liability except as provided by UPC Section 3-808(b).

8. Trusts and non-trust recipients of nonprobate transfers incur liability in the order described in subsection (c). Note that either a revocable or an irrevocable trust might be designated devisee of a pour-over provision that would make the trust the "principal non-probate instrument in the decedent's estate plan" and, consequently, make it liable under subsection (c)(2) ahead of other nonprobate transferees to the extent of values acquired by a transfer at death as described in subsection (a). Note, too, that nothing would pass to the receptacle trust by the pour-over devise if all probate estate assets are used to discharge statutory allowances and claims. However, the fact that the trust was designated to receive a pour-over devise signals that the trust probably includes the equivalent of a residuary clause measuring benefits by available assets and signaling probable intention of the settlor that residuary benefits should abate to pay the settlor's debts prior to other trust gifts.

9. The abatement order among classes of beneficiaries of trusts specified by subsection (d) applies to all trusts subject to liability to the extent of nonprobate transfers received or administered whether or not the trust instrument is the principal nonprobate instrument in the decedent's estate plan. The drafters decided against a cross-reference to the Code's abatement provision, Section 3-902, in part because that section deals with intestate and partially intestate estates as well as estates governed by wills. Note, too, that trusts for successive beneficiaries also will be governed by income and

principal accounting principles that will serve to resolve some abatement issues.

10. Subsection (e) recognizes that a number of separate instruments and transactions, executed at different times and with or without internal references linking them to other documents, may constitute the paperwork describing succession to a decedent's assets by probate and nonprobate methods. By authorizing control of abatement among gifts made by various transfers at death by the last executed instrument, the subsection permits a simple, last-minute override of earlier directions concerning a decedent's wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death. The expression "block buster will" was coined by estate planners in the mid 70's to signal interest in legislation enabling a later will to override death benefits by any nonprobate transfer device. This subsection meets some of the goals of advocates of this legislation.

11. Subsection (f) builds on the principle employed in the Code’s augmented estate provisions (UPC §§ 2-201 - 2-214) in relation to nonprobate transfers made to persons in other states, possibly by transactions governed by laws of other states. The underlying principle is that the law of a decedent's last domicile should be controlling as to rules of public policy that override the decedent's power to devise the estate to anyone the decedent chooses. The principle is implemented by subjecting donee recipients of the decedent to liability under the decedent's domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.

12. The first and third sentences of subsection (g) are identical to sentences now appearing in UPC Section 6-215, which this section replaces. The second sentence is new. It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants. A creditor whose claim has been allowed but remains unsatisfied and whose demand for a proceeding has been turned down by the estate fiduciary may proceed at personal risk in efforts to enforce the estate claim against the nonprobate beneficiary. This is so because the last two sentences of (g) shift the risk of unrecoverable costs from the decedent's estate to the claimant who undertakes collection efforts on behalf of the decedent's estate. Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding. A personal representative tempted to decline a demand for a proceeding should note that the "good faith" standard of this section must be determined in light of the fiduciary responsibility imposed by UPC Section 3-703.

13. Subparagraph (h) meshes with time limits in the Code’s sections governing allowance and disallowance of claims. See Sections 3-804 and 3-806.

14. Subsection (i)(1) is designed to protect issuers of TOD security registrations who make payments or delivery to designated death beneficiaries before receiving notice from the decedent's probate estate of a probable insolvency. These entities are not "transferees" subject to liability under subsection (b), but they might incur legal or other costs if the beneficiaries request payment in spite of warning notices from estate fiduciaries.

Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if no warning of probable estate insolvency has been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.

PART 2

MULTIPLE-PERSON ACCOUNTS

Subpart 1. Definitions And General Provisions

Section 6-201. Definitions.

In this part:

(1) "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share account.

(2) "Agent" means a person authorized to make account transactions for a party.

(3) "Beneficiary" means a person named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee.

(4) "Financial institution" means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union.

(5) "Multiple-party account" means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned.

(6) "Party" means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent.

(7) "Payment" of sums on deposit includes withdrawal, payment to a party or third person pursuant to check or other request, and a pledge of sums on deposit by a party, or a set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

(8) "POD designation" means the designation of (i) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or (ii) a beneficiary in an

account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.

(9) "Receive," as it relates to notice to a financial institution, means receipt in the office or branch office of the financial institution in which the account is established, but if the terms of the account require notice at a particular place, in the place required.

(10) "Request" means a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but, for purposes of this part, if terms of the account condition payment on advance notice, a request for payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for payment.

(11) "Sums on deposit" means the balance payable on an account, including interest and dividends earned, whether or not included in the current balance, and any deposit life insurance proceeds added to the account by reason of death of a party.

(12) "Terms of the account" includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit.

COMMENT

This and the sections that follow are designed to reduce certain questions concerning many forms of multiple-person accounts (including the so-called Totten trust account). A "payable on death" designation and an "agency" designation are also authorized for both single-party and multiple-party accounts. The POD designation is a more direct means of achieving the same purpose as a Totten trust account; this part therefore discourages creation of a Totten trust account and treats existing Totten trust accounts as POD designations.

An agent (paragraph (2)) may not be a party. The agency designation must be signed by all parties, and the agent is the agent of all parties. *See* Section 6-205 (designation of agent).

A "beneficiary" of a party (paragraph (3)) may be either a POD beneficiary or the beneficiary of a Totten trust; the two types of designations in an account serve the same function and are treated the same under this part. *See* paragraph (8) ("POD designation" defined). The definition of "beneficiary" refers to a "person," who may be an individual, corporation, organization, or other legal entity. Section 1-201(29). Thus a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

The term "multiple-party account" (paragraph 5)) is used in this part in a broad

sense to include any account having more than one owner with a present interest in the account. Thus an account may be a "multiple-party account" within the meaning of this part regardless of whether the terms of the account refer to it as "joint tenancy" or as "tenancy in common," regardless of whether the parties named are coupled by "or" or "and," and regardless of whether any reference is made to survivorship rights, whether expressly or by abbreviation such as JTWROS or JT TEN. Survivorship rights in a multiple-party account are determined by the terms of the account and by statute, and survivorship is not a necessary incident of a multiple-party account. *See* Section 6-212 (rights at death).

Under paragraph (6), a "party" is a person with a present right to payment from an account. Therefore, present owners of a multiple-party account are parties, as is the present owner of an account with a POD designation. The beneficiary of an account with a POD designation is not a party, but is entitled to payment only on the death of all parties. The trustee of a Totten trust is a party but the beneficiary is not. An agent with the right of withdrawal on behalf of a party is not itself a party. A person claiming on behalf of a party such as a guardian or conservator, or claiming the interest of a party such as a creditor, is not itself a party, and the right of such a person to payment is governed by general law other than this part.

Various signature requirements may be involved in order to meet the payment requirements of the account. A "request" (paragraph (10)) involves compliance with these requirements. A party is one to whom an account is presently payable without regard to whose signature may be required for a "request."

Section 6-202. Limitation On Scope Of Part.

This part does not apply to (i) an account established for a partnership, joint venture, or other organization for a business purpose, (ii) an account controlled by one or more persons as an agent or trustee for a corporation, unincorporated association, or charitable or civic organization, or (iii) a fiduciary or trust account in which the relationship is established other than by the terms of the account.

COMMENT

This part applies to accounts in this state. Section 1-301(4).

The reference to a fiduciary or trust account in item (iii) includes a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, and a fiduciary account arising from a fiduciary relation such as attorney-client.

Section 6-203. Types Of Account; Existing Accounts.

(a) An account may be for a single party or multiple parties. A multiple-party account may be with or without a right of survivorship between the parties. Subject to Section 6-212(c), either a single-party account or a multiple-party account may have a POD designation, an agency

designation, or both.

(b) An account established before, on, or after the effective date of this part, whether in the form prescribed in Section 6-204 or in any other form, is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation, within the meaning of this part, and is governed by this part.

COMMENT

In the case of an account established before (or after) the effective date of this part that is not in substantially the form provided in Section 6-204, the account is governed by the provisions of this part applicable to the type of account that most nearly conforms to the depositor's intent. *See* Section 6-204 (forms).

Thus, a tenancy in common account established before or after the effective date of this part would be classified as a "multiple-party account" for purposes of this part. *See* Section 6-201(5) ("multiple-party account" defined). On death of a party there would not be a right of survivorship since the tenancy in common title would be treated as a multiple-party account without right of survivorship. *See* Section 6-212(c). It should be noted that a POD designation may not be made in a multiple-party account without right of survivorship. *See* Sections 6-201(8) ("POD designation" defined), 6-204 (forms), and 6-212 (rights at death).

Under this section, a Totten trust account established before, on, or after the effective date of this part is governed by the provisions of this part applicable to an account with a POD designation. *See* Section 6-201(8) ("POD designation" defined) and the Comment to Section 6-201.

Section 6-204. Forms.

(a) A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of this part applicable to an account of that type:

UNIFORM SINGLE-OR MULTIPLE-PARTY ACCOUNT FORM

PARTIES [Name One or More Parties]:
_____ _____

OWNERSHIP [Select One And Initial]:
_____SINGLE-PARTY ACCOUNT

_____MULTIPLE-PARTY ACCOUNT
Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

RIGHTS AT DEATH [Select One And Initial]:

_____SINGLE-PARTY ACCOUNT
At death of party, ownership passes as part of party's estate.

_____SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH) DESIGNATION
[Name One Or More Beneficiaries]:

_____ _____
At death of party, ownership passes to POD beneficiaries and is not part of party's estate.

_____MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP
At death of party, ownership passes to surviving parties.

_____MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH) DESIGNATION
[Name One Or More Beneficiaries]:

_____ _____
At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

_____MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP
At death of party, deceased party's ownership passes as part of deceased party's estate.

AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]
Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.
[To Add Agency Designation To Account, Name One Or More Agents]:

_____ _____
[Select One And Initial]:
_____AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

_____AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES

(b) A contract of deposit that does not contain provisions in substantially the form provided in subsection (a) is governed by the provisions of this part applicable to the type of account that most nearly conforms to the depositor's intent.

COMMENT

This section provides short forms for single- and multiple-party accounts which, if used, bring the accounts within the terms of this part. A financial institution that uses the statutory form language in its accounts is protected in acting in reliance on the form of the account. *See* also Section 6-226 (discharge).

The forms provided in this section enable a person establishing a multiple-party account to state expressly in the account whether there are to be survivorship rights between the parties. The account forms permit greater flexibility than traditional account designations. It should be noted that no separate form is

provided for a Totten trust account, since the POD designation serves the same function.

An account that is not substantially in the form provided in this section is nonetheless governed by this part. *See* Section 6-203 (types of account; existing accounts).

Section 6-205. Designation Of Agent.

(a) By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party.

(b) Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated.

(c) Death of the sole party or last surviving party terminates the authority of an agent.

COMMENT

An agent has no beneficial interest in the account. *See* Section 6-211 (ownership during lifetime). The agency relationship is governed by the general law of agency of the state, except to the extent this part provides express rules, including the rule that the agency survives the disability or incapacity of a party.

A financial institution may make payments at the direction of an agent notwithstanding disability, incapacity, or death of the party, subject to receipt of a stop notice. Section 6-226 (discharge); *see also* Section 6-224 (payment to designated agent).
The rule of subsection (b) applies to agency designations on all types of accounts, including nonsurvivorship as well as survivorship forms of multiple-party accounts.

Section 6-206. Applicability Of Part.

The provisions of Subpart 2 concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of the account. Subpart 3 governs the liability and set-off rights of financial institutions that make payments pursuant to it.

Subpart 2. Ownership As Between Parties And Others

Section 6-211. Ownership During Lifetime.

(a) In this section, "net contribution" of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

(b) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

(c) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

(d) An agent in an account with an agency designation has no beneficial right to sums on deposit.

COMMENT

This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership. The section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them.

The assumption that no present change of beneficial ownership is intended may be disproved by showing that a gift was intended. For example, under subsection (c) it is presumed that the beneficiary of a POD designation has no present ownership interest during lifetime. However, it is possible that in the case of a POD designation in trust form an irrevocable gift was intended.

It is important to note that the section is limited to ownership of an account while parties are alive. Section 6-212 prescribes what happens to beneficial ownership on the death of a party.

The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party. Sections 6-221 and 6-226 protect a financial institution in that circumstance without reference to whether a withdrawing party may be entitled to less than that party withdraws as against another party. Rights between parties in this situation are governed by general law other than this part.

"Net contribution" as defined by subsection (a) has no application to the financial institution-depositor relationship. Rather, it is relevant only to

controversies that may arise between parties to a multiple-party account.

The last sentence of subsection (b) provides a clear rule concerning the amount of "net contribution" in a case where the actual amount cannot be established as between spouses. This part otherwise contains no provision dealing with a failure of proof. The omission is deliberate. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals, and not equal and undivided ownership that would be an incident of joint tenancy.

In a state that recognizes tenancy by the entireties for personal property, this section would not change the rule that parties who are married to each other own their combined net contributions to an account as tenants by the entireties. *See* Section 6-216 (community property and tenancy by the entireties).

Section 6-212. Rights At Death.

(a) Except as otherwise provided in this part, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under Section 6-211, and the right of survivorship continues between the surviving parties.

(b) In an account with a POD designation:

(1) On death of one of two or more parties, the rights in sums on deposit are governed by subsection (a).

(2) On death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and there is no right of survivorship in the event of death of a beneficiary thereafter. If no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

(c) Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 is transferred as part of the decedent's estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

(d) The ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

COMMENT

The effect of subsection (a) is to make an account payable to one or more of two or more parties a survivorship arrangement unless a nonsurvivorship arrangement is specified in the terms of the account. This rule applies to community property as well as other forms of marital property. *See* Section 6-216 (community property and tenancy by the entireties). The section also applies to various forms of multiple-party accounts that may be in use at the effective date of the legislation. *See* Sections 6-203 (type of account; existing accounts) and 6-204 (forms).

By technical amendment effective August 5, 1991, the word "part" was substituted for "section" in the first sentence of subsection (a). The amendment clarified the original purpose of the drafters and Commissioners to permit a Court to implement the intentions of parties to a joint account governed by Section 6-204(b) if it finds that the account was opened solely for the convenience of a party who supplied all funds reflected by the account and intended no present gift or death benefit for the other party. In short, the account characteristics described in this section must be determined by reference to the form of the account *and* the impact of Sections 6-203 and 6-204 on the admissibility of extrinsic evidence tending to confirm or contradict intention as signalled by the form.

Subsection (b) applies to both POD and Totten trust beneficiaries. *See* Section 6-201(8) ("POD designation" defined). It accepts the New York view that an account opened by "A" in A's name as "trustee for B" usually is intended by A to be an informal will of any balance remaining on deposit at A's death.

Section 6-213. Alteration Of Rights.

(a) Rights at death of a party under Section 6-212 are determined by the terms of the account at the death of the party. A party may alter the terms of the account by a notice signed by the party and given to the financial institution to change the terms of the account or to stop or vary payment under the terms of the account. To be effective the notice must be received by the financial institution during the party's lifetime.

(b) A right of survivorship arising from the express terms of the account, Section 6-212, or a POD designation, may not be altered by will.

COMMENT

Under this section, rights of parties and beneficiaries are determined by the

type of account at the time of death. It is to be noted that only a "party" may give notice blocking the provisions of Section 6-212 (rights at death). "Party" is defined by Section 6-201(6). Thus if there is an account with a POD designation in the name of A and B with C as beneficiary, C cannot change the right of survivorship because C has no present right to payment and hence is not a party.

1995 Technical Amendment. By technical amendment in 1995, subsection (a) was amended to substitute "terms of the account" (as defined in Section 6-201(12)) for the language "type of account." The purpose of this amendment is to *reject* any implication that to fall within this section an alteration of an account must affect the "type" of account, not merely its "terms."

Section 6-214. Accounts And Transfers Nontestamentary.

Except as provided in Part 2 of Article II (elective share of surviving spouse) or as a consequence of, and to the extent directed by, Section 6-215, a transfer resulting from the application of Section 6-212 is effective by reason of the terms of the account involved and this part and is not testamentary or subject to Articles I through IV (estate administration).

COMMENT

The purpose of classifying the transactions contemplated by this part as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers on death is not to be determined by the requirements for wills. The section is consistent with Part 1 of Article VI (provisions relating to effect of death).

Section 6-215. [Reserved].

COMMENT

Former Section 6-215 became unnecessary with the approval in 1998 of Section 6-102. The former section, titled "Rights of Creditors and Others", imposed potential liability on survivor beneficiaries of multiple-person bank accounts for the debts of a deceased party and statutory allowances owed by the decedent's estate. Section 6-102 is more comprehensive, subjecting other types of nonprobate transfers to creditor claims and statutory allowances.

Section 6-216. Community Property And Tenancy By The Entireties.

(a) A deposit of community property in an account does not alter the community character of the property or community rights in the property, but a right of survivorship between parties married to each other arising from the express terms of the account or Section 6-212 may not be altered by will.

(b) This part does not affect the law governing tenancy by the entireties.

COMMENT

Section 6-216 does not affect or limit the right of the financial institution to make payments pursuant to Subpart 3 (protection of financial institutions) and the deposit agreement. See Section 6-206 (applicability of part). For this reason, Section 6-216 does not affect the definiteness and certainty that the financial institution must have in order to be induced to make payments from the account and, at the same time, the section preserves the rights of the parties, creditors, and successors that arise out of the nature of the funds in the account-community or separate, or tenancy by the entireties.

Subpart 3. Protection Of Financial Institutions

Section 6-221. Authority Of Financial Institution.

A financial institution may enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account, and may provide for a POD designation and an agency designation in either a single-party account or a multiple-party account. A financial institution need not inquire as to the source of a deposit to an account or as to the proposed application of a payment from an account.

COMMENT

The provisions of this subpart relate only to protection of a financial institution that makes payment as provided in the subpart. Nothing in this subpart affects the beneficial rights of persons to sums on deposit or paid out. Ownership as between parties, and others, is governed by Subpart 2. *See* Section 6-206 (applicability of part).

Section 6-222. Payment On Multiple-Party Account.

A financial institution, on request, may pay sums on deposit in a multiple-party account to:

(1) one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when payment is requested and whether or not the party making the request survives another party; or

(2) the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary, unless the account is without right of survivorship under Section 6-212.

COMMENT

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. Section 6-226 (discharge). Paragraph (1) applies to both a multiple-party account with right of survivorship and a multiple-party account without right of survivorship (including an account in tenancy in common form). Paragraph (2) is limited to a multiple-party account with right of survivorship; payment to the personal representative or heirs or devisees of a deceased party to an account without right of survivorship is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

Section 6-223. Payment On POD Designation.

A financial institution, on request, may pay sums on deposit in an account with a POD designation to:

(1) one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when the payment is requested and whether or not a party survives another party;

(2) the beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties; or

(3) the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary.

COMMENT

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. Section 6-226 (discharge). Payment to the personal representative or heirs or devisees of a deceased beneficiary who would be entitled to payment under paragraph (2) is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

Section 6-224. Payment To Designated Agent.

A financial institution, on request of an agent under an agency designation for an account, may pay to the agent sums on deposit in the account, whether or not a party is disabled, incapacitated, or deceased when the request is made or received, and whether or not the authority of the agent terminates on the disability or incapacity of a party.

COMMENT

This section is intended to protect a financial institution that makes a payment pursuant to an account with an agency designation even though the agency may have terminated at the time of the payment due to disability, incapacity, or death of the principal. The protection does not apply if the financial institution has received notice under Section 6-226 not to make payment or that the agency has terminated. This section applies whether or not the agency survives the party's disability or incapacity under Section 6-205 (designation of agent).

Section 6-225. Payment To Minor.

If a financial institution is required or permitted to make payment pursuant to this part to a minor designated as a beneficiary, payment may be made pursuant to the Uniform Transfers to Minors Act.

COMMENT

Section 6-225 is intended to avoid the need for a guardianship or other protective proceeding in situations where the Uniform Transfers to Minors Act may be used.

Section 6-226. Discharge.

(a) Payment made pursuant to this part in accordance with the terms of the account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors. Payment may be made whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased when payment is requested, received, or made.

(b) Protection under this section does not extend to payments made after a financial institution has received written notice from a party, or from the personal representative, surviving spouse, or heir or devisee of a deceased party, to the effect that payments in accordance with the terms of the account, including one having an agency designation, should not be permitted, and the financial institution has had a reasonable opportunity to act on it when the payment is made. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in a request for payment if the financial institution is to be protected under this section. Unless a financial institution has been served with process in an action or proceeding, no other notice or other information shown to have been available to the financial institution affects its right to protection under this section.

(c) A financial institution that receives written notice pursuant to this section or otherwise has reason to believe that a dispute exists as to the rights of the parties may refuse, without liability, to make payments in accordance with the terms of the account.

(d) Protection of a financial institution under this section does not

affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts.

COMMENT

The provision of subsection (a) protecting a financial institution for payments made after the death, disability, or incapacity of a party is a specific elaboration of the general protective provisions of this section and is drawn from Uniform Commercial Code Section 4-405.

Knowledge of disability, incapacity, or death of a party does not affect payment on request of an agent, whether or not the agent's authority survives disability or incapacity. *See* Section 6-224 (payment to designated agent). But under subsection (b), the financial institution may not make payments on request of an agent after it has received written notice not to, whether because the agency has terminated or otherwise.

1995 Technical Amendment. By technical amendment in 1995, the defined expression "terms of the account" was substituted for "type of account" in the first sentence of subsection (a). This amendment, made in association with a similar technical amendment to Section 6-213, was not intended to change the meaning of the section. Rather, it was made to negate a possible interpretation of the words "type of account" that is more restrictive than that intended by the drafters.

Historical Note. This Comment was revised in 1995.

Section 6-227. Set-Off.

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party is indebted to a financial institution, the financial institution has a right to set-off against the account. The amount of the account subject to set-off is the proportion to which the party is, or immediately before death was, beneficially entitled under Section 6-211 or, in the absence of proof of that proportion, an equal share with all parties.

PART 3

UNIFORM TOD SECURITY REGISTRATION ACT

Section 6-301. Definitions.

In this part:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(3) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(4) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(5) "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

COMMENT

"Security" is defined as provided in UCC § 8-102 and includes shares of mutual funds and other investment companies. The defined term "security account" is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

"Survive" is not defined. No effort is made in this part to define survival as it is for purposes of intestate succession in UPC § 2-104 which requires survival by an heir of the ancestor for 120 hours. For purposes of this part, survive is used in its common law sense of outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.

Section 6-302. Registration In Beneficiary Form; Sole Or Joint Tenancy Ownership.

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

COMMENT

This section is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of *all* co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holding into separate registrations of the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term "individuals," as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict individuals using this ownership form as to their choice of death beneficiary. The definition of "beneficiary form" in Section 6-301 indicates that any "person" may be designated beneficiary in a registration in beneficiary form. "Person" is defined so that a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary. Section 1-201(29).

Section 6-303. Registration In Beneficiary Form; Applicable Law.

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

COMMENT

This section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on an enactment of this Act in X Company's state of incorporation, or in the state of incorporation of X Company's transfer agent. Or, an enactment by the state of the issuer's principal office, the transfer agent's principal office, or of the issuer's office making the registration also would validate the registration. An enactment of the state of the registering owner's address at time of registration also might be used for validation purposes.

The last sentence of this section is designed, as is UPC § 6-101, to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this part.

Section 6-304. Origination Of Registration In Beneficiary Form.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

COMMENT

As noted above in commentary to Section 6-302, this part places no restriction on who may be designated beneficiary in a registration in beneficiary form.

Section 6-305. Form Of Registration In Beneficiary Form.

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD," or by the words "pay on death" or the abbreviation "POD," after the name of the registered owner and before the name of a beneficiary.

COMMENT

The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner's death so that the sums realized may be "paid" to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid nonprobate death benefit or transfer on death.

Section 6-306. Effect Of Registration In Beneficiary Form.

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

COMMENT

This section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant. *See* Section 6-310. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would

be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

Section 6-307. Ownership On Death Of Owner.

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

COMMENT

Even though multiple owners holding in the beneficiary form here authorized hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary also should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 6-308 deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; Section 6-310 enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as "TOD A (20%), B (30%), C (50%)," would be improper. Though not included in the beneficiary forms described for illustrative purposes in Section 6-310, the part enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration in beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any anti-lapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner.

Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative.

See the Comment to Section 6-301 regarding the meaning of "survive" for purposes of this part.

Section 6-308. Protection Of Registering Entity.

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with Section 6-307 and does so in good faith reliance (i) on the registration, (ii) on this part, (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part.

(d) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

COMMENT

It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. This part does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subsection (c) would qualify as a notice under UCC § 8-403.

"Good faith" as used in this section is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade, "as specified in UCC § 2-103(1)(b).

The protections described in this section are designed to meet any questions regarding registering entity protection that may not be foreclosed by issuer protections provided in the Uniform Commercial Code. Because persons interested in this part may wish to be reminded of relevant UCC provisions, a brief summary follows.

"U.C.C. § 8-403, 'Issuer's Duty as to Adverse Claims' contains detailed provisions regarding duties of inquiry by an issuer of a certificated or uncertificated security who is requested to effect a transfer, and the availability and use of 30 day notices to force adverse claimants to start litigation if further delay in transfer is desired. U.C.C. § 8-201's definition of 'issuer' for purposes of 'registration of transfer....' is simply 'a person on whose behalf transfer books are maintained'. U.C.C. § 8-403 is among the sections dealing with registration of transfers.

"U.C.C. sections 8-308 and 8-404(1) appear to exonerate an issuer who acts in response to transfer directions signalled by the 'necessary endorsement'[sic] on or with a certificated security or in response to 'an instruction originated by an appropriate person' in the case of an uncertificated security. Section 8-308 describes the meaning of 'appropriate person' in the case of a certificated security as 'the person specified by the certificated security ... to be entitled to the security.' U.C.C. § 8-308(6) (1978). In the case of an uncertificated security, 'appropriate person' means the 'registered owner.' *Id.* § 8-308(7). The survivor of owners listed as joint tenants with right of survivorship is specifically defined as an authorized person. *Id.* § 8-308(8)(d). The U.C.C. aspect of the problem could be met by an additional sub-paragraph to section 8-308(8) that would include a TOD beneficiary as an 'appropriate person' when the beneficiary has survived the owner.

"No U.C.C. addition would be necessary if a TOD beneficiary designation were viewed as a contingent order for transfer at the owner's death that may be safely implemented as a direction from the owner as an 'authorized person.' The owner's death before completion of the transfer would not pose U.C.C. problems because section 8-308(10) provides: 'Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him does not become unauthorized for the purposes of this Article by virtue of any subsequent change of circumstances.'

"It might be questioned whether a TOD direction, which may be revoked before it is carried into effect and is also contingent on the beneficiary's survival of the registrant, is within the transfer directions contemplated by the U.C.C. framers for purposes of issuer protection. However, since section 8-202 explicitly protects issuers against problems arising because of restrictions or conditions on transfers, only the novelty of revocable directions for transfer on death gives pause.

"In general, article 8 of the U.C.C. reflects a careful attempt to protect implementation of a wide range of transfer instructions so long as the signatures are genuine and are those of owners acting in conformity with duly imposed rules of the issuer organization ... Hence, existing U.C.C. protections should be adequate, ..."

Wellman, *Transfer-On-Death Securities Registration: A New Title Form,* 21 Ga. L. Rev. 789, 823 n. 90 (1987).

Section 6-309. Nontestamentary Transfer On Death.

A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Act and is not testamentary.

COMMENT

This section is comparable to UPC § 6-214. Incident to the addition of Section 6-102 in 1998, former subsection (b)was deleted and the text of former subsection (a) became the entire text of the section. Section 6-102 makes the decedent’s non-probate transferees liable for statutory allowances and allowed claims against the decedent’s estate to the extent the decedent’s probate estate is inadequate. Former subsection (b) provided:

This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this State.

Section 6-310. Terms, Conditions, And Forms For Registration.

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stripes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: John S. Brown TOD (or POD) John S. Brown Jr.

(2) Multiple owners-sole beneficiary: John S. Brown, Mary B. Brown JT TEN TOD John S. Brown Jr.

(3) Multiple owners-primary and secondary (substituted) beneficiaries: John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr. SUB BENE Peter Q. Brown *or* John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr. LDPS.

COMMENT

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under this part and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; *i.e.*, that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 6-307.

Section 6-311. Application Of Part.

This part applies to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date].

COMMENT

Section 6-311 is an optional provision that may be particularly useful in a state that has previously enacted the Uniform Probate Code, since the general effective date and transitional provisions of UPC § 8-101 are not expressly adapted for the addition of this part. A state newly enacting the Uniform Probate Code, including this part, may find that general Section 8-101 is adequate for this purpose and addition of optional Section 6-311 unnecessary.

ARTICLE VII

TRUST ADMINISTRATION

PART 1

TRUST REGISTRATION

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7-101. Duty to Register Trusts.
7-102. Registration Procedures.
7-103. Effect of Registration.
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PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

Section
7-201. Court; Exclusive Jurisdiction of Trusts.
7-202. Trust Proceedings; Venue.
7-203. Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.
7-204. Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties.
7-205. Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust.
7-206. Trust Proceedings; Initiation by Notice; Necessary Parties.

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

Section
7-301. General Duties Not Limited.
7-302. Trustee's Standard of Care and Performance.
7-303. Duty to Inform and Account to Beneficiaries.
7-304. Duty to Provide Bond.
7-305. Trustee's Duties; Appropriate Place of Administration; Deviation.
7-306. Personal Liability of Trustee to Third Parties.
7-307. Limitations on Proceedings Against Trustees After Final Account.

PART 4

POWERS OF TRUSTEES

[GENERAL COMMENT ONLY]

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COMMENT

Several considerations explain the presence in the Uniform Probate Code of procedures applicable to inter vivos and testamentary trusts. The most important is that the Court assumed by the Code is a full power Court which appropriately may receive jurisdiction over trustees. Another is that personal representatives under Articles III and IV and conservators under Article V, have the status of trustees. It follows naturally that these fiduciaries and regular trustees should bear a similar relationship to the Court. Also, the general move of the Code away from the concept of supervisory jurisdiction over any fiduciary is compatible with the kinds of procedural provisions which are believed to be desirable for trustees.

The relevance of trust procedures to those relating to settlement of decedents' estates is apparent in many situations. Many trusts are created by will. In a substantial number of states, statutes now extend probate Court control over decedents' estates to testamentary trustees, but the same procedures rarely apply to inter vivos trusts. For example, eleven states appear to require testamentary trustees to qualify and account in much the same manner as executors, though quite different requirements relate to trustees of inter vivos trusts in these same states. Twenty-four states impose some form of mandatory Court accountings on testamentary trustees, while only three seem to have comparable requirements for inter vivos trustees.

From an estate planning viewpoint, probate Court supervision of testamentary trustees causes many problems. In some states, testamentary trusts cannot be released to be administered in another state. This requires complicated planning if inconvenience to interested persons is to be avoided when the beneficiaries move elsewhere. Also, some states, preclude foreign trust companies from serving as trustees of local testamentary trusts without complying with onerous or prohibitive qualification requirements. Regular accountings in Court have proved to be more expensive than useful in relation to the vast majority of trusts and sometimes have led to the ill-advised use of legal life estates to avoid these burdens.

The various restrictions applicable to testamentary trusts have caused many planners to recommend use of revocable inter vivos trusts. The widely adopted Uniform Testamentary Addition to Trusts Act has accelerated this tendency by permitting testators to devise estates to trustees of previously established receptacle trusts which have and retain the characteristics of inter vivos trusts for purpose of procedural requirements.

The popularity of this legislation and the widespread use of pour-over wills indicates rather vividly the obsolescence and irrelevance of statutes contemplating supervisory jurisdiction.

One of the problems with inter vivos and receptacle trusts at the present time, however, is that persons interested in these arrangements as trustees or beneficiaries frequently discover that there are no simple and efficient statutory or judicial remedies available to them to meet the special needs of the trust relationship. Proceedings in equity before Courts of general jurisdiction are possible, of course, but the difficulties of obtaining jurisdiction over all interested persons on each occasion when a judicial order may be necessary or desirable are commonly formidable. A few states offer simplified procedures on a voluntary basis for inter vivos as well as testamentary trusts. In some of these, however, the legislation forces inter

vivos trusts into unpopular patterns involving supervisory control. Nevertheless, it remains true of the legislation in most states that there is too little for inter vivos trusts and too much for trusts created by will.

Other developments suggest that enactment of useful, uniform legislation on trust procedures is a matter of considerable social importance. For one thing, accelerating mobility of persons and estates is steadily increasing the pressure on locally oriented property institutions. The drafting and technical problems created by lack of uniformity of trust procedures in the several states are quite serious. If people cannot obtain efficient trust service to preserve and direct wealth because of state property rules, they will turn in time to national arrangements that eliminate property law problems. A general shift away from local management of trusteed wealth and increased reliance on various contractual claims against national funds seems the most likely consequence if the local law of trusts remains nonuniform and provincial.

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need for concern about this development if it could be assumed also that the people involved are seeking and getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlors nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uninformed or baffled by formidable difficulties in obtaining relief or information.

Enactment of clear statutory procedures creating simple remedies for persons involved in trust problems will not prevent disappointment for many of these persons but should help minimize their losses.

Several objectives of the Code are suggested by the preceding discussion. They may be summarized as follows:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.

2. To strengthen the ability of owners to select trustees by eliminating formal qualification of trustees and restrictions on the place of administration.

3. To locate nonmandatory judicial proceedings for trustees and beneficiaries in a convenient Court fully competent to handle all problems that may arise.

4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.

5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable Courts, thereby acknowledging jurisdiction and providing some evidence of the trust's existence for future beneficiaries.

6. To eliminate routinely required Court accountings, substituting clear

remedies and statutory duties to inform beneficiaries.

PART 1

TRUST REGISTRATION

GENERAL COMMENT

Registration of trusts is a new concept and differs importantly from common arrangements for retained supervisory jurisdiction of Courts of probate over testamentary trusts. It applies alike to inter vivos and testamentary trusts, and is available to foreign-created trusts as well as those locally created. The place of registration is related not to the place where the trust was created, which may lose its significance to the parties concerned, but is related to the place where the trust is primarily administered, which in turn is required (Section 7-305) to be at a location appropriate to the purposes of the trust and the interests of its beneficiaries. Sections 7-102 and 7-305 provide for transfer of registration. The procedure is more flexible than the typical retained jurisdiction in that it permits registration or submission to other appropriate procedures at another place, even in another state, in order to accommodate relocation of the trust at a place which becomes more convenient for its administration. (Cf. 20 [Purdon's] Pa.Stat. § 2080.309.) In addition, the registration acknowledges that a particular Court will be accessible to the parties on a permissive basis without subjecting the trust to compulsory, continuing supervision by the Court.

The process of registration requires no judicial action or determination but is accomplished routinely by simple acts on the part of the trustee which will place certain information on file with the Court (Section 7-102). Although proceedings involving a registered trust will not be continuous but will be separate each time an interested party initiates a proceeding, it is contemplated that a will maintain a single file for each registered trust as a record available to interested persons. Proceedings are facilitated by the broad jurisdiction of the Court (Section 7-201) and the Code's representation and notice provisions (Section 1-403).

Section 7-201 provides complete jurisdiction over trust proceedings in the Court of registration. Section 7-103 above provides for jurisdiction over parties. Section 7-104 should facilitate use of trusts involving assets in several states by providing for a single principal place of administration and reducing concern about qualification of foreign trust companies.

Section 7-101. Duty To Register Trusts.

The trustee of a trust having its principal place of administration in this state shall register the trust in the Court of this state at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but

one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them. The duty to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

COMMENT

This section rests on the assumption that a central "filing office" will be designated in each county where the Court may sit in more than one place.

The scope of this section and of Article VII is tied to the definition of "trustee" in Section 1-201. It was suggested that the definition should be expanded to include "land trusts." It was concluded, however that the inclusion of this term which has special meaning principally in Illinois, should be left for decision by enacting states. Under the definition of "trust" in this Code, custodial arrangements as contemplated by legislation dealing with gifts to minors, are excluded, as are "trust accounts" as defined in Article VI.

Section 7-102. Registration Procedures.

Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust: (1) in the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance. If a trust has been registered elsewhere, registration in this state is ineffective until the earlier registration is released by order of the Court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this state.

COMMENT

Additional duties of the clerk of the Court are provided in Section 1-305. The duty to register trusts is stated in Section 7-101.

Section 7-103. Effect Of Registration.

(a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the Court in any proceeding under Section 7-201 of this Code relating to the trust that

may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee, or mailed to him by ordinary first class mail at his address as listed in the registration or as thereafter reported to the Court and to his address as then known to the petitioner.

(b) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of registration for the purposes of proceedings under Section 7-201, provided notice is given pursuant to Section 1-401.

COMMENT

This section provides for jurisdiction over the parties. Subject matter jurisdiction for proceedings involving trusts is described in Sections 7-201 and 7-202. The basic jurisdictional concept in Section 7-103 is that reflected in widely adopted long-arm statutes, that a state may properly entertain proceedings when it is a reasonable forum under all the circumstances, provided adequate notice is given. Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration. This basis for consent jurisdiction is in addition to and not in lieu of other bases of jurisdiction during or after registration. Also, incident to an order releasing registration under Section 7-305, the Court could condition the release on registration of the trust in another state or Court. It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been initiated there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by his selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. Although most cases will fit within traditional concepts of jurisdiction, this section goes beyond established doctrines of in personam or quasi in rem jurisdiction as regards a nonresident beneficiary's interests in foreign land of chattels, but the National Conference believes the section affords due process and represents a worthwhile step forward in trust proceedings.

Section 7-104. Effect Of Failure To Register.

A trustee who fails to register a trust in a proper place as required by this Part, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any Court in which the trust could have been registered. In addition, any trustee who, within 30 days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required by this Part is subject to removal and denial of compensation or to surcharge as the Court may direct. A provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the Court, is ineffective.

COMMENT

Under Section 1-108, the holder of a presently exercisable general power of appointment can control all duties of a fiduciary to beneficiaries who may be changed by exercise of the power. Hence, if the settlor of a revocable inter vivos trust directs the trustee to refrain from registering a trust, no liability would follow even though another beneficiary demanded registration. The ability of the general power holder to control the trustee ends when the power is terminated.

Section 7-105. Registration, Qualification of Foreign Trustee.

A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign co-trustee is not required to qualify in this State solely because its co-trustee maintains the principal place of administration in this State. Unless otherwise doing business in this State, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this State, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.

COMMENT

Section 7-105 deals with non-resident trustees in a fashion which should correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust. The ease of avoiding foreign corporation qualification statutes by the common use of local nominees or subtrustees, and the acceptance of these practices, are evidence of the futility and undesirability of more restrictive legislation of the sort commonly existing today. The position embodied in this section has been recommended by important segments of the banking and trust industry through a proposed model statute, and the failure to adopt this reform has been characterized as unfortunate by a leading trust authority. *See* 5 Scott on Trusts § 558 (3rd ed. 1967).

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

Section 7-201. Court; Exclusive Jurisdiction of Trusts.

(a) The Court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of

trusts. These include, but are not limited to, proceedings to:

(1) appoint or remove a trustee;

(2) review trustees' fees and to review and settle interim or final accounts;

(3) ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and determine the existence or nonexistence of any immunity, power, privilege, duty or right; and

(4) release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the Court as invoked by interested parties or as otherwise exercised as provided by law.

COMMENT

Derived in small part from Florida Statutes, 1965, Chapters 737 and 87, and Title 20, Penna.Statutes, (Purdon) 32080.101 et seq.

Section 7-202. Trust Proceedings; Venue.

Venue for proceedings under Section 7-201 involving registered trusts is in the place of registration. Venue for proceedings under Section 7-201 involving trusts not registered in this state is in any place where the trust properly could have been registered, and otherwise by the rules of civil procedure.

Section 7-203. Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.

The Court will not, over the objection of a party, entertain proceedings under Section 7-201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which

the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order.

COMMENT

While recognizing that trusts which are essentially foreign can be the subject of proceedings in this state, this section employs the concept of forum non conveniens to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust but leaves open the possibility of suit elsewhere when necessary in the interests of justice. It is assumed that under this section a court would refuse to entertain litigation involving the foreign registered trust unless for jurisdictional or other reasons, such as the nature and location of the property or unusual interests of the parties, it is manifest that substantial injustice would result if the parties were referred to the court of registration. As regards litigation involving third parties, the trustee may sue and be sued as any owner and manager of property under the usually applicable rules of civil procedure and also as provided in Section 7-203.

The concepts of res judicata and full faith and credit applicable to any managing owner of property have generally been applicable to trustees. Consequently, litigation by trustees has not involved the artificial problems historically found when personal representatives maintain litigation away from the state of their appointment, and a prior adjudication for or against a trustee rendered in a foreign court having jurisdiction is viewed as conclusive and entitled to full faith and credit. Because of this, provisions changing the law, analogous to those relating to personal representatives in Section 4-401 do not appear necessary. See also Section 3-408. In light of the foregoing, the issue is essentially only one of forum non conveniens in having litigation proceed in the most appropriate forum. This is the function of this section.

Section 7-204. Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties.

The Court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions.

Section 7-205. Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust.

On petition of an interested person, after notice to all interested persons, the Court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of any person so employed, and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

COMMENT

In view of the broad jurisdiction conferred on the probate court, description of the special proceeding authorized by this section might be unnecessary. But the Code's theory that trustees may fix their own fees and those of their attorneys marks an important departure from much existing practice under which fees are determined by the Court in the first instance. Hence, it seems wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy. This review would meet in part the criticism of the broad powers given in the Uniform Trustees' Powers Act.

Section 7-206. Trust Proceedings; Initiation by Notice; Necessary Parties.

Proceedings under Section 7-201 are initiated by filing a petition in the Court and giving notice pursuant to Section 1-401 to interested parties. The Court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified.

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

Section 7-301. General Duties Not Limited.

Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code.

Section 7-302. Trustee's Standard of Care and Performance.

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

COMMENT

This is a new general provision designed to make clear the standard of skill expected from trustees, both individual and corporate, nonprofessional and professional. It differs somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:

"The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a reasonable man of ordinary prudence, he is under a duty to exercise such skill."

By making the basic standard align to that observed by a prudent man in dealing with the property of another, the section accepts a standard as it has been articulated in some decisions regarding the duty of a trustee concerning investments. See Estate of Cook, (Del.Chanc.1934) 20 Del. Ch. 123, 171 A. 730. Also, the duty as described by the above section more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care.

Section 7-303. Duty to Inform and Account to Beneficiaries.

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

(a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

COMMENT

Analogous provisions are found in Section 3-705.

This provision does not require regular accounting to the Court nor are copies of statements furnished beneficiaries required to be filed with the Court. The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping. Under Section 1-108, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person.

This section requires that a reasonable selection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request. This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. Usually this will be accompanied

by a narrative explanation by the trustee. In the case of the charitable trust, notice need be given only to the attorney general or other state officer supervising charitable trusts and in the event that the charitable trust has, as its primary beneficiary, a charitable corporation or institution, notice should be given to that charitable corporation or institution. It is not contemplated that all of the individuals who may receive some benefit as a result of a charitable trust be informed.

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. See ALI-ABA Monograph, Whitman, Brown and Kramer, Fiduciary Accounting Guide (2nd edition 1990).

Section 7-304. Duty to Provide Bond.

A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the Court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the Court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the Court of registration or other appropriate Court in amounts and with sureties and liabilities as provided in Sections 3-604 and 3-606 relating to bonds of personal representatives.

COMMENT

See Sections 3-603 and 3-604; 60 Okla.Stats.1961, § 175.24 [60 Okl.St.Ann. § 175.24]; Pa.Fid. Act, 1949, § 390.911(b) [20 Purdon's Pa.Stat. § 390.911(b)]; cf. Tenn.Code Ann. § 35-113.

Section 7-305. Trustee's Duties; Appropriate Place of Administration; Deviation.

A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

COMMENT

This section and 7-102 are related. The latter section makes it clear that registration may be released without Court order if the trustee and beneficiaries can agree on the matter. Section 1-108 may be relevant, also.

The primary thrust of Article VII is to relate trust administration to the jurisdiction of courts, rather than to deal with substantive matters of trust law. An aspect of deviation, however, is touched here.

Section 7-306. Personal Liability of Trustee to Third Parties.

(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

COMMENT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

Section 7-307. Limitations on Proceedings Against Trustees After Final

Account.

Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within [6 months] after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in Section 1-403(1) and (2).

COMMENT

Final accounts terminating the trustee's obligations to the trust beneficiaries may be formal or informal. Formal judicial accountings may be initiated by the petition of any trustee or beneficiary. Informal accounts may be conclusive by consent or by limitation. This section provides a special limitation supporting informal accounts. With regard to facilitating distribution see Section 5-103.

Section 1-108 makes approval of an informal account or settlement with a trustee by the holder of a presently exercisable general power of appointment binding on all beneficiaries. In addition, the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.

PART 4

POWERS OF TRUSTEES

GENERAL COMMENT

There has been considerable interest in recent years in legislation giving trustees extensive powers. The Uniform Trustees' Powers Act, approved by the National Conference in 1964 has been adopted in Idaho, Kansas, Mississippi and Wyoming. New York and New Jersey have adopted similar statutes which differ somewhat from the Uniform Trustees' Powers Act, and Arkansas, California, Colorado, Florida, Iowa, Louisiana, Oklahoma, Pennsylvania, Virginia and Washington have comprehensive legislation which differ in various respects from other models. The legislation in Connecticut, North Carolina and Tennessee provides lists of powers to be incorporated by reference as draftsmen wish.

Comprehensive legislation dealing with trustees' powers appropriately may be included in the Code package at this point.

ARTICLE VIII

EFFECTIVE DATE AND REPEALER

Section

8-101. Time of Taking Effect; Provisions for Transition.
8-102. Specific Repealer and Amendments.

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Section 8-101. Time of Taking Effect; Provisions for Transition.

(a) This Code takes effect on January 1, 200_.

(b) Except as provided elsewhere in this Code, on the effective date of this Code:

(1) the Code applies to governing instruments executed by decedents dying thereafter;

(2) the Code applies to any proceedings in Court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the Court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;

(3) every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

(5) any rule of construction or presumption provided in this Code applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent;

(6) a person holding office as judge of the Court on the effective date of this Act may continue the office of judge of this Court and may be selected for additional terms after the effective date of this Act even though he does not meet the qualifications of a judge as provided in Article I.

Section 8-102. Specific Repealer and Amendments.

(a) The following Acts and parts of Acts are repealed:

(1)

(2)

(3)

(b) The following Acts and parts of Acts are amended:

(1)

(2)

(3)