ARTICLE II

INTESTACY, WILLS, AND DONATIVE TRANSFERS

PART 1

INTESTATE SUCCESSION

GENERAL COMMENT

Part I of Article II contains the basic pattern of intestate succession historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to the decedent's heirs in the same manner.

A principal purpose of this Article and Article III of the Code is to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law. While the prescribed patterns may strike some as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing the changes it must therefore be borne in mind that the decedent may always choose a different rule by executing a will.

The principal features of the statute 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 $100,000 plus one-half of the balance of the intestate estate, if the decedent's surviving descendants are also descendants of the surviving spouse but the surviving spouse has one or more other descendants. The surviving spouse receives the first $100,000 plus one-half of the balance of the intestate estate, if the decedent has one or more surviving descendants who are not descendants of the surviving spouse.

3. The intestate estate not passing to a surviving spouse passes to the decedent's surviving descendants by representation or, if none, to the decedent's surviving parents or, if none, to the parents' surviving descendants or, if none, to the decedent's surviving next of kin.

4. A system of representation called per capita at each generation is adopted. Under the per capita at each generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares.

5. Estates of dower and curtesy are abolished and, along with the statutory provisions for necessaries, are replaced with allowances under Part 4.

6. For the purposes of intestate succession, a child is the child of his or her natural parents, regardless of their marital status. An exception provides that an adopted child is the child of his or her adoptive parents and not of the natural parents. However, this exception does not prevent a child who is adopted by the spouse of a natural parent from taking a share of the intestate estate of either natural parent.

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 part, 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 the intestate share.

COMMENT

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 bequest, such as "I give $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 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 bequest (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 2-801(g), 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; 2-801(g). Had Hector not been excluded by G's will, the share to which Hector would have succeeded would have been 1/2. Under section 2-801(g), that half, not the whole of G's intestate estate, is what passes to Hector's descendants by representation as if Hector had disclaimed his intestate share.

Note that if brother Hector had actually predeceased G, then no consequence flows from Hector's disinheritance: V, X, Y, and Z would each take 1/4 of G's intestate estate under sections 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 100,000, 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

Under this Section, 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 $100,000 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 $100,000.

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 exemption and allowances to which the surviving spouse is entitled under Part 4. These can add up to a minimum of $43,000.

The theory of this section is discussed in Waggoner, "Spousal Probate Rights in a Multiple-Marriage Society", 45 The Record of the Ass'n of the Bar of the City of New York 339, 344-48 (1990) (Mortimer H. Hess Memorial Lecture).

Empirical studies support the increase in the surviving spouse's intestate share, reflected in 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.

MASSACHUSETTS COMMENT

This section gives the surviving spouse a larger share than is provided by current law under section 1 of chapter 190. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share under Part 2 of this Article.

Under chapter 190, the decedent's surviving spouse received the entire intestate estate only if there were neither surviving descendants nor kindred. If there were surviving descendants, the surviving spouse took one-half of the personal and one-half of the real property. If there were no surviving descendants, but there was surviving kindred, the surviving spouse took the whole estate up to $200,000 and one-half of the remaining personal and real property.

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 per capita at each generation;

(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 per capita at each generation;

(4) if there is no surviving descendant, parent, or descendant of a parent, then equally to the decedent's next of kin in equal degree; but if there are 2 or more descendants of deceased ancestors in equal degree claiming through different ancestors, those claiming through the nearest ancestor shall be preferred to those claiming through an ancestor more remote. Degrees of kindred shall be computed according to the rules of civil law.

COMMENT

This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and other ancestors and collateral relatives labeled "next of kin", similar to G.L. c. 190 § 2.

In general the principle of per capita at each generation representation (which is defined in Section 2-106) is adopted as the pattern which most decedents would prefer.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under Section 2-801.

The word "descendants" replaces the word "issue" in this section and throughout 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. See also Section 2-114, parent and child relationship.

Section 2-104. [Reserved.]

Section 2-105. [No Taker.]

If there is no taker under the provisions of this article, the intestate estate passes to the commonwealth; provided, however, if such intestate is a veteran who died while a member of the Soldiers' Home in Massachusetts or the Soldiers' Home in Holyoke, the intestate estate shall inure to the benefit of the legacy fund or legacy account of the soldiers' home of which the intestate was a member.

MASSACHUSETTS COMMENT

This Section contains the same rule as section G.L. c. 190, § 3(7).

Section 2-106. [Representation.]

(a) [Definitions.] In this section:

(1) "Deceased descendant", "deceased parent", or "deceased ancestor", a descendant, parent, or ancestor who predeceased the decedent.

(2) "Surviving descendant", a descendant who survived the decedent.

(b) [Decedent's Descendants.] If, under section 2-103(1), a decedent's intestate estate or a part thereof passes "per capita at each generation" 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 that contains 1 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 in the nearest generation and their surviving descendants had predeceased the decedent.

(c) [Descendants of Parents.] If, under section 2-103(3), a decedent's intestate

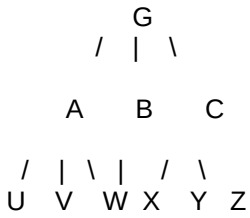
estate or a part thereof passes "per capita at each generation" to the descendants of the decedent's deceased parents or either of them, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest the deceased parents or either of them 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 in the nearest generation and their surviving descendants had predeceased the decedent.

COMMENT

This section adopts the system of representation called per capita at each generation. The per capita at each generation system is more responsive to the underlying premise of the original UPC system, in that it always provides equal shares to those equally related. 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 (71.11 percent) chose the per capita at each generation system; 145 (19.1 percent) chose the per-stirpes system, and 70 (9.21 percent) chose the pre-1990 UPC system.

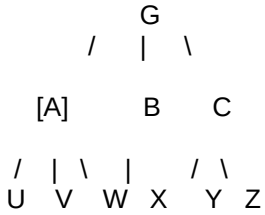
To illustrate the differences among the three systems, consider a family, in which G is the intestate. G has 3 children, A, B, and C. Child A has 3 children, U, V, and W. Child B has 1 child, X. Child C has 2 children, Y and Z. Consider four variations.

Variation 1: All three children survive G.



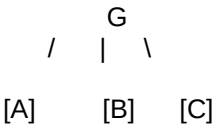
Solution: All three systems reach the same result:
A, B, and C take 1/3 each.

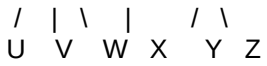
Variation 2: One child, A, predeceases G; the other two survive G.



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.

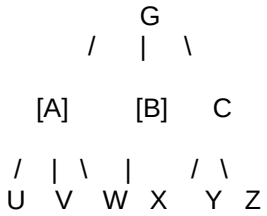




Solution: The pre-1990 UPC and the 1990 UPC systems reach the same result: U, V, W, X, Y, and Z take 1/6 each.

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.



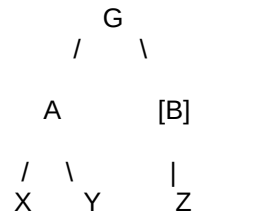
Solution: In this instance, the 1990 UPC system (per capita at each generation) departs from the pre-1990 UPC system. Under the 1990 UPC system, C takes 1/3 and the other two 1/3 shares are combined into a single share (amounting to 2/3 of the estate) and distributed as if C, Y and Z had predeceased 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 2-801(g), 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 Section 2-801. A cannot affect the basic division of G's intestate estate by this maneuver. Section 2-801(g) provides that "the disclaimed interest devolves as if the disclaimant had predeceased the decedent, except that if by law or under the testamentary instrument the disclaimant's descendants would take the disclaimant's share by representation if the disclaimant actually predeceased the decedent, and if the disclaimant left descendants who survive the decedent, the disclaimed interest passes by representation to the disclaimant's descendants who survive the decedent". 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 2-801(g) 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 Section 2-801(d)(1), however, prevents A from manipulating the result by this method.

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.

MASSACHUSETTS COMMENT

This Section contains the same rule as G.L. c. 190, § 4.

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.

MASSACHUSETTS COMMENT

This Section contains a rule similar to G.L. c. 190, § 4, except for the added requirement that the individual survive for 120 hours.

Section 2-109. [Advancements.]

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

(b) If the value of an advancement is expressed in the conveyance, in the contemporaneous writing, or in the acknowledgment, such value shall be adopted in the division and distribution of the intestate estate; otherwise it shall be determined according to the value when the property was given.

(c) Property which is advanced by an intestate shall be considered as part of the intestate's estate in the division and distribution of such estate, and shall be taken by the heir who received the advance toward the heir's share of the intestate estate; but the heir shall not be required to restore any part thereof, although it exceeds the intestate share. A surviving spouse shall be entitled only to a share in the residue after deducting the value of the advancement.

(d) If a child or other lineal descendant of the intestate who has received an advancement dies before the intestate, leaving descendants who receive a share of the intestate's estate, the advancement shall be considered as part of the intestate's estate in the division and distribution of such estate, and the value thereof shall be taken in

equal shares by the representatives of the person who received the advancement toward their share of the intestate estate, as if the advancement had been made directly to them.

(e) The probate court in which the estate of a decedent is settled may hear and determine all questions of advancements arising relative to such estate.

MASSACHUSETTS COMMENT

This section is substantially similar to the advancement rules under chapter 196.

COMMENT

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 this section, 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 the donor's estate, the donor may either execute a will so providing or, if the donor 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, but with respect to advances made to a person who dies before the intestate, it applies only to advances to the decedent's lineal descendants.

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 2-801(d)(1) prevents a living debtor from using the combined effects of the last sentence of Section 2-110 and a disclaimer to avoid a set-off. 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 2-801(d) 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 the debtor not disclaimed the intestate share, minus the debt.

Section 2-111. [Alienage.]

No individual is disqualified to take as an heir because the individual or another individual through whom the individual claims is or has been an alien.

MASSACHUSETTS COMMENT

See G.L. c. 206, section 27A, permitting the court to require a person who resides outside the United States to appear in person to claim a legacy or distributive share where there are questions as to the person's identity, right, and opportunity to receive such funds; and G.L. c. 206, section 27B, permitting the court, if it is not assured that a person domiciled outside the United State will receive a legacy or distributive share in substantially full value, to order that payment be made in the form of necessaries of life, food, clothing and medicine, delivered through a recognized public or private agency.

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 personality, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.

This section has broader vitality in light of the decision of the United States Supreme Court in Zschernig v. Miller, 88 S.Ct.664, 389 U.S. 429, 19 L.Ed.2d 683 (1968), holding unconstitutional a state statute providing for escheat if a nonresident alien cannot meet three requirements: the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country, the right of United States citizens to receive payment here of funds from estates in the foreign country, and the right of the foreign heirs to receive the proceeds of the local estate without confiscation by the foreign government. The rationale was that such a statue involved the local probate court in matters which essentially involve United States foreign policy, whether or not there is a governing treaty with the foreign country. Hence, the statute is "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress".

Section 2-112. [Dower and Curtesy Abolished.]

The estates of dower and curtesy are abolished.

MASSACHUSETTS COMMENT

The provisions of this Code replace the common-law concepts of dower and curtesy and their statutory counterparts, including the tenancy by dower provided in chapter 189. See the allowances and exemption provided in Part 4.

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 subsection (b), for purposes of intestate succession by, through, or from a person, an individual is the child of his natural parents, regardless of their marital status. The parent and child relationship may be established under applicable state law.

(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 the right of the child or a descendant of the child to inherit from or through either natural parent. The court may decree that the rights of succession to property under this section, or under former section 7 of chapter 210, shall vest in an adopted individual as of the date of the filing of the petition for adoption.

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. This is a change from G.L. c. 190, Sections 5-7, under which a person born out of wedlock is deemed the heir of his or her mother, while rights with respect to the father require a determination of paternity. The parent and child relationship will be established under applicable state law, and this should include the provisions in G.L. c. 190, Section 7, expanded to cover the establishment of parenthood, not just of paternity. Intestate shares run to "descendants" which includes adopted children, Section 2-103.

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. However, 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 both natural parents. With respect to the noncustodial natural parent and that parent's family, 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 parent and that noncustodial natural parent's family do not have a right to inherit from or through the adopted individual.

MASSACHUSETTS COMMENT

Chapter 140 of the Acts of 2012 added the last sentence of subsection (b) and repealed sections 7 and 8 of G.L. c. 210.

PART 2

ELECTIVE SHARE OF SURVIVING SPOUSE

Sections 2-200 to 2-299. [Reserved]

MASSACHUSETTS COMMENT

The uniform act provisions for reforming the spousal elective share are not included in this measure. Rather, such reform is left to separate legislation.

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 a will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate the spouse 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 is 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 section 2-603 or 2-604 to such a child or to a descendant of such a child, unless:

(1) it appears from the will 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 any 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.

MASSACHUSETTS COMMENT

Under section 9 of chapter 191, marriage revokes a will unless it appears from the will that the will was executed in contemplation of the pending marriage. This section takes the opposite position, reflecting the view that the intestate share of the spouse is what the decedent would want the spouse to have if the decedent had thought about the relationship of the old will to the new situation. One effect of this section should be to reduce the number of instances where a spouse will claim an elective share.

COMMENT

Purpose and Scope. 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) makes 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. 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 right 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 3-901), 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).

Section 2-302. [Omitted Children.]

(a) Except as provided in subsection (b), if a testator fails to provide in a will for any 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 the will was executed, 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 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 1 or more children living when the will was executed, and the will devised property or an interest in property to 1 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 the will for a living child solely because the testator believes the child to be dead, the child is entitled to a 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.

(e) No such omitted child shall take any share in real property unless a claim is filed in the registry of probate by or on behalf of such child within 1 year after the death of the decedent.

MASSACHUSETTS COMMENT

This section changes the rule for omitted after-born or after-adopted children under G.L. c. 191, § 20 by differentiating between those omitted when there are no other children and those omitted when there are other children who received property under the will. Subsection (e) preserves the last sentence of c. 191, § 20.

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 a child because of the mistaken belief that the child is dead.

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

One or More Children Living When Will Executed. If the testator had one or more children living when the will was executed, subsection (a)(2), which implements the second basic objective stated above, provides 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 the will for a living child solely because the testator believes the child to be dead. Extrinsic evidence is admissible to determine whether the testator omitted the living child solely because the testator believed the child to be dead. Cf. Section 2-601, Comment. If the child was omitted solely because of that belief, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

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

PART 4

EXEMPT PROPERTY AND ALLOWANCES

MASSACHUSETTS COMMENT

The allowances and exempt property replace the allowances to widows and children under sections 1 and 2 of chapter 196. [Note - there is no longer a declaration that apparel and ornaments of the spouse and minors belong to them.]

GENERAL COMMENT

For decedents who die domiciled in this commonwealth, this Part grants various allowances and exempt property 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. In insolvent estates they have priority over transfers resulting from rights of survivorship or payable on death designation under Section 6-215, if claimed within one year of the death of the decedent. If there is a surviving spouse, exempt property of up to $10,000, plus whatever is allowed to the spouse for support during administration under the discretionary family allowance (up to $18,000), 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 allowances and exempt property.

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.

Section 2-401. [Applicable Law.]

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

Section 2-402. [Reserved.]

Section 2-403. [Exempt Property.]

(a) The decedent's surviving spouse is entitled from the estate to a value at date of death, 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 unsecured 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 the discretionary 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.

(b) The dededent's surviving spouse may remain in the house of the decedent for not more than 6 months next succeeding the date of death without being chargable for rent.

COMMENT

Unlike the allowance described in Section 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 exemption described in this section and the allowance described in Section 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. [Discretionary Family Allowance.]

(a) In addition to the right to 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. This discretionary family 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 discretionary family allowance may be made partially to the child or the child's guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The discretionary family allowance is exempt from and has priority over all unsecured claims.

(b) The discretionary 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 a discretionary 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 $1,500 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.]

If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to 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 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 exempt property. The personal representative may determine the discretionary family allowance in a lump sum not exceeding $18,000 or periodic installments not exceeding $1,500 per month for 1 year, and may disburse funds of the estate in payment of the discretionary family 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 discretionary family allowance other than that which the personal representative determined or could have determined.

COMMENT

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.

PART 5

WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

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 consistently defined in Section 1-201.

MASSACHUSETTS COMMENT

This replaces G.L. c. 191, §1. The ability of a testator to dispose of his or her property may be limited by such things as surviving spouse's elective share (Article 2, Part 2), family allowances (Article 2, Part 4), or if he or she is the owner of an estate tail. See §3-101.

Section 2-502. [Execution; Witnessed Wills.]

(a) Except as provided in subsection (b); subsection (d) and in sections 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 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) Intent that the document constitute the testator's will can be established by extrinsic evidence.

COMMENT

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)).

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).

Section 2-503. [Reserved.]

MASSACHUSETTS COMMENT

The Committee felt that in Massachusetts the standards for executing and attesting a will should not be loosened any more than under UPC Section 2-502.

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 18 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 18 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 _____, witness, 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 18 years of 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).

MASSACHUSETTS COMMENT

The language of paragraphs (a) and (b) of this Section is basically the same as clauses (ii) and (iii) of G.L. Chapter 192, § 2, which itself was adapted from the Uniform Probate Code. Paragraph (c), however, is new. It would permit the signatures affixed to a separate self-proving affidavit attached to an unsigned will to be considered as signatures affixed to the will in order to establish due execution. Proof of the will upon testimony of one of the witnesses (clause (i) of § 2) is codified in section 3-405 and section 3-406.

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 except that a devise to a witness or a spouse of such witness shall be void unless there are two other subscribing witnesses to the will who are not similarly benefited thereunder or the interested witness establishes that the bequest was not inserted, and the will was not signed, as a result of fraud or undue influence by the witness.

COMMENT

This Section 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 devise 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.

MASSACHUSETTS COMMENT

Under Chapter 191, § 2 "a beneficial devise or legacy to a subscribing witness or to the husband or wife of such witness shall be void unless there are two other subscribing witnesses to the will who are not similarly benefited thereunder". Paragraph (b) of this Section would change the statutory rule, but the opportunity for fraud or undue influence is lessened considerably by addition of a clause at the end of that paragraph.

Incompetence of a witness subsequent to attestation should not prevent probate of the will under this section. Repeal of G.L. c. 191, §3 should not create any implication to the contrary.

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

A written will is valid if executed in compliance with section 2-502 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. 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.

MASSACHUSETTS COMMENT

Under Chapter 191, § 5, a will which is in writing and subscribed by the testator "shall be of the same force and effect as if executed in the mode prescribed by the laws of this Commonwealth" if executed under the laws of the place where the will was executed or the testator domiciled. This section would add place of abode and place of nationality to the laws which can be invoked to determine the validity of execution. In all four cases the laws could be those in effect at the time of signing or in effect at the time of the testator's death; c. 191, § 4 says that a will is valid if executed in accordance with the law

in effect at the time of signing.

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.

(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, 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, 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 standard 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, 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 the 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 rebutting this presumption, Will # 1 would be revoked only to the extent Will #2 is inconsistent 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.

Subsection (a)(2) is 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 statements 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.

MASSACHUSETTS COMMENT

This section comes close to existing Massachusetts law. Chapter 191, § 8 provides:

"No will shall be revoked except by burning, tearing, canceling or obliterating it with the intention

of revoking it by the testator himself or by a person in his presence and by his direction; or by some other writing signed, attested and subscribed in the same manner as a will; or by subsequent changes in the condition and circumstances of the testator from which a revocation is implied by law".

The statement in paragraph (a)(2) of the UPC version that a cancellation may result even if it did not touch any of the words of the will, however, is inconsistent with the result in Yont v. Eads, 317 Mass. 232 (1944) and is not adopted. A partial revocation, which section 2-507 expressly permits, is recognized in Massachusetts. Bigelow v. Gillott, 123 Mass. 102 (1877). See also Currier Gallery of Art v. Packard, 23 Mass. App. 988 (1987); Putnam v. Neubrand, 329 Mass. 453 (1952); Schneider v. Harrington, 320 Mass. 723 (1947). In Hertrais v. Moore, 325 Mass. 57, 62 (1949), the Court stated: "Consequently, § 8 (of Chapter 191) covers no case of revocation by implication not now expressly covered by § 9 which is the statute of broader scope".

Section 2-508. [Revocation by Change of Circumstances.]

Except as provided in sections 2-301, 2-803 and 2-804, a change of circumstances does not revoke a will or any part of it.

MASSACHUSETTS COMMENT

A change of circumstances will revoke a will to the extent provided in section 2-803 in the event of homicide and to the extent provided by section 2-804 in the event of divorce, but contrary to present Massachusetts law, Chapter 191, § 9, marriage is not a change of circumstances which revokes a will (not made in contemplation of marriage). If the married testator dies with the prior will, Section 2-301 revokes the will (unless it falls under one of the exceptions to the operation of Section 2-301(a)), but only to the extent necessary to provide an intestate share for the surviving spouse.

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. 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).

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 as to the testator'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).

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 No. 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.

MASSACHUSETTS COMMENT

The Commonwealth recognizes the doctrine of dependent relative revocation. See G. Newhall, Settlement of Estates (4th Ed.) § 341 and cases noted, particularly Aldrich v. Aldrich, 215 Mass. 164 (1913) and Williams v. Williams, 142 Mass. 515 (1886). The burden of persuasion appears to be on the proponent who seeks to revive a revoked will. Placing the burden of persuasion on the other party when a later will, which revoked the earlier will in part only, is itself revoked is new. The Committee felt that the distinction is logically explained in the Comment.

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, or 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. 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 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 the UTATA if previously enacted in the state.

MASSACHUSETTS COMMENT

This is much like current Massachusetts law, G.L. c. 203, §3B, which was based on the predecessor of the 1990 version of Section 2-511. Note, however, that the pourover may be to a trust executed "before, or concurrently with, or after the execution of the testator's will". This "or after" is new." Note, however, that clause (ii) of paragraph (a) is new; this would make it clearer than it now may be that the pour-over trust could be "established" with the pour-over itself. Two other minor changes are described at the end of the second paragraph of the Comment.

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.

MASSACHUSETTS COMMENT

This section codifies the common law doctrine of facts of independent significance. Second Bank-State Street Trust Company v. Pinion, 341 Mass. 366 (1960).

Section 2-513. [Separate Writing Identifying Devise of Certain Types of Tangible Personal Property.]

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. 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 personality 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.

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.

MASSACHUSETTS COMMENT

This Section would give binding effect to letters or memoranda which are now only precatory.

Section 2-514. [Contracts Concerning Succession.]

A contract to make or not to make a will or devise, or to revoke 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

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.

MASSACHUSETTS COMMENT

Clauses (i) and (ii) of section 2-514 should present no problem because the testator has either incorporated the key provisions of the contract in the will itself or has sufficiently identified the contract by incorporation by reference or facts of independent significance.

As to clause (iii), the current Massachusetts (Statute of Frauds) law is G.L. c. 259, §§ 5 and 5A. Section 5 reads: "No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding unless such agreement is in writing signed by the person whose executor or administrator is sought to be charged, or by some person by him duly authorized. . . ."

In Foman v. Davis, 316 F. 2d 254 (1st. Cir. 1963) a daughter allegedly agreed with her father that she would pay for the care of her invalid mother in return for the father's agreement to die intestate. After the mother died, the father remarried and left his estate to his second wife. The plaintiff sued for her intestate share and lost in the District Court, which interpreted § 5 broadly, as though it meant "no agreement about making a will . . ." and, because the agreement was within the statute, the plaintiff's suit was dismissed. On appeal, the First Circuit read the statute narrowly and, because the alleged agreement to die intestate was outside of it, the case was remanded to the District Court for further proceedings on the plaintiff's suit.

In 1965, the Legislature, in response, enacted § 5A of Chapter 259 which reads: "No agreement to make a will of real or personal property or codicil thereto or to make a bequest or devise, or to revoke or not to revoke a will, codicil, bequest or devise, or to refrain from making a will, codicil, bequest or devise or any other agreement relative to making or not making a will, codicil, bequest or devise, shall be binding unless such agreement is in writing and signed by the person whose executor or administrator is sought to be charged, or by some person duly authorized thereunto by him in writing. . . ."

The minor edits to section 2-514 are suggested for the purpose of making it clear that the intention of § 5A is not changed.

The last sentence of section 2-514 reflects Massachusetts law. "Execution of simultaneous wills, while suggestive of a common purpose, without more will not show that the parties entered into a contract to make the wills or to refrain from revoking them. Tweedie v. Sibley (1988) 25 Mass. App. 683, 521 N.E. 2d 1056." G. Newhall, supra, § 334 (1991 Vol. 2 Supp. 97).

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 guardian of the estate or 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.

MASSACHUSETTS COMMENT

The subject matter of this section is now covered in G.L. c. 191, §§ 10-12, which contain many of the detailed provisions to which the first paragraph of the Comment refers. The Committee approves of the UPC rewording, and notes that if this section is enacted, the Probate Courts may wish to consider rules for deposit of wills, access to them and opening of them. Allowing a conservator to examine a deposited will is a welcome improvement and one which seems consistent with the most recent amendment of G.L. c. 201, § 38, which provides (among other things) that a conservator "shall have custody of all wills, codicils, and other instruments purporting to be testamentary dispositions executed by his ward".

Section 2-516. [Duty of Custodian of Will; Liability.]

After the death of a testator a person having custody of a will of the testator shall deliver it within thirty days after notice of the death 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 register or magistrate, 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.

MASSACHUSETTS COMMENT

The subject matter of this section is now covered in G.L. c. 191, §§ 13 and 14. The UPC version provides for damages for willful failure to deliver, whereas § 13 contemplates such damages only after failure to deliver after the Court ordered that person to deliver. Section 14 provides that a person interested in the estate may initiate proceedings to compel delivery of a will to the Probate Court by a complaint; that appears to be implied in the last sentence of section 2-516.

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 enforceable.

MASSACHUSETTS COMMENT

The Committee recommends against UPC Section 2-517, which would make in terrorem clauses unenforceable if probable cause exists for instituting proceedings, as it prefers to continue present Massachusetts law which permits enforcement of in terrorem clauses. See 2 Newhall on Settlement of Massachusetts Estates (4th Ed.) § 348 and Old Colony Trust Company v. Wolfman, 311 Mass. 614 (1942).

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 making donative dispositions.

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 shown by the terms of the will, the rules of construction in this part control the construction of a will.

COMMENT

Purpose and Scope. Common-law rules of construction yield to a finding of a contrary intention.

Cross Reference. See § 43 of Chapter 521 of the Acts of 2008 for the application of the rules of construction in this Part to documents executed prior to the effective date of this Article.

MASSACHUSETTS COMMENT

Under current Massachusetts law, one can determine a testator's intention by looking only at the will itself. G.L. c. 191, §1A(2).

Section 2-602. [Will May Pass All Property and After-Acquired Property.]

Property owned by the testator at death and any acquired by the testator's estate thereafter passes under the will unless a different intention appears.

COMMENT

Purpose and Scope. This section assures 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.

MASSACHUSETTS COMMENT

Under current law, property acquired by a testator after the making of his will passes under the will unless a different intention appears. G.L. c. 191, § 19. Section 2-602 would broaden the statutory language to include property acquired after the testator's death (unless the will otherwise provides). In practice, executors and administrators, c.t.a. probably assume that after acquired property is governed by the will.

Section 2-603. [Antilapse; Deceased Devisee; Class Gifts.]

If a devisee who is a grandparent or a lineal descendant of a grandparent is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take per capita at each generation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

MASSACHUSETTS COMMENT

The Massachusetts Anti-Lapse Statute, G.L. c. 191, § 22 applies to a devise or legacy to a child "or other relation" of the testator which may be somewhat broader than a grandparent, a descendant of the grandparent . . ." This Code adopts the pre-1990 Uniform Probate Code version appearing there at 2-605.

Chapter 140 of the Acts of 2012 replaced the words “by representation” with the words “per capita at each generation”.

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. There is also a special rule for disclaimers contained in Section 2-801; a disclaimed devise may be governed by either Section 2-603 or the present section, depending on the circumstances.

MASSACHUSETTS COMMENT

This appears to state current Massachusetts law, G.L. c. 191, § 1A(5).

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. 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.

MASSACHUSETTS COMMENT

This section is very close to current Massachusetts law, G.L. c. 191, § 1A(3). Paragraph (a)(3) of section 2-605 is new.

Section 2-606. [Nonademption of Specific Devises; Unpaid Proceeds of Sale, Condemnation, or Insurance; Sale by Guardian of the Estate, Conservator or Agent.]

(a) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

(1) any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at 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; and

(4) 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.

(b) If specifically devised property is sold or mortgaged by a guardian of the estate conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if a condemnation award, insurance proceeds, or recovery for injury to the property are 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 by 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 for 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. 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 reasonably clear that the testator did not intend to revoke the devise. Notable examples include McGee v. McGee, 122 R.I. 837, 413 A.2d 72 (1980); Estate of Dungan, 31 Del.Ch. 551, 73 A.2d 776 (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).

MASSACHUSETTS COMMENT

Massachusetts has followed the "identity" rule rather than the "intent" rule so far as ademption is concerned. See G. Newhall, supra, § 350. Most recently in BayBank Harvard Trust Co. v. Grant, 23 Mass. App. 653 (1987) the Court held that a specific bequest of a bank account had been adeemed since the testatrix had transferred the funds to another account (which meant they were readily traceable). The facts and circumstances approach of the UPC version of subsections (a)(5) and (a)(6) might tempt those whose bequests were adeemed to press the personal representative for a replacement or for its value. On balance, the Committee felt that the expense and delay inherent in such proceedings outweighed the possibility for correcting an occasional injustice, thus (a)(5) and (a)(6) were not adopted.

Section 2-607. [Nonexonoration.]

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.

MASSACHUSETTS COMMENT

This is consistent with current Massachusetts law, G.L. c. 191, § 23. That law goes on to say that if the personal representative discharges the mortgage note, he or she shall, at the request of any interested party and by leave of the Probate Court, sell the real estate in order to make the estate whole.

This is covered, but not as well, in UPC section 3-814.

Section 2-608. [Exercise of Power of Appointment.]

(a) 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 an effective gift if the power is not exercised or (ii) the testator's will manifests an intention to include the property subject to the power.

(b) Unless a contrary intent is manifested in the terms of an instrument creating or limiting a power of appointment, it shall be presumed that the person so creating or limiting such power intended to authorize the donee thereof, when exercising said power, not only to create absolute interests but also to create less than absolute legal and equitable interests, including interests in trust for the benefit of objects of said power even though the trustees thereof may not be objects of said power and including new powers of appointment, general or more limited, in objects of said power, even though the objects of the new powers may include one or more that are not objects of said power.

COMMENT

General Residuary Clause. 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.

MASSACHUSETTS COMMENT

Current Massachusetts law, c. 191, § 1A(4), is consistent with the second UPC exception to the rule that a residuary clause does not exercise a power of appointment (where the donor did not specify a particular method of exercise). The first exception, where the donor of the power did not provide a gift in default of exercise, seems reasonable for the reason stated in the Comment.

Subsection (b) has been added to retain the presumption established by G.L. c. 191, § 1B.

Section 2-609. [Ademption by Satisfaction.]

(a) Property a testator gave in the testator's 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 shall be valued as expressed in the will or in the contemporaneous writing; if it is not so valued, such property shall be 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. 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 hotchpot 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).

MASSACHUSETTS COMMENT

The current Massachusetts law, G.L. c. 197, § 25A, was based on the previous UPC provision on ademption by satisfaction. The two changes which new section 2- 609 would make are the one discussed in the first paragraph of the Comment and the addition of paragraph (c).

Section 2-610. [Annuities.]

(a) If an annuity, or the use, rent, income or interest of property, real or personal, is given by will or by trust instrument for the benefit of a person for life or until the happening of a contingency, such person shall be entitled to receive and enjoy the same from and after the death of the deceased, unless it is otherwise provided in such will or trust instrument.

MASSACHUSETTS COMMENT

This section has been added to preserve G.L. c. 197, § 26.

PART 7

RULES OF CONSTRUCTION APPLICABLE TO DONATIVE DISPOSITIONS IN WILLS AND OTHER GOVERNING INSTRUMENTS

GENERAL COMMENT

Part 7 contains rules of construction applicable to donative dispositions in wills, 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.

The sections in Part 7 are based upon Article II, Part 7, of the 1990 revision of the Uniform Probate Code.

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 UPC as desirable means of carrying out common intention.

Section 2-701. [Scope.]

In the absence of a finding of a contrary intention shown by the terms of the will, 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 donative disposition 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 donative disposition 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 donative, appointive, or nominative instrument of any other 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 2-706 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. See Section 43 of Chapter 521 of the Acts of 2008 for the application of the rules of construction in this Part to documents executed prior to the effective date of this Article.

Section 2-702. [Requirement of Survival.]

(a) [Requirement of Survival Under Probate Code.] For the purposes of this code, except as provided in subsection (d), an individual who is not established to have survived an event, including the death of another individual, is deemed to have predeceased the event.

(b) [Requirement of Survival under Donative Provision of Governing Instrument.] Except as provided in subsection (d), for purposes of a donative provision of a governing instrument, an individual who is not established to have survived an event, including the death of another individual, is deemed to have predeceased the event.

(c) [Co-owners With Right of Survivorship; Requirement of Survival.] Except as provided in subsection (d) if (i) it is not established that 1 of 2 co-owners with right of survivorship survived the other co-owner, one-half of the property passes as if 1 had survived, and one-half as if the other had survived and (ii) there are more than 2 co-owners and it is not established that at least 1of them survived the others, the property passes in the proportion that 1 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 1 or more to the whole of the property or account on the death of the other or others.

(d) [Exceptions.] This section does not apply 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;

(3) the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition.

(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. The scope of this section is expanded to cover all donative dispositions and provisions of this Code that relate to a person surviving an event (including the death of another person). As expanded, this section imposes requirement of survival in the areas covered by the Uniform Simultaneous Death Act, G.L. c. 190A, §§ 1-8.

Note that subsection (d)(1) provides that the requirement of survival is inapplicable if the governing instrument "contains some 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 to H's estate. The language in the governing instrument does not apply, since H survived W. The governing instrument does contain language dealing with simultaneous deaths, but 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.

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.

MASSACHUSETTS COMMENT

The requirement of survival by 120 hours in Sections 2-104 and 2-702 of the Uniform Probate Code are not adopted.

Chapter 140 of the Acts of 2012 deleted the phrase “except for purposes of part 3 of article VI [Uniform TOD Security Registration Act] and” from subsection (a) and deleted the phrase “and except for a security registered in beneficiary form (TOD) under part 3 of Article VI, Uniform TOD Security Registration Act” from subsection (b).

Section 2-703. [Choice of Law as to Meaning and Effect of Donative Dispositions.]

The meaning and legal effect of a donative disposition is determined by the local law of the state selected by the transferor 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 commonwealth otherwise applicable to the disposition.

COMMENT

Purpose and Scope. The scope of this section covers all donative dispositions, not just testamentary transfers. This section enables a transferor to select the law of a particular state for purposes of interpreting his will or other donative disposition 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.

Section 2-704. [Taxes on QTIPs.]

A direction in a will or instrument of trust to pay taxes caused by, resulting from, or imposed by reason of the death of the testator or donor, as the case may be, out of the decedent's probate estate or trust estate or other property, shall not include, unless the will or instrument of trust or a provision of such tax laws specifically provides otherwise, taxes levied or assessed under the tax laws of the United States or of the commonwealth or of any foreign state or commonwealth on any qualified terminable interest property in which the decedent had a qualifying income interest for life.

MASSACHUSETTS COMMENT

This section preserves the provisions of G.L. c. 191, §1A(6), except as relates to generation-skipping transfers.

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 donative disposition by a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adoption took place while the person adopted was a minor.

COMMENT

Purpose and Scope. 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 general theory of subsection (b) 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 adoption took place while the person adopted was a minor.

> 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.
>
> Solution: Not having been adopted while a minor, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.
>
> If, however, A executed a will containing a devise to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class. Under Section 2-114, X would be A's child for purposes of intestate succession. Subsection (b) is inapplicable because the transferor, A, is an adopting parent.

Reference. Halbach, "Issues About Issue", 48 Mo. L. Rev. 333 (1983).

Section 2-706. [Life insurance; retirement plan; account with POD designation; transfer-on-death registration; deceased beneficiary.]

(a) If a beneficiary fails to survive the decedent and is a grandparent or a descendant of a grandparent, the following apply:

(1) If the beneficiary designation is not in the form of a class gift and the

deceased beneficiary leaves surviving descendants, a substitute gift shall be created in the beneficiary's surviving descendants. Such descendants take per capita at each generation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(2) 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 shall be created in the deceased beneficiary or beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the decedent shall pass to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary shall take the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary shall take per capita at each generation 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" is a class member who failed to survive the decedent and left 1 or more surviving descendants.

(b) (1) A payor shall be 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 shall discharge the payor, but not the recipient, from all claims for the amounts paid. A payor shall be liable for a payment made after the payor has received written notice of the claim. A recipient shall be liable for a payment received, whether or not written notice of the claim is given.

(2) The written notice of the claim shall 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 shall discharge the payor from all claims for the amounts paid.

(c) (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, shall not be obligated under this section to return the payment, item of property, or benefit nor shall such person be liable under this section for the amount of the payment or the value of the item of property or benefit; provided, however, that a person who, not for value, receives a payment, item of property, or any other benefit to which such person is not entitled under this section shall be obligated to return the payment, item of property or benefit or

shall be 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 shall be obligated to return the payment, item of property or benefit or shall be 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 so preempted.

COMMENT

Purpose of Section. This section provides an antilapse statute for "beneficiary designations", a term 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".

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 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.

MASSACHUSETS COMMENT

Chapter 140 of the Acts of 2012 deleted subsection (a), renumbered subsections (b), (c) and (d) as (a), (b) and (c) respectively; and changed the words “by representation” to read “per capita at each generation” wherever they appeared.

Section 2-707. [Survivorship with respect to future interests under terms of trust; substitute takers.]

(a) If an instrument is silent on the requirement of survivorship, a future interest under the terms of a trust shall be contingent on the beneficiary surviving the distribution date. In that case, if a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(1) 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. Such descendants take per capita at each generation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

(2) 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 shall be created in the deceased beneficiary or beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of the beneficiaries survived the distribution date shall pass to the surviving

beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary shall take the share to which the surviving beneficiary 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 per capita at each generation 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" shall mean a class member who failed to survive the distribution date and left 1 or more surviving descendants.

(b) If, after the application of subsections (a), 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 shall pass under the residuary clause in the transferor's will. For purposes of this section, a residuary clause shall be treated as creating a future interest under the terms of a trust.

(2) if no taker is produced by the application of clause (1), the property shall pass to the transferor's heirs under section 2-711.

COMMENT

Rationale of Section. This section applies only to future interests under the terms of a trust. For shorthand purposes, references in this Comment to the term "future interest" refer to a future interest under the terms of a trust.

The 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, see G.L. c. 191 § 22, 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 sales 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 (a): Subsection (a) 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.

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.

Ambiguous Survivorship Language. Subsection (a) 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, 320 Pa. 380, 182 A. 401 (1936)), the predominant position at common law interprets "surviving" as requiring survival of the life tenant, A. Hawke v. Lodge, 9 Del. Ch. 146, 77 A. 1090 (1910); Restatement of Property § 251 (1940). The first sentence of subsection (a), codifies the predominant common-law/Restatement position that survival relates to the distribution date.

The first sentence of subsection (a), 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 (a) requires B's children to survive 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 (a) 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 of Article 2.

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 "per capita at each generation" a term defined in Section 2-709(b).

Subsection (a)(1) -- Future Interests Not in the Form of a Class Gift: Subsection (a)(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 (a)(1)creates a substitute gift with respect to B's future interest; the substitute gift is to B's descendants who survive A.

Subsection (a)(2) -- Class Gift Future Interests. Subsection (a)(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 (a)(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 (a)(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 (a)(1) would be out of place with respect to these types of future interests. The first sentence of subsection (c) does 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). Since it is possible that, after the application of subsections (a) and (b), 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.

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 the charity, not to X. Because B's future interest is not in the form of a class gift, subsection (a)(1) applies, not (a)(2). Subsection (a)(1) does not create a substitute gift with respect to B's future interest to B-s child, X, because the words of survivorship attached to B's future interest ("to B if B survives A") indicate an intent contrary to the creation of that substitute gift.

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

Solution: Same as Example 1.

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: G takes the trust property by reversion. Because B's future interest is not in the form of a class gift, subsection (a)(1) applies, not (a)(2). Subsection (a)(1) does not create a substitute gift with respect to B's future interest: the words of survivorship ("to B if B survives A") indicate an intent contrary to the creation of a substitute gift.

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 (a)(1) applies, not (a)(2). Subsection (a)(1) does not create a substitute gift with respect to B's future interest: the words of survivorship ("to B if B survives A") indicate an intent contrary to the creation of that substitute gift.

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 (a)(1) applies, not (a)(2). Subsection (a)(1) does not create a substitute gift with respect to B's future interest: the words of survivorship ("to B if B survives A") indicate an intent contrary to the creation of that substitute gift.

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 (a)(2) applies, not (a)(1). Subsection (a)(2) does not create a substitute gift with respect to the future interest in A's children: the words of survivorship("to A's children who survive A") indicate an intent contrary to the creation of that substitute gift.

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 the entire trust property. 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.

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 (a)(1) produces a substitute gift only with respect to C's future interest. 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 (a); 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. C's child takes under the substitute gift.

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 M and N.

Subsection (a)(2) does not produce substitute gifts with respect to A's children who predeceased A leaving descendants who survived A. Subsection (a)(1) creates a substitute gift with respect to B's future interest. 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 (a); 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. B's descendants, M and N, take under the substitute gift.

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, 347 Pa. 465, 32 A.2d 729 (1943).)

Solution: The trust property goes to the 7 children of the nieces who survived Lilly. Subsection (a)(2) does not create a substitute gift to the nephew's child or to the one niece's only child, deceased, because the words of survivorship indicate an intention contrary to the creation of that substitute gift. The expressly designated beneficiaries of the 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, 302 N.Y. 424, 99 N.E.2d 222 (1951).)

Solution: John, of course, takes his half of the trust property. Because Florence left no descendants who survived W, subsection (a)(1) does not create a substitute gift with respect to

Florence's future interest in her half. Subsection (b)(1) is inapplicable because G's trust was not created in a nonresiduary devise or in a codicil to G's will. Subsection (b)(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.

MASSACHUSETS COMMENT

Chapter 140 of the Acts of 2012 deleted subsection (a), renumbered subsections (b) and (c) as (a) and (b) respectively; and changed the words “by representation” to read “per capita at each generation”.

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 Section. This 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", a child or a descendant who predeceased the distribution date.

(2) "Distribution date", with respect to an interest, is 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", an ancestor, a child, or a descendant who did not predecease the distribution date.

(b) [Per Capita at Each Generation.] If an applicable statute or a governing instrument calls for property to be distributed "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) [Representation; Per Stirpes.] If a governing instrument calls for property to be distributed "by representation" or "per stirpes", 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 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 Section. This section provides statutory definitions of "representation", "per capita at each generation", and "per stirpes". Subsection (c) 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". Compare the system of representation adopted in Section 2-106 for intestate succession.

Section 2-710. [Worthier Title Doctrine Abolished.]

The doctrine of worthier title does not exist in this commonwealth either as a rule of law or as a rule of construction. Language in a governing instrument describing the beneficiaries of a donative 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 Section. This section confirms the abolition of the doctrine of worthier title as a rule of law and as a rule of construction. See G.L. c. 184, §§ 33A and 33B.

Cross Reference. See Section 2-711 for a rule of construction concerning the meaning of a donative disposition to the heirs, etc., of a designated person.

Section 2-711. [Future Interests in "Heirs" and Like.]

If an applicable statute or a governing instrument calls for a future distribution to or creates a 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 commonwealth under section 2-105, 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 donative 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 interest is to take effect in possession or enjoyment, the surviving spouse is not an heir of the

designated individual.

COMMENT

Purpose of Section. This section provides a statutory definition of "heirs", etc., when contained in a donative disposition or a statute (such as Section 2-707(h)).

Cross Reference. See Section 2-710, confirming the abolition of the doctrine of worthier title.

PART 8

GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

GENERAL COMMENT

Part 8 contains four general provisions that cut across probate and nonprobate transfers. Section 2-801 provides for disclaimers.

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.

Section 2-801. [Disclaimer of Property Interests.]

(a) [Definitions.] The following words as used in this section shall have the following meanings, unless otherwise expressly provided or the context otherwise requires:-

"Beneficiary", any person to whom, and any estate, trust, corporation or other legal entity to which, an interest in property would pass in any manner described in subsection (b), except for the execution and filing of a disclaimer in accordance with the provisions of this chapter.

An "interest in property" which may be disclaimed shall include:

1. any legal or equitable interest or estate, whether present, future or contingent, in any real or personal property, or in any fractional part, share, or portion thereof, or in any specific asset or assets thereof;

2. any power to appoint, consume, apply, or expend property or any other right, power, or privilege, relating thereto;

3. any fractional part, share or portion of any interest described in clause 1 or 2.

(b) [Interests Which May be Disclaimed.] Unless barred by the provisions of subsection (h), a beneficiary may disclaim any interest in property which, except for the execution and filing of a disclaimer in accordance with the provisions of this section, pass to the beneficiary:

1. By intestate succession, devise, legacy, bequest, exercise or nonexercise of a power of appointment exercisable by will, or testamentary exercise or

nonexercise of a power of appointment exercisable by either deed of trust or will; as beneficiary of a testamentary trust, beneficiary of a testamentary gift to a nontestamentary trust, or donee of a power of appointment created by will; by succession in any manner described in this clause to a disclaimed interest; or in any other manner not specified above under a testamentary instrument or by operation of any statute or rule of law governing devolution or disposition of property upon or after a person's death.

2. As donee, grantee, beneficiary of an intervivos trust, beneficiary of an insurance or annuity contract, donee of a power of appointment created by a nontestamentary instrument, or as surviving joint tenant or tenant by the entirety, except that a surviving joint tenant or tenant by the entirety may not disclaim that portion of an interest in joint property or property held by the entirety which is allocable to amounts contributed by him or her to the interest in such property; through exercise or nonexercise of a power of appointment exercisable by deed of trust or will; under any deed, assignment, or other non-testamentary instrument of conveyance or transfer; by succession in any manner described in this clause to a disclaimed interest; or in any other manner not specified above under a non-testamentary instrument or by operation of any statute or rule of law.

Disclaimer may be made for a beneficiary under a legal disability by the duly appointed guardian or conservator of such beneficiary, and for a deceased beneficiary by the legal representative of such beneficiary's estate; provided, in any case, however, that the probate court having jurisdiction of the estate of such beneficiary shall have decreed, upon complaint filed by such guardian, conservator, or legal representative, that such disclaimer is in the best interests of those interested in the estate of such beneficiary and not detrimental to the best interests of the beneficiary or the estate of such beneficiary, and that such guardian, conservator, or legal representative is authorized to execute and file such disclaimer on behalf of such beneficiary in accordance with the provisions of this chapter.

(c) [Time of Filing and Executing Disclaimer.] A disclaimer shall be executed and filed pursuant to the provisions of this section at any time after the creation of the interest in property being disclaimed, but in any event not later than nine months after the event determining that the beneficiary is finally ascertained as the beneficiary of such interest and that such interest is indefeasibly vested and in the case of a beneficiary who is a surviving joint tenant or tenant by the entirety, a disclaimer shall be executed and filed in any event not later than nine months after the death of the other joint tenant or tenants or tenant by the entirety; provided, that any court having jurisdiction of the property, an interest in which is being disclaimed, may, upon petition filed by the beneficiary, the duly appointed guardian or conservator of a beneficiary under a legal disability, or the legal representative of a deceased beneficiary's estate, permit an extension of time to execute and file a disclaimer, for such further period of time as the court in its discretion deems advisable.

(d) [Form and Requisites of Disclaimer.] A disclaimer shall be in writing, shall describe the interest in property being disclaimed, shall declare the disclaimer and the extent thereof, shall be clear and unequivocal, and shall be signed by the beneficiary, the duly appointed guardian or conservator of a beneficiary under a legal disability, or the legal representative of a deceased beneficiary's estate.

(e) [Filing; Acknowledgment; Recording; Service.] The original of the disclaimer or an attested copy thereof, if filing is required to be made with more than one probate court, shall be filed with the probate court, or probate courts, if any, wherein a duly appointed fiduciary, if any, having custody or control of the property, an interest in which is being disclaimed, is required to file periodic accounts.

If the property, an interest in which is being disclaimed, is real property, the disclaimer shall be acknowledged in the manner provided for deeds of real property. The disclaimer shall not be valid as against any person, except the beneficiary, the heirs and devisees of the beneficiary, and any person, estate, trust, corporation or other legal entity having actual notice of the disclaimer, unless the original thereof or an attested copy thereof if the original is required to be filed with a probate court, is recorded in the registry of deeds for the county or district in which the real property is situated or, in the case of registered real property, is filed and registered in the office of the assistant recorder for the registry district in which the real property is located.

A copy of the disclaimer shall be served by delivering in hand or by mailing by certified mail to the last known address of the person or persons or other legal entity or entities having custody or possession of the property, an interest in which is being disclaimed. Failure to comply with these requirements of service shall not affect the validity of the disclaimer.

(f) [Liability for Disposition of Disclaimed Property.] No person or other legal entity having custody or possession of the property, an interest in which is being or has been disclaimed, shall be liable for any distribution or other disposition made prior to the delivery to him or it of a copy of the disclaimer, pursuant to the requirements of subsection (e); and no such person or other legal entity shall be liable for any good faith distribution or other disposition made in reliance upon a disclaimer, the form of which is in accordance with the requirements of subsection (d), and a copy of which has been delivered to him or it pursuant to the requirements of subsection (e).

If a disclaimer certifies, with particularity, that none of the contingencies specified in subsection (h), which would result in waiver or bar of the beneficiary's right to disclaim, are applicable, any person or other legal entity having custody or possession of the property, and any third party purchaser of the property, an interest in which is being or has been disclaimed, shall be entitled to rely without further inquiry upon the aforesaid certifications.

(g) [Effect of Disclaimer.] A disclaimer complying with all the applicable requirements of this section shall be effective according to its terms, and shall be irrevocable, upon execution in accordance with the provisions of subsection (d), and filing in accordance with the provisions of subsection (e).

If the interest in property being disclaimed is a power to appoint, consume, apply, or expend property, as described in clause 2 of the second paragraph of subsection (a), or any fractional part, share, or portion thereof, such interest shall be extinguished.

Except as provided in the preceding paragraph, and unless such a result would substantially impair the provisions or intent of any instrument, statute or rule of law

relating to the interest in property being disclaimed, such interest shall pass in the same manner as if the beneficiary had died immediately preceding the event determining that he, she or it is the beneficiary of such interest and that such interest is indefeasibly vested.

The interest in property being disclaimed shall never vest in the beneficiary.

Any person or other legal entity having custody or possession of the property, an interest in which is being disclaimed, may file a complaint for instruction or complaint for declaratory judgment seeking a determination of the effect of a disclaimer, in

1. A probate court, if any, having jurisdiction of such property; or

2. If no probate court has jurisdiction of such property, any other court having jurisdiction of such property.

(h) [Conditions Which Bar Right to Disclaim.] The right to disclaim an interest in property shall be barred by:-

1. assignment, conveyance, encumbrance, pledge, transfer or other disposition of such interest, or any contract therefor, by the beneficiary or sale or other disposition of such interest pursuant to judicial process made before the beneficiary has disclaimed such interest as herein provided;

2. insolvency of the beneficiary at the time of attempted disclaimer. For purposes of this paragraph only, sections 1 to 4, inclusive, and sections 8 to 13, inclusive, of chapter one hundred and nine A shall be applicable as if the disclaimer were a conveyance;

3. a written waiver of the right to disclaim such interest pursuant to the provisions of this section, signed by the beneficiary, the duly appointed guardian or conservator of a beneficiary under a legal disability, or the legal representative of a deceased beneficiary's estate;

4. acceptance of such interest by the beneficiary; if the beneficiary, having knowledge of the existence of such interest, receives without objection a benefit from such interest, such receipt shall be deemed to constitute acceptance of such interest.

The assignment, conveyance, encumbrance, pledge, transfer or other disposition or any contract therefor, sale or other disposition pursuant to judicial process, written waiver of the right to disclaim, or acceptance of apart of an interest in property shall not bar the right to disclaim any other part of such interest.

(i) [Restraints on Alienation; Right to Disclaim Unaffected.] The right to disclaim pursuant to the provisions of this section shall exist irrespective of any limitation in the nature of an express or implied spendthrift provision or other similar restraint on alienation imposed by any instrument, statute, rule of law or otherwise on the interest in property being disclaimed.

(j) [Applicability of Section.] Except for subsection (h), this section shall not abridge the right of any person to disclaim, waive, release, renounce or abandon any interest in property under any other statute or rule of law.

MASSACHUSETTS COMMENT

This Part follows G.L. c. 191A which was an earlier adoption of the UPC disclaimer provisions.

Chapter 140 of the Acts of 2012 replaced subsection (j) which read as follows: "(j) Except for the provisions of subsection (h), this section shall not abridge the right of any person to disclaim, waive, release, renounce, or abandon any interest in property under section 2-201 or any other statute or rule of law.

Section 2-802. [Effect of Divorce, Annulment, and Judgment of Separation.]

(a) An individual who is divorced from the decedent is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A judgment 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 commonwealth, 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

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 2-204 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.

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", 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 the decedent in place of the killer 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, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the 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 as 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 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 that are not revoked by this section are given effect as if the killer disclaimed all revoked provisions 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 the 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 probate and family court 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

The section substantially parallels the structure of Section 2-804, which deals with the effect of divorce on revocable benefits to the former spouse.

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.

The section 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 UPC 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 present version, the severance applies only to "property held by [the decedent and killer] as joint tenants with the right of survivorship. The term "joint tenants with the right of survivorship" is 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.

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".

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", 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 judgment 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", a governing instrument executed by the divorced individual before the divorce or annulment of the individual's marriage to the individual's former spouse.

(5) "Relative of the divorced individual's former spouse", 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 the former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself in place of the former spouse or in place of the 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 the individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (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 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 that are not revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions 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

This section intends to unify the law of probate and nonprobate transfers. This section covers "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). 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.

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. § 35-50-115 (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 G.L. c. 191 § 9 to various will substitutes. In Clymer v. Mayo, 393 Mass. 754, 473 N.E.2d 1084 (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." 393 Mass. at 768. 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 by 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 similar statute 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, 393 Mass. 754, 473 N.E.2d 1084 (1985), and Estate of Coffed, 46 N.Y.2d 514, 414 N.Y.S.2d 893, 387 N.E.2d 1209 (1979), the result of treating the former spouse as if the former spouse 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, 520 Pa. 519, 555 A.2d 75 (1989); Estate of Graef, 124 Wis.2d 25, 368 N.W.2d 633 (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, of course, that the governing instrument is given effect as if the revoked provisions were removed or stricken therefrom at the time of the divorce or annulment. The remaining or unrevoked provisions of the governing instrument take effect as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed the revoked provisions (see Section 2-801(g) for the effect of a disclaimer) 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. 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 state 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 state 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 Probate Rights in a Multiple-Marriage Society", 45 The Record of the Ass'n of the Bar of the City of New York 339, 341-43 (1990) (Mortimer H. Hess Memorial Lecture). See also Langbein, "The Nonprobate Revolution and the Future of the Law of Succession", 97 Harv. L. Rev. 1108 (1984).

PART 9

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[1] years, 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

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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.

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 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. _____ (1990) (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); Young, "USRAP to the Rescue", 73 Mass. L.Q. 126 (1988).

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 2-108, that a child in gestation (a child sometimes described as a child en ventre sa mere) who is later born alive (and, under Section 2-108, 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) 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. In any given case, 90 years can turn out to be longer than the 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 interests 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 of (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 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 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.

(c) For purposes 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 Section2-902(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 commonwealth.

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), this part applies to a nonvested property interest or a power of appointment that is created on or after the effective date 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 this part and is determined in a judicial proceeding, commenced on or after the effective date of this part, to violate this commonwealth's rule against perpetuities as that rule existed before the effective date 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]. This part supersedes the rule of the common law known as the rule against perpetuities.