

**CBA TRUST AND ESTATE SECTION
STATUTORY REVISIONS COMMITTEE
AGENDA**

December 1, 2021

1. Introductions

2. Approval of November 3, 2021 Minutes

3. Announcements

a. *Email List.* If you did not receive the SRC materials in an email from Katie then you are not on the SRC email list. Email Jonathan (JHaskell@wadeash.com.) and he'll add you to the email list.

4. Legislative Report

5. SRC Approved Proposals

a. Active Matters

- (i) Disclosure of Fiduciary Fees, §§ 15-10-602 and 15-12-705, C.R.S. (approved in 2015-2016) (Gordon Williams);**

Probate Trial and Procedure has no objections. Information of Appointment form needs to be updated by Supreme Court. Dylan will coordinate with Ms. Connie Eyster on the form.

- (ii) Amendment to Visitor Reporting Statute, C.R.S. § 15-14-113.5 (Gordon Williams);**

Elder Law opposes the proposed language.

- (iii) Amendment to Personal Representative Priority Statute, C.R.S. § 15-12-203(4) to include Agent under power of attorney who is granted “hot power” to remove and appoint fiduciaries (Gordon Williams);**

Proposed language: 15-12-203(4.5) If no conservator or guardian is acting, then an agent who is authorized under a financial power of attorney to nominate a fiduciary in accordance with 15-14-724(1)(g)(ii), C.R.S., may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the principal would have if qualified for appointment.

The above is new language that SRC needs to approve which takes into account the possibility that a Conservator or Guardian is

serving and the protected person also has a financial power of attorney that is still effective.

b. Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons

(i) Colorado Electronic Preservation of Abandoned Estate Planning Documents Act Subcommittee (Pete Bullard, Chair)

- a. The language that SRC approved was much broader (7 categories of estate planning documents) than the State Court Administrator was able to achieve (one category-Wills). Essentially the State Court Administrator created a pilot program which will be implemented on January 1, 2023 (when funding comes in) and the pilot program will only deal with Wills.
- b. This matter will remain on Inactive Matters until the pilot program is complete so that SRC can readdress whether to attempt to reincorporate the broader definition and whether the 6 other categories should be restored to the Act by amendment.
- c. See Attachment to Agenda for an Email from Frank Hill to Dylan Metzner et al. providing an overview of some important milestones in the history of CEPAEPDA.

6. Unapproved Matters under Consideration by SRC - Reports from Subcommittees

a. Child Support in Probate Subcommittee (Pat Mellen, Chair)

c. Uniform Probate Code (UPC) 2019 Revisions (Bette Heller and Darla Daniels, Co-Chairs)

Questions on materials submitted by Subcommittee.

d. Lodged Wills- Investigate issues with lodging wills and the return of lodged wills. (Bette Heller)

Committee to begin working on draft language.

e. Family Allowance (Michael Kirtland, Chair)

f. Beneficiary Deeds Statute Update re Named Insureds for Casualty Coverage (Carl Stevens)

g. Uniform Cohabitants Economic Remedies Act (Connie Eyster)

7. **Inactive Matters**
8. **Report from Elder Law Section**
9. **Report from Other Sections of the Bar**
10. **New Matters**
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11. **Passed Proposals for Inclusion in Omnibus Bill or Stand Alone Legislation**

The Uniform Probate Code's New Intestacy and Class Gift Provisions

Mary Louise Fellows & Thomas P. Gallanis***

INTRODUCTION

The Uniform Law Commission (“Commission”) approved in 2019 substantial amendments to the intestacy and class gift provisions of the Uniform Probate Code (“UPC”).¹ We were the reporters, or principal drafters, of these amendments. In this article, we explain the amendments and how they advance likely donative intention. The article has three aims. One is to describe the 2019 revisions to the UPC. A second is to explain how the statutory changes promote the UPC’s purposes and policies. A third is to encourage bar associations and legislative committees in each state to consider adopting the 2019 UPC. We begin with some background.

The Commission promulgated the UPC in 1969.² From time to time, the Commission revises the UPC to reflect changes in the U.S. family and to advance the UPC’s purposes and policies. The substantive core of the UPC is Article II, which contains provisions on intestacy,

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** Allan D. Vestal Chair in Law at the University of Iowa, Visiting Professor (2017-2022) at the University of Chicago Law School, and Visiting Professor (2019-2022) at the KoGuan Law School of Shanghai Jiao Tong University. Portions of this article are adapted with permission of the Uniform Law Commission from the comments to the 2019 Uniform Probate Code Amendments without further citation or acknowledgment. The authors were the principal drafters of those comments. The views expressed in this article are those of Professors Fellows and Gallanis and are not intended to reflect the views of the drafting committee or the Commission. For helpful comments on a prior draft, we thank participants in a faculty workshop at the University of Iowa College of Law.

¹ UNIF. PROB. CODE (UNIF. L. COMM’N 2019) [hereinafter 2019 UPC], <https://www.uniformlaws.org/viewdocument/final-act-with-comments-135?CommunityKey=35a4e3e3-de91-4527-aec-26b1fc41b1c3&tab=librarydocuments> [https://perma.cc/D3L4-4Y8G]; THOMAS P. GALLANIS, UNIFORM TRUSTS AND ESTATES STATUTES (2020-2021 ed. 2020).

² UNIF. PROBATE CODE: OFFICIAL TEXT WITH COMMENTS (UNIF. L. COMM’N 1969) [hereinafter 1969 UPC].

wills, and rules of construction, among other topics. Article II has undergone three major revisions: in 1990, 2008, and 2019.³

The 1990 amendments to Article II had several objectives, two of which are pertinent here. The first pertinent objective was to redesign the surviving spouse's intestate share to reflect both prevailing donative intention and the rise of blended families, meaning a family in which one or more children of one spouse are not children of the other spouse. The 1969 UPC provided that, if a decedent is survived by a spouse and one or more descendants, the intestate estate is divided between the spouse and the descendants.⁴ In contrast, the 1990 UPC provides that, if a decedent dies survived by a spouse and one or more descendants, the identification of intestate takers and the determination of their respective shares depend on whether the family is nonblended or blended. In a nonblended family—all the decedent's surviving descendants are also descendants of the surviving spouse and vice versa—the surviving spouse inherits the entire intestate estate.⁵ This result, supported by empirical evidence of donative intention,⁶ was new to the UPC; no prior version of the UPC authorized a surviving spouse to inherit the entire intestate estate when the decedent had surviving descendants. Also new in 1990 was the recognition that blended families are not all alike.⁷ The 1990 UPC divides blended families into two categories: (1) families in which the decedent's surviving descendants are descendants of the surviving spouse but the surviving spouse has one or more additional descendants who are not descendants of the decedent and (2) families in which one or more of the decedent's surviving descendants are not descendants of the surviving spouse.⁸ The 1990 UPC provides that the surviving spouse's portion of the intestate estate is larger in category 1 than in category 2 for the following reason.⁹ The surviving spouse has a parent-child relationship with all of the decedent's descendants in category 1 but only with some of the decedent's descendants in category 2. The

³ See 2019 UPC Art. II Prefatory Note (discussing the 1990, 2008, and 2019 revisions).

⁴ See 1969 UPC § 2-102(3), (4) (defining the surviving spouse's intestate share when the decedent also has "surviving issue"). Under this statute, the surviving spouse received "the first [\$50,000], plus one-half of the balance of the intestate estate" when the decedent is survived by issue "all of whom are issue of the surviving spouse also." *Id.* § 2-102(3). The \$50,000 amount was sufficiently large that it could lead to the decedent's surviving spouse inheriting the decedent's entire intestate estate.

⁵ See 2019 UPC § 2-102(1)(B), cmt. (discussing statutory language introduced in 1990).

⁶ See 2019 UPC § 2-102 cmt.

⁷ See 2019 UPC § 2-102(3) (containing statutory language introduced in 1990); *cf.* 1969 UPC § 2-102(3).

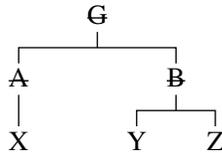
⁸ Compare 2019 UPC § 2-102(3), with *id.* § 2-102(4).

⁹ See the discussion of the 1990 revisions in 2019 UPC § 2-102 cmt.

decedent's probable intention, therefore, is to give the surviving spouse more when in category 1 than category 2. These provisions of the 1990 UPC take blended family structures and empirical evidence of donative intention into account in determining the surviving spouse's intestate share.

The second pertinent objective of the 1990 revision was to codify a system of representation called per capita at each generation.¹⁰ In contrast to the traditional system of representation known as per stirpes, which emphasizes vertical equality by dividing property into equal shares at the generation nearest to the decedent, per capita at each generation emphasizes horizontal equality by assuring that equal shares pass to descendants who are members of the same generation. The choice to have the UPC adopt the per capita at each generation system is not based on a normative judgment but on the goal of reflecting likely donative intent. Empirical evidence reveals that per capita at each generation, not per stirpes, is what most individuals prefer.¹¹ The following example illustrates the difference between the two systems.

Example 1. The decedent, G, died intestate, survived only by three grandchildren, X, Y, and Z. X is the child of G's predeceased child A. Y and Z are the children of G's predeceased child B.



Under the per stirpes system of representation, X inherits one-half of the intestate estate; Y and Z share the other half, with each receiving one-fourth of the intestate estate. Under the per capita at each generation system, the three grandchildren inherit equally; each receives one-third of the intestate estate.

The next major revision of Article II of the UPC was completed in 2008.¹² One of the revision's principal aims was to respond to the rising number of parent-child relationships created by assisted reproduction. One might think that parent-child relationships would be an appropriate topic for the Uniform Parentage Act ("UPA"), and indeed there were

¹⁰ See 2019 UPC § 2-106 cmt. (discussing the 1990 revisions). For an earlier argument for such a system, see Lawrence W. Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Representation among Descendants*, 66 Nw. U. L. REV. 626, 632-33 (1971).

¹¹ See Raymond H. Young, *Meaning of "Issue" and "Descendants"*, 13 PROB. NOTES 225, 225-26 (1988), and the studies cited therein.

¹² See 2019 UPC Art. II Prefatory Note (discussing the 2008 revisions).

some provisions on assisted reproduction in the 2000 UPA, amended in 2002.¹³ However, the Commission showed no interest in the decade of the 2000s in further updating the UPA. The Joint Editorial Board for Uniform Trust and Estate Acts stepped into the breach in order to clarify when a parent-child relationship created by assisted reproduction is recognized for purposes of intestate succession and membership in a class gift. Among the sections added to the UPC in 2008 were the pre-2019 versions of section 2-120, regarding assisted reproduction without the assistance of a surrogacy arrangement, and section 2-121, regarding assisted reproduction with the assistance of a surrogacy arrangement.¹⁴

In 2017, the Commission approved a new version of the UPA.¹⁵ The 2017 UPA introduces significant substantive and procedural changes to the determination of parent-child relationships. Three aspects of the 2017 UPA are of particular importance to succession law. First, the 2017 UPA makes significant revisions to the 2000/2002 version of the UPA regarding parent-child relationships created by assisted reproduction.¹⁶ Second, the 2017 UPA codifies the doctrine of *de facto* parentage.¹⁷ *De facto* parentage is a doctrine of functional parentage. The doctrine enables a court to recognize a parent-child relationship if an individual has functioned as a parent for a significant time such that the individual has established “a bonded and dependent relationship with the child which is parental in nature.”¹⁸ Third, the 2017 UPA contains an optional provision allowing a court to decide that a child has more than two parents. Alternative B of section 613(c) authorizes a court to “adjudicate a child to have more than two parents . . . if the court finds that failure to recognize more than two parents would be detrimental to the child.”¹⁹ With all of these changes to parentage law, the approval of the 2017 UPA created the necessity and opportunity for a revision of the UPC, which the Commission completed in 2019.

¹³ See UNIF. PARENTAGE ACT Arts. VII, VIII (UNIF. L. COMM’N 2002).

¹⁴ See, e.g., UNIF. PROBATE CODE §§ 2-120, 2-121 (UNIF. L. COMM’N 2010) [hereinafter PRE-2019 UPC]. The 2010 date for the Uniform Probate Code given by the Commission is misdescriptive because minor amendments were made to various UPC provisions between 2010 and 2018. Provisions of the pre-2019 version of the Uniform Probate Code are contained in THOMAS P. GALLANIS, UNIFORM TRUSTS AND ESTATES STATUTES (2019-2020 ed. 2019).

¹⁵ UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2017) [hereinafter 2017 UPA], <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1a489a1f-ec9a-ee72-7dbc-10f6d43943b5&forceDialog=0> [https://perma.cc/UQ2T-XTDC]; GALLANIS, *supra* note 1.

¹⁶ See 2017 UPA Arts. VII, VIII.

¹⁷ See generally 2017 UPA § 609, cmt. (regarding the adjudication of a claim of *de facto* parentage).

¹⁸ 2017 UPA § 609(d)(5).

¹⁹ 2017 UPA § 613(c) Alternative B.

The 2019 UPC amendments make five significant changes to prior law. We list them here for reference then explain them in subsequent parts of this article. First, the 2019 UPC takes blended families into account not only with respect to the intestate share of the surviving spouse, as in the 1990 revision, but also with respect to the intestate shares of heirs other than the surviving spouse.²⁰ Second, the 2019 UPC incorporates the per capita at each generation system of representation throughout the intestacy provisions. Prior law favored surviving parents over descendants of deceased parents and favored surviving grandparents over descendants of deceased grandparents. In contrast, the 2019 UPC provides that surviving descendants of a deceased family member are heirs even if one or more others survive in that family member's generation.²¹ It further reflects the per capita at each generation system by ordinarily assuring that heirs in a generation closer to the decedent are favored compared to heirs in a more remote generation and that heirs in a given generation are treated equally. Third, the 2019 UPC eliminates outdated, inaccurate, or imprecise terms.²² Examples include old references to a decedent's "maternal" and "paternal" grandparents, to relatives of the "half blood" or "whole blood," and to "genetic" parents. Fourth, the 2019 UPC restructures the intestacy and class gift provisions to incorporate the innovations in the 2017 UPA, such as the codification of the doctrine of de facto parentage and the recognition that a child may have more than two parents.²³ Fifth, the 2019 UPC largely incorporates by reference the rules in the 2017 UPA governing parent-child relationships created by assisted reproduction.²⁴

This article divides the following discussion into four main parts. Part I explains the revision of UPC section 2-103, which governs the intestate share of heirs other than the surviving spouse. (No revision was needed to section 2-102 on the intestate share of the surviving spouse, updated in 1990.) Part II explains the 2019 amendments to the UPC's intestacy provisions pertaining to parent-child relationships. The discussion here is divided into four sub-parts: the effect of a termination of parental rights; de facto parentage; assisted reproduction; and adoption. Part III explains the revision of UPC section 2-705, which contains rules of construction for class gifts. Part IV explains the remainder of the 2019

²⁰ See 2019 UPC §§ 2-102, 2-103.

²¹ *Id.* § 2-107.

²² Compare PRE-2019 UPC §§ 2-103, 2-107, 2-117 to 2-119 (containing terms such as "maternal" and "paternal" grandparents, "half blood" or "whole blood" relatives, and "genetic" parents), with 2019 UPC §§ 2-103, 2-107, 2-117 to 2-119 (eliminating these terms).

²³ 2019 UPC Prefatory Note.

²⁴ *Id.*

amendments, which are designed to improve and modernize the wording of various UPC sections. A brief conclusion follows.

I. SECTION 2-103: HEIRS OTHER THAN THE SURVIVING SPOUSE

The UPC's core provisions on intestate succession are section 2-102 on the intestate share of the surviving spouse and section 2-103 on the intestate share of heirs other than the surviving spouse. Section 2-102 was revised in 1990 and did not need further revision in 2019. Section 2-103 underwent substantial revision in 2019. An examination of each subsection of section 2-103 is necessary to appreciate the breadth of the changes made in 2019 in the order of priority of who, other than a surviving spouse, is eligible to take as an heir of a decedent. The analysis of the question of who qualifies as an heir is completed in Part II, which describes the rules of intestate succession governing parent-child relationships under the 2019 UPC.

Subsection (a) contains definitions. The terms "deceased parent," "deceased grandparent," and "deceased spouse" are defined as "a parent, grandparent, or spouse who either predeceased the decedent or is deemed under this [article] to have predeceased the decedent."²⁵ "Surviving spouse," "surviving descendant," "surviving parent," and "surviving grandparent" are defined as "a spouse, descendant, parent, or grandparent who neither predeceased the decedent nor is deemed under this [article] to have predeceased the decedent."²⁶ These definitions help to implement the fundamental rule that, in order to be an heir, an individual must survive the decedent by 120 hours.²⁷ An individual who fails to survive the decedent—or is deemed to have predeceased the decedent—cannot be the decedent's heir. The circumstances in which an individual is deemed to have predeceased the decedent include, but are not limited to, disclaimer, homicide, and termination of parental rights.²⁸ Subsection (a), which is new to section 2-103, clarifies that an

²⁵ *Id.* § 2-103(a)(1).

²⁶ *Id.* § 2-103(a)(2). Section 1-201(51) defines "survive" and its derivatives such as "survives," "survived," "survivor," and "surviving" but does not define "deceased." *See id.* § 1-201(51).

²⁷ Section 2-102 gives intestacy rights to the "surviving" spouse. *Id.* § 2-102. Section 2-103 gives intestacy rights to specified "surviving" relatives. *Id.* § 2-103. "Surviving" requires surviving by 120 hours. *See, e.g., id.* § 2-104(b)(1) ("An individual born before a decedent's death who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent."). Section 2-104(b)(1) applies to all individuals born before the decedent's death, not only to the decedent's spouse, descendant, parent, or grandparent. *Id.* In contrast, the definitions in section 2-103(a) are limited to the terms in section 2-103 that require definition. *Id.* § 2-103(a).

²⁸ *See* 2019 UPC §§ 2-114(b) (termination of parental rights), 2-803(b) (homicide), 2-1106(b)(3)(c) (disclaimer).

individual deemed to have predeceased the decedent does not meet the definition of “surviving”—hence, the individual cannot be an heir.

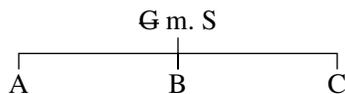
Subsection (b) provides a roadmap to the remaining provisions of section 2-103. It states:

Any part of the intestate estate not passing under section 2-102 to the decedent’s surviving spouse passes to the decedent’s descendants or parents as provided in subsections (c) and (d). If there is no surviving spouse, the entire intestate estate passes to the decedent’s descendants, parents, or other heirs as provided in subsections (c) through (j).

Subsection (b) thus states the well-established rule that section 2-103 governs the part of the decedent’s intestate estate not passing to the decedent’s surviving spouse under section 2-102 or the entire intestate estate if the decedent has no surviving spouse.

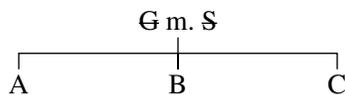
Subsection (c) begins a series of subsections establishing an order of priority for heirs other than the surviving spouse. The first priority is given to the decedent’s surviving descendants. Subsection (c) states: “If a decedent is survived by one or more descendants, any part of the intestate estate not passing to the surviving spouse passes by representation to the decedent’s surviving descendants.” This is the well-established rule that, if the decedent is survived by one or more descendants, the intestate estate or part thereof not passing to the surviving spouse passes by representation to the decedent’s surviving descendants. The following examples illustrate the operation of subsection (c).

Example 2. G, the intestate, has a surviving spouse, S, and three surviving children, A, B, and C, who are also children of S. S has no other children.



Section 2-102 provides that the entire intestate estate passes to S. Nothing passes under section 2-103.

Example 3. Same facts as Example 2, except that S predeceased G.

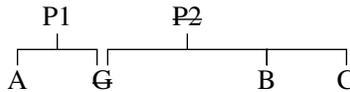


The intestate estate passes by representation to G’s surviving children—A, B, and C—under subsection (c). “By representation” in subsection

(c) means per capita at each generation, as defined in section 2-106(b). The result is that A, B, and C each inherit one-third of G's intestate estate.

Subsection (d) establishes the second priority for heirs other than the surviving spouse. If a decedent is not survived by a descendant but is survived by one or more parents, subsection (d) states that any part of the intestate estate not passing to the surviving spouse is distributed according to a three-step procedure. First, the intestate estate or part is divided into as many equal shares as there are (i) surviving parents and (ii) deceased parents with one or more surviving descendants, if any. Second, one share passes to each surviving parent. Third, the balance of the intestate estate or part, if any, passes by representation to the surviving descendants of the decedent's deceased parents.²⁹ The following example illustrates the operation of subsection (d).

Example 4. G, the intestate, had two parents, P1 and P2. P1 had one other child, A. P2 had two other children, B and C. G was predeceased by P2 and was survived by P1, A, B, and C.



The intestate estate is divided into two equal shares because there is one surviving parent (P1) and one deceased parent with surviving descendants (P2). One share passes to P1, who inherits one-half of G's intestate estate. The balance passes by representation to the surviving descendants of P2, namely B and C. "By representation" in subsection (d) means per capita at each generation, as defined in section 2-106(c). The result is that B and C each inherit one-fourth of G's intestate estate. In accordance with section 2-107, B and C inherit as G's siblings without regard to the fact that they share only one parent with G.³⁰ A does not share in G's estate because A's parent (P1) survived G.

The outcome in Example 4 contrasts in two respects with the result under the pre-2019 version of section 2-103, which gives the entire intestate estate to P1. First, the 2019 revisions respond to blended families not only in section 2-102 but also in section 2-103. Second, they incorporate the per capita at each generation system of representation by recog-

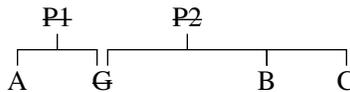
²⁹ For a further discussion of subsection (d) when the special rules of subsection (e) apply, see *infra* Examples 9-12 and accompanying text.

³⁰ For a discussion of section 2-107, having to do with the right of an heir to inherit without regard to the number of common ancestors in the same generation the heir shares with the decedent, see *infra* notes 133-34 and accompanying text.

nizing a deceased parent's descendants as heirs although a parent of the decedent survives.

Subsection (f) establishes the third priority for heirs other than the surviving spouse. (Descendants of the decedent's parents and more remote heirs take only if there is no surviving spouse.) If the decedent is not survived by a descendant or parent but is survived by one or more descendants of a parent, subsection (f) provides that "the intestate estate passes by representation to the surviving descendants of the decedent's deceased parents." The following example illustrates the operation of subsection (f).

Example 5. Same facts as Example 4, except that P1 and P2 predeceased G and that A, B, and C survived G.

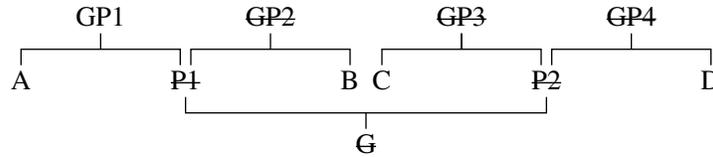


The intestate estate passes by representation to the surviving descendants (A, B, and C) of G's deceased parents (P1 and P2). "By representation" in subsection (f) means per capita at each generation, as defined in section 2-106(d). The result is that A, B, and C each inherit one-third of G's intestate estate. The pre-2019 version of section 2-103 reaches the same result.

Subsection (g) establishes the fourth priority for heirs other than the surviving spouse. If the decedent is not survived by a descendant, parent, or descendant of a parent but is survived by one or more grandparents, subsection (g) provides that the intestate estate is distributed according to a three-step procedure. First, the intestate estate is divided into as many equal shares as there are (i) surviving grandparents and (ii) deceased grandparents with one or more surviving descendants, if any. Second, one share passes to each surviving grandparent. Third, the balance of the intestate estate, if any, passes by representation to the surviving descendants of the decedent's deceased grandparents.³¹ The following example illustrates the operation of subsection (g).

Example 6. G, the intestate, was survived by only one grandparent (GP1), GP1's child A, and three children (B, C, and D) of predeceased grandparents. A is the child of GP1 and the sibling of G's parent P1. B is the child of grandparent GP2 and the sibling of P1. C is the child of grandparent GP3 and the sibling of G's parent P2. D is the child of grandparent GP4 and the sibling of P2.

³¹ For a further discussion of subsection (g) when the special rules of subsection (h) apply, see *infra* Examples 9-12 and accompanying text.

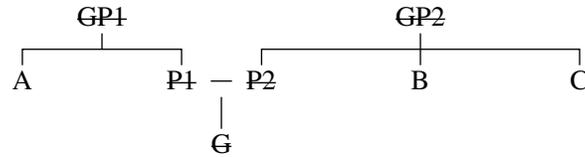


G's intestate estate is divided into four equal shares because there is one surviving grandparent (GP1) and there are three deceased grandparents (GP2, GP3, and GP4) with surviving descendants. One share passes to GP1, who inherits one-fourth of G's intestate estate. The balance passes by representation to the surviving descendants of GP2, GP3, and GP4: namely, B, C, and D. "By representation" in subsection (g) means per capita at each generation, as defined in section 2-106(e). The result is that B, C, and D each inherit one-quarter of G's intestate estate. A does not share in G's estate because A's parent (GP1) survived G.

The outcome in Example 6 contrasts with the result under the pre-2019 version of section 2-103, which gives one-half of the intestate estate to GP1 and divides the other half equally between C and D. B does not share in G's intestate estate. Instead, GP1 inherits the half passing to P1's parents. Under the 2019 UPC, B does share in the intestate estate. Just as the 2019 version of subsection (d) accounts for blended families when at least one parent survives, the 2019 version of subsection (g) does the same when at least one grandparent survives. The result is that B, who is not a descendant of GP1, shares in G's intestate estate. Another difference between the pre-2019 and 2019 versions is that the distributional scheme under subsection (g) applies per capita at each generation. B, C, and D inherit equally notwithstanding that (1) B is a sibling of P1 whereas C and D are siblings of P2 and (2) G's grandparent (GP1), who is P1's parent, survives G.

Subsection (i) establishes the fifth priority for heirs other than the surviving spouse. If the decedent is not survived by a descendant, parent, descendant of a parent, or grandparent, subsection (i) provides that "the intestate estate passes by representation to the surviving descendants of the decedent's deceased grandparents." The following example illustrates the operation of subsection (i).

Example 7. G, the intestate, was survived only by A, B, and C. A is the child of G's predeceased grandparent GP1 and is the sibling of G's predeceased parent P1. B and C are the children of G's predeceased grandparent GP2 and are the siblings of G's predeceased parent P2.

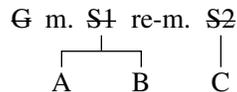


The intestate estate passes by representation to the surviving descendants (A, B, and C) of G's deceased grandparents (GP1 and GP2). "By representation" in subsection (i) means per capita at each generation, as defined in section 2-106(f). The result is that A, B, and C each inherit one-third of G's intestate estate.

The outcome in Example 7 contrasts with the result under the pre-2019 version of section 2-103, which gives one-half of the intestate estate to A and divides the other half in equal shares between B and C. This is inconsistent with the principle of per capita at each generation because descendants who are members of the same generation do not inherit equally. By first dividing G's estate between P1 and P2 before applying the per capita at each generation representational system, the pre-2019 version leads to the unequal treatment of A, B, and C even though they are members of the same generation. The 2019 UPC applies the principle of per capita at each generation consistently.

Subsection (j) establishes the final priority—before escheat.³² It applies if a decedent dies without a surviving spouse, descendant, parent, descendant of a parent, grandparent, or descendant of a grandparent. The subsection grants inheritance rights to descendants of the decedent's deceased spouse or spouses who are not also descendants of the decedent. The term "deceased spouse" means "an individual to whom the intestate was married at the individual's death."³³ The following example illustrates the operation of subsection (j).

Example 8. G, the intestate, was survived only by A and B (the children of G's predeceased spouse S1) and by C (the child of G's predeceased spouse S2). A, B, and C are not descendants of G.



The intestate estate passes by representation to the surviving descendants (A, B, and C) of G's deceased spouses (S1 and S2). "By representation" in subsection (j) means per capita at each generation, as defined in

³² See 2019 UPC § 2-105 (providing for escheat if there is no taker under the provisions of Article II).

³³ *Id.* § 2-103 cmt. to Subsec. (j).

section 2-106(g). The result is that A, B, and C each inherit one-third of G's intestate estate.

Subsection (j) is based on pre-2019 section 2-103(b), which was added to the UPC in 2008 to allow a decedent's stepchild or a stepchild's descendants to inherit. The distribution of G's intestate estate in Example 8, however, contrasts with the result reached under the pre-2019 version. The pre-2019 version gives one-half of the intestate estate to C and divides the other half in equal shares between A and B. This distribution is inconsistent with the principle of per capita at each generation because descendants who are members of the same generation do not inherit equally. Subsection (j) avoids this result by not initially dividing a decedent's estate by the number of predeceased spouses leaving surviving descendants but, instead, dividing the estate among the descendants of predeceased spouses by representation, meaning by per capita at each generation.

An alert reader may have noticed that we did not yet address subsections (e) and (h). Both are designed to achieve an appropriate distribution of a decedent's intestate estate among descendants of predeceased parents (or grandparents) in situations involving families that are at least partially nonblended. Computational adjustments are necessary in two fact-patterns: (1) when a surviving parent (or grandparent) and a predeceased parent (or grandparent) have the same descendants who survive the decedent³⁴ and (2) when at least one parent (or grandparent) survives the decedent and two or more parents (or grandparents) predecease the decedent leaving the same descendants who survive the decedent.

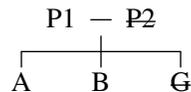
The first fact-pattern arises when a surviving parent (or grandparent) and a predeceased parent (or grandparent) have the same descendants who survive the decedent.³⁵ The appropriate distribution of the decedent's intestate estate in this situation is achieved under subsection (e)(1), having to do with deceased parents, and (h)(1), having to do with

³⁴ As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment that would apply the rules in subsections (e)(1) and (h)(1) when the surviving descendants of a predeceased parent (or grandparent) also are descendants of a surviving parent (or grandparent). This amendment deletes the words "and none of those surviving parents has any other surviving descendant" from subsection (e)(1) and the words "and none of those surviving grandparents has any other surviving descendant" from subsection (h)(1). As so revised, subsections (e)(1) and (h)(1) would not require a surviving parent (or grandparent) and a deceased parent (or grandparent) to have the same surviving descendants. The subsections would apply as long as the surviving descendants of a deceased parent (or grandparent) also are descendants of a surviving parent (or grandparent). On the definition of and procedure for a technical amendment to a uniform law, see Thomas P. Gallanis, *Trusts and Estates: Teaching Uniform Law*, 58 ST. LOUIS U. L.J. 671, 679-80 (2014).

³⁵ See *supra* note 34.

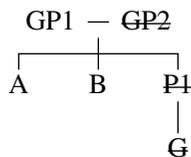
deceased grandparents. The two subsections deem the descendants to have predeceased the decedent. The following two examples illustrate the application of subsections (e)(1) and (h)(1).

Example 9. G, the intestate, had two parents, P1 and P2. P1 survived G; P2 predeceased G. P1 and P2 had two other children, A and B, both of whom survived G.



Under subsection (d), P1 inherits all of G's intestate estate. Subsection (e)(1) assures this result by providing that the descendants of P2 (A and B) are deemed to have predeceased G because the surviving descendants of P2 are surviving descendants of P1. The pre-2019 version of section 2-103 reaches the same result on these facts based on a different rationale. It provides that P1 receives the entire estate regardless of whether P1 and P2 share surviving descendants.

Example 10. G, the intestate, was survived only by one grandparent, GP1, and by two children (A and B) of GP1, who are also descendants of G's predeceased grandparent GP2.



Under subsection (g), GP1 inherits all of G's intestate estate. Subsection (h)(1) assures this result by providing that the descendants of GP2 (A and B) are deemed to have predeceased G because the surviving descendants of GP2 are surviving descendants of GP1. The pre-2019 version of section 2-103 reaches the same result on these facts, based on a different rationale. It provides that GP1 inherits the entire intestate estate regardless of whether GP1 and GP2 share surviving decedents.

The second fact-pattern arises when at least one parent (or grandparent) survives the decedent and two or more parents (or grandparents) predecease the decedent leaving the same descendants who survive the decedent. The appropriate distribution of the decedent's estate in this situation is achieved under subsection (e)(2), having to do with deceased parents, and (h)(2), having to do with deceased grandparents. The two subsections deem the deceased parents (or deceased grandparents) to be one deceased parent (or one deceased grandpar-

related to P2. GP1 inherits one-half of G's intestate estate and P2's siblings (A and B) share the other half equally.

One final point about the 2019 version of section 2-103 remains to be made. It functions equally well whether the decedent has at most two parents and at most two sets of grandparents or whether, as optionally allowed by the 2017 UPA, a court determined that the decedent has more than two parents. It also functions equally well if the decedent's *parent* had more than two parents. This is in sharp contrast to the pre-2019 version of section 2-103. The pre-2019 version of section 2-103(a)(2) is premised on a decedent having at most two parents: "to the decedent's parents equally if *both* survive" ³⁶ The pre-2019 version of section 2-103(a)(4), having to do with the decedent's grandparents and their descendants, is similarly premised: it refers to grandparents or descendants of grandparents on "*both the paternal and maternal sides*." ³⁷ Removal of the gendered labels to reflect the modern era of same-sex parenting—e.g., to refer to grandparents or their descendants "on the one side" and "on the other side"—would not remedy the problem, which arises from the presumption that there are no more than two sides. ³⁸

The accommodation of a child with more than two parents in the 2019 version of section 2-103 allows for additional revisions to the UPC. We discuss these and other innovations in Part II, which outlines how the 2019 amendments have changed the pre-2019 rules recognizing a parent-child relationship for purposes of intestate succession.

II. THE 2019 UPC AND PARENT-CHILD RELATIONSHIPS IN INTESTATE SUCCESSION

The 2019 UPC incorporates the 2017 UPA's purposes and policies underlying the formation of parent-child relationships in its substantive changes and choices of statutory language. The 2017 UPA treats all parent-child relationships alike. The 2019 UPC embraces that approach. It does not regard one manner by which an individual establishes parentage as more "conventional" or "normal" than another. The 2019 UPC, in its pursuit of furthering donative intention, does address unique succession issues that arise due to the manner by, as well as the circumstances under, which an individual establishes parentage or loses parental status.

³⁶ PRE-2019 UPC § 2-103(a)(2) (emphasis added).

³⁷ *Id.* § 2-103(a)(4) (emphasis added).

³⁸ For an additional example, see PRE-2019 UPC § 2-103(a)(5) (addressing the fact-pattern where, as between the paternal and maternal sides, only one side has individuals who survive the decedent).

The definitions of “parent” and child” in the 2019 UPC rely on the definitions in the 2017 UPA. “Child” is now defined in UPC section 1-201(5) as “an individual of any age whose parentage is established under [cite to Uniform Parentage Act (2017)][cite to state’s parentage act][applicable state law].”³⁹ “Parent” is now defined in UPC section 1-201(32) as “an individual who has established a parent-child relationship under [cite to Uniform Parentage Act (2017)][cite to state’s parentage act][applicable state law].”⁴⁰ An accompanying legislative note explains that the first bracketed option is for states that have enacted the 2017 UPA, the second bracketed option is for states that have enacted a parentage act other than the 2017 UPA, and the third bracketed option is for states that do not have a statute governing the establishment of parent-child relationships.⁴¹ The phrase “‘applicable state law’ includes statutory, regulatory, and case law.”⁴² The definitions of “child” and “parent” operate throughout the 2019 UPC as legal terms of art. Only when the 2019 UPC recognizes a parent-child relationship between two individuals does a statutory provision refer to an individual as a “child” or a “parent.”

The discussion in this Part is divided into four topics. The first is the effect on intestate succession of the termination of parental rights. The discussion then turns to the intestate succession issues arising when an individual establishes a parent-child relationship by adjudication of a claim of de facto parentage, assisted reproduction, or adoption.

A. The Effect of Termination of Parental Rights

Section 2-114(a)(1) does not allow a parent to inherit from or through a child if the parent’s parental rights were terminated. It provides: “A parent is barred from inheriting from or through a child of the parent if . . . the parent’s parental rights were terminated and the parent-child relationship was not judicially reestablished”⁴³ Section 2-114 continues to recognize the parent-child relationship for all other purposes of intestate succession.⁴⁴ Under subsection (b), “[f]or the pur-

³⁹ 2019 UPC § 1-201(5).

⁴⁰ *Id.* § 1-201(32).

⁴¹ *Id.* § 1-201 Legislative Note to Paras. (5), (32).

⁴² *Id.*

⁴³ *Id.* § 2-114(a)(1). As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment to delete the words “the parent-child relationship was” from this subsection.

⁴⁴ *See also* 2019 UPC § 2-114(a)(2) (addressing the situation in which a child dies “before reaching [18] years of age and there is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated under state law . . . on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.”).

pose of intestate succession from or through the deceased child, a parent who is barred from inheriting under . . . [subsection (a)] is deemed to have predeceased the child.” The effect of subsection (b) is that a child’s relative who is also related to the parent can inherit from the child.⁴⁵ For example, the child’s grandparent can inherit from the child. Termination of parental rights can occur for a number of reasons and under a variety of familial circumstances. For instance, termination might occur because a parent abused or neglected a child, leading to custody being awarded to a relative of the parent. Alternatively, termination might occur when a parent relinquishes parental rights to allow, under the law of a jurisdiction, a child’s stepparent to establish a parent-child relationship by adoption or adjudication of a claim of de facto parentage. Other examples demonstrating the application of section 2-114 in the context of de facto parentage and adoption can be found below. The range of possible familial situations involving a termination of parental rights makes difficult the determination of the likely intent of a decedent. Section 2-114’s response is to deny *a parent* whose parental rights are terminated the right to inherit from or through the child. In other respects, given the potential for continuing familial ties, section 2-114 keeps the parent-child relationship intact for purposes of intestate succession.

The 2019 amendments add subsection (c) in response to the West Virginia Supreme Court’s 2018 holding in *Hall v. Hall*.⁴⁶ *Hall* held that a termination of a parent’s rights due to abuse and neglect also terminated the right of the child to inherit from the parent.⁴⁷ Subsection (c) makes clear that “the termination of a parent’s parental rights to a child has no effect on the right of the child or a descendant of the child to inherit from or through the parent.”⁴⁸ Subsection (c) does not substantively change the pre-2019 UPC. It only clarifies it.

The examples that follow illustrate how section 2-114 affects the inheritance rights of a parent whose parental rights have been terminated but does not affect the inheritance rights of others. Unless otherwise stated, the examples assume, for ease of presentation, that no individual dies survived by a spouse or descendants and that each individual identified as having survived a decedent lived at least 120 hours after the decedent’s death.

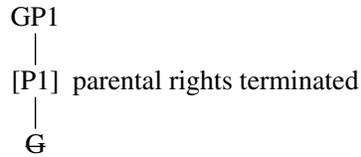
Example 13. G, the intestate, died survived only by GP1 (G’s grandparent) and P1 (GP1’s child). P1’s parental rights to G were terminated while G was alive.

⁴⁵ The definition of “relative” in the 2019 UPC is in section 2-115(4). It is the same definition as in PRE-2019 UPC § 2-115(9).

⁴⁶ 818 S.E.2d 838, 848 (W. Va. 2018).

⁴⁷ *Id.* at 847.

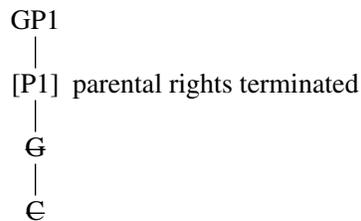
⁴⁸ 2019 UPC § 2-114(c).



Under section 2-114(b), P1 is deemed to have predeceased G. GP1, as G's grandparent, has the right to inherit from G.

Example 14. Same facts as Example 13, except that P1 and GP1 died intestate in that order survived only by G. Under section 2-114(c), G, as P1's child, has the right to inherit from P1 and, as GP1's grandchild, the right to inherit from GP1.

Example 15. Same facts as Example 13, except that G died survived by G's child, C, who died intestate survived only by P1 and GP1.



Under section 2-114(b), P1 is deemed to have predeceased G, which in turn means that P1 is deemed to have predeceased C. GP1, however, does not have the right to inherit from C because GP1 is C's great-grandparent and is not an eligible heir under section 2-103. C's intestate estate escheats to the state in accordance with section 2-105.

The discussions below concerning de facto parentage and adoption have more to say about the effect of a termination of parental rights and the operation of section 2-114.⁴⁹ For now, we turn to de facto parentage.

B. Parentage by Adjudication of a Claim of De Facto Parentage

Most states by statute or case law recognize a doctrine that extends some or all parental rights to an individual who has performed functions customarily associated with parenting.⁵⁰ The 2017 UPA treats an adjudication of de facto parentage as a "new means by which an individual can establish a parent-child relationship."⁵¹ Section 609 of the 2017 UPA, in

⁴⁹ See *infra* Parts II.B, II.D.

⁵⁰ See 2017 UPA Prefatory Note, § 609 cmt. (both describing the similarities and differences among the states regarding the equitable doctrines, referred to variously as de facto parentage, in loco parentis, or the psychological parent doctrine).

⁵¹ *Id.* § 609 cmt.

an effort to “provide greater clarity to the parties and affected child,” sets forth procedures to establish a parent-child relationship based on an adjudication of a claim of de facto parentage.⁵² These 2017 UPA provisions promote the efficient application of succession law by requiring that a proceeding to adjudicate a claim of de facto parentage commence while both “the child” and the “individual who claims to be a de facto parent” are alive.⁵³ The UPA also requires that the proceeding commence “before the child attains 18 years of age.”⁵⁴

The 2019 UPC incorporates the de facto parentage doctrine into the rules of intestate succession.⁵⁵ Three UPC sections are pertinent here.

Section 2-115 contains a definition of “de facto parent.” A de facto parent is “an individual who is adjudicated on the basis of de facto parentage under [cite to Uniform Parentage Act (2017)][cite to state’s parentage act][applicable state law] to be a parent of a child.”⁵⁶

Section 2-118 recognizes a parent-child relationship between an individual and the individual’s de facto parent. It states in pertinent part: “A parent-child relationship exists between an individual and the individual’s de facto parent.”⁵⁷

Section 2-119 addresses the effect of de facto parentage on parent-child relationships in existence before the adjudication of a claim of de facto parentage. A defined term is important here. Section 2-119(a)(1) defines a “parent before the adjudication” to mean “an individual who is a parent of a child (A) immediately before another individual is adjudicated a de facto parent of the child; or (B) immediately before dying, or being deemed . . . to have died, and before another individual is adju-

⁵² *Id.*; see also *id.* § 609(e) (providing that, if in an adjudication of a claim of de facto parentage, a court determines that (1) the individual claiming de facto parentage has met the statutory requirements to establish parentage and (2) there is more than one other individual who is a parent or has a claim to parentage of the child, then the court must adjudicate parentage under UPA section 613); *id.* § 613(a) (setting forth factors for adjudicating “parentage in the best interest of the child”). Alternative B of 2017 UPA § 613(c) authorizes a court to “adjudicate a child to have more than two parents . . . if the court finds that failure to recognize more than two parents would be detrimental to the child.”

⁵³ *Id.* § 609(a), (b).

⁵⁴ *Id.* § 609(b)(1). Although state law other than the 2017 UPA does not necessarily require that an individual claiming to be a de facto parent must do so before the child of the de facto parent reaches adulthood, the criteria to qualify as a de facto parent appears to presume that the de facto parent has built a parent-child relationship while the child of the de facto parent was a minor. See, e.g., ME. STAT. tit. 19-A § 1891(3) (2021).

⁵⁵ See 2019 UPC §§ 2-115(3), 2-118(b), 2-119(a)(1), (c).

⁵⁶ *Id.* § 2-115(3). For an explanation of the bracketed options, see *supra* notes 41-42 and accompanying text.

⁵⁷ *Id.* § 2-118(b).

icated a de facto parent of the child.”⁵⁸ The definition of “parent before the adjudication” includes a parent without regard to the manner by which that parent acquired parental status.

Section 2-119(c) provides that, unless provided otherwise by court order, “an adjudication that an individual is a child of a de facto parent does not affect a parent-child relationship between the child and an individual who was the child’s parent before the adjudication.”⁵⁹ The continuing recognition of parent-child relationships established before an adjudication of de facto parentage reflects the de facto parentage doctrine under which a finding of de facto parentage adds, rather than replaces, a parent.⁶⁰

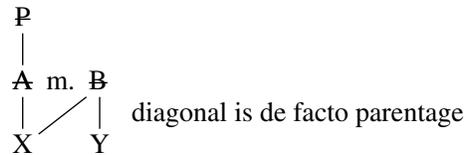
The following examples demonstrate the application of the 2019 versions of sections 2-118 and 2-119 with respect to de facto parentage. The interaction between section 2-119(c) and section 2-114, having to do with a parent who is not allowed to inherit from or through a child if the parental rights were terminated, also is discussed in these examples. Unless otherwise stated, the examples assume, for ease of presentation, that no individual dies survived by a spouse or descendants and that each individual identified as having survived a decedent lived at least 120 hours after the decedent’s death.

Example 16. A and B were married. At the time of their marriage, A had a child, X, and B had a child, Y. With A’s consent, B commenced a proceeding on the basis of de facto parentage to be adjudicated a parent of X. The court adjudicated B to be a parent of X and did not terminate A’s parental rights. A, B, and A’s only surviving parent, P, subsequently died intestate in that order, survived only by X and Y.

⁵⁸ *Id.* § 2-119(a)(1). As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, technical amendments to this definition. The amendments add “for purposes of intestate succession” to subsection (a)(1), thereby clarifying that an individual whose parentage is no longer recognized as a result of a previous adoption is not considered a “parent before the adjudication.” See *infra* notes 81-85 and accompanying text (discussing the opening clause of section 2-119(b)). The amendments also delete, as unnecessary, the reference to “deemed” death in subparagraph (B).

⁵⁹ 2019 UPC § 2-119(c). As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment to this subsection. The amendment deletes the exception for a court order for the following reason: regardless of a court order, a parent-child relationship established by de facto parentage should not disturb, for succession purposes, prior parent-child relationships.

⁶⁰ See 2017 UPA § 2-609(d)(6) (requiring an individual claiming de facto parentage to demonstrate “by clear-and-convincing evidence that . . . another parent of the child fostered or supported the bonded and dependent relationship” with the child).

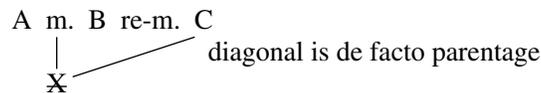


X remains A's child under section 2-119(c) and has the right to inherit from A. (A and B have a blended family and, therefore, in accordance with sections 2-102(3) and 2-103(b) and (c), B is not A's sole heir.) X is B's child under section 2-118(b) and has the right to inherit from B. Because X remains A's child (P's grandchild) under section 2-119(c), X has the right to inherit from P.

Example 17. Same facts as Example 16 except that Y and X died intestate in that order after the death of A and B, and only P survived X. Under section 2-118(b), X has the right to inherit from Y because, as B's child, X is Y's sibling. Under section 2-119(c), P has the right to inherit from X because P remains X's grandparent.

Example 18. Same facts as Example 16 except that A's parental rights to X were terminated, and X predeceased P. Under sections 2-114(c) and 2-119(c), X remains A's child and has the right to inherit from A. Under section 2-118(b), X is B's child and has the right to inherit from B. When X dies, for the purpose of determining X's heirs, section 2-114(b) does not apply because A predeceased X. Under section 2-119(c), P remains X's grandparent and has the right to inherit from X.

Example 19. A and B were married and had a child, X. When X was four years old, A and B divorced, and B married C. When X was twelve years old, C commenced, with the consent of A and B, a proceeding to establish a claim of de facto parentage of X. When the court adjudicated C to be a parent of X, the court did not terminate A's or B's parental rights. Later, X died intestate, survived only by A, B, and C.



Under sections 2-118(b) and 2-119(c), A, B, and C are parents of X, and each has the right to inherit from X.

The 2019 UPC's recognition of de facto parentage assures that the UPC's rules on the formation of parent-child relationships reflect the innovations of the 2017 UPA and other state law developments. Together, the two uniform laws have the potential to influence the future development of the de facto parentage doctrine.

C. Parentage by Assisted Reproduction

We now turn to parent-child relationships established by assisted reproduction. Unlike de facto parentage, parentage by assisted reproduction was treated extensively in the pre-2019 UPC. The promulgation of the 2017 UPA enabled a simplification of the UPC. For the most part, but not entirely, the 2019 UPC incorporates by reference the provisions on assisted reproduction of the 2017 UPA. In the discussion below, we examine both that incorporation and the circumstances in which the UPC makes an exception to the rules found in the 2017 UPA in order to further an intestate decedent's likely donative intention. We also note that the 2019 UPC is careful in its language to ensure that a parent-child relationship established by assisted reproduction is treated no differently than a parent-child relationship established in another manner. In keeping with the core principles of the 2017 UPA, the 2019 UPC treats all parent-child relationships equally for purposes of the law of succession.

The two principal UPC sections addressing parent-child relationships established through assisted reproduction are section 2-120, on assisted reproduction without the assistance of a surrogacy arrangement, and section 2-121, on assisted reproduction with the assistance of a surrogacy arrangement. These sections first appeared in the 2008 UPC. At the time, the Commission showed no interest in updating the UPA's provisions on assisted reproduction. Instead, it promulgated UPC sections 2-120 and 2-121 to address the succession-law consequences of assisted reproduction. Sections 2-120 and 2-121 were lengthy. The approval of the 2017 UPA, which contains comprehensive provisions on parentage by assisted reproduction, enables the UPC mostly to incorporate by reference the 2017 UPA provisions.

1. *Assisted Reproduction without a Surrogacy Arrangement*

As amended in 2019, section 2-120 provides: "Except as otherwise provided under Section 2-121, parentage of an individual conceived by assisted reproduction is determined under [cite to Uniform Parentage Act (2017) Article 7 other than Section 708(b)(2)][cite to equivalent provisions of state's parentage act][applicable state law]."⁶¹

The one 2017 UPA provision inappropriate for section 2-120 to incorporate into the rules of intestate succession is section 708(b)(2). If a pregnancy, resulting in the birth of an individual, starts after the death of an intended parent, section 708(b)(2) does not recognize a parent-child relationship between the intended parent and the individual unless

⁶¹ 2019 UPC § 2-120. For an explanation of the bracketed options, see *supra* notes 41-42 and accompanying text.

either the pregnancy starts or birth occurs within certain prescribed time limits measured from the intended parent's death. Section 708(b)(2) requires that "either (A) the embryo is in utero not later than [36] months after the individual's [intended parent's] death; or (B) the child is born not later than [45] months after the individual's [intended parent's] death."⁶² These time limits may be familiar to the reader. The pre-2019 version of UPC section 2-120(k) adopts a similar rule.⁶³ Time limits keyed to the intended parent's death are fine for purposes of intestate succession when the intended parent is the decedent, but they are too restrictive to apply for all purposes.

The 2019 version of the UPC furthers the likely intention of an intestate decedent without interfering unduly with the efficient administration of the intestate decedent's estate. Section 2-104 imposes time limits for an individual to be considered a child of an intended parent only if the pregnancy resulting in the birth of the individual starts after the death of an intestate decedent. The decedent may be, but is not necessarily, the individual's intended parent. Section 2-104 provides in pertinent part:

If the decedent dies before the start of a pregnancy by assisted reproduction resulting in the birth of an individual who lives at least 120 hours after birth, that individual is deemed to be living at the decedent's death if [the decedent's personal representative, not later than [6] months after the decedent's death, received notice or had actual knowledge of an intent to use genetic material in the assisted reproduction and]:

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

(B) the individual was born not later than [45] months after the decedent's death.⁶⁴

⁶² 2017 UPA § 708(b)(2).

⁶³ Compare 2019 UPC § 1-120(k), with 2017 UPA § 708(b)(2).

⁶⁴ 2019 UPC § 2-104(b)(3). As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment to put the reference to "120 hours" in brackets. Data raise doubts about whether 120 hours—imported from the survivorship rule for simultaneous or near-simultaneous death—is the appropriate period to provide reasonable assurance of infant survivorship. See, e.g., Rabah Kamal et al., *What Do We Know About Infant Mortality in the U.S. and Comparable Countries?*, PETERSON-KFF HEALTH SYS. TRACKER (Oct. 18, 2019), <https://www.healthsystemtracker.org/chart-collection/infant-mortality-u-s-compare-countries/#item-start> [https://perma.cc/82B9-QF3R] (reporting that, of the infants dying in 2017 within the first year after birth, 40 percent died within 23 hours after birth, 13 percent died between one to six days after birth, 13 percent died between seven to 27 days after birth, and 34 percent died between 28 and 364 days after birth).

Although the 2019 version of section 2-104 measures the time limits from an intestate decedent's death rather than only from the death of an intended parent, the time periods are designed to accommodate the situation in which the intended parent is the intestate decedent. The 36-month period allows for a period of grieving after the intended parent's death, time to decide whether to go forward with a pregnancy, and the possibility that attempts to achieve a pregnancy may initially fail. The 36-month period also coincides with section 3-1006 of the UPC, under which an heir is allowed to recover property improperly distributed, or its value, from any distributee during the later of three years after the decedent's death or one year after distribution.⁶⁵ If the assisted-reproduction procedure is performed in a medical facility, medical records ordinarily indicate the date when the embryo is in utero. In some cases, however, the evidence may be lacking if the procedure is not performed in a medical facility. The alternative time limit of birth within 45 months provides the necessary certainty when the start of the pregnancy is indeterminate. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical gestational period. The time limits are bracketed to indicate that states may want to consider other time limits that may be more consistent with their rules of probate administration. Other bracketed language in this section imposes a requirement of notice to the personal representative.

The first set of examples apply the 2019 version of sections 2-104 and 2-120 to the situation in which the intended parent of an individual died intestate. These examples illustrate that the results under the 2019 and pre-2019 versions of the UPC are identical. They also illustrate that the 2019 UPC and the 2017 UPA both conclude that a parent-child relationship exists between the intended parent and the individual.

Example 20. G and G's spouse, S, had a child, X, by assisted reproduction. G was alive when X was born. G met the requirements in the 2017 UPA to establish a parent-child relationship with X. Later, G died intestate survived only by S, X, and a stepchild (S's child but not G's child). S, X, and G's stepchild survived G by at least 120 hours. In accordance with section 2-120, which incorporates by reference the rules for parentage in the 2017 UPA, X is G's child and has the right to inherit from G. (G and S have a blended family and, therefore, in accordance with section 2-102(3), S is not G's sole heir.) The same result is reached under the pre-2019 version of section 2-120.⁶⁶

⁶⁵ See 2019 UPC § 3-1006.

⁶⁶ See PRE-2019 UPC §§ 2-104(a)(1) (reaching the same results as the 2019 version of section 2-104 discussed in the example), 2-120(d) (establishing a parent-child relationship between the individual and the husband of the birth mother if the "husband provided the sperm that the birth mother used during his lifetime for assisted

Example 21. Same facts as Example 20 except that G died after the start of the pregnancy and before the birth of X. After birth, X lived at least 120 hours. In accordance with section 2-120, X is G's child. Under section 2-104(b)(2), X is deemed to be living at G's death because X lived at least 120 hours after birth. X has the right to inherit from G. If, instead, X had failed to survive for 120 hours after birth, X would have been deemed to have predeceased G. The same results are reached under the pre-2019 version of sections 2-104(a)(2) and 2-120.⁶⁷

*Example 22.*⁶⁸ The same facts as Example 20 except that G died intestate before the start of a pregnancy. S timely notified G's personal representative that S intended to use G's genetic material to have a child. One year later, S used the genetic material to start a pregnancy. About nine months thereafter, S gave birth to X. X lived at least 120 hours after birth. In accordance with section 2-120, X is G's child. X's birth falls within the bracketed time limits of section 2-104(b)(3), which means that X is deemed to be living at G's death and has the right to inherit from G. If, instead, X had failed to survive for 120 hours after birth, X would have been deemed to have predeceased G. The same results are reached under the pre-2019 version of section 2-120.⁶⁹

reproduction”), (f)(1) (establishing a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction if the intended parent signed a record demonstrating consent to be the parent), (f)(2)(A) (establishing a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction if the intended parent functioned as a parent of the individual), (h) (in the absence of clear and convincing evidence to the contrary, presuming requirements of (f)(2)(A) to establish a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction are met if the birth mother is married to the intended parent).

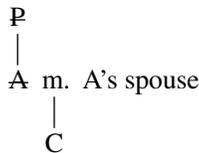
⁶⁷ See *id.* §§ 2-104(a)(2) (reaching the same results as the 2019 version of section 2-104), 2-120(d) (establishing a parent-child relationship between the individual and the husband of the birth mother if the “husband provided the sperm that the birth mother used during his lifetime for assisted reproduction”), (f)(1) (establishing a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction if the intended parent signed a record demonstrating consent to be the parent), (f)(2)(B) (establishing a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction if the intended parent intended to function as a parent of the individual but was prevented from doing so because of death), (h) (in the absence of clear and convincing evidence to the contrary, presuming requirements of (f)(2)(B) to establish a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction are met if the birth mother is married to the intended parent).

⁶⁸ This example derives from THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND ESTATES* 94 (8th ed. 2020).

⁶⁹ See PRE-2019 UPC §§ 2-120(f)(1) (establishing a parent-child relationship between an intended parent other than the birth mother and the individual who was born

The second set of examples apply the 2019 version of sections 2-104 and 2-120 to the situation in which the intestate decedent is not an intended parent. Each of the examples presumes that the intended parents of a child conceived by assisted reproduction satisfied all the requirements in the 2017 UPA except the time limits in section 708(b)(2). This set of examples illustrates why the 2019 UPC's time limits, rather than the time limits in the 2017 UPA, further the intestate decedent's likely donative intention. The examples also illustrate that the results under the 2019 and pre-2019 versions of the UPC are sometimes, but not always, identical.

Example 23. Before A died, A deposited genetic material in a medical facility. Five years after A's death, A's surviving spouse used A's genetic material to give birth to C. After C's birth, A's only surviving parent, P, died intestate, survived only by C. C survived P by at least 120 hours.



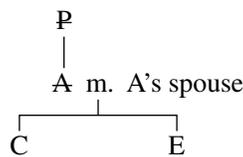
Under section 2-120, C is a child of A and a grandchild of P. C has the right to inherit from P because, in accordance with section 2-104(b)(1), C was born before P's death and survived P by at least 120 hours. The pre-2019 UPC reaches the same result.⁷⁰ The 2017 UPA reaches a different conclusion: the length of time between A's death and the start of the

by assisted reproduction if the intended parent signed a record demonstrating consent to be the parent), (f)(2)(C) (establishing a parent-child relationship if the individual other than the birth mother "intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence"), (k) (providing that, if a parent-child relationship otherwise exists in accordance with section 2-120 and a pregnancy starts after the death of the intended parent resulting in the birth of an individual who survives at least 120 hours, the pre-2019 version of section 2-104(a)(2) applies to treat the individual as living at the death of the intended parent only so long as the pregnancy started "not later than 36 months after the" intended parent's death or the individual is born "not later than 45 months after the" intended parent's death).

⁷⁰ See *id.* §§ 2-104(a)(1) (reaching the same results as the 2019 version of section 2-104 discussed in the example), 2-120(f)(1) (establishing a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction if the intended parent signed a record demonstrating consent to be the parent), (f)(2)(C) (establishing a parent-child relationship if the individual other than the birth mother "intended to be treated as a parent of a posthumously conceived child" and "that intent is established by clear and convincing evidence"). Pre-2019 UPC section 2-120(k) with its time limitations is inapplicable to the facts of Example 23 because it applies only when the intended parent is the intestate decedent.

pregnancy resulting in C's birth means that section 708(b)(2) concludes that C is not A's child and, therefore, not P's grandchild. This conclusion is inconsistent with the law of succession, which strives to further an intestate decedent's likely donative intention.

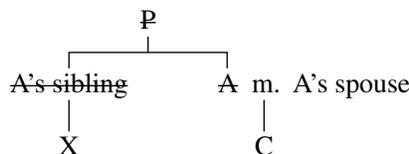
Example 24. Same facts as Example 23 except that A's spouse again used A's genetic material and, two months after P's death, gave birth to E, who lived at least 120 hours after birth.



Under section 2-120, E is a child of A and a grandchild of P. E has the right to inherit from P because, in accordance with section 2-104(b)(2), P died during the gestational period that resulted in the birth of E, who lived at least 120 hours after birth. The same result is reached under the pre-2019 UPC.⁷¹ The 2017 UPA reaches a different conclusion: the length of time between A's death and the start of the pregnancy resulting in E's birth means that section 708(b)(2) concludes that E is not A's child and, therefore, not P's grandchild. This conclusion is inconsistent with the law of succession, which strives to further an intestate decedent's likely donative intention.

Example 25. Before A died, A deposited genetic material in a medical facility. Five years after A's death, A's parent P died intestate survived only by P's grandchild, X, who is the child of A's predeceased sibling. A's surviving spouse timely notified P's personal representative of an intention to use A's genetic material to have a child. Fifteen months after P's death, A's surviving spouse used the genetic material to start a pregnancy. About twenty-four months after P's death, A's surviving spouse gave birth to C, who lived at least 120 hours after birth.

⁷¹ See *id.* §§ 2-104(a)(2) (reaching the same results as the 2019 version of section 2-104 discussed in the example), 2-120(f)(1) (establishing a parent-child relationship between an intended parent other than the birth mother and the individual who was born by assisted reproduction if the intended parent signed a record demonstrating consent to be the parent), (f)(2)(C) (establishing a parent-child relationship if the individual other than the birth mother "intended to be treated as a parent of a posthumously conceived child" and "that intent is established by clear and convincing evidence"). Pre-2019 UPC section 2-120(k) with its time limitations is inapplicable to the facts of Example 24 because it applies only when the intended parent is the intestate decedent.



Under section 2-120, C is A's child and P's grandchild. C has the right to inherit from P because, in accordance with section 2-104(b)(3), C satisfied the conditions to be deemed to be living at P's death: P died before the start of the pregnancy resulting in C's birth, A's surviving spouse timely notified P's personal representative of an intent to use genetic material in assisted reproduction, the time-limits in section 2-104(b)(3) measured from P's death were satisfied, and C lived at least 120 hours after birth. The pre-2019 UPC does not have a counterpart to section 2-104(b)(3), with the result that the common law applies. C is not an heir of P because C is not alive at P's death. The 2017 UPA, because of the length of time between A's death and the start of the pregnancy resulting in C's birth, concludes, in accordance with section 708(b)(2), that C is not A's child and, therefore, not P's grandchild. The results under the pre-2019 UPC and the 2017 UPA are inconsistent with the intestate decedent's likely donative intention.

These three examples make clear why section 2-120 does not incorporate section 708(b)(2) of the UPA. The 2019 UPC, without unduly interfering with the efficient administration of the decedent's estate, furthers the likely donative intention of an intestate decedent by allowing an individual born as a result of assisted reproduction to qualify as an heir as long as the individual is born (1) before the decedent's death, (2) as a result of a pregnancy starting before the decedent's death, or (3) if certain time limits are met, as a result of a pregnancy starting after the decedent's death.

2. *Assisted Reproduction with the Assistance of a Surrogacy Arrangement*

The other principal UPC section on parent-child relationships established through assisted reproduction is section 2-121, which has to do with assisted reproduction with the assistance of a surrogate. As amended in 2019, section 2-121 provides: "Parentage of an individual conceived by assisted reproduction and born to a gestational or genetic surrogate is determined under [cite to Uniform Parentage Act (2017) Article 8 other than sections 810(b)(2) and 817(b)(2)][cite to equivalent provisions of state's parentage act][applicable state law]."⁷² If a preg-

⁷² 2019 UPC § 2-121. For an explanation of the bracketed options, see *supra* notes 41-42 and accompanying text.

nancy resulting in the birth of an individual starts after the death of an intended parent, sections 810(b)(2) (having to do with a gestational surrogacy arrangement) and 817(b)(2) (having to do with a genetic surrogacy arrangement) do not recognize a parent-child relationship between the intended parent and the individual unless either the pregnancy starts or birth occurs within prescribed time limits measured as of the intended parent's death. The time limits are the same as the those discussed *supra* in Part II.C.1, having to do with assisted reproduction undertaken without the assistance of a surrogate.

For the same reasons set forth in Part II.C.1, the UPA's time limits keyed exclusively to the intended parent's death are too restrictive for purposes of intestate succession. In contrast, sections 2-104 and 2-121 of the 2019 UPC impose time limits for an individual to be considered a child of an intended parent only if the pregnancy starts after the death of the intestate decedent. This can be illustrated readily. If the facts in Examples 23 through 25 stay the same except that assisted reproduction occurs with the assistance of a surrogacy arrangement, neither the analyses nor the results change. The only difference is that the relevant UPC section is section 2-121 instead of section 2-120. As was true in Part II.C.1 *supra*, the pre-2019 version of sections 2-104 and 2-121 would reach identical results to the 2019 version of the UPC except when a pregnancy by assisted reproduction starts after the death of an intestate decedent who is not an intended parent.

D. Parentage by Adoption

Two sections of the 2019 UPC address the intestate succession consequences of adoption. One is section 2-118(a), regarding parent-child relationships established by adoption. The other is section 2-119, regarding the effect of adoption on parent-child relationships existing before the adoption.

Section 2-118(a) recognizes, for purposes of intestate succession, a parent-child relationship established by adoption. It states: "A parent-child relationship exists between an adoptee and the adoptee's adoptive parent"⁷³ or parents. This is substantially the same language as in the pre-2019 version of section 2-118(a).⁷⁴ The 2019 version of section 2-118 simplified the pre-2019 UPC version by eliminating the provisions—for-

⁷³ 2019 UPC § 2-118(a); *see also id.* § 2-115(1) (defining the term "adoptee" to mean "an individual who is adopted").

⁷⁴ *See* PRE-2019 UPC § 2-118(a) ("A parent-child relationship exists between an adoptee and the adoptee's adoptive parent or parents.").

mer subsections (b) and (c)—dealing with situations in which death occurs during the adoption process.⁷⁵

The pre-2019 and 2019 versions of section 2-119 address, for purposes of intestate succession, the effect of adoption on parent-child relationships in existence before the adoption. The 2019 amendments to section 2-119 eliminate the outdated and restrictive term “genetic parent,”⁷⁶ replacing it with “parent before the adoption.” This term of art is defined in section 2-119(a)(2) to mean “an individual who is a parent of a child: (A) immediately before another individual adopts the child; or (B) immediately before dying, or being deemed . . . to have died, and before another individual adopts the child.”⁷⁷ This definition treats each parent before the adoption the same without regard to the manner by which the parent-child relationship was established. The 2019 version makes three further consequential changes. First, it recognizes a parent-child relationship between an adoptee and a parent before the adoption if a court order or law other than the UPC so provides.⁷⁸ Second, it allows a parent before the adoption to inherit from and through an adoptee when a parent-child relationship between an adoptee and a parent before the adoption continues to be recognized.⁷⁹ Third, it adjusts language to accommodate the possibility that an adoptee has more than two parents.⁸⁰

The opening clause of subsection (b) provides a general rule that a parent-child relationship does not exist between an adoptee and the adoptee’s parent before the adoption.⁸¹ This nonrecognition means that (1) an adoptee and the adoptee’s descendants cannot inherit from or through a parent before the adoption and (2) a parent before the adop-

⁷⁵ See, e.g., *id.* § 2-118(b)(1) (having to do with “an individual who is in the process of being adopted by a married couple when one of the spouses dies”), (b)(2) (having to do with “a child of a genetic parent who is in the process of being adopted by a genetic parent’s spouse when the spouse dies”), (c) (extending the rule found in subsection (b)(2) when a child had been conceived by assisted reproduction).

⁷⁶ See *supra* Introduction; *infra* Part IV (discussing why the 2019 UPC eliminates the term “genetic”).

⁷⁷ 2019 UPC § 2-119(a)(2). As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, technical amendments to this definition. The amendments add “for purposes of intestate succession” to subsection (a)(2), thereby clarifying that an individual whose parentage is no longer recognized as a result of a previous adoption is not considered a “parent before the adoption.” See *infra* notes 81-85 and accompanying text (discussing the opening clause of section 2-119(b)). The amendments also delete, as unnecessary, the reference to “deemed” death in subparagraph (B).

⁷⁸ See 2019 UPC § 2-119(b)(1).

⁷⁹ *Id.* § 2-119 cmt.

⁸⁰ See *id.* Art. II Prefatory Note (discussing the 2019 revisions).

⁸¹ See *id.* § 2-119(b) (stating that “[a] parent-child relationship does not exist between an adoptee and an individual who was the adoptee’s parent before the adoption unless” one of the exceptions to this general rule is met).

tion, the parent's parent, and the descendants of the parent's parent—*i.e.*, those who would have been an adoptee's grandparents or descendants of grandparents before the adoption—cannot inherit from or through the adoptee.⁸² This rule furthers an intestate decedent's likely donative intention in the situations in which the adoption provides an adopted child with a replacement family, sometimes referred to in the case law as “clean slate” or a “fresh start.”⁸³ The *Restatement (Third) of Property: Wills and Other Donative Transfers* (“the Restatement”) elaborates on this theory.⁸⁴ Subsection (b)'s general rule is, in substance, the same as in the pre-2019 version of section 2-119.⁸⁵

Subsections (b)(1) and (b)(2) provide exceptions to the “fresh start” general rule. These exceptions are designed to further the intestate decedent's likely donative intention. If an exception applies, the parent-child relationship between the adoptee and each of the adoptee's parents before the adoption continues to be recognized for purposes of intestate succession. This means that an adoptee and the adoptee's descendants have the right to inherit from and through each of the parents before the adoption— plus, of course, from and through each of the adoptive parents.

The 2019 revisions to section 2-103 accommodate an individual with more than two parents.⁸⁶ This enables the 2019 version of section 2-119(b)(1) and (2) to expand the inheritance rights of a parent before the adoption as compared to the pre-2019 UPC. Unlike the pre-2019 version of section 2-119, the 2019 version provides that, if an exception to the “fresh start” general rule applies, each parent before the adoption as well as each adoptive parent has the right to inherit from and through the adoptee. There is one caveat, however. The right of any parent to inherit from and through a child is subject to section 2-114, having to do

⁸² It is possible that an adoption or an adjudication of a claim of de facto parentage occurs after a previous adoption. If, under section 2-119(b) the previous adoption resulted in the nonrecognition of a parent-child relationship, that parent should no longer be considered a “parent before the adoption” or a “parent before the adjudication.” *Id.* § 2-119(a), (b). Once an adoption results in the nonrecognition of a parent-child relationship under the “fresh start” general rule, that parent-child relationship does not exist for purposes of intestate succession. *See id.* § 2-119 cmt. to Subsec. (b).

⁸³ *See, e.g., In re Estates of Donnelly*, 502 P.2d 1163, 1166-67 (Wash. 1972) (using both terms).

⁸⁴ *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(2)(A), cmt. d-e (AM. L. INST. 1999).

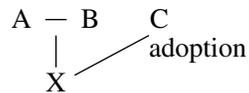
⁸⁵ *See* PRE-2019 UPC § 2-119(a) (stating that, subject to certain exceptions, “a parent-child relationship does not exist between an adoptee and the adoptee's genetic parents”).

⁸⁶ *See* 2019 UPC § 2-103 cmt. on 2019 Revisions; *supra* Part I; *see also supra* note 19 and accompanying text (discussing 2017 UPA § 613(c) Alternative B).

with the termination of parental rights.⁸⁷ We illustrate these rules in the examples soon to follow.

Subsection (b)(1) keeps intact the parent-child relationship between an adoptee and a parent before the adoption if a court order or law other than the UPC so provides. This subsection was added as part of the 2019 reforms to assure that the rules for intestate succession are consistent with a court order or applicable law that continues to recognize a parent-child relationship between an adoptee and a parent before the adoption.

Example 26. A and B had a child, X. C, who has no familial relationship to A or B, adopted X. During the adoption proceeding, the court ordered that A and X shall have a legal relation of parent and child with C and shall have all the legal rights and responsibilities of that relation.



Under the opening clause of section 2-119(b), B no longer has a parent-child relationship with X. Under subsection (b)(1), X is A's child for purposes of intestate succession. Under section 2-118(a), X is C's child for purposes of intestate succession. The pre-2019 version of section 2-118(a) also treats X as the child of C. The pre-2019 version of section 2-119 does not have a counterpart to subsection (b)(1). It is possible that a court, relying on section 1-102, which directs courts to construe UPC provisions liberally and apply the UPC "to promote its underlying purposes and policies," would allow X or a descendant of X to inherit from and through A. A court is not likely, however, to allow A to inherit from and through X, because none of the pre-2019 exceptions (section 2-119(b)-(d)) to the "fresh start" general rule of section 2-119(a) allows a parent before the adoption to inherit from or through an adoptee.

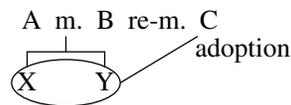
Subsection (b)(2) contains three further exceptions to the "fresh start" general rule. The purpose of these exceptions—set forth in subsections (b)(2)(A) through (C)—is to identify the circumstances when an adoptee has been, and is likely to continue to be, connected to a parent before the adoption or the family of a parent before the adop-

⁸⁷ See *supra* Part II.A (discussing section 2-114 and how it bars inheritance by a parent whose parental rights have been terminated, while keeping the parent-child relationship intact for the purpose of the child and the child's descendants to inherit from or through the parent and for a child's relative who is also related to the parent to inherit from and through the child).

tion.⁸⁸ In contrast to the pre-2019 version of these exceptions, which presumes that the adoptee has no more than two parents before the adoption, the 2019 version acknowledges the possibility of more than two parents before the adoption: if one of the exceptions applies, then all parent-child relationships between an adoptee and a parent before the adoption continue to be recognized.

The first exception in subsection (b)(2) has to do with a stepparent adopting a stepchild. When a stepparent adopts a stepchild, subsection (b)(2)(A) provides that a parent-child relationship continues to exist between the adoptee and each of the adoptee's parents before the adoption. The following examples illustrate its effect on the determination of heirs of an intestate decedent.

Example 27. A and B were married and had two children, X and Y. A and B obtained a divorce, and B married C. C adopted X and Y. The court did not terminate the parental rights of A or B.



Under section 2-118(a), X and Y are C's children for purposes of intestate succession. Under section 2-119(b)(2)(A), X and Y remain the children of A and B for purposes of intestate succession.⁸⁹ The pre-2019 UPC allows X and Y and their descendants to inherit from or through A and B but does not allow A to inherit from or through X and Y.

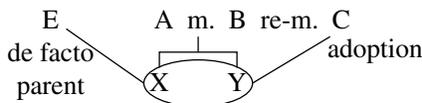
Example 28. Same facts as Example 27 except that A's parental rights to X and Y were terminated when C adopted X and Y. Under section 2-119(b)(2)(A), the parent-child relationships between A and X and between A and Y continue to exist for purposes of intestate succession. However, under section 2-114(a)(1) and (b), for the purpose of intestate succession from or through X, A is deemed to have predeceased X; and for the purpose of intestate succession from or through Y, A is deemed to have predeceased Y. Under sections 2-114(c) and 2-119(b)(2)(A), X and Y remain the children of A, and they and their descendants have the right to inherit from and through A. The pre-2019

⁸⁸ The term "family" rather than relative is used in the text to take account of the breadth of the exception in section 2-119(b)(2)(B). The exception continues the recognition of parent-child relationships between the adoptee and all parents before the adoption if the adoptive parent is a relative of a parent before the adoption or is a spouse or surviving spouse of a relative of a parent before the adoption.

⁸⁹ 2019 UPC § 2-119(b)(2)(C) (pertaining to an adoption occurring after the death of a parent before the adoption, which would reach the same result if C had adopted X and Y after B's death). For further discussion of the exception to the "fresh start" general rule in section 2-119(b)(2)(C), see *infra* Examples 34-35 and accompanying text.

UPC reaches the same result on these facts. The addition in 2019 of subsection (c) to section 2-114 clarifies, but does not change, the pre-2019 result.⁹⁰

Example 29. The same facts as Example 27 except that, before C’s adoption of X and Y, E adjudicated a claim of de facto parentage of X and Y, and the court held E to be their legal parent.



E meets the definition of a parent before the adoption in accordance with sections 2-118(b) and 2-119(a)(2)(A). Under section 2-119(b)(2)(A), X and Y remain the children of E as well as the children of A and B. The result under the pre-2019 version of section 2-119(b), having to do with a stepparent adoption, is unclear for two reasons. First, its language referring only to “either genetic parent” and to “the other genetic parent” does not accommodate an adoptee who has more than two parents before an adoption. Second, the pre-2019 version does not address de facto parentage. In light of the direction of section 1-102 to construe liberally and apply the UPC “to promote its underlying purposes and policies,” a court might apply the pre-2019 version of section 2-119(b) to conclude that X and Y remain E’s children for purposes of intestate succession. This construction is made more likely given that the pre-2019 version of section 2-119(e) provides that a parent who establishes a parent-child relationship under the pre-2019 version of sections 2-120 and 2-121, having to do with assisted reproduction, should be “treated as a child’s genetic parent” for the purpose of section 2-119. The pre-2019 version’s inclusiveness regarding assisted reproduction might enable a court, reasoning by an analogy between parentage by assisted reproduction and de facto parentage, to interpret “genetic parent” to include a de facto parent.

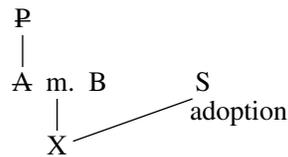
The second exception in subsection (b)(2) has to do with other intra-family adoptions. Under subsection (b)(2)(B), a child who is adopted by a relative of a parent before the adoption or by the spouse or surviving spouse of a relative of a parent before the adoption remains a child of each of the child’s parents before the adoption.⁹¹ The follow-

⁹⁰ See *supra* notes 46-48 and accompanying text.

⁹¹ Remarriage by a surviving spouse of a relative of a parent before the adoption should not affect the determination of whether the exception in section 2-119(b)(2)(B) applies. The policy of section 2-119(b) is to maintain parent-child relationships established before an adoption whenever the circumstances of an adoption indicate a likelihood that an adoption would not interfere with an adoptee’s ties with the family of a parent before the adoption. The adoption itself provides evidence that the surviving

ing examples illustrate its effect on the determination of heirs of an intestate decedent.

Example 30. A and B, a married couple with a four-year old child, X, were badly injured in an automobile accident and were no longer able to care for X. Thereafter, B's sibling S adopted X. The court did not terminate A's and B's parental rights to X. A and A's parent P then died intestate in that order.



Under subsection (b)(2)(B), X remains A's child and P's grandchild for purposes of intestate succession. The pre-2019 version of section 2-119(c) reaches the same result under these facts.

Example 31. Same facts as Example 30 except that X died intestate survived only by A, B, and S. Under section 2-118(a) and section 2-119(b)(2)(B), A, B, and S have the right to inherit from X because X was a child of A, B, and S. The pre-2019 version of section 2-119(c) reaches a different result: it does not allow A and B to inherit from X.

Example 32. Same facts as Example 30 except that the parental rights of A and B were terminated when S adopted X. Under section 2-119(b)(2)(B), the parent-child relationships between A and X and between B and X continue to exist. In accordance with section 2-114(c) and section 2-119(b)(2)(B), X remains A's child and P's grandchild, and X and X's descendants have the right to inherit from and through A and P. The pre-2019 version of sections 2-114 and 2-119 reaches these results. The addition in 2019 of subsection (c) to section 2-114 clarifies, but does not change, the pre-2019 result.

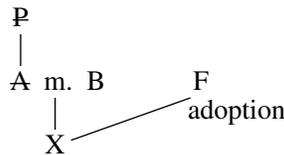
Example 33. Same facts as Example 32 except that X died intestate, survived only by A, B, and P. Under section 2-114(a)(1) and (b), A and B are not allowed to inherit from or through X and are deemed to have predeceased X. Under section 2-119(b)(2)(B), P remains X's grandparent and has the right to inherit from X. The pre-2019 version of section 2-119(c) reaches a different result: it does not allow P to inherit from X. Even though the pre-2019 UPC recognizes the parent-child relationship

spouse, notwithstanding remarriage, has remained a member of the family of the parent before the adoption. *Cf.* 2019 UPC § 2-711 (if a transferor makes a donative transfer to a "designated individual's 'heirs,'" providing a constructional rule that excludes the individual's spouse from the disposition if the spouse has remarried between the death of the individual and the time of the distribution).

between X and A, it allows only an adoptee and an adoptee's descendants to inherit from or through a parent before the adoption.

The third and final exception in subsection (b)(2) has to do with adoptions that occur after the death of a parent before the adoption.⁹² The pre-2019 UPC presumes that an adoptee had at most two parents before the adoption. It makes an exception to the “fresh start” general rule if “both” of those parents died.⁹³ Subsection (b)(2)(C) in the 2019 UPC requires that only one of the adoptee's parents before the adoption die. This exception provides that the parent-child relationships between an adoptee and each parent before the adoption continue to be recognized for purposes of intestate succession if a parent before the adoption predeceases the adoption. The following examples illustrate its effect on the determination of heirs of an intestate decedent.

Example 34. A and B, a married couple with a four-year old child, X, were badly injured in an automobile accident. A subsequently died. B, who remained seriously injured, was no longer able to care for X. Thereafter, B's close friend F adopted X. A's parent P then died intestate.



Under section 2-119(b)(2)(C), X remains P's grandchild and has the right to inherit from P. The pre-2019 version of this rule—in pre-2019 section 2-119(d)—does not apply because X's parent B is still alive. Therefore, the applicable rule is the “fresh start” of pre-2019 section 2-119(a): upon F's adoption, A and B are no longer parents of X, and P is no longer a grandparent of X.

Example 35. Same facts as Example 34 except that after F adopted X and before P died, B, F, and X died intestate in that order. At B's death, under section 2-119(b)(2)(C), X remains a child of B and has the right to inherit from B. At F's death, under section 2-118(a), X is a child

⁹² For purposes of 2019 UPC section 2-119(b)(2)(C), the term “death” means physical death. Section 2-119 of the 2019 UPC takes into account other provisions in Article II of the UPC that deem an individual to have died only in the determination of whether an individual is a “parent before the adjudication” or a “parent before the adoption.” See 2019 UPC § 2-119(a)(1)(B), (2)(B); *supra* note 77 (discussing a technical amendment under consideration by the Uniform Law Commission that would clarify that “death” means actual death, not “deemed” death).

⁹³ See PRE-2019 UPC § 2-119(d) (referring to an adoption “after the death of both genetic parents”).

of F and has the right to inherit from F. At X's death, under section 2-119(b)(2)(C), P remains X's grandparent and has the right to inherit from X. The results under the pre-2019 UPC are as follows. Pre-2019 section 2-119(d) does not apply to keep intact the parent-child relationship between B and X. Therefore, the applicable rule is the "fresh start" of pre-2019 section 2-119(a): X is not a child of B and is not allowed to inherit from B. The pre-2019 version of section 2-118(a) does allow X to inherit from F. Pre-2019 section 2-119(d) does not apply to keep the parent-child relationship intact between A and X. Therefore, the applicable rule is the "fresh start" of pre-2019 section 2-119: X is not a child of A, and, therefore, P is not allowed to inherit from X.

Part I's discussion of the order of priority of heirs in section 2-103 and this discussion of parent-child relationships demonstrate how both the priority of heirs and the determinations of parental status are crucial to the UPC achieving its aim to further the likely intention of an intestate decedent. Part III builds on Part II by extending the discussion of parent-child relationships beyond the law of intestate succession to rules of construction of class gifts in donative documents. Here too, likely donative intention remains the focus. Part III concentrates on the likely intention of transferors who make donative transfers, whether during life or at death.

III. CLASS GIFTS

Part II focused on the rules of intestate succession governing parent-child relationships. In accordance with UPC section 2-705, the same rules are the starting point for the construction of class gifts that use terms of relationship to identify class members.

These rules of construction are default rules, not mandatory rules. Section 2-701, which has not changed from the pre-2019 version of the UPC, provides in pertinent part that "[i]n the absence of a finding of contrary intention, the rules of construction in this [part] control the construction of a governing instrument."⁹⁴ This makes clear that the statutory provisions in Article II, Part 7, including section 2-705, establish default rules of construction. The 2019 version of section 2-705 primarily simplifies the rules of construction found in the pre-2019 version.

Subsection (b) sets forth the core rule of construction for both the 2019 and pre-2019 versions of section 2-705. As re-worded in 2019, subsection (b) provides: "Except as otherwise provided in subsections (c)

⁹⁴ 2019 UPC § 2-701. Unless otherwise stated, the examples in this Part assume, for ease of presentation, that each individual identified as having survived an event, including the death of another individual, lived the amount of time required by the governing instrument or by the default rules in section 2-702.

and (d), a class gift in a governing instrument which uses a term of relationship to identify the class members is construed in accordance with the rules for intestate succession.”⁹⁵

A major difference between the two versions of subsection (b) is that the pre-2019 version referenced only “the rules for intestate succession regarding *parent-child* relationships.”⁹⁶ In contrast, the 2019 version provides that a class gift that uses a *term of relationship* to identify its class members is to be “construed in accordance with the rules of intestate succession.”⁹⁷ By referencing all terms of relationship, not merely parent-child relationships, the 2019 version ensures, for example, that a class gift to a grantor’s descendants “and their spouses” is presumptively construed in accordance with section 2-102, which makes no distinction between spouses based on either spouse’s gender.⁹⁸ Section 2-705(b) also eliminates the need for the pre-2019 version of subsection (d), having to do with “half-blood relatives.” Subsection (b) of the 2019 version is sufficient to establish a rule of construction that, in accordance with the 2019 version of section 2-107, the identification of a class member—for example, in a class gift to “siblings”—is determined without regard to how many common ancestors in the same generation one class member shares with another.⁹⁹

The lengthy phrase “class gift in a governing instrument that uses a term of relationship to identify the class members” needs some further unpacking. The term “governing instrument” is defined broadly in section 1-201(18), which the 2019 amendments do not modify, to mean

a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.¹⁰⁰

Examples of class gifts using a term of relationship to identify the class members include class gifts to “spouses,” “children,” “grandchildren,”

⁹⁵ *Id.* § 2-705(b).

⁹⁶ PRE-2019 UPC § 2-705(b) (emphasis added).

⁹⁷ 2019 UPC § 2-705(b) (emphasis added).

⁹⁸ *See also id.* § 2-802 (excluding from the definition of a “surviving spouse” an individual who is divorced from a decedent or whose marriage to the decedent has been annulled and an individual who took certain specified actions that are inconsistent with being a surviving spouse).

⁹⁹ For further discussion of the 2019 revision of section 2-107, see *infra* notes 134-35 and accompanying text.

¹⁰⁰ 2019 UPC § 1-201(18).

finer to include a stepchild.¹⁰² Aside from the stylistic changes, the 2019 and pre-2019 versions set forth the same rule of construction. Section 14.10 of the Restatement adopts a similar constructional rule.¹⁰³

As section 2-705(c) and the Restatement recognize, circumstances surrounding the execution of a governing instrument containing a class gift may indicate that the transferor intended a relative by marriage to be included as a member of the class. A situation in which, at the time when the transferor executed the governing instrument, the class “was then and foreseeably would be empty”—to use the words of subsection (c)(1)—indicates a transferor’s intention to include a relative by marriage as a member of the class. The following example illustrates the constructional rule of subsection (c)(1).

Example 38. G devised property in trust, directing the trustee to pay the income in equal shares “to my children who are living on each income payment date and, on the death of my last surviving child, to distribute the trust property to my then-living descendants, by representation, or, if none, to X-Charity.” When G executed the will just before entering an assisted living facility, G had no children. G’s spouse, S, had four children. The children lived with G and S for many years, but G had not established a parent-child relationship with any of them by adoption or an adjudication of a claim of de facto parentage. In accordance with subsection (c)(1), the presumptive construction of the class gifts is that G intended G’s stepchildren to be included in the class gift to G’s “children” and that G intended the descendants of G’s stepchildren to be included in the class gift to G’s “descendants.” The presumptive inclusion of G’s stepchildren in a class gift to G’s “children” is sufficient to create a presumptive inclusion of the descendants of G’s stepchildren in a class gift to G’s “descendants.”¹⁰⁴ If instead, at the time G executed the will, G had living children, then, in the absence of a

¹⁰² As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment to the definition of “in-law” that would replace “a stepchild” with the more inclusive phrase “a step relative or a former step relative.”

¹⁰³ See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 14.10 (AM. L. INST. 2011).

¹⁰⁴ See *id.* § 14.10 illus. 1. If the only class gift in the governing instrument had been to “descendants” rather than including both a class gift to “children” and a class gift to “descendants,” the result should be the same. See *id.* § 14.10 illus. 2; see also the parenthetical preceding the text *supra* accompanying note 100 (describing a proposed technical amendment to the definition of “in-law”). If, instead, the class gift had been to “heirs,” the relevant UPC provision would be section 2-711, not section 2-705. Under section 2-711, a stepchild or a descendant of a stepchild could take as an heir under section 2-103(j). See 2019 UPC § 2-711 (construing “heirs” to mean “those persons, including the state, and in such shares as would succeed to the designated individual’s intestate estate under the intestate succession law of the designated individual’s domicile if the designated individual died when the disposition is to take effect in possession or enjoyment”).

finding of a contrary intention, G's stepchildren and the descendants of G's stepchildren would not share in the class gifts.

As indicated in subsection (c)(2), the class gift language or other circumstances surrounding the transferor's execution of a governing instrument may establish a presumptive intention to include a relative by marriage. Section 2-701 similarly provides that the rules in section 2-705 apply "[i]n the absence of a finding of a contrary intention."¹⁰⁵ Section 14.10 of the Restatement contains an extensive discussion of this topic.¹⁰⁶ The following example is intended to be illustrative.

Example 39. G devised half of G's estate to G's spouse, S, and half to G's "children." G had one child from a prior marriage. S had two children from a prior marriage. G did not establish a parent-child relationship with either of S's children by adoption or an adjudication of a claim of de facto parentage. G's relationship with G's stepchildren was close and G performed parental functions with respect to them. The use of the plural "children" indicates that G intended to include G's stepchildren in the class gift.

The second exception to section 2-705(b) is contained in section 2-705(d), which provides,

In construing a governing instrument of a transferor who is not a parent of an individual, the individual is not considered the child of the parent unless:

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

(2) the parent intended to perform functions under paragraph (1) but was prevented from doing so by death or another reason if the intent is proved by clear and convincing evidence.¹⁰⁷

¹⁰⁵ 2019 UPC § 2-701. Section 2-705(c)(2) makes clear that the exception in (c)(1) is not the only exception for relatives by marriage.

¹⁰⁶ See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 14.10 cmt. c-d.

¹⁰⁷ 2019 UPC § 2-705(d). As this article goes to press, we are proposing a technical amendment, for consideration by the Uniform Law Commission, that would add the words "a class gift in a" so that the opening clause reads, "In construing a class gift in a governing instrument"

The breadth of the persons who are treated as members of a parent's family under section 2-705(d)(1) indicates that remarriage, whether it occurs before or during the time a surviving spouse performs parental functions, should not disqualify the surviving spouse from being treated as a family member under this subsection. For purposes of the construction of a class gift in a governing instrument of a transferor who is not the child's parent, the fact that a surviving spouse performed parental functions should be sufficient

The rationale for subsection (d)(1) is that a transferor who is not a parent of an individual would not want the individual to be treated as a child of the parent for purposes of determining membership in a class gift unless the parent or a member of the parent's family had performed parental functions on behalf of the individual before the individual reached adulthood. Subsection (d)(1) makes no changes to the pre-2019 version of this constructional rule except that it eliminates the term "genetic parent" and defines parental functions in a different manner. Subsection (d)(2) was added in 2019 to establish a presumptive rule that an individual be treated as a child of a parent if clear and convincing evidence shows that the parent had intended to perform parental functions but was prevented from doing so. As part of its efforts to simplify section 2-705, the 2019 version does not include a separate provision to address adult adoptions. That issue, instead, is addressed within the more generalized language of subsection (d).

The phrase "performed functions customarily performed by a parent" is derived from the Restatement. Reporter's Note No. 5 to section 14.5 of the Restatement lists the following parental functions:

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

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

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

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

evidence to conclude that the transferor likely intended to have the child included as a member of the class gift notwithstanding that the surviving spouse may have remarried. For a similar discussion regarding remarriage of a surviving spouse, see *supra* note 91 (continuing the recognition of a parent-child relationship between a parent before the adoption and an adoptee when the adoption is by a relative's surviving spouse).

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

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

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

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

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

(g) providing moral and ethical guidance;

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

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

(a) providing economic support;

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

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

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

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.¹⁰⁸

The following examples illustrate the operation of subsection (d).

¹⁰⁸ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 14.5 Reporter's Note 5.

Example 40. G devised property in trust, directing the trustee to pay the income to G's child A for life, and at A's death to distribute the corpus to A's "descendants" who survive A, by representation. A had a child X by assisted reproduction. A had met all the requirements of section 2-120 and, therefore, subsection (b) presumptively includes X as a member of the class of "descendants." Before X reached age 18, A performed functions with respect to X that are customarily performed by a parent. In the absence of a finding of a contrary intention, X is a member of the class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

Example 41. G devised property in trust, directing the trustee to pay the income to G's child A for life, and at A's death to distribute the corpus to A's "descendants" who survive A, by representation. A became pregnant without the use of assisted reproduction, resulting in the birth of a child, X. Given section 2-117, subsection (b) presumptively includes X as a member of the class of "descendants." A did not perform, before X reached age 18, functions with respect to X that are customarily performed by a parent. A's sibling did perform such functions with respect to X before X reached age 18. In the absence of a finding of a contrary intention, X is a member of the class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

Example 42. Same facts as Example 41, except that X predeceased A, leaving two children who survived A. In the absence of a finding of a contrary intention, X's two children are members of the class of A's "descendants" who take the corpus of G's trust at A's death.

Example 43. G devised property in trust, directing the trustee to pay the income to G's child A for life, and at A's death to distribute the corpus to A's "descendants" who survive A, by representation. A adopted Y when Y was 25 years old.¹⁰⁹ Section 2-118(a) establishes a parent-child relationship between A and Y for purposes of intestate succession and, therefore, subsection (b) presumptively includes Y as a member of the class of A's "descendants." A's sibling performed parental functions with respect to Y before Y reached adulthood. In the absence of a finding of a contrary intention, Y is a member of the class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

Example 44. Same facts as Example 43, except that no one in A's family, including no spouse or surviving spouse of A and no spouse or surviving spouse of a relative of A, performed parental functions with

¹⁰⁹ For a discussion of adult adoption, see GALLANIS, *supra* note 68, at 101 (reporting that state law "generally permit[s] adoption of adults" but that, in the absence of a statute on point or clarifying language in the dispositive instrument, "courts have differed on whether to treat the adult as an adopted child" for purposes of a class gift).

respect to Y before Y reached adulthood. In the absence of a finding of a contrary intention, Y is not a member of the class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

A word is appropriate about how subsection (d) operates with respect to de facto parentage. Section 609(b)(1) of the 2017 UPA requires a proceeding to establish parentage of an individual to commence before the individual attains age 18.¹¹⁰ If a state has enacted the 2017 UPA, including this provision, subsection (d) assures that the parent-child relationship between an individual and the individual's de facto parent is recognized. This means that a child of a de facto parent or a descendant of the child presumptively is treated as a member of a class gift in a governing instrument by a transferor who is not the de facto parent. If, however, a state's applicable law allows for de facto parentage to be established after an individual has attained adulthood, subsection (d)(1) presumptively may not treat a child of a de facto parent or a descendant of the child to be a member of a class. The following examples demonstrate how the rule of construction set forth in subsection (d)(1) applies when a parent-child relationship is established through an adjudication of a claim of de facto parentage.

Example 45. G devised property in trust, directing the trustee to pay the income to G's child A for life, and at A's death to distribute the corpus to A's "descendants" who survive A, by representation. A established a parent-child relationship with X based on a claim of de facto parentage when X was 25 years old. Section 2-118(b) recognizes the parent-child relationship between A and X for purposes of intestate succession and, therefore, subsection (b) presumptively includes X as a member of the class of A's "descendants." A did not perform, before X reached age 18, functions that are customarily performed by a parent—nor did a relative of A or the spouse or surviving spouse of A or of A's relative perform such functions before X reached age 18. In the absence of a finding of a contrary intention, X is not a member of the class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

Example 46. Same facts as Example 45 except that A's sibling did perform parental functions until X reached the age of 18. In the absence of a finding of a contrary intention, X is a member of the class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

If a state has not enacted the 2017 UPA, including its provisions on de facto parentage, a legislative note to section 2-705 encourages states

¹¹⁰ 2017 UPA § 609(b)(1) (requiring the proceeding to commence "before the child attains 18 years of age").

to consider adding the following language as a new subsection to section 2-705:

A class gift in a governing instrument of a transferor who is not the de facto parent of an individual is not construed to treat the individual as the child of the de facto parent if:

- (1) the de facto parent opposed being adjudicated a parent; or
- (2) the de facto parent or the individual died before the proceeding to adjudicate parentage was commenced.¹¹¹

In the absence of a finding of a contrary intention, the suggested subsection is likely to further the intention of a transferor who is not the individual's de facto parent. The following examples demonstrate how the rule of construction in the legislative note would apply.

Example 47. G devised property in trust, directing the trustee to pay the income to G's child A for life, and at A's death to distribute the corpus to A's "descendants" who survive A, by representation. The trust is governed by the law of a jurisdiction that did not enact the 2017 UPA but did enact the 2019 UPC including the suggested language in the legislative note to section 2-705. A married S, who had a child X. A did not adopt or commence proceedings to adjudicate a claim of de facto parentage of X. Near the time that A and S divorced and when X was 10 years of age, S commenced proceedings, which A opposed, to adjudicate A as X's parent based on a claim of de facto parentage. A court held A to be X's parent. Section 2-118(b) recognizes the parent-child relationship between A and X for purposes of intestate succession and, therefore, subsection (b) presumptively includes X as a member of the class of A's "descendants." In accordance with the suggested language in the legislative note, and in the absence of a finding of a contrary intention, X is not a member of the class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

Example 48. Same facts as Example 47 except that A and S did not divorce and the adjudication of A as X's parent based on a claim of de facto parentage commenced after A's death. In contrast to 2017 UPA section 609(a)(1), which would require the proceeding to commence before A's death, the law of the jurisdiction permits the proceeding to commence after A's death. A court held A to be X's parent. Section 2-118(b) recognizes the parent-child relationship between A and X for purposes of intestate succession and, therefore, subsection (b) presumptively includes X as a member of the class of A's "descendants." In accordance with the suggested language in the legislative note, and in the absence of a finding of a contrary intention, X is not a member of the

¹¹¹ 2019 UPC § 2-705 Legislative Note.

class of A's "descendants" who, if they survive A, take the corpus of G's trust at A's death.

2. *Class-Closing Rules*

In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must *both* qualify as a class member under section 2-705(b), (c), and (d) *and* not be excluded by the rules of class closing that apply to class gifts. The class-closing rules are explained extensively in section 15.1 of the Restatement.¹¹² The focus of the discussion here is the class-closing rules contained in section 2-705(e). Aside from adding a provision pertaining to de facto parentage and amending language to conform to other 2019 amendments and avoid outdated or imprecise terms, the 2019 version of section 2-705(e) does not change the class-closing rules found in the pre-2019 version.

Subsection (e)(1) deals with a class closing that occurs during a gestational period. The term "gestational period" is defined in subsection (a)(4) by reference to section 2-104 to mean the time between the start of a pregnancy and birth.¹¹³ Subsection (e)(1) provides: "If a particular time is during a gestational period that results in the birth of an individual who lives at least 120 hours after birth, the individual is deemed to be living at that time."¹¹⁴ The following example demonstrates this well-established class-closing rule.

Example 49. G devised property to G's "children." When G executed the will, G had a child A. Subsequently, G arranged to have another child with the assistance of a surrogacy arrangement. G met the requirements in the 2017 UPA to establish a parent-child relationship¹¹⁵ which are incorporated by reference into section 2-121. During the pregnancy, G died, survived by A. A is included in the class gift to G's "children" under the standard common-law class-closing rules. The surrogate subsequently gave birth to B, who lived 120 hours after birth. Under subsection (b), which presumptively includes B as a member of the class of G's "children," and subsection (e)(1), which establishes a class-clos-

¹¹² RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 15.1.

¹¹³ 2019 UPC § 2-705(a)(4).

¹¹⁴ *Id.* § 2-705(e)(1). As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment to put the reference to "120 hours" in brackets. For the rationale, see *supra* note 64.

¹¹⁵ See, e.g., 2017 UPA § 817(a) (establishing a parent-child relationship between an intended parent and a child born through assisted reproduction with the assistance of a genetic surrogacy agreement when the intended parent dies during the gestational period).

ing rule that deems B as living at G's death, B is also included in the class gift.

Subsection (e)(3) embraces a similar class-closing rule for an individual who is in the process of being adopted. It provides that "[a]n individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted."¹¹⁶ An individual is "in the process of being adopted" if a legal proceeding to adopt the individual had been filed before the class closed. The phrase "in the process of being adopted" is not intended to be limited to the filing of a legal proceeding, but is intended to grant flexibility to find, on a case-by-case basis, that the process commenced earlier.

Subsection (e)(4) establishes a similar presumptive rule for an individual who is in the process of being adjudicated a child of a de facto parent. It provides that "[a]n individual who is in the process of being adjudicated a child of a de facto parent when the class closes is treated as a child of the de facto parent when the class closes, if the parentage is subsequently established."¹¹⁷ Subsection (e)(4) is intended to grant flexibility for a court to determine, based on the circumstances surrounding the determination of de facto parentage, when "the process of being adjudicated a child of a de facto parent" commenced.

The class-closing rule set forth in subsection (e)(2) has to do with a parent-child relationship established through assisted reproduction after the death of an individual's intended parent. It provides:

If the start of a pregnancy resulting in the birth of an individual occurs after the death of the individual's parent and the distribution date is the death of the parent, the individual is deemed to be living on the distribution date if [the person with the power to appoint or distribute among the class members received notice or had actual knowledge, not later than [6] months after the parent's death, of an intent to use genetic material in assisted reproduction and] the individual lives at least 120 hours after birth, and:

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

(B) the individual was born not later than [45] months after the deceased parent's death.¹¹⁸

¹¹⁶ 2019 UPC § 2-705(e)(3).

¹¹⁷ *Id.* § 2-705(e)(4).

¹¹⁸ 2019 UPC § 2-705(e)(2). As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment to put the reference to "120 hours" in brackets. For the rationale, see *supra* note 64.

Similar to the pre-2019 version of this subsection, the 2019 version responds to developments in assisted reproduction that make it possible for a pregnancy to start after the death of an intended parent. As previously discussed, in accordance with the intestate succession rules of sections 2-120 and 2-121, if an intended parent satisfies all other requirements to establish a parent-child relationship except that the pregnancy starts or a birth occurs beyond the UPA's prescribed time limits, the 2019 UPC recognizes a parent-child relationship between the intended parent and the individual if the individual lives at least 120 hours after birth.¹¹⁹

For purposes of the class-closing rules, subsection (e)(2) imposes time limits if the start of a pregnancy resulting in the birth of an individual occurs after the death of an intended parent *and* if the distribution date is the intended parent's death. In such a case, the individual is deemed to be living on the distribution date only if: (1) the individual lives at least 120 hours after birth, and (2) either (i) the embryo was in utero no later than 36 months after the intended parent's death or (ii) the individual was born no later than 45 months after the intended parent's death.¹²⁰ Bracketed language imposes an additional requirement that the person with the power to appoint or distribute the property receive notice or have actual knowledge within 6 months of the parent's death of an intention to use genetic material in assisted reproduction and thereby affect class membership.¹²¹ The 2019 UPC added this bracketed language, which is not contained in the pre-2019 version. Subsection (e)(2) does not apply if the distribution date is not the intended parent's death.

The following examples illustrate the class-closing rules when the start of a pregnancy resulting in the birth of an individual occurs after the intended parent's death. Each example assumes that the intended parent met all the requirements to establish a parent-child relationship in accordance with section 2-120 or 2-121 and that the individual lived at least 120 hours after birth. In other words, subsection (b) presumptively includes the individual as a member of the class, and the remaining question is whether the class-closing rule of subsection (e)(2) excludes the individual from the class gift.

Example 50. G devised "90 percent of my residuary estate to my spouse, S, if S survives me, and 10 percent of my residuary estate (or all of my residuary estate if S does not survive me) to my descendants who

¹¹⁹ See *supra* Part II.C; see also *supra* note 118.

¹²⁰ See 2019 UPC § 2-705(e)(2); see also *supra* notes 64-65 and accompanying text (explaining the reasoning for the 36-month and 45-month time limits and why the time limits are bracketed).

¹²¹ See 2019 UPC § 2-705(e)(2).

survive me, by representation.” G left genetic material to be used by S in assisted reproduction. S gave timely notice to G’s personal representative of S’s intent to use G’s genetic material in assisted reproduction. If either (1) the embryo was in utero within 36 months after G’s death or (2) the child was born within 45 months after G’s death, then, in accordance with subsection (e)(2), the child is deemed to be living at G’s death and, as G’s child, is included in the class of G’s “descendants” who share in G’s residuary estate. Even if the time requirements were not met, a parent-child relationship would exist between G and the child under the UPC.

Example 51. G’s parent devised property in trust, directing the trustee to pay the income to G for life, and at G’s death to distribute the corpus to G’s “then-living descendants, by representation.” When G’s parent died, G was married but had no children. G deposited genetic material to be used by G’s spouse, S, in assisted reproduction. S gave timely notice to the trustee of S’s intent to use G’s genetic material in assisted reproduction. If either (1) the embryo was in utero within 36 months after G’s death or (2) the child was born within 45 months after G’s death, then in accordance with subsection (e)(2), the child is deemed to be living at G’s death and, as G’s child, is included in the class of G’s “descendants” who, if they survive G, take the corpus of the trust at G’s death. Even if the time requirements were not met, a parent-child relationship would exist between G and the child under the UPC.

Example 52. Same facts as Example 51, except that when G’s parent died, G had two children, A and B. A then died, survived by A’s spouse, S. G then died, survived only by S and B. A had left genetic material to be used by S in assisted reproduction. S used the genetic material after G’s death. Even if S gave timely notice to the trustee of S’s intent to use G’s genetic material in assisted reproduction and (1) the embryo was in utero within 36 months after G’s death or (2) the child was born within 45 months after G’s death, the child is not deemed to be living at G’s death and thus is not included in the class of G’s “descendants” who take the corpus of the trust at G’s death. The reason is that subsection (e)(2) does not apply because the distribution date is G’s death, not A’s death. Even though the child is not included in this class gift, a parent-child relationship exists between A and the child under the UPC.

Subsection (e)(2) applies only if the pregnancy starts after the death of an intended parent *and* if the distribution date is the intended parent’s death. It does not apply if the distribution date is before or after the intended parent’s death, as illustrated in Example 52. As the discussion below explains, well-established class-closing rules—including sub-

section (e)(1), having to do with a distribution date occurring after the start of a pregnancy resulting in the birth of an individual—suffice.

A well-known case that reached the same result as is reached under section 2-705 is *In re Martin B.*¹²² In that case, the grantor, Martin B., executed in 1969 seven trust agreements, retaining an income interest for his lifetime. The trust agreements provided that, after the grantor's death, the trustees were given the power to distribute principal, from time to time, to and among Martin B's "issue" during the life of the grantor's surviving spouse, Abigail. The trust agreements contained additional dispositive provisions, triggered by Abigail's death, in favor of the grantor's "issue" or "descendants," depending on the trust document. The grantor died in 2001, predeceased by six months by his son, James, who died of Hodgkin's lymphoma. Before dying, James deposited genetic material for use in assisted reproduction by his wife, Nancy. Nancy used the material and gave birth to a son, James Mitchell, in October 2004 and to a second son, Warren, in August 2006. The court held that the two children qualify as members of the classes of "issue" and "descendants."¹²³

The 2019 UPC reaches the same result. A parent-child relationship between each of the two children and James is established under section 2-120, which incorporates by reference the 2017 UPA requirements except for the time limits it imposes. Section 2-705(b) in turn presumes the children's inclusion in the class gifts to "issue" and "descendants" because it incorporates by reference section 2-120. However, it is important to be clearer than the court was in *Martin B.* about *which* class gifts include James's children. The distributions of trust principal during Abigail's life, and then at Abigail's death, create a series of successive postponed class gifts.¹²⁴ For each distribution of trust principal, the class closes on that distribution date.¹²⁵ If a child is living on a distribution date, the common-law class-closing rules provide that the child is an eligible member of the class for that distribution.¹²⁶ If a distribution date

¹²² 841 N.Y.S.2d 207 (Sur. Ct. 2007).

¹²³ *Id.* at 210-12. The New York Estate Powers and Trusts Law overrules *Martin B.* to the extent that it limits membership in a class gift contained in a governing instrument by a transferor other than a parent to either a child born as a result of a pregnancy starting no later than 24 months after a parent's death or a child born no later than 33 months after a parent's death. It applies to wills of persons dying on or after September 1, 2014, to lifetime instruments executed before that date that are revocable or amendable by the transferor, and to all other lifetime instruments executed on or after September 1, 2014. The statutory provision establishes a rule of construction and not a rule of law. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(b)(4), (f) (McKinney 2021).

¹²⁴ See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 15.1 cmt. q. (AM. L. INST. 2011).

¹²⁵ *Id.*

¹²⁶ *Id.*

occurs during a gestational period, section 2-705(e)(1) provides that the child is an eligible member of the class for that distribution if the child lives at least 120 hours after birth.¹²⁷ With respect to a distribution date before the start of a pregnancy resulting in the birth of a child of the intended parent, the child is not a member of the class for that distribution. Thus, for example, with respect to a distribution of trust principal on January 1, 2005, James Mitchell is an eligible member of the class but Warren is not.

Martin B. illustrates why the time limits in sections 708(b)(2), 810(b)(2), and 817(b)(2) of the 2017 UPA are inappropriate in the construction of class gifts.¹²⁸ The examples that follow further demonstrate why these time limits undermine likely donative intention.

Example 53. G established a revocable trust, directing the trustee to pay the income to G for life, and at G's death "to pay the income to my spouse, S, for life, then to distribute the trust principal by representation to my descendants who survive S." When G died, G and S had no children. Shortly before G's death, G preserved genetic material at a fertility clinic. After G's death, S decided to become pregnant using G's genetic material. G's child X was born five years after G's death. X survived S. At S's death, X is entitled to receive the trust principal because (1) X was living on the distribution date; (2) in accordance with section 2-120, the requirements for a parent-child relationship between G and X were satisfied except for the time limits in section 708(b)(2) of the 2017 UPA; and (3) section 2-705(b) incorporates by reference the rules for intestate succession, including section 2-120, to determine class membership. Section 2-705(b)'s rule of construction for class gifts that use a term of relationship and the common-law class-closing rules operate together to treat X as a member of the class. Section 2-705(e) has no role to play in the construction of G's class gift to "my descendants."

Example 54. G's parent devised property in trust, directing the trustee to pay the income to G for life, and at G's death authorizing the trustee to pay the income to G's "descendants from time to time living," and then, at the death of G's last surviving child, directing the trustee to distribute the trust principal by representation to G's "descendants" who survive G's last surviving child. When the grantor died, G was married but had no children. Shortly before G's death, G preserved genetic material at a fertility clinic. After G's death, G's spouse, S, gave timely notice to the trustee of S's intent to use G's genetic material in assisted

¹²⁷ 2019 UPC § 2-705(e)(1); see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 15.1 cmt. q.

¹²⁸ See also *supra* Examples 23-25 and accompanying text (making a similar argument for pregnancies by assisted reproduction started after the death of a parent for purposes of intestate succession and the application of section 2-104).

reproduction. If the child lives 120 hours after birth and satisfies the time-limits in section 2-705(e)(2)—either the embryo was in utero within 36 months after G’s death or the child was born within 45 months after G’s death—the child is treated as living at G’s death and is presumptively included in a class gift of income for which the distribution date is G’s death. With respect to subsequent payments of income, subsection (e)(2) does not apply. Instead, the ordinary class-closing rules apply. The income interest constitutes a series of successive postponed class gifts.¹²⁹ The child is a member of the class for distribution dates on which the child is alive. If S later decides to become pregnant one or more times using G’s genetic material resulting in the birth of another child or children, those children would be included or excluded from the class gift of each income payment based on ordinary class-closing rules. The same would be true for any descendant of G born or in gestation between G’s death and the death of G’s last surviving child. With respect to the remainder interest that takes effect in possession on the death of G’s last surviving child, the then-living descendants of G’s children would take the trust principal. Subsection (e)(2) may apply to determine membership in the class gift to “G’s descendants who survive G’s last surviving child” if (1) timely notice is given to the trustee of an intent to use the genetic material of G’s last surviving child, (2) G’s last surviving child is the intended parent of an individual who is born through assisted reproduction within the prescribed time limits, and (3) the individual lives 120 hours after birth.

Example 55. G’s parent devised property in trust, directing the trustee to pay the income to “my spouse, S, for life” and at S’s death to distribute the trust corpus “by representation to G’s descendants who survive S.” G, facing impending death, deposited genetic material in a medical facility. Five years after G died, G’s surviving spouse, A, used G’s genetic material to start a pregnancy. During the pregnancy, S died. Three months after S’s death, A gave birth to M, who lived at least 120 hours after birth. Subsection (e)(1) provides that M is deemed to be alive at the distribution date, which is the death of S, because the distribution date occurred during the gestational period resulting in the birth of M. The class-closing rule of (e)(1), along with the constructional rule of subsection (b), means that M is presumptively entitled to share in the corpus of the trust as one of G’s “descendants.”

A final point about probate and trust administration is necessary. The use of genetic material after the death of an intended parent raises potential difficulties for a personal representative or a trustee when making distributions of property. The 2019 UPC amendments added

¹²⁹ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 15.1 cmt. p.

section 3-703(d), which provides: “A personal representative may not be surcharged for a distribution that does not take into consideration the possibility of posthumous pregnancy unless the personal representative[, not later than [6] months after the decedent’s death,] received notice or had actual knowledge of an intent to use genetic material in assisted reproduction.”¹³⁰ Section 2-705(e)(2) includes a bracketed requirement that a child born as a result of a pregnancy starting after an intended parent’s death is included in a class gift only if timely notice is received, by a person with the power to appoint or distribute among the class members, of an intention to use genetic material in assisted reproduction or, in the alternative, if the person has actual knowledge of the intention to use genetic material in assisted reproduction.¹³¹ The 2019 UPC, in the legislative note to section 2-705, also encourages state legislatures to consider requiring a fiduciary when notifying beneficiaries of the fiduciary’s appointment to inquire whether a beneficiary has knowledge of an intent to use genetic material in assisted reproduction and to indicate that a beneficiary who has such information must give written notice to the fiduciary within a designated time.¹³²

With the incorporation of the rules of succession into section 2-705(b), the rules of construction for class gifts reflect the revisions within the 2017 UPA, which assure gender neutrality in the establishment of parent-child relationships, recognize that a child may have more than two parents, codify the doctrine of de facto parentage, and clarify and improve the law as it relates to parent-child relationships established through assisted reproduction. The re-writing of section 2-705(b) also allows for the elimination of some subsections and the simplification of others.

Section 2-705’s rules of construction have special significance because of the important role in donative documents played by class gifts that use a term of relationship to identify a class member. Section 2-705’s determination of class membership establishes who presumptively shares as a devisee or beneficiary based on familial ties. In that regard, class membership, like heirship, influences the meaning of family legally and culturally.

IV. OTHER 2019 AMENDMENTS

This Part briefly explains the remaining 2019 UPC amendments not otherwise discussed in the preceding Parts of the article. Broadly speaking, these remaining amendments have four objectives: (1) to remove

¹³⁰ 2019 UPC § 3-703(d).

¹³¹ *See id.* § 2-705(e)(2).

¹³² *See id.* § 2-705 Legislative Note.

outdated, inaccurate, or imprecise terminology; (2) to work equally well regardless of the number of parents a child may have; (3) to improve or clarify the statutory language; and (4) to make, along with the efforts of others, the UPC gender neutral.

As discussed in earlier parts of the article, one objective of the remaining 2019 UPC amendments is to remove outdated, inaccurate, or imprecise terminology.¹³³ For example, the pre-2019 UPC uses terms such as “blood” or “genetics” to denote familial relationships; these terms fail to include parent-child relationships established by de facto parentage, adoption, or assisted reproduction. The pre-2019 version of section 2-107 said, “Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.”¹³⁴ As revised in 2019, this section provides: “An heir inherits without regard to how many common ancestors in the same generation the heir shares with the decedent.”¹³⁵ The pre-2019 version of section 2-117 uses the term “genetic.” It provides that “a parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.”¹³⁶ The 2019 amendments replace this with language drawn verbatim from section 202 of the 2017 UPA: “A parent-child relationship extends equally to every child and parent, regardless of the marital status of the parent.”¹³⁷ Additional instances of imprecise terminology appear in the pre-2019 UPC when it refers to an “individual” or “child” before birth. For example, the pre-2019 version of section 2-104(a)(2) refers to an “individual in gestation,”¹³⁸ and the pre-2019 version of section 2-705(g)(1) refers to a “child in utero.”¹³⁹ The 2019 versions of these provisions, re-lettered as 2-104(b)(2) and 2-705(e)(1) respectively, refer to “a gestational period that results in the birth of an individual.”¹⁴⁰

A second objective is to assure that the provisions achieve their respective goals regardless of the number of parents a child may have. For example, the pre-2019 version of section 2-113 provides that “[a]n individual who is related to the decedent through two lines of relationship is entitled only to a single share based on the relationship that

¹³³ See, e.g., *supra* Introduction, Part I.

¹³⁴ PRE-2019 UPC § 2-107.

¹³⁵ 2019 UPC § 2-107. The substitution of the term “heir” rather than “relatives” in the 2019 version of section 2-107 also serves to clarify that this section applies only after takers of an intestate decedent’s estate are determined in accordance with section 2-103. See 2019 UPC § 2-103.

¹³⁶ PRE-2019 UPC § 2-117.

¹³⁷ 2019 UPC § 2-117; 2017 UPA § 202.

¹³⁸ PRE-2019 UPC § 2-104(a)(2).

¹³⁹ *Id.* § 2-705(g)(1).

¹⁴⁰ 2019 UPC §§ 2-104(b)(2), 2-705(e)(1).

would entitle the individual to a larger share.”¹⁴¹ As revised in 2019, this section provides that “[a]n individual who is related to a decedent through more than one line of relationship is entitled to only a single share based on the relationship that would entitle the individual to the largest share.”¹⁴²

A third objective is to improve or clarify the statutory language. Three examples will suffice. As part of the revision of section 2-113 to remove the reference to “two lines of relationship,” the following sentence was added: “The individual and the individual’s descendants are deemed to have predeceased the decedent with respect to a line of relationship resulting in a smaller share.”¹⁴³ It clarifies, for the first time, the consequences under the UPC of an individual not taking under a line of relationship. A second example is section 2-106, which defines the per-capita-at-each-generation system of representation. This section was unchanged in substance but was re-written to clarify how the representational system applies to each category of heirs. A third (collective) example is the 2019 version of sections 1-201(51), 2-103(a)(1), 2-106(a)(1), and 2-119(a)(1) and (a)(2). These refer to an individual being deemed by one or more other UPC sections to have predeceased. Rather than attempting to identify those sections individually, as is sometimes done in the pre-2019 version of the UPC,¹⁴⁴ the 2019 UPC uses the comprehensive phrase “deemed under this [article]” to have predeceased.¹⁴⁵

The fourth and final objective of the remaining 2019 UPC amendments is to assist in making all provisions of the UPC gender neutral. As we were drafting the 2019 UPC amendments, Professor David English was leading a separate project to identify and remove gendered UPC language. Our 2019 UPC amendments assisted this project by removing gendered language from sections 2-101, 2-109, 2-201, 2-302, 2-802, 2-803, 2-804, and 3-703.

¹⁴¹ PRE-2019 UPC § 2-113. For a discussion of a proposed technical amendment to section 2-113, see *infra* note 142.

¹⁴² PRE-2019 UPC § 2-113. As this article goes to press, we are proposing, for consideration by the Uniform Law Commission, a technical amendment that would clarify section 2-113 by re-wording it to read, “An individual who is related to a decedent through more than one line of relationship is entitled to only a single share. If the shares are unequal, the individual is entitled to the largest share. The individual and the individual’s descendants are deemed to have predeceased the decedent with respect to the other line or lines of relationship.”

¹⁴³ 2019 UPC § 2-113.

¹⁴⁴ See, e.g., PRE-2019 UPC § 1-201(51).

¹⁴⁵ See 2019 UPC §§ 1-201(51), 2-103(a)(1), 2-106(a)(1), 2-119(a)(1)-(2). For a discussion of proposed technical amendments to section 2-119(a)(1) and (a)(2), see also *supra* notes 58 and 77 (deleting the references to “deemed” death).

CONCLUSION

Law and society inextricably link family and wealth transmission. An individual's right to inherit from an intestate decedent depends on whether the individual has a legally recognized familial relationship to the decedent. Similarly, when a class gift in a donative document uses a term of relationship to identify the class members, an individual's right to share in the gift depends on the legal recognition of the relationship. The enactment of the 2017 UPA therefore required a revision of the UPC.

The 2019 UPC accommodates the 2017 UPA's innovations, including the codification of the doctrine of *de facto* parentage and the optional statutory provision authorizing a court to hold that a child has more than two parents. In addition, the 2019 UPC largely relies on the 2017 UPA's revisions of the rules regarding parentage by assisted reproduction. Both the 2019 UPC and the 2017 UPA also assure the equal treatment of children born to same-sex couples. As part of that effort, the 2019 revisions use only gender-neutral language. The 2019 UPC also treats all parent-child relationships alike by avoiding any inference that one manner by which an individual establishes parentage is more "conventional" or "normal" than another. Further, it eliminates outdated or inaccurate terms, such as a "blood" relatives or a "genetic" parent. The two uniform laws together are designed to support the transformation of U.S. families.

With the 2017 UPA as an impetus for a revision, the 2019 UPC builds upon the pre-2019 UPC's consideration of blended families in its determination of the intestate share passing to a surviving spouse. The 2019 UPC now accounts for blended families in section 2-103's determination of intestate shares for heirs other than a surviving spouse. That advance, as well as the revisions recognizing that a decedent or a decedent's parent could have more than two parents, led to the incorporation of the *per capita* at each generation system of representation throughout the section. This change assures that ordinarily (1) surviving descendants of a deceased family member in a higher generation are heirs even if a member of that higher generation survives; (2) heirs in a generation closer to the decedent are favored compared to heirs in a more remote generation; and (3) heirs in a given generation are treated equally.

The order of priority for heirs other than a surviving spouse and the determination of parental status are crucial to the UPC's achieving its goal to advance the likely intention of an intestate decedent. Likely donative intention also is the focus of the revisions to section 2-705, having to do with rules of construction for class gifts. Instead of a focus on the probable donative intention of an intestate decedent, these revisions

concentrate on the likely intention of the individuals who make lifetime or deathtime donative transfers. Section 2-705's rules of construction have special significance because of the important role in governing instruments of class gifts that use a term of relationship to identify the class members. Section 2-705's determination of class membership establishes who presumptively shares as a devisee or beneficiary based on familial ties. In that regard, class membership, like heirship, influences the meaning of family legally and culturally.

This article has had three objectives. One is to describe each of the 2019 revisions to the UPC. A second is to explain how the statutory changes promote the UPC's purposes and policies. A third is to encourage bar associations and legislative committees in each state to consider in tandem the 2017 UPA and 2019 UPC. The 2017 UPA provides the framework within which the UPC meets the wealth transfer needs of modern families. The 2019 UPC, in turn, supplements the 2017 UPA by determining inheritance rights and rules of construction based, in large part, on the UPA's requirements for the establishment of parent-child relationships. The enactment of the 2017 UPA and the 2019 UPC, together, furthers a state's obligation to provide clarity regarding parent-child relationships and to effectuate the lifetime and deathtime donative intent of its residents. Given the interstate mobility of state residents and their families, we encourage states across the U.S. to enact these uniform provisions.

**CBA TRUST AND ESTATE SECTION
STATUTORY REVISIONS COMMITTEE
MINUTES**

November 3, 2021

1. Introductions

Chair, Dylan Metzner, called the meeting to order at 1:31 pm.

New Member: Samuel Astorga - 2L at CU Boulder who has an interest in estate planning

We are still meeting via Zoom, there is an option to meet in person or virtual for the remainder of 2021. Please participate however you feel most comfortable. Dylan and Jonathan will plan to be here in person.

2. Approval of October 6, 2021 Minutes

3. Announcements

a. *Email List.* If you did not receive the SRC materials in an email from Katie then you are not on the SRC email list. Email Jonathan (JHaskell@wadeash.com.) and he'll add you to the email list.

4. Legislative Report

Andy reported that the legislature is getting ready for January meeting. The greatest interest is reapportionment that were submitted to Supreme Court last month. If the current proposal is approved by the Supreme Court then the belief is that the Democratic Party will control both House and Senate for the next few years. The Supreme Court has ability to review and request reapportionment; maps must be completed by December 19. January 12 convening date for legislature. LPC meets weekly beginning in January.

5. SRC Approved Proposals

a. **Active Matters**

- (i) **Disclosure of Fiduciary Fees, §§ 15-10-602 and 15-12-705, C.R.S. (approved in 2015-2016) (Gordon Williams);**
Probate Trial and Procedure has no objections. Information of Appointment form needs to be updated by Supreme Court. Dylan will coordinate with Ms. Connie Eyster on the form.
- (ii) **Amendment to Visitor Reporting Statute, C.R.S. § 15-14-113.5 (Gordon Williams);**

Report from Chair and Co-Chair's call with elder Law

Dylan Metzner and Jonathan Haskell met with Chris Zumalt (Chair of Elder Law Section) and Rose Zapor (SRC/Elder Law liaison) to discuss possible amendments to this statute. Elder Law oppose the proposed language. Under the current statute, a court visitor is only appointed at the beginning and their fees are capped at \$575 and they can be a non-lawyer. Elder law believes that a GAL is more equipped to investigate issues Per Elder Law, a GAL has access to more information than a court appointed visitor – police reports, mental health reports, etc.

Tabled until next month.

(iii) Amendment to Personal Representative Priority Statute, C.R.S. § 15-12-203(4) to include Agent under power of attorney who is granted “hot power” to remove and appoint fiduciaries (Gordon Williams);

Report from Chair and Co-Chair's call with Elder Law

Proposed language: 15-12-203(4.5) An agent who is authorized under a financial power of attorney to nominate a fiduciary in accordance with 15-14-724(1)(g)(ii), C.R.S., may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the principal would have if qualified for appointment.

Chris Zumalt and Rose Zapor met with Dylan Metzner and Jonathan Haskell on this last month. Example Scenario – surviving parent dies intestate; sole heir is child; that child would have priority to act as PR. If sole heir is incapacitated, and a conservator for the sole heir has been appointed, the conservator can appoint PR. But under current statute, if that heir had a financial power of attorney had the hot power to remove and appoint fiduciaries the agent under the power of attorney would not the ability to appoint or remove a PR – the amendment fixes this.

Proposed language was discussed with Elder Law and they have no objections.

Mr. Metzner read language and asked for any questions. Mr. Williams gave real life scenarios where this occurred and had to go through formal probate.

Ms. Heller moved to approve; 2nd by Mr. Williams. Mr. Kent brought up issue of whether a conservator and agent under power of attorney could potentially get into a conflict. He proposed may creating an order of priority 1. conservator; if none, 2. agent under power of attorney.

Tabled until next month but below is the likely language to be approved in December:

Proposed language: 15-12-203(4.5) If no conservator or guardian is acting, then an agent who is authorized under a financial power of attorney to nominate a fiduciary in accordance with 15-14-724(1)(g)(ii), C.R.S., may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the principal would have if qualified for appointment.

Tabled for discussion next month; Mr. Williams will research issue. Mr. Metzner will send to Elder Law for approval.

(iv) Common Law Marriage (Leia Ursery);

No update. Move to inactive matters.

(v) Lodged Wills- Investigate issues with lodging wills and the return of lodged wills. (Bette Heller)

Ms. Heller and Ms. McMinimee met with State Judicial. Reports that some district courts were not accepting lodged wills and some courts are returning Wills before probate has been closed. The position of State Judicial is that they will accept lodged Wills but not for safekeeping during lifetime (“deposited will”) so issue is no longer a concern. The issue is some courts are returning them and not giving any instruction as to whether to retain Will for some time period. Best Business Practice – “BBP”

CRCP 121(7) which states that the filer is required to hold onto original for 2 years and original must be lodged with the Court. BBP states to the courts that if there is no probate they should keep for 3 years after DOD; or if there is a probate opened then it should be held until probate is over. Ms. Heller would like this to be a requirement and not a recommendation.

Suggestion is to consider revising 0C.R.S.15-10-305(2) to include the BBP – 3 years if no probate; if probate then until it closes. Judicial does not think there would be pushback and no fiscal note related to this proposal because it is already being recommended. Judicial will review our proposed language.

Mr. Zuspahn question - what do we do with Wills that have been returned? If returned after probate is ended no need to keep according to Ms. Heller. Court will have an electronic copy.

Motion was made for Lodged Wills Committee to begin working on language to make the BBP statutory law. No objections; No abstentions; Motion passes unanimously.

b. Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons

(i) Colorado Electronic Preservation of Abandoned Estate Planning Documents Act Subcommittee (Pete Bullard, Chair)ⁱ

- a. The language that SRC approved was much broader (7 categories of estate planning documents) than the State Court Administrator was able to achieve (one category-Wills). Essentially the State Court Administrator created a pilot program which will be implemented on January 1, 2023 (when funding comes in) and the pilot program will only deal with Wills.
- b. This matter will remain on Inactive Matters until the pilot program is complete so that SRC can readdress whether to attempt to reincorporate the broader definition and whether the 6 other categories should be restored to the Act by amendment.
- c. See Attachment to Agenda for an Email from Frank Hill to Dylan Metzner et al. providing an overview of some important milestones in the history of CEPAPDA.

6. Unapproved Matters under Consideration by SRC - Reports from Subcommittees

a. ADR Legislation (C. Jean Stewart, Chair)

Ms. Heller reported that Orange Book is working on drop in language that could be put into any trust/will that requires ADR. This language, and even a CLE may occur about this language. This will be taken off of agenda for December.

b. Child Support in Probate Subcommittee (Pat Mellen, Chair)

No report.

c. Uniform Probate Code (UPC) 2019 Revisions (Bette Heller and Darla Daniels, Co-Chairs)

Ms. Daniels reported that the subcommittee has completed its work which was distributed to SRC on November 2, 2021. Goal is to review this language in November and vote within SRC at the December meeting. Goal is to modernize code, remove gender references, account for blended families, children from artificial reproductive technology.

Ms. Daniel and her committee propose changes to 15-11-107, 15-11-113, 15-11-103, and 15-11-106. It should be noted that the Uniform Parentage Act of 2017 has not been adopted in Colorado. Family Law Section is on board with the proposed changes and not modifying parent child relationships. These proposed revisions do not affect the Family Law Section.

d. Family Allowance (Michael Kirtland, Chair)

No Report; Mr. Williams mentioned this may have to deal with a current appeal; Court disapproved a family allowance for a surviving spouse who did not have

minor children. Mr. Williams will update Mr. Metzner if/when Court of Appeals rules on this issue.

7. **Inactive Matters**

8. **Report from Elder Law Section**

No Report.

9. **Report from Other Sections of the Bar**

No Report.

10. **New Matters**

a. **Beneficiary Deeds Statute Update re Named Insureds for Casualty Coverage (Carl Stevens)**

Deals with an unpublished case out of Minnesota. Mr. Stevens has approached the business law section, real estate section, and elder law. Mr. Stevens is soliciting members for virtual zoom subcommittee meetings. Mr. Stevens will report back sometime in late winter/spring of 2022.

b. **Disposition of Community Property Rights at Death Act (Connie Eyster)**

Reach out to Ms. Eyster if you want to join subcommittee.

c. **Uniform Cohabitants Economic Remedies Act (Connie Eyster)**

Reach out to Ms. Eyster if you want to join subcommittee.

11. **Passed Proposals for Inclusion in Omnibus Bill or Stand Alone Legislation**

ⁱ Judicial (State Court Administrator) would only agree to become the sponsoring agency of this legislation if the seven separate categories under the definition of “original estate planning document” was pared down to the single category of “will documents.” This was insisted upon to minimize the size of the “pilot program” Judicial envisioned would be needed to initially implement the legislation in partnership with (and utilizing the technological resources of) the Colorado State Archives office. Once Judicial has completed it’s pilot program and the electronic document upload, storage, and retrieval system for “will documents” is operating as intended under the statute, the other six categories of “original estate planning documents” as they appear in § 15-23-103(14) in HB19-1229 as originally introduced on March 8, 2019 should be restored to the Act by amendment. See <https://leg.colorado.gov/bills/hb19-1229>.

UPC 2019 REVISIONS – SUMMARY TABLE

Recommendations of UPC 2019 Revisions Subcommittee

The Colorado UPC Revisions Subcommittee has completed its review of the 2019 revisions to the Uniform Probate Code as promulgated by the Uniform Law Commissioners.

The Summary Table which follows contains each of the revisions recommended by the subcommittee for adoption in Colorado.

1. The first category of recommended revisions in the Table are those which remove outdated terminology from the code in favor of more modern language, including the removal of gender-specific references to “his” or “her.” Most of the subcommittee’s recommended revisions to the Colorado Probate Code fall into this category. A short description of each revision is shown below:
 - a. C.R.S. § 15-11-101(b): changes “his or her” to THE in the last sentence.
 - b. C.R.S. § 15-11-109(1): changes “his or her” to THE in the first sentence.
 - c. C.R.S. § 15-11-201(7): removes “his or her” and uses gender-neutral language instead.
 - d. C.R.S. § 15-11-201(c): removes “himself or herself” and uses gender-neutral language instead.
 - e. C.R.S. § 15-11-302: rewords this section to modernize its terminology and remove reference to “his or her.”
 - f. C.R.S. § 15-11-802: removes “he or she” and “husband and wife” and uses gender-neutral language instead.
 - g. C.R.S. § 15-11-803: removes “himself or herself” and “his or her” and uses gender-neutral language instead.
 - h. C.R.S. § 15-11-804: removes “husband and wife” and “his or her” and uses gender-neutral language instead.
 - i. C.R.S. § 15-12-703: rewords this section to modernize its terminology and remove references to gender-specific terms.

2. The second category of recommended revisions in the Table are those which remove outdated terminology (such as “relatives of half-blood”) and also recognize the modern possibility that a child may have more than two parents (such as a stepparent adopting a stepchild), and thus, more than two sets of grandparents.
 - a. C.R.S. § 15-11-107: ~~Kindred of half blood~~ INHERITANCE WITHOUT REGARD TO NUMBER OF COMMON ANCESTORS IN SAME GENERATION.
~~Relatives of half blood inherit the same share they would inherit if they were of whole blood.~~ AN HEIR INHERITS WITHOUT REGARD TO HOW MANY COMMON ANCESTORS IN THE SAME GENERATION THE HEIR SHARES WITH THE DECEDENT.
 - b. C.R.S. § 15-11-113: INDIVIDUAL RELATED TO DECEDENT THROUGH ~~TWO BLOOD LINES~~ MORE THAN ONE LINE

An individual who is related to the decedent through ~~two blood lines~~ MORE THAN ONE LINE of relationship is entitled to only a single share based upon the relationship which would entitle the individual to the ~~larger~~ LARGEST share. THE INDIVIDUAL AND THE INDIVIDUAL'S DESCENDANTS ARE DEEMED TO HAVE PREDECEASED THE DECEDENT WITH RESPECT TO A LINE OF RELATIONSHIP RESULTING IN A SMALLER SHARE.

3. The third category of recommended revisions in the Table are substantive revisions necessary to modernize the probate code, but which do not depend upon terms and concepts in the Uniform Parentage Act of 2017, which Colorado has not adopted.

The third category includes two revisions:

- a. C.R.S. § 15-11-103: Paragraph (2) is unchanged; the remainder of this statute is all new. The purpose of this revision is to take blended families into account with respect to the intestate shares of heirs other than the surviving spouse. Part I of the ACTEC Law Journal article (pages 132 – 141) explains the revisions to UPC 2-103 in detail, with helpful diagrams. We have included a comparison of existing 15-11-103 with revised UPC 2-103, for reference. The order of priority for heirs other than the decedent's surviving spouse or designated beneficiary under the revised 15-11-103 is:

- i. To decedent's surviving descendants, per capita at each generation.¹
- ii. If decedent is not survived by any descendants but is survived by one or more parents, there is a three-step procedure (see diagrams - Examples 4 and 5 in the ACTEC article at page 134-5):

Divide the intestate estate or part into as many equal shares as there are

Surviving parents, and

Deceased parents with one or more surviving descendants.

One share goes to each surviving parent.

The balance goes to the surviving descendants of the decedent's deceased parents, per capita at each generation.

- iii. If decedent is not survived by a descendant, parent or descendant of a parent, but is survived by one or more grandparents, there is a three-step procedure (see diagrams – Example 6 in the ACTEC article at page 135-6):

¹ Note: Under the Uniform Probate Code, the term "by representation" means the same as "per capita at each generation." The Colorado Probate Code did not adopt this uniform usage.

Divide the intestate estate or part into as many equal shares as there are

Surviving grandparents, and

Deceased grandparents with one or more surviving descendants.

One share goes to each surviving grandparent.

The balance goes to the surviving descendants of the decedent's deceased grandparents, per capita at each generation.

- iv. If decedent is not survived by a descendant, parent, descendant of a parent, or grandparent, the intestate estate or part goes to the surviving descendants of the decedent's deceased grandparents, per capita at each generation. See Example 7 in the ACTEC article at page 136-7.
- v. The Colorado subcommittee voted not to adopt the final proposed revision to 15-11-103, which would make a surviving descendant of a decedent's deceased spouse (i.e., a stepchild) an intestate heir prior to escheat.

- b. C.R.S. § 15-11-106: Paragraphs (1) and (2) contain simple changes in wording. Paragraphs (3) through (6) are all new. The revisions to 106 are required so that the "deemed to have predeceased" language in new 15-11-103 and new 15-11-113 work properly.

The Colorado subcommittee voted not to adopt the final proposed revision to 15-11-106 for the same reason it did not adopt the final proposed revision to 15-11-103.

- 4. The fourth category of 2019 revisions to the UPC recommended by the Uniform Law Commissioners are those which depend upon terms and concepts in the 2017 Uniform Parentage Act (UPA). Colorado has not adopted this act.

The Colorado subcommittee studied these revisions but voted not to adopt them. Accordingly, the subcommittee recommends that Colorado **not** adopt the UPC's proposed revisions to the following:

- a. C.R.S. § 15-10-201 - Definitions
- b. C.R.S. § 15-11-104 – Survival by 120 hours
- c. C.R.S. §§ 15-11-115 through 15-11-122 – Parent-Child Relationship statutes
- d. C.R.S. § 15-11-705 – Class Gifts

Summary Table Key:

lowercase = existing unchanged C.R.S. language

~~struck through~~ = deleted text

UPPERCASE = new uniform language

UPPERCASE & UNDERLINED = changes to uniform language that are necessary to conform to existing Colorado statutes

UPC Proposed Revision	CO UPC Subcommittee Recommendation
<p>UPC ARTICLE I, PART 2</p> <p>1-201. GENERAL DEFINITIONS</p> <p>“Child”</p> <p>“Parent”</p> <p>“Survive”</p>	<p>CPC ARTICLE 10, PART 2</p> <p>15-10-201</p> <p>Do not adopt</p> <p>Do not adopt</p> <p>Do not adopt</p>
<p>UPC ARTICLE II, PART 1</p> <p>2-101. INTESTATE ESTATE</p>	<p>CPC ARTICLE 11, SUBPART 1</p> <p>Revisions approved:</p> <p>15-11-101(b)</p> <p>(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her THE intestate share.</p>
<p>2-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE</p>	<p>15-11-103. Share of heirs other than surviving spouse and designated beneficiary</p> <p>Revisions approved:</p> <p>Delete 15-11-103 in its entirety and replace with this:</p> <p>(1) [DEFINITIONS.] IN THIS SECTION:</p> <p>(a) “DECEASED PARENT”, “DECEASED GRANDPARENT”, OR “DECEASED SPOUSE” MEANS A PARENT, GRANDPARENT, OR SPOUSE WHO EITHER PREDECEASED THE DECEDENT OR IS DEEMED UNDER THIS ARTICLE 11 TO HAVE PREDECEASED THE DECEDENT.</p> <p>(b) “SURVIVING SPOUSE”, “SURVIVING DESCENDANT”, “SURVIVING PARENT”, OR “SURVIVING GRANDPARENT” MEANS A SPOUSE, DESCENDANT, PARENT, OR GRANDPARENT WHO NEITHER PREDECEASED THE</p>

DECEDENT NOR IS DEEMED UNDER THIS ARTICLE 11 TO HAVE PREDECEASED THE DECEDENT.

(2) **[HEIRS OTHER THAN SURVIVING SPOUSE AND DESIGNATED BENEFICIARY.]** ANY PART OF THE INTESTATE ESTATE NOT PASSING TO THE DECEDENT'S SURVIVING SPOUSE UNDER SECTION 15-11-102, OR TO THE DECEDENT'S SURVIVING DESIGNATED BENEFICIARY UNDER SECTION 15-11-102.5, OR THE ENTIRE ESTATE IF THERE IS NO SURVIVING SPOUSE AND NO SURVIVING DESIGNATED BENEFICIARY WITH THE RIGHT TO INHERIT REAL OR PERSONAL PROPERTY FROM THE DECEDENT THROUGH INTESTATE SUCCESSION, PASSES TO THE DECEDENT'S DESCENDANTS, PARENTS, OR OTHER HEIRS AS PROVIDED IN SUBSECTIONS (3) THROUGH (10).

(3) **[SURVIVING DESCENDANT.]** IF A DECEDENT IS SURVIVED BY ONE OR MORE DESCENDANTS, ANY PART OF THE INTESTATE ESTATE NOT PASSING TO THE SURVIVING SPOUSE OR SURVIVING DESIGNATED BENEFICIARY PASSES BY REPRESENTATION PER CAPITA AT EACH GENERATION TO THE DECEDENT'S SURVIVING DESCENDANTS.

(4) **[SURVIVING PARENT.]** IF A DECEDENT IS NOT SURVIVED BY A DESCENDANT BUT IS SURVIVED BY ONE OR MORE PARENTS, ANY PART OF THE INTESTATE ESTATE NOT PASSING TO THE SURVIVING SPOUSE OR SURVIVING DESIGNATED BENEFICIARY IS DISTRIBUTED AS FOLLOWS:

(a) THE INTESTATE ESTATE OR PART IS DIVIDED INTO AS MANY EQUAL SHARES AS THERE ARE:

(i) SURVIVING PARENTS; AND

(ii) DECEASED PARENTS WITH ONE OR MORE SURVIVING DESCENDANTS, IF ANY, AS DETERMINED UNDER SUBSECTION (5).

(b) ONE SHARE PASSES TO EACH SURVIVING PARENT.

(c) THE BALANCE OF THE INTESTATE ESTATE OR PART, IF ANY, PASSES ~~BY REPRESENTATION~~ PER CAPITA AT EACH GENERATION TO THE SURVIVING DESCENDANTS OF THE DECEDENT'S DECEASED PARENTS, AS DETERMINED UNDER SUBSECTION (5).

(5) **[WHEN PARENT SURVIVES: COMPUTATION OF SHARES OF SURVIVING DESCENDANTS OF DECEASED PARENT.]** THE FOLLOWING RULES APPLY UNDER SUBSECTION (4) TO DETERMINE WHETHER A DECEASED PARENT OF THE

DECEDENT IS TREATED AS HAVING A SURVIVING DESCENDANT:

(a) IF ALL THE SURVIVING DESCENDANTS OF ONE OR MORE DECEASED PARENTS ALSO ARE DESCENDANTS OF ONE OR MORE SURVIVING PARENTS AND NONE OF THOSE SURVIVING PARENTS HAS ANY OTHER SURVIVING DESCENDANT, THOSE DESCENDANTS ARE DEEMED TO HAVE PREDECEASED THE DECEDENT.

(b) IF TWO OR MORE DECEASED PARENTS HAVE THE SAME SURVIVING DESCENDANTS AND NONE OF THOSE DECEASED PARENTS HAS ANY OTHER SURVIVING DESCENDANT, THOSE DECEASED PARENTS ARE DEEMED TO BE ONE DECEASED PARENT WITH SURVIVING DESCENDANTS.

(6) **[SURVIVING DESCENDANT OF DECEASED PARENT.]** IF A DECEDENT IS NOT SURVIVED BY A DESCENDANT OR PARENT BUT IS SURVIVED BY ONE OR MORE DESCENDANTS OF A PARENT, THE INTESTATE ESTATE PASSES ~~BY REPRESENTATION~~ PER CAPITA AT EACH GENERATION TO THE SURVIVING DESCENDANTS OF THE DECEDENT'S DECEASED PARENTS.

(7) **[SURVIVING GRANDPARENT.]** IF A DECEDENT IS NOT SURVIVED BY A DESCENDANT, PARENT, OR DESCENDANT OF A PARENT BUT IS SURVIVED BY ONE OR MORE GRANDPARENTS, THE INTESTATE ESTATE IS DISTRIBUTED AS FOLLOWS:

(a) THE INTESTATE ESTATE IS DIVIDED INTO AS MANY EQUAL SHARES AS THERE ARE:

(i) SURVIVING GRANDPARENTS; AND

(ii) DECEASED GRANDPARENTS WITH ONE OR MORE SURVIVING DESCENDANTS, IF ANY, AS DETERMINED UNDER SUBSECTION (8).

(b) ONE SHARE PASSES TO EACH SURVIVING GRANDPARENT.

(c) THE BALANCE OF THE INTESTATE ESTATE, IF ANY, PASSES ~~BY REPRESENTATION~~ PER CAPITA AT EACH GENERATION TO THE SURVIVING DESCENDANTS OF THE DECEDENT'S DECEASED GRANDPARENTS, AS DETERMINED UNDER SUBSECTION (8).

(8) **[WHEN GRANDPARENT SURVIVES: COMPUTATION OF SHARES OF SURVIVING DESCENDANTS OF DECEASED GRANDPARENT.]** THE FOLLOWING RULES APPLY UNDER

	<p>SUBSECTION (7) TO DETERMINE WHETHER A DECEASED GRANDPARENT OF THE DECEDENT IS TREATED AS HAVING A SURVIVING DESCENDANT:</p> <p>(a) IF ALL THE SURVIVING DESCENDANTS OF ONE OR MORE DECEASED GRANDPARENTS ALSO ARE DESCENDANTS OF ONE OR MORE SURVIVING GRANDPARENTS AND NONE OF THOSE SURVIVING GRANDPARENTS HAS ANY OTHER SURVIVING DESCENDANT, THOSE DESCENDANTS ARE DEEMED TO HAVE PREDECEASED THE DECEDENT.</p> <p>(b) IF TWO OR MORE DECEASED GRANDPARENTS HAVE THE SAME SURVIVING DESCENDANTS AND NONE OF THOSE DECEASED GRANDPARENTS HAS ANY OTHER SURVIVING DESCENDANT, THOSE DECEASED GRANDPARENTS ARE DEEMED TO BE ONE DECEASED GRANDPARENT WITH SURVIVING DESCENDANTS.</p> <p>(9) [SURVIVING DESCENDANT OF DECEASED GRANDPARENT.] IF A DECEDENT IS NOT SURVIVED BY A DESCENDANT, PARENT, DESCENDANT OF A PARENT, OR GRANDPARENT BUT IS SURVIVED BY ONE OR MORE DESCENDANTS OF A GRANDPARENT, THE INTESTATE ESTATE PASSES BY REPRESENTATION <u>PER CAPITA AT EACH GENERATION</u> TO THE SURVIVING DESCENDANTS OF THE DECEDENT'S DECEASED GRANDPARENTS.</p> <p>(10) [SURVIVING DESCENDANT OF DECEASED SPOUSE.] IF A DECEDENT IS NOT SURVIVED BY A DESCENDANT, PARENT, DESCENDANT OF A PARENT, GRANDPARENT, OR DESCENDANT OF A GRANDPARENT BUT IS SURVIVED BY ONE OR MORE DESCENDANTS OF ONE OR MORE DECEASED SPOUSES, THE INTESTATE ESTATE PASSES PER CAPITA AT EACH GENERATION TO THE SURVIVING DESCENDANTS OF THE DECEASED SPOUSE OR SPOUSES.</p>
<p>2-104. REQUIREMENT OF SURVIVAL BY 120 HOURS; GESTATIONAL PERIOD; PREGNANCY AFTER DECEDENT'S DEATH</p>	<p>15-11-104</p> <p>Do not adopt</p>

2-106. BY REPRESENTATION

15-11-106

Revisions approved:

Delete 15-11-106 in its entirety and replace with this:

15-11-106. BY REPRESENTATION PER CAPITA AT EACH GENERATION

(1) **Definitions.** ~~As used~~ In this section:

(A) “Deceased descendant”, “deceased parent”, ~~or~~ “deceased grandparent”, OR “DECEASED SPOUSE” means a descendant, parent, ~~or~~ grandparent, OR SPOUSE who either predeceased the decedent or is deemed UNDER THIS SUBPART 1 to have predeceased the decedent ~~under section 15-11-104.~~

(B) “Surviving descendant” means a descendant who neither predeceased the decedent nor is deemed UNDER THIS SUBPART 1 to have predeceased the decedent ~~under section 15-11-104.~~

(2) **Decedent’s descendants.** If, under section ~~2-103(c)~~ 15-11-103(2), ALL OR PART OF a decedent’s intestate estate ~~or a part thereof~~ passes PER CAPITA AT EACH GENERATION ~~BY REPRESENTATION~~ to the decedent’s SURVIVING descendants, the estate or part ~~thereof~~ is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

(3) **[DESCENDANTS OF PARENT WHEN PARENT SURVIVES.]**

IF A DECEDENT IS SURVIVED BY ONE OR MORE PARENTS AND, UNDER SECTION ~~2-103(D) AND (E)~~ 15-11-103(4) AND (5), THE BALANCE OF THE DECEDENT’S INTESTATE ESTATE OR PART PASSES ~~BY REPRESENTATION~~ PER CAPITA AT EACH

GENERATION TO THE SURVIVING DESCENDANTS OF ONE OR MORE OF THE DECEDENT'S DECEASED PARENTS, THE BALANCE PASSES TO THOSE DESCENDANTS AS IF THEY WERE THE DECEDENT'S SURVIVING DESCENDANTS UNDER SUBSECTION ~~(B)~~ (2).

(4) [DESCENDANTS OF PARENT WHEN NO PARENT SURVIVES.] IF A DECEDENT IS NOT SURVIVED BY A PARENT AND, UNDER SECTION ~~2-103(F)~~ 15-11-103(6), THE DECEDENT'S INTESTATE ESTATE PASSES ~~BY REPRESENTATION~~ PER CAPITA AT EACH GENERATION TO THE SURVIVING DESCENDANTS OF ONE OR MORE OF THE DECEDENT'S DECEASED PARENTS, THE INTESTATE ESTATE PASSES TO THOSE DESCENDANTS AS IF THEY WERE THE DECEDENT'S SURVIVING DESCENDANTS UNDER SUBSECTION ~~(B)~~(2).

(5) [DESCENDANTS OF GRANDPARENT WHEN GRANDPARENT SURVIVES.] IF A DECEDENT IS SURVIVED BY ONE OR MORE GRANDPARENTS AND, UNDER SECTION ~~2-103(G) AND (H)~~ 15-11-103(7) AND (8), THE BALANCE OF THE DECEDENT'S INTESTATE ESTATE PASSES ~~BY REPRESENTATION~~ PER CAPITA AT EACH GENERATION TO THE SURVIVING DESCENDANTS OF ONE OR MORE OF THE DECEDENT'S DECEASED GRANDPARENTS, THE BALANCE PASSES TO THOSE DESCENDANTS AS IF THEY WERE THE DECEDENT'S SURVIVING DESCENDANTS UNDER SUBSECTION ~~(B)~~(2).

(6) [DESCENDANTS OF GRANDPARENT WHEN NO GRANDPARENT SURVIVES.] IF A DECEDENT IS NOT SURVIVED BY A GRANDPARENT AND, UNDER SECTION ~~2-103(I)~~ 15-11-103(9), THE DECEDENT'S INTESTATE ESTATE PASSES ~~BY REPRESENTATION~~ PER CAPITA AT EACH GENERATION TO THE SURVIVING DESCENDANTS OF ONE OR MORE OF THE DECEDENT'S DECEASED GRANDPARENTS, THE INTESTATE ESTATE PASSES TO THOSE DESCENDANTS AS IF THEY WERE THE DECEDENT'S SURVIVING DESCENDANTS UNDER SUBSECTION ~~(B)~~(2).

~~**(7) [DESCENDANTS OF DECEASED SPOUSE.]** IF A DECEDENT IS SURVIVED BY DESCENDANTS OF ONE OR MORE DECEASED SPOUSES AND, UNDER SECTION 2-103(J), THE~~

	<p><u>DECEDENT'S INTESTATE ESTATE PASSES BY REPRESENTATION TO THE SURVIVING DESCENDANTS OF ONE OR MORE OF THE DECEDENT'S DECEASED SPOUSES, THE INTESTATE ESTATE PASSES TO THOSE DESCENDANTS AS IF THEY WERE THE DECEDENT'S SURVIVING DESCENDANTS UNDER SUBSECTION (B).</u></p>
<p>2-107. INHERITANCE WITHOUT REGARD TO NUMBER OF COMMON ANCESTORS IN SAME GENERATION</p>	<p>15-11-107</p> <p>Revisions approved:</p> <p>15-11-107. Kindred of half blood INHERITANCE WITHOUT REGARD TO NUMBER OF COMMON ANCESTORS IN SAME GENERATION.</p> <p>Relatives of half blood inherit the same share they would inherit if they were of whole blood. AN HEIR INHERITS WITHOUT REGARD TO HOW MANY COMMON ANCESTORS IN THE SAME GENERATION THE HEIR SHARES WITH THE DECEDENT.</p>
<p>2-109. ADVANCEMENTS</p>	<p>15-11-109</p> <p>Revisions approved:</p> <p>15-11-109(1)</p> <p>(1) If an individual dies intestate as to all or a portion of his or her THE estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement, or (ii) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.</p>

<p>2-113. INDIVIDUAL RELATED TO DECEDENT THROUGH TWO BLOOD LINES</p>	<p>15-11-113.</p> <p>Revisions approved:</p> <p>15-11-113. INDIVIDUAL RELATED TO DECEDENT THROUGH TWO BLOOD LINES MORE THAN ONE LINE</p> <p>An individual who is related to the decedent through two blood lines MORE THAN ONE LINE of relationship is entitled to only a single share based upon the relationship which would entitle the individual to the larger LARGEST share. THE INDIVIDUAL AND THE INDIVIDUAL'S DESCENDANTS ARE DEEMED TO HAVE PREDECEASED THE DECEDENT WITH RESPECT TO A LINE OF RELATIONSHIP RESULTING IN A SMALLER SHARE.</p>
<p>2-114. PARENT BARRED FROM INHERITING IN CERTAIN CIRCUMSTANCES.</p>	<p>15-11-114</p> <p>Revisions approved:</p> <p>15-11-114(2):</p> <p>For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is DEEMED TO HAVE PREDECEASED THE CHILD treated as if the parent predeceased the child.</p>
<p>UPC ARTICLE II, PART 1, SUBPART 2</p> <p>PARENT-CHILD RELATIONSHIP</p> <p>2-115. DEFINITIONS</p>	<p>CPC ARTICLE 11, SUBPART 2</p> <p>15-11-115: no change / do not adopt (10/28/20 minutes)</p>
<p>2-116. SCOPE</p>	<p>15-11-116: no change / do not adopt (10/28/20 minutes)</p>
<p>2-117. NO DISTINCTION BASED ON MARITAL STATUS OF PARENT</p>	<p>15-11-117: no change / do not adopt (10/28/20 minutes)</p>
<p>2-118. PARENT-CHILD RELATIONSHIP ESTABLISHED THOUGH ADOPTION OR DE FACTO PARENTAGE.</p>	<p>15-11-118: no change / do not adopt (9/24/20 minutes)</p>

<p>2-119. EFFECT OF ADOPTION; EFFECT OF DE FACTO PARENTAGE.</p>	<p>15-11-119: no change / do not adopt (9/24/20 minutes)</p>
<p>2-120. INDIVIDUAL CONCEIVED BY ASSISTED REPRODUCTION BUT NOT BORN TO GESTATIONAL OR GENETIC SURROGATE.</p>	<p>15-11-120: no change / do not adopt (9/24/20 minutes)</p>
<p>2-121. INDIVIDUAL BORN TO GESTATIONAL OR GENETIC SURROGATE.</p>	<p>15-11-121 and 122: No change / do not adopt (9/24/20 minutes)</p>
<p>UPC ARTICLE II, PART 2</p> <p>ELECTIVE SHARE OF SURVIVING SPOUSE</p> <p>2-201. DEFINITIONS</p> <p>“Presently exercisable general power of appointment”</p> <p>“Transfer”</p>	<p>CPC ARTICLE 11, PART 2</p> <p>15-11-201</p> <p>Revisions approved:</p> <p>15-11-201(7)</p> <p>“Presently exercisable general power of appointment” means a power of appointment under which, at the time in question, the decedent HELD A POWER TO CREATE A PRESENT OR FUTURE INTEREST IN THE DECEDENT, THE DECEDENT’S CREDITORS, THE DECEDENT’S ESTATE, OR CREDITORS OF THE DECEDENT’S ESTATE, whether or not THE DECEDENT he or she then had the capacity to exercise the power. held a power to create a present or future interest in himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate, and THE TERM includes a power to revoke or invade the principal of a trust or other property arrangement.</p> <p>15-11-201(10)(c)</p> <p>“Transfer” . . . includes:</p> <p>. . .</p> <p>(c) An exercise, release, or lapse of a presently exercisable general power of appointment that the decedent created in himself or herself RESERVED OR and of a power</p>

	<p>described in section 15-11-205(2)(b) that the decedent conferred on a nonadverse party.</p>
<p>UPC ARTICLE II, PART 3 2-302. OMITTED CHILD.</p>	<p>CPC ARTICLE 11, PART 3 15-11-302 Revisions approved: 15-11-302</p> <p>(1) Except as provided in subsection (2) of this section, if a testator BECOMES A PARENT TO A CHILD fails to provide in his or her will for any of his or her children born or adopted after the execution of the TESTATOR'S will AND FAILS TO PROVIDE IN THE WILL FOR THE CHILD, the omitted after born or after adopted child receives a share in the estate as follows:</p> <p>(a) If the testator had no child living when he or she THE TESTATOR executed the will, an THE omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all OF the estate to ANOTHER the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.</p> <p>(b) If the testator has one or more children living when THE TESTATOR he or she executed the will, and the will devised property or an interest in property to one or more of the then-living children, an THE omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:</p> <p>(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.</p> <p>(II) The omitted CHILD after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (I) of this paragraph (b), 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</p>

	<p>under the will and had given an equal share of the estate to each child.</p> <p>(III) To the extent feasible, the interest granted an THE omitted after-born or after-adopted child under this section MUST shall 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.</p> <p>(IV) In THE SATISFACTION OF satisfying a share provided by this paragraph (b), 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.</p> <p>(2) Neither SUBSECTION paragraph (1)(a) nor (1)(b) of subsection (1) of this section applies if:</p> <p>(a) It appears from the will that the omission was intentional; or</p> <p>(b) 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.</p> <p>(3) If at the time of execution of the will the testator fails to provide in THE his or her will for a living child solely because THE TESTATOR he or she believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.</p> <p>(4) In THE SATISFACTION OF satisfying a share provided by SUBSECTION paragraph (a) of subsection (1) of this section, devises made by the will abate under sSection 15-12-902.</p>
<p>UPC ARTICLE 2, PART 7</p> <p>2-705. CLASS GIFTS CONSTRUED TO ACCORD WITH INTESTATE SUCCESSION; EXCEPTIONS</p>	<p>CPC ARTICLE 11, PART 7</p> <p>Do not adopt</p>

	<p>CPC ARTICLE 11, PART 8</p> <p>15-11-802</p> <p>Revisions approved:</p> <p>15-11-802(1)</p> <p>(1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she THE INDIVIDUAL is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife MARRIAGE is not a divorce for purposes of this section.</p>
<p>2-803. EFFECT OF HOMICIDE ON INTESTATE SUCCESSION, WILLS, TRUSTS, JOINT ASSETS, LIFE INSURANCE, AND BENEFICIARY DESIGNATIONS</p>	<p>15-11-803</p> <p>Revisions approved:</p> <p>15-11-803(1)(e)</p> <p>(e) “Revocable”, with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate himself or herself THE DECEDENT in place of his or her THE killer and WHETHER or NOT the decedent then had capacity to exercise the power.</p> <p>15-11-803(2)</p> <p>If the decedent died intestate, the decedent’s intestate estate passes as if the killer disclaimed his or her THE intestate share.</p> <p>15-11-803(6)</p> <p>A wrongful acquisition of property or interest by a killer not covered by this section shall MUST be treated in accordance with the principle that a killer cannot profit from his or her wrong THE KILLER’S WRONGDOING.</p>

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

15-11-804

Revisions approved:

15-11-804(1)(b)

“Divorce or annulment” means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage that would exclude the spouse as a surviving spouse within the meaning of Section 15-11-802. A decree of separation that does not terminate the ~~status of husband and wife~~ MARRIAGE is not a divorce for purposes of this section.

15-11-804(1)(d)

“Governing instrument” means a governing instrument executed by the divorced individual before the divorce or annulment of ~~his or her~~ THE marriage to ~~his or her~~ THE DIVORCED INDIVIDUAL’S former spouse.

15-11-804(1)(f)

“Revocable,” with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of ~~his or her~~ THE DIVORCED INDIVIDUAL’S former spouse or former spouse’s relative, whether or not the divorced individual was then empowered to designate ~~himself or herself~~ THE DIVORCED INDIVIDUAL in place of the divorced individual’s former spouse or in place of ~~his or her~~ the divorced individual’s former spouse’s relative and whether or not the divorced individual then had the capacity to exercise the power.

15-11-804(2)

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:

(a) revokes any revocable

(i) disposition or appointment of property made by a divorced individual to ~~his or her~~ THE DIVORCED INDIVIDUAL’S former spouse in a governing instrument and any disposition or appointment created by law or in a

	governing instrument to a relative of the divorced individual's former spouse. . . .
<p>UPC ARTICLE 3, PART 7</p> <p>3-703. GENERAL DUTIES; RELATION AND LIABILITY TO PERSONS INTERESTED IN ESTATE; STANDING TO SUE.</p>	<p>CPC ARTICLE 12, PART 7</p> <p>15-12-703</p> <p>Revisions approved:</p> <p>15-12-703</p> <p>(1) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees, including part 8 of article 5 of this title 15. A personal representative IS UNDER A has a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. A THE personal representative shall use the authority conferred upon him or her by this code, the terms of the will, if any, and any order in proceedings to which THE PERSONAL REPRESENTATIVE he or she is party for the best interests of successors to the estate.</p> <p>(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning THE PERSONAL REPRESENTATIVE'S his appointment or fitness to continue, or a supervised administration proceeding. THIS SECTION DOES NOT AFFECT Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants WHOSE CLAIMS HAVE BEEN ALLOWED, the surviving spouse, any minor and dependent children, and any OMITTED pretermitted child of the decedent AS DESCRIBED ELSEWHERE IN THIS CODE.</p>

	<p>...</p> <p>(4) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as THE his decedent had immediately prior to death.</p>

Current CO Law
C.R.S. 15-11-103

§ 15-11-103. Share of heirs other than surviving spouse and designated beneficiary

Any part of the intestate estate not passing to the decedent's surviving spouse under section [15-11-102](#), or to the decedent's surviving designated beneficiary under section [15-11-102.5](#), or the entire intestate estate if there is no surviving spouse and no surviving designated beneficiary with the right to inherit real or personal property from the decedent through intestate succession, passes in the following order to the individuals who survive the decedent:

- (1) (Deleted by amendment, L. 2010, (SB 10-199), ch. 374, p. 1748, § 5, effective July 1, 2010.)
- (2) To the decedent's descendants per capita at each generation;
- (3) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;
- (4) 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;
- (5) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

UPC Revisions
2-103

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

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

- ~~(1) to the decedent's descendants by representation;~~
- ~~(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;~~
- ~~(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;~~
- ~~(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:~~

<p>(a) Half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation; and</p> <p>(b) Half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation;</p> <p>(6) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner as described in subsection (5) of this section;</p> <p>(7) (Deleted by amendment, L. 2010, (SB 10-199), ch. 374, p. 1748, § 5, effective July 1, 2010.)</p> <p>(8) (Deleted by amendment, L. 2009, (HB 09-1287), ch. 310, p. 1672, § 4, effective July 1, 2010.)</p>	<p>(A) half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and</p> <p>(B) half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking by representation;</p> <p>(5) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner described in paragraph (4).</p> <p>(b) If there is no taker under subsection (a), but the decedent has:</p> <p>(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation; or</p> <p>(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.</p> <p><u>(a) [Definitions.] In this section:</u></p> <p><u>(1) "Deceased parent", "deceased grandparent", or "deceased spouse" means a parent, grandparent, or spouse who either predeceased the decedent or is deemed under this [article] to have predeceased the decedent.</u></p> <p><u>(2) "Surviving spouse", "surviving descendant", "surviving parent", or "surviving grandparent" means a spouse, descendant,</u></p>
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parent, or grandparent who neither predeceased the decedent nor is deemed under this [article] to have predeceased the decedent.

(b) [Heirs Other Than Surviving Spouse.]

Any part of the intestate estate not passing under Section 2-102 to the decedent's surviving spouse passes to the decedent's descendants or parents as provided in subsections (c) and (d). If there is no surviving spouse, the entire intestate estate passes to the decedent's descendants, parents, or other heirs as provided in subsections (c) through (j).

(c) [Surviving Descendant.] If a decedent is survived by one or more descendants, any part of the intestate estate not passing to the surviving spouse passes by representation to the decedent's surviving descendants.

(d) [Surviving Parent.] If a decedent is not survived by a descendant but is survived by one or more parents, any part of the intestate estate not passing to the surviving spouse is distributed as follows:

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

(A) surviving parents; and

(B) deceased parents

with one or more surviving descendants, if any, as determined under subsection (e).

(2) One share passes to each surviving parent.

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

(e) [When Parent Survives: Computation of Shares of Surviving Descendants of Deceased Parent.] The following rules apply under subsection (d) to determine whether a deceased parent of the decedent is treated as having a surviving descendant:

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

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

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

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

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

(A) surviving grandparents; and

(B) deceased grandparents with one or more surviving descendants, if any, as determined under subsection (h).

(2) One share passes to each surviving grandparent.

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

(h) [When Grandparent Survives: Computation of Shares of Surviving Descendants of Deceased Grandparent.] The following rules apply under subsection (g) to determine whether a deceased grandparent of the decedent is treated as having a surviving descendant:

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

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

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

(j) [Surviving Descendant of Deceased Spouse.] If a decedent is not survived by a descendant, parent, descendant of a parent, grandparent, or descendant of a grandparent but is survived by one or more descendants of one or more deceased spouses, the intestate estate passes by representation to the surviving descendants of the deceased spouse or spouses.