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ARTICLE 2

Intestate Succession and Wills

Editor’s Note

2013 Act No. 100, Section 4, provides as follows:

“Section 4. (A) This act [amending Articles 1, 2, 3, 4, 6, and 7] takes effect on January 1, 2014.

“(B) Except as otherwise provided in this act, on the effective date of this act:

“(1) this act applies to any estates of decedents dying thereafter and to all trusts created before, on, or after its effective date;

“(2) the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date;

“(3) this act applies to judicial proceedings concerning estates of decedents and trusts commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;

“(4) subject to item (5) and subsection (C) of this section, any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date of the act unless there is a clear indication of a contrary intent in the terms of the governing instrument; and

“(5) an act done and any right acquired or accrued before the effective date of the act is not affected by this act. Unless otherwise provided in this act, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust and a substantive right in the decedent’s estate accrues in accordance with the law in effect on the date of the decedent’s death.

“(C) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded.”

Part 1

Intestate Succession

**SECTION 62‑2‑101.** Intestate estate.

 Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this Code.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑102.** Share of the spouse.

 The intestate share of the surviving spouse is:

 (1) if there is no surviving issue of the decedent, the entire intestate estate;

 (2) if there are surviving issue, one‑half of the intestate estate.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑103.** Share of heirs other than surviving spouse.

 The part of the intestate estate not passing to the surviving spouse under Section 62‑2‑102, or the entire estate if there is no surviving spouse, passes as follows:

 (1) to the issue of the decedent: if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree then those of more remote degree take by representation;

 (2) if there is no surviving issue, to his parent or parents equally;

 (3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;

 (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half;

 (5) if there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by one or more great‑grandparents or issue of great‑grandparents, half of the estate passes to the surviving paternal great‑grandparents in equal shares, or to the surviving paternal great‑grandparent if only one survives, or to the issue of the paternal great‑grandparents if none of the great‑grandparents survive, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving great‑grandparent or issue of a great‑grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 10; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment deleted subsection (6) relating to stepchildren.

**SECTION 62‑2‑104.** Requirement that individual survive decedent for one hundred twenty hours.

 (1) For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (2):

 (a) an individual who was born before a decedent’s death but who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent. If it is not established that an individual who was born before the decedent’s death survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period;

 (b) an individual who was in gestation at a decedent’s death is deemed to be living at the decedent’s death if the individual lives one hundred twenty hours after birth. If it is not established that an individual who was in gestation at the decedent’s death lived one hundred twenty hours after birth, it is deemed that the individual failed to survive for the required period.

 (2) This section does not apply if it would result in a taking of the intestate estate by the state under Section 62‑2‑105.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 11; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment rewrote the section.

**SECTION 62‑2‑105.** No taker.

 If there is no taker under the provisions of this article [Sections 62‑2‑101 et seq.], the intestate estate passes to the State of South Carolina.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑106.** Representation; disclaimer by intestate beneficiary.

 If representation is called for by this Code, the estate is divided into as many equal shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner. If an interest created by intestate succession is disclaimed, the beneficiary is not treated as having predeceased the decedent for purposes of determining the generation at which the division of the estate is to be made.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 12; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑107.** Kindred of half blood.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 13; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑108.** Afterborn heirs.

 Issue of the decedent (but no other persons) conceived before his death but born within ten months thereafter inherit as if they had been born in the lifetime of the decedent.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 14; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑109.** Meaning of child and related terms.

 If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

 (1) From the date the final decree of adoption is entered, and except as otherwise provided in Section 63‑9‑1120, an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

 (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father if:

 (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

 (ii) the paternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a personal representative of his estate and, if after his death, by clear and convincing proof, except that the paternity established under this subitem (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

 (3) A person is not the child of a parent whose parental rights have been terminated under Section 63‑7‑2580 of the 1976 Code, except that the termination of parental rights is ineffective to disqualify the child or its kindred to inherit from or through the parent.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 4; 1990 Act No. 521, Section 15; 1997 Act No. 152, Section 6; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑110.** Advancements.

 If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter’s share of the estate only if declared in a contemporaneous writing signed by the decedent or acknowledged in a writing signed by the heir to be an advancement. For this purpose, the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property shall be taken into account in computing the intestate share to be received by the recipient’s issue, unless the declaration or acknowledgment provides otherwise.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑111.** Debts to decedent.

 A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor’s issue.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑112.** Alienage.

 No person is disqualified to take as an heir because he, or a person through whom he claims, is or has been an alien.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑113.** Persons related to decedent through two lines.

 A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑114.** Limitation on parent’s entitlement as intestate heirs to estate proceeds; failure to provide support for decedent during minority.

 Notwithstanding any other provision of law, if the parents of the deceased would be the intestate heirs pursuant to Section 62‑2‑103(2), upon the service of a summons, petition and notice by either parent or any other party of potential interest based upon the decedent having died intestate, the probate court may deny or limit either or both parent’s entitlement for a share of the proceeds if the court determines, by a preponderance of the evidence, that the parent or parents failed to reasonably provide support for the decedent as defined in Section 63‑5‑20 and did not otherwise provide for the needs of the decedent during his or her minority. If the court makes such a determination as to a parent or parents, the parent shall be a disqualified parent. The proceeds, or portion of the proceeds, that a disqualified parent would have taken shall pass as though the disqualified parent had predeceased the decedent.

HISTORY: 1996 Act No. 370, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Part 2

Elective Share of Surviving Spouse

**SECTION 62‑2‑201.** Right of elective share.

 (a) If a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of one‑third of the decedent’s probate estate, as computed under Section 62‑2‑202, the share to be satisfied as detailed in Sections 62‑2‑206 and 62‑2‑207 and, generally, under the limitations and conditions hereinafter stated.

 (b) If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take an elective share in property in this State is governed by the law of the decedent’s domicile at death.

 (c) “Surviving spouse”, as used in this Part, is as defined in Section 62‑2‑802.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 5; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑202.** Probate estate.

 (a) For purposes of this Part, probate estate means the decedent’s property passing under the decedent’s will plus the decedent’s property passing by intestacy, reduced by funeral and administration expenses and enforceable claims.

 (b) Except as provided in Section 62‑7‑401(c) with respect to a revocable inter vivos trust found to be illusory, the elective share shall apply only to the decedent’s probate estate.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 6; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑203.** Exercise of right of election by surviving spouse.

 The right of election of the surviving spouse may be exercised only during his lifetime by him or by his duly appointed attorney in fact. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑204.** Voluntary waiver of surviving spouse’s right to elective share, homestead allowance, and exempt property; property settlement in anticipation of divorce.

 (A) The rights of a surviving spouse to an elective share, homestead allowance, and exempt property, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver voluntarily signed by the waiving party after fair and reasonable disclosures to the waiving party of the other party’s property and financial obligations have been given in writing.

 (B) Unless it provides to the contrary, a waiver of all rights in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, and exempt property by each spouse in the property of the other and a disclaimer by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of a will executed before the waiver or property settlement.

HISTORY: 1986 Act No. 539, Section 1; 2008 Act No. 173, Section 1, eff February 4, 2008, applicable to all waivers executed after that date; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2008 amendment designated the first sentence as subsection (A) and rewrote it, adding the disclosure requirement; and designated the second sentence as subsection (B).

**SECTION 62‑2‑205.** Proceedings for elective share; time limit.

 (a) The surviving spouse may elect to take an elective share in the probate estate by filing in the court and serving upon the personal representative, if any, a summons and petition for the elective share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent’s will, or (3) thirty days after a surviving spouse is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent’s will.

 (b) The surviving spouse shall give notice of the time and place set for the hearing on the elective share claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the elective share.

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

 (d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the probate estate or by contribution as set out in Sections 62‑2‑206 and 62‑2‑207.

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 7; 2010 Act No. 244, Section 5, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑206.** Effect of election on benefits by will or statute.

 A surviving spouse is entitled to benefits provided under or outside of the decedent’s will, by any homestead allowance, by Section 62‑2‑401, whether or not he elects to take an elective share, but such amounts as pass under the will or by intestacy, by any homestead allowance, and by Section 62‑2‑401 are to be charged against the elective share pursuant to Section 62‑2‑207(a).

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 16; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑207.** Charging spouse with gifts received; liability of others for balance of elective share.

 (a) In the proceeding for an elective share, all property, including any beneficial interest, which passes or has passed to the surviving spouse, or would have passed to the surviving spouse, but was renounced or disclaimed, must be applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the probate estate, so long as the property is passed to the surviving spouse:

 (1) under the decedent’s will;

 (2) by intestacy;

 (3) by a homestead allowance;

 (4) by Section 62‑2‑401;

 (5) by a beneficiary designation in life insurance policies;

 (6) by a beneficiary designation of an Individual Retirement Account, qualified retirement plan, or annuity;

 (7) in a trust created by the decedent’s will; or

 (8) in a revocable inter vivos trust created by the decedent.

 (b) A beneficial interest that passes or has passed to a surviving spouse under the decedent’s will includes:

 (1) an interest as a beneficiary in a trust created by the decedent’s will;

 (2) an interest as a beneficiary in property passing under the decedent’s will to an inter vivos trust created by the decedent; and

 (3) an interest as a beneficiary in property contained at the decedent’s death in a revocable inter vivos trust found to be illusory, as provided in Section 62‑7‑401(c).

 (c)(1) For purposes of this provision, the value of the electing spouse’s beneficial interest in property which qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, or, if the federal estate tax is not applicable at the decedent’s death, would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, in effect on December 31, 2009, must be computed at the full value of the qualifying property. Qualifying for these purposes must be determined without regard to whether an election has been made to treat the property as qualified terminable interest property.

 (2) The value of this qualifying property shall be the value at the date of death as finally determined in the decedent’s estate tax proceedings, or if there is no federal estate tax proceeding, as shown on the inventory and appraisement or as determined by the court. The personal representative must choose assets, in order of abatement pursuant to Section 62‑3‑902, to satisfy the elective share, using the fair market value at the date of distribution. The elective share is pecuniary in nature.

 (3) The electing spouse who is the income beneficiary of a trust, the value of which is treated, or could be treated, as qualifying property, shall have the right to require a conversion of the income trust to a total return unitrust as defined in the South Carolina Uniform Principal and Income Act.

 (d) In choosing assets to fund the elective share, remaining property of the probate estate is applied so that liability for the balance of the elective share of the surviving spouse is satisfied from the probate estate, with devises abating in accordance with Section 62‑3‑902.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 8; 1990 Act No. 521, Section 17; 2010 Act No. 181, Section 1, eff May 28, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2010 amendment rewrote the section to include language regarding trusts.

Part 3

Spouse and Children Unprovided for in Wills

**SECTION 62‑2‑301.** Omitted spouse.

 (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless:

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

 (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

 (b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62‑3‑902.

 (c) The spouse may claim a share as provided by this section by filing in the court and serving upon the personal representative, if any, a summons and petition for such share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent’s will, or (3) thirty days after the omitted spouse is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent’s will . The spouse shall give notice of the time and place set for the hearing on the omitted spouse claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the share.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 9; 1990 Act No. 521, Section 18; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑302.** Pretermitted children.

 (a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

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

 (2) when the will was executed the testator devised substantially all his estate to his spouse; or

 (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

 (b) If, at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes that child to be dead, the child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

 (c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62‑3‑902.

 (d) The child, and his guardian or conservator acting for him, may claim a share as provided by this section by filing in the court and serving upon the personal representative, if any, a summons and petition for such share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent’s will, or (3) thirty days after the omitted child is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of a decedent’s will. The child, and his guardian or conservator acting for him, shall give notice of the time and place set for the hearing on the omitted child claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the share.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 10; 1990 Act No. 521, Section 19; 1997 Act No. 152, Section 7; 2013 Act No. 100, Section 1, eff January 1, 2014.

Part 4

Exempt Property

**SECTION 62‑2‑401.** Exempt property.

 The surviving spouse of a decedent who was domiciled in this State is entitled from the estate to a value not exceeding twenty‑five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, minor or dependent children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than twenty‑five thousand dollars, or if there is not twenty‑five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the twenty‑five thousand dollar value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except claims described in Section 62‑3‑805(a)(1). These rights are in addition to any right of homestead and personal property exemption otherwise granted by law but are chargeable against and not in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by the elective share. Any surviving spouse or minor or dependent children of the decedent who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of this section.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 20; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment substituted “twenty‑five thousand dollars” for “five thousand dollars” throughout.

**SECTION 62‑2‑402.** Source, determination, and documentation.

 (a) If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians or conservators of the minor children, or children who are adults may select property of the estate as exempt property. The personal representative may make these selections if the surviving spouse, the children, or the guardians or conservators of the minor children are unable or fail to do so within a reasonable time or if there are no guardians or conservators of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may make application to the court for appropriate relief.

 (b) The surviving spouse or the minor or dependent child, and the minor’s guardian or conservator acting for him, as the case may be, may claim a share of exempt property as provided in this part by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death, or within six months after the probate of the decedent’s will, whichever limitation last expires.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 11; 1990 Act No. 521, Section 21; 2010 Act No. 244, Section 6, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑403.** Federal veteran payments shall be exempt from creditors’ claims.

 All monies paid for insurance, compensation, or pensions by the United States of America to the executors, administrators, or heirs‑at‑law of any deceased veteran who served during any “period of war” as determined in reference to pension entitlement under 38 U.S.C. 1521, 1541 and 1542 and the regulations issued thereunder, and whose estate is administered in this State for insurance, compensation, or pensions is hereby declared to be exempt from the claims of any and all creditors of such deceased veteran.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Part 5

Wills

**SECTION 62‑2‑501.** Who may make a will.

 An individual who is of sound mind and who is not a minor as defined in Section 62‑1‑201(27) may make a will.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 8; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment substituted “An individual” for “A person” and substituted “Section 62‑1‑201(27)” for “Section 62‑1‑201(24)”.

**SECTION 62‑2‑502.** Execution.

 Except as provided for writings within Section 62‑2‑512 and wills within Section 62‑2‑505, every will shall be:

 (1) in writing;

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

 (3) signed by at least two individuals each of whom witnessed either the signing or the testator’s acknowledgment of the signature or of the will.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 22; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment made nonsubstantive changes.

**SECTION 62‑2‑503.** Attestation and self‑proving.

 (a) Any will may be simultaneously executed, attested, and made self‑proved. The self‑proof shall be effective upon the acknowledgment by the testator and the affidavit of at least one witness, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer’s certificate, under official seal, in the following form or in a similar form showing the same intent:

 I, \_, the testator, sign my name to this instrument this \_ day of \_, 20\_, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older (or if under the age of eighteen, am married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

 We, \_ and \_, the witnesses, sign our names to this instrument, and at least one of us, being first duly sworn, does hereby declare, generally and to the undersigned authority, that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator’s signing, and that to the best of our knowledge the testator is eighteen years of age or older (or if under the age of eighteen, was married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

 (b) An attested will may at any time subsequent to its execution be made self‑proved by the acknowledgment thereof by the testator and the affidavit of at least one witness, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer’s certificate, under the official seal, attached, or annexed to the will in the following form or in a similar form showing the same intent:

The State of \_ County of \_ We, \_ and \_, the testator and at least one of the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and to the best of his knowledge the testator was at that time eighteen years of age or older (or if under the age of eighteen, was married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

 (c) A witness to any will who is also an officer authorized to administer oaths under the laws of this State may notarize the signature of the other witness of the will in the manner provided by this section.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 12; 1988 Act No. 659, Section 15; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment, in each form, inserted the parenthetical regarding age, marriage and emancipation.

**SECTION 62‑2‑504.** Subscribing witnesses not incompetent because of interest; effect on gifts to them.

 (a) A subscribing witness to any will is not incompetent to attest or prove the same by reason of any devise therein in favor of the witness, the witness’s spouse, or the witness’s issue . If there are two disinterested witnesses to a will in addition to the interested witness, then the devise is valid and effectual, if otherwise effective. If there are not two disinterested witnesses to a will in addition to an interested witness, then the devise is null and void to the extent of the value of the excess property, estate, or interest so devised over the value of the property, estate or interest to which the witness, the witness’s spouse, or the witness’ issue would be entitled upon the failure to establish the will. The voided portion of the devise shall pass by intestacy in accordance with Section 62‑2‑101 et seq., provided the share of the interested witness, the witness’s spouse, or the witness’ issue shall not increase due to the devise passing by intestacy.

 (b) A subscribing witness to any will is not incompetent to attest or prove the will by reason of any appointment within the will of the witness, the witness’s spouse, or the witness’s issue to any office, trust, or duty. The appointment of a witness, a witness’s spouse, or a witness’s issue is valid, if otherwise so, and the individual so appointed, in such case, is entitled by law to take or receive any commissions or other compensation on account thereof.

 (c) A subscribing witness to any will is not incompetent to attest or prove the will by reason of any charge within the will of debts to any part of the estate in favor of the witness, the witness’s spouse, or the witness’s issue as creditor.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 23; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment rewrote the section.

**SECTION 62‑2‑505.** Choice of law as to execution.

 A written will is valid if:

 (a) it is executed in compliance with Section 62‑2‑502 either at the time of execution or at the date of the testator’s death; or

 (b) if its execution complies with the law at the time of execution of either (1) the place where the will is executed, or (2) the place where the testator is domiciled at the time of execution or at the time of death.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 13; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment added the subsection designators and made other nonsubstantive changes.

**SECTION 62‑2‑506.** Revocation by writing or by act.

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

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

 (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in the testator’s presence and by the testator’s direction.

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

 (1) The testator is presumed to have intended a subsequent will to replace rather than to supplement a previous will if the subsequent will makes a complete disposition of the testator’s estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked and only the subsequent will is operative on the testator’s death.

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

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment inserted subsection designator (a); in subsection (a)(1) inserted “executing” before “a subsequent will”; added subsection (b), relating to a subsequent will not expressly revoking a previous will; and made other nonsubstantive changes.

**SECTION 62‑2‑507.** Revocation by divorce, annulment, and order terminating marital property rights; no revocation by other changes of circumstances.

 (a) In this section:

 (1) “Disposition or appointment of property” includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

 (2) “Divorce or annulment” means any divorce or annulment or declaration of invalidity of a marriage or other event that would exclude the spouse as a surviving spouse in accordance with Section 62‑2‑802. It also includes a court order purporting to terminate all marital property rights or confirming equitable distribution between spouses unless they are living together as husband and wife at the time of the decedent’s death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

 (3) “Divorced individual” includes an individual whose marriage has been annulled.

 (4) “Governing instrument” means an instrument executed by the divorced individual before the divorce or annulment of the individual’s marriage to the individual’s former spouse including, but not limited to wills, revocable inter vivos trusts, powers of attorney, life insurance beneficiary designations, annuity beneficiary designations, retirement plan beneficiary designations and transfer on death accounts.

 (5) “Revocable” with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the divorced individual’s former spouse, whether or not the divorced individual was then empowered to designate the divorced individual in place of the divorced individual’s former spouse and whether or not the divorced individual then had the capacity to exercise the power.

 (b) No change of circumstances other than those described in this section and in Section 62‑2‑803 effects a revocation.

 (c) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage:

 (1) revokes any revocable:

 (i) disposition or appointment of property or beneficiary designation made by a divorced individual to the divorced individual’s former spouse in a governing instrument;

 (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual’s former spouse; or

 (iii) nomination in a governing instrument, nominating a divorced individual’s former spouse to serve in any fiduciary or representative capacity, including a personal representative, trustee, conservator, agent, attorney in fact or guardian;

 (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship so that the share of the decedent passes as the decedent’s property and the former spouse has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint and multiple‑party accounts in banks, savings and loan associations, credit unions, and other institutions, and any other form of co‑ownership with survivorship incidents.

 (d) A severance under subsection (c)(2) does not affect any third‑party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving the property, as evidence of ownership.

 (e) Provisions of a governing instrument and nomination in a fiduciary or representative capacity that are revoked by this section are given effect as if the former spouse predeceased the decedent.

 (f) Provisions revoked solely by this section are revived by the divorced individual’s remarriage to the former spouse or by a nullification of the divorce or annulment.

 (g)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

 (2) Written notice of the divorce, annulment, or remarriage under subsection (g)(1) must be mailed to the payor’s or other third party’s main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 24; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑508.** Revival of revoked will.

 (a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under Section 62‑2‑506(a)(2) the previous will remains revoked unless it is revived. The previous will is revived if it appears by clear and convincing evidence that the testator intended to revive or make effective the previous will.

 (b) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under Section 62‑2‑506(a)(2), a revoked part of the previous will is revived unless it appears by clear and convincing evidence that the testator did not intend the revoked part to take effect as executed.

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

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑509.** Incorporation by reference.

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

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑510.** Additions to trusts.

 (A) A devise made by a will to the trustee of a trust to a trust is valid so long as:

 (1) the trust is identified in the testator’s will and its terms are set forth in:

 (a) a written instrument (other than a will) executed before, concurrently with, or after the execution of the testator’s will but not later than the testator’s death; or

 (b) in the valid last will of another individual who has predeceased the testator;

 (B) The trust is not required to have a trust corpus other than the expectancy of receiving the testator’s devise.

 (C) The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator.

 (D) Unless the testator’s will provides otherwise, the property so devised:

 (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given; and

 (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before or after the death of the testator.

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

 (F) Death benefits of any kind, including but not limited to proceeds of life insurance policies and payments under an employees’ trust, or contract of insurance purchased by such a trust, forming part of a pension, stock‑bonus or profit‑sharing plan, or under a retirement annuity contract, may be paid to the trustee of a trust established by the insured, employee, or annuitant or by some other person if the trust is in existence at the death of the insured, employee, or annuitant, it is identified and its terms are set forth in a written instrument, and such death benefits shall be administered and disposed of in accordance with the provisions of the instrument setting forth the terms of the trust including any amendments made thereto before the death of the insured, employee, or annuitant and, if the instrument so provides, including any amendments to the trust made after the death of the insured, employee, or annuitant. It shall not be necessary to the validity of any such trust instrument, whether revocable or irrevocable, that it have a trust corpus other than the right of the trustee to receive such death benefits.

 (G) Death benefits of any kind, including but not limited to proceeds of life insurance policies and payments under an employees’ trust, or contract of insurance purchased by such a trust, forming part of a pension, stock‑bonus, or profit‑sharing plan, or under a retirement annuity contract, may be paid to a trustee named, or to be named, in a will which is admitted to probate as the last will of the insured or the owner of the policy, or the employee covered by such plan or contract, as the case may be, whether or not such will is in existence at the time of such designation. Upon the admission of such will to probate, and the payment thereof to the trustee, such death benefits shall be administered and disposed of in accordance with the provisions of the testamentary trust created by the will as they exist at the time of the death of the testator. Such payments shall be deemed to pass directly to the trustee of the testamentary trust and shall not be deemed to have passed to or be receivable by the executor of the estate of the insured, employee, or annuitant.

 (H) In the event no trustee makes proper claim to the proceeds payable as provided in subsections (F) and (G) of this section from the insurance company or the obligor within a period of one year after the date of the death of the insured, employee, or annuitant, or if satisfactory evidence is furnished to the insurance company or other obligor within such one year period that there is or will be no trustee to receive the proceeds, payment must be made by the executors or administrators of the person making such designations, unless otherwise provided by agreement.

 (I) Death benefits payable as provided in subsections (F) and (G) of this section shall not be subject to the debts of the insured, employee, or annuitant nor to transfer or estate taxes to any greater extent than if such proceeds were payable to the beneficiary of such trust and not to the estate of the insured, employee, or annuitant.

 (J) Such death benefits payable as provided in subsections (F) and (G) of this section so held in trust may be commingled with any other assets which may properly come into such trust.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment rewrote the section.

**SECTION 62‑2‑511.** Events of independent significance.

 A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator’s death. The execution or revocation of a will of another person is such an event.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment made nonsubstantive changes.

**SECTION 62‑2‑512.** Separate writing identifying bequest of tangible property.

 A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator’s death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect upon the dispositions made by the will.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 25; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment deleted “, evidences of indebtedness, documents of title (as defined in Section 36‑1‑201(15)), securities (as defined in Section 36‑8‑102(1)(A)),” and made other nonsubstantive changes.

Part 6

Construction

**SECTION 62‑2‑601.** Rules of construction and intention; reformation of will.

 (A) The intention of a testator as expressed in the testator’s will controls the legal effect of the testator’s dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

 (B) Notwithstanding subsection (A), the court may reform the terms of the will, even if unambiguous, to conform the terms to the testator’s intention if it is proved by clear and convincing evidence that the testator’s intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment added subsection designator (A), added subsection (B), relating to reformation of will, and made other nonsubstantive changes.

**SECTION 62‑2‑602.** Construction that will passes all property; after‑acquired property.

 A will is construed to pass all property which the testator owns at the testator’s death including property acquired after the execution of the will and all property acquired by the testator’s estate after the testator’s death.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment inserted “and all property acquired by the testator’s estate after the testator’s death” and made nonsubstantive changes.

**SECTION 62‑2‑603.** Anti‑lapse; deceased devisee; class gifts.

 (A) Unless a contrary intent appears in the will, if a devisee, who is a great‑grandparent or a lineal descendant of a great‑grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree than those of more remote degree take by representation.

 (B) One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

 (C) Words of survivorship in a devise to an individual, such as, “if he survives me,” or to “my surviving children,” are, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of subsections (A) and (B).

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑604.** Failure of testamentary provision.

 (A) Except as provided in Section 62‑2‑603, if a devise other than a residuary devise fails for any reason it becomes a part of the residue.

 (B) Except as provided in Section 62‑2‑603 if the residue is devised to two or more persons, the share of the residuary devisees that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment changed the subsection designators from lower case to upper case, and made other nonsubstantive changes.

**SECTION 62‑2‑605.** Change in securities; accessions; nonademption.

 (A) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

 (1) as much of the devised securities as is a part of the testator’s estate at the time of the testator’s death;

 (2) any additional or other securities of the same organization owned by the testator by reason of action initiated by the organization or any successor, related or acquiring organization excluding any acquired by exercise of purchase options;

 (3) securities of another organization owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the organization or any successor, related or acquiring organization;

 (4) any additional securities of the organization owned by the testator as a result of a plan of reinvestment in the organization.

 (B) Distributions in cash declared prior to death with respect to a specifically devised security not provided for in subsection (A) are not part of the specific devise.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 26; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑606.** Nonademption of specific devises in certain cases; unpaid proceeds of sale, condemnation or insurance; sale by conservator.

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

 (1) any balance of the purchase price (together with any mortgage or other security interest) owed by a purchaser to the testator at the testator’s death by reason of sale of the property;

 (2) any amount of a condemnation award for the taking of the property unpaid at the testator’s death;

 (3) any proceeds unpaid at the testator’s death on fire or casualty insurance or on other recovery for injury to the property;

 (4) any property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

 (b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or a condemnation award or insurance proceeds or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

 (c) The right of the specific devisee under subsection (b) is reduced by the value of any right he has under subsection (a).

 (d) For purposes of references in subsection (b) to a conservator, subsection (b) does not apply if after the sale, mortgage, condemnation, casualty or recovery, it was adjudicated that the testator’s disability ceased and the testator survived the adjudication for at least one year.

 (e) For purposes of references in subsection (b) to an agent acting within the authority of a durable power of attorney for an incapacitated principal, (i) “incapacitated principal” means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑607.** Nonexoneration.

 A specific devise passes subject to any mortgage, pledge, security interest or other lien existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 27; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑608.** Exercise of power of appointment.

 A general residuary clause in a will, or a will making general disposition of all of the testator’s property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑609.** Construction of generic terms to accord with relationships as defined for intestate succession.

 Half bloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑610.** Ademption by satisfaction.

 (a) Property which a testator gave in the testator’s lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if:

 (i) the will provides for deduction of the lifetime gift;

 (ii) the testator declared in a contemporaneous writing that the gift is to be deducted from the devise; or

 (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

 (b) For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator’s death, whichever occurs first.

 (c) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying Sections 62‑2‑603 and 62‑2‑604, unless the testator’s contemporaneous writing provides otherwise.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑611.** Construction that devise passes fee simple.

 A devise of land is construed to pass an estate in fee simple, regardless of the absence of words of limitation in the devise.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑612.** Proceeding to determine decedent’s intent regarding application of certain federal tax formulas.

 The personal representative, trustee, or any affected beneficiary under a will, trust, or other instrument of a decedent who dies or did die after December 31, 2009, and before January 1, 2011, may bring a proceeding to determine the decedent’s intent when the will, trust, or other instrument contains a formula that is based on the federal estate tax or generation‑skipping tax.

HISTORY: 2010 Act No. 251, Section 1, eff June 11, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Code Commissioner’s Note

This section was codified at the direction of the Code Commissioner.

Editor’s Note

2010 Act No. 251, Section 2, provides:

“This act takes effect upon approval by the Governor and applies with respect to decedents dying after December 31, 2009, and before January 1, 2011.”

Effect of Amendment

The 2013 amendment deleted the former last sentence relating to when the proceeding must be commenced.

Part 7

Contractual Arrangements Relating to Death

**SECTION 62‑2‑701.** Contracts concerning succession.

 A contract to make a will or devise, or to revoke a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this act, can be established only by (1) provisions of a will of the decedent stating material provisions of the contract; (2) an express reference in a will of the decedent to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract and extrinsic evidence proving the terms of the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 28; 2013 Act No. 100, Section 1, eff January 1, 2014.

Part 8

General Provisions

**SECTION 62‑2‑801.** Disclaimer.

 (a) This section applies to disclaimers of any interest in or power over property, whenever created, and, in addition to other methods, is the means by which a disclaimer may be made under the laws of this State.

 (b) For purpose of this section:

 (1) “Disclaimer” means any writing which disclaims, renounces, declines, or refuses an interest in or power over property.

 (2) “Disclaimant” means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made.

 (3) “Disclaimed interest” means the interest that would have passed to the disclaimant had the disclaimer not been made.

 (4) “Fiduciary” means a personal representative, trustee, agent acting under a power of attorney, guardian, conservator, or other person authorized to act as a fiduciary with respect to the property of another person.

 (c)(1) A person may disclaim, in whole or in part, any interest in or power over property, including a power of appointment.

 (2) Unless barred, a disclaimer must be made within a reasonable time after the disclaimant acquires actual knowledge of the interest. A disclaimer is conclusively presumed to have been made within a reasonable time if made within nine months after the date of effectiveness of the transfer as determined under subsection (d)(3).

 (3) To be effective, a disclaimer must be:

 (i) in writing;

 (ii) declare the writing as a disclaimer;

 (iii) describe the interest or power disclaimed; and

 (iv) be delivered to the transferor of the interest, the transferor’s fiduciary, the holder of the legal title to or the person in possession of the property to which the interest relates, or a court that would have jurisdiction over such interest or subject matter. A disclaimer of a power must be delivered as if the power disclaimed were an interest in property. Delivery of a disclaimer may be made by personal delivery, first‑class mail, or any other method that results in its receipt. A disclaimer sent by first‑class mail shall be deemed to have been delivered on the date it is postmarked.

 (4) A disclaimer is not a transfer, assignment, or release if made within a reasonable time after the disclaimant acquires actual knowledge of the interest and if not otherwise barred.

 (5) A barred disclaimer is ineffective as a disclaimer under this section. A disclaimer is barred by any of the following conditions occurring before the disclaimer becomes effective:

 (i) the disclaimant waived in writing the right to disclaim;

 (ii) the disclaimant accepted the interest sought to be disclaimed;

 (iii) the disclaimant voluntarily assigned, conveyed, encumbered, pledged, transferred, or directed the interest sought to be disclaimed or has contracted to do so; or

 (iv) a judicial sale of the interest sought to be disclaimed has occurred.

 (6) A disclaimer is not barred by a spendthrift provision or similar restriction on transfer or the right to disclaim imposed by the creator of the interest in or power over the property.

 (7) A disclaimer is not barred by a disclaimant’s financial condition, whether or not insolvent, and a disclaimer that complies with this section is not a fraudulent transfer under the laws of this State.

 (8) A disclaimer, in whole or in part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

 (9) A disclaimer, in whole or in part, of the future exercise of a power not held in a fiduciary capacity is not barred unless the power is exercisable in favor of a disclaimant.

 (10) Unless a disclaimer is barred, a disclaimer treated as a qualified disclaimer pursuant to Internal Revenue Code Section 2518 is effective as a disclaimer under this section.

 (d)(1) If a disclaimant makes a disclaimer with respect to any transferor’s transfer (including transfers by any means whatsoever, lifetime and testamentary, voluntary and by operation of law, initial and successive, by grant, gift, trust, contract, intestacy, wrongful death, elective share, forced share, homestead allowance, exempt property, devise, bequest, beneficiary designation, survivorship provision, exercise and nonexercise of a power, and otherwise) to the disclaimant of any interest in, including any power with respect to, property, or any undivided portion thereof, the interest, or such portion, is considered never to have been transferred to the disclaimant.

 (2) Unless the transferor has provided otherwise in the event of a disclaimer, the disclaimed interest shall be transferred (or fail to be transferred), as if the disclaimant had predeceased the date of effectiveness of the transfer of the interest. The disclaimer shall relate back to that date of effectiveness for all purposes, and any future interest which is provided to take effect in possession or enjoyment after the termination of the disclaimed interest shall take effect as if the disclaimant had predeceased the date on which he or she as the taker of the disclaimed interest became finally ascertained and the disclaimed interest became indefeasibly vested. Provided, that an interest disclaimed by a disclaimant who is the spouse of a decedent, the transferor of the interest, may pass by any further process of transfer to such spouse, notwithstanding the treatment of the transfer of the disclaimed interest as if the disclaimant had predeceased.

 (3) The date of effectiveness of the transfer of the disclaimed interest is (i) as to transfers by intestacy, wrongful death, elective share, forced share, homestead allowance, exempt property allowance, and devise and bequest, the date of death of the decedent transferor, or that of the donee of a testamentary power of appointment (whether exercised or not exercised) with respect to, the interest, as the case may be, and (ii) as to all other transfers, the date of effectiveness of the instrument, contract, or act of transfer.

 (e)(1) If and to the extent an instrument creates a fiduciary relationship and expressly grants the fiduciary the right to disclaim, the fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. If there is no instrument expressly granting the fiduciary the right to disclaim, the fiduciary’s right to disclaim shall be determined by the laws of this State applicable to that fiduciary relationship.

 (2) If a trustee disclaims an interest in property that otherwise would have become trust property, the disclaimed interest does not become trust property.

 (3) A fiduciary may disclaim a power held in a fiduciary capacity. If the power has not been previously exercised, the disclaimer takes effect as of the time the instrument creating the power became irrevocable. If the power has been previously exercised, the disclaimer takes effect immediately after the last exercise of the power. The disclaimer of a fiduciary power may be made binding on any successor fiduciary if the disclaimer so provides.

 (4) If no conservator or guardian has been appointed, a parent may disclaim on behalf of that parent’s minor child and unborn issue, in whole or in part, any interest in or power over property which the minor child or unborn issue is to receive as a result of another disclaimer, but only if the disclaimed interest or power does not pass outright to that parent as a result of the disclaimer.

 (f) A fiduciary or other person having custody of the disclaimed interest is not liable for any otherwise proper distribution or other disposition made without actual notice of the disclaimer or, if the disclaimer is barred pursuant to subsection (c)(5), for any otherwise proper distribution or other disposition made in reliance on the disclaimer, if the distribution or disposition is made without actual knowledge of the facts constituting the bar of the right to disclaim.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 70 Section 7; 1990 Act No. 521, Section 29; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment rewrote the section.

**SECTION 62‑2‑802.** Effect of divorce, annulment, decree of separate maintenance, or order terminating marital property rights.

 (a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

 (b) For purposes of Parts 1, 2, 3, and 4 of Article 2 [Sections 62‑2‑101 et seq., 62‑2‑201 et seq., 62‑2‑301 et seq., and 62‑2‑401 et seq.] and of Section 62‑3‑203, a surviving spouse does not include:

 (1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or live together as husband and wife at the time of the decedent’s death;

 (2) an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person;

 (3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between spouses unless they are living together as husband and wife at the time of the decedent’s death; or

 (4) an individual claiming to be a common law spouse who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative; if the action is commenced after the death of the decedent, proof must be by clear and convincing evidence.

 (c) A divorce or annulment is not final until signed by the court and filed in the office of the clerk of court.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 9; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑2‑803.** Effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations.

 (a) An individual who feloniously and intentionally kills the decedent is not entitled to any benefits under the decedent’s will, trust of which the decedent is a grantor or under this article with respect to the decedent’s estate, including, but not limited to, an intestate share, an elective share, an omitted spouse’s share or child’s share, a homestead allowance, and exempt property, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

 (b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent’s property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint and multiple‑party accounts in banks, savings and loan associations, credit unions, and other institutions, and any other form of co‑ownership with survivorship incidents.

 (c) A named beneficiary of a bond, life insurance policy, retirement plan, annuity, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the individual upon whose life the policy is issued is not entitled to any benefit under the bond, policy, retirement plan, annuity, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

 (d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section. A beneficiary whose interest is increased as a result of feloniously and intentionally killing shall be treated in accordance with the principles of this section.

 (e) The felonious and intentional killing of the decedent revokes the nomination of the killer in a will or other document nominating or appointing the killer to serve in any fiduciary capacity or representative capacity, including, but not limited to, as personal representative, trustee, agent or guardian.

 (f) A final judgment by conviction, or guilty plea establishing criminal accountability of felonious and intentional killing the decedent conclusively establishes that the convicted individual feloniously and intentionally killed the decedent for purposes of this section. In the absence of such final judgment the court, upon the petition of an interested person, must determine whether, upon the preponderance of the evidence standard, the individual would be found responsible for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be responsible for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent’s killer for purposes of this section.

 (g) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer, for value and without notice, property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

 (h) If an individual feloniously and intentionally kills the decedent, and if the killer dies within one hundred twenty hours of the decedent’s death, then the decedent shall be deemed to have survived the killer for purposes of distributing the killer’s estate, including, but not limited to, property passing by intestacy, the killer’s will, any trust of which the killer is a grantor, joint tenancy with right of survivorship and benefits payable under a life insurance policy, retirement plan, annuity or other contractual arrangement.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 10; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment rewrote subsection (a), rewrote subsection (c), added subsection (e) and redesignated subsections accordingly, rewrote subsection (f), rewrote subsection (h), and made other nonsubstantive changes.

**SECTION 62‑2‑804.** Effect of provision for survivorship on succession to joint tenancy.

 When any individual is seized or possessed of any real property held in joint tenancy at the time of the individual’s death, the joint tenancy is deemed to have been severed by the death of the joint tenant and the real property is distributable as a tenancy in common unless the instrument which creates the joint tenancy in real property, including any instrument in which one individual conveys to himself and one or more other persons, or two or more persons convey to themselves, or to themselves and another or others, expressly provides for a right of survivorship, in which case the severance does not occur. While other methods for the creation of a joint tenancy in real property may be utilized, an express provision for a right of survivorship is conclusively considered to have occurred if the will or instrument of conveyance contains the names of the devisees or grantees followed by the words “as joint tenants with right of survivorship and not as tenants in common”.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 14; 1996 Act No. 405, Section 1; 2000 Act No. 398, Section 3; 2010 Act No. 266, Section 1, eff June 24, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2010 amendment substituted “real property held in” for “estate of”, substituted “real property” for “estate”, twice inserted “in real property” and substituted “considered” for “deemed”.

The 2013 amendment made nonsubstantive changes.

**SECTION 62‑2‑805.** Presumption of ownership of tangible personal property; exceptions.

 (A) For purposes of this article, tangible personal property in the joint possession or control of the decedent and the surviving spouse at the time of the decedent’s death is presumed to be owned by the decedent and the decedent’s spouse in joint tenancy with right of survivorship if ownership is not evidenced otherwise by a certificate of title, bill of sale, or other writing. This presumption does not apply to property:

 (1) acquired by either spouse before marriage;

 (2) acquired by either spouse by gift or inheritance during the marriage;

 (3) used by the decedent spouse in a trade or business in which the surviving spouse has no interest;

 (4) held for another; or

 (5) specifically devised in a will or devised in a written statement or list disposing of tangible personal property pursuant to Section 62‑2‑512.

 (B) The presumption created in this section may be overcome by a preponderance of the evidence demonstrating that ownership was held other than in joint tenancy with right of survivorship.

HISTORY: 2010 Act No. 266, Section 2, eff June 24, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment in subsection (A)(5) inserted “specifically devised in a will or”.

**SECTION 62‑2‑806.** Modification to achieve testator’s tax objectives.

 To achieve the testator’s tax objectives, the personal representative or any interested person may file a summons and petition requesting the court, after notice and a hearing, to issue an order modifying the terms of a testator’s will in a manner not contrary to the testator’s probable intent. The court may provide that the modification has retroactive effect.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

Part 9

Delivery and Suppression of Wills

**SECTION 62‑2‑901.** Delivery of will to judge of probate; filing.

 (a) After the death of a testator, a person having custody of a will of the testator shall deliver such will, within thirty days of actual notice or knowledge of the testator’s death to the judge of the probate court having jurisdiction to admit the same or to a person named as personal representative in the will who shall deliver the will to the judge of the probate court. Upon receipt of the will, the judge of probate shall file the same in probate court and if proceedings for the probate are not begun within thirty days the judge shall publish a notice of such delivery and filing in one of the newspapers in the county of the probate court for once a week for three consecutive weeks.

 (b) Any person who intentionally or fraudulently destroys, suppresses, conceals, or fails to deliver the will to the judge of the probate court having jurisdiction to admit it to probate is liable to any person aggrieved for any damages that may be sustained by such action or inaction.

 (c) Any person who intentionally or fraudulently destroys, suppresses, conceals, or fails to deliver the will to the judge of the probate court having jurisdiction to admit it to probate, after being ordered by the court in a proceeding brought for the purpose of compelling delivery, is subject to a penalty for contempt of court.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 15; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment rewrote the section.