
**The
American
College of
Trust
and Estate
Counsel**

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The summary of each state's law reflected in this study has been based on opinion received from a reporter for that state. With rare exceptions, reporters are Fellows of the College from that state. Following the reporter's name is the date as of which that state's material was most recently reviewed. Neither the College nor the individual reporters and editors (who have volunteered their time and experience in the preparation of the studies) assume any responsibility for the accuracy of the information contained in any study.

Study 1:

**Will Requirements
of Various States**

Compiled by

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AGE OF TESTATOR

Real Estate	Personal Property
18	18

(Code of Alabama 1975, Section 43-8-130).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not valid, unless its execution complies with the law of the place where the will was executed or testator was domiciled or has a place of abode or is a national at time of execution or at a time of death (if other than Alabama). (Code of Alabama 1975, Sections 43-8-131 and 43-8-135).

NUNCUPATIVE (ORAL)

Not valid. (Code of Alabama 1975, Section 43-8-131).

NUMBER AND AGES OF WITNESSES

Two witnesses required. (Code of Alabama 1975, Section 43-8-131).

No specific age, but witness must be competent to testify in court as to the facts of the execution. (Code of Alabama 1975, Section 43-8-134(a))

Age of majority in Alabama is 19 years. (Code of Alabama 1975, Section 26-1-1).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

A will is revoked by a subsequent will (expressly or by inconsistency) or by being burned, torn, canceled, obliterated or destroyed with the intent and the purpose of revoking it by the testator or by another person in the testator's presence by his consent and direction. (Code of Alabama 1975, Section 43-8-136).

Divorce or annulment of marriage revokes provisions for former spouse unless the will expressly provides otherwise. Subsequent remarriage to the former spouse revives provisions revoked solely by this section. (Code of Alabama 1975, Section 43-8-137).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

If the decedent was domiciled in Alabama at the time of his or her death, his or her surviving spouse may take an elective share equal to the *lesser* of (a) all of the decedent's estate reduced by the value of the surviving spouse's separate estate, or (b) one-third of the estate of the decedent. The surviving spouse retains rights to homestead allowance, exempt property and family allowance, whether or not he or she takes an elective share. Election must be made in writing and within six months of the probate of the will. (Code of Alabama 1975, Sections 43-8-70 *et seq*).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

After-born or after-adopted children take the same share of the decedent's estate as they would have taken in case of intestacy, unless (a) it appears from the will that the omission was intentional, (b) the testator had one or more children when the will was executed and devised substantially all his or her estate to the other parent of the omitted child, or (c) the testator provided for the child by transfer outside the will and the intent that the transfer is in lieu of a testamentary provision is reasonably proven. If, at the time of the execution of the will, the Testator fails to provide in his or her will for a living child solely because Testator believes the child to be dead, such child takes the same share of decedent's estate which an after-born or after-adopted child takes as hereinabove set forth. (Code of Alabama 1975, Section 43-8-91).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A will or any provision thereof is not invalid because the will is signed by an interested witness. (Code of Alabama 1975, Section 43-8-134).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

If a devisee who is a grandparent or a lineal descendant of a 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 or she predeceased the testator, the issue of the deceased devisee who survive the testator by five days will take in place of the deceased devisee. One who would have been devisee under a class gift if he or she had survived the testator is treated as a devisee whether his or her death occurred before or after the execution of the will. (Code of Alabama 1975, Section 43-8-224).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A written will is valid if executed in compliance with Alabama law or if its execution complies with the law, at the time of execution, of the place where the will is executed, or with the law of the place where, at the time of execution or the time of death, the testator is domiciled, has a place of abode, or is a national. (Code of Alabama 1975, Section 43-8-135).

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. (Code of Alabama 1975, Section 43-8-139).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Currently, Alabama law allows a competent adult to execute a living will (known as a "declaration"). The declaration may direct that life-sustaining procedures be withheld or withdrawn for a patient with a terminal condition. "Life-sustaining" is defined as any medical procedure or intervention which serves only to prolong the dying process and where the attending physician has determined death will occur regardless of the use of such procedure. The declaration is only applicable to a patient who has been diagnosed and certified to be terminally ill by two physicians. A patient is terminally ill if death is imminent or his or her condition is deemed

hopeless without the use of life-sustaining procedures. The declaration must be in writing and witnessed by two adults who are not related to the patient by blood or marriage and who are not responsible for the patient's care. At the present time, the withholding or withdrawal or artificially administered nutrition and hydration is not specifically addressed in the statute or caselaw leaving a question as to the effect of the declaration on such procedures. (Code of Alabama 1975, Section 22-8A-1 et. seq.). Health care proxies are not specifically authorized by statute. In addition, the durable power of attorney statute makes no reference to health care decisions. However, the statute may be broad enough to encompass such decisions if specifically authorized in the document. (See Code of Alabama 1975, Section 26-1-2).

ALASKA

C.L. Cloudy
Ketchikan, Alaska
October 30, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

With or without attestation if in handwriting and signed by testator. Admitted to probate same as other wills. (A.S. 13.11.160).

NUNCUPATIVE (ORAL)

If made by mariners at sea or a soldier in military service, may dispose of personal property orally or by writing. If oral, the will must be proved within 6 months unless reduced to writing within 30 days after the words were spoken. (A.S. 13.11.158).

NUMBER AND AGES OF WITNESSES

Two. No age specified, "competent witness." (A.S. 13.11.155 & 13.11.170(a)).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Will made by unmarried person is not revoked by subsequent marriage; however, unprovided-for spouse entitled to take against the will (intestate share). Revoked as to divorced spouse. Revived by testator's re-marriage to former spouse. (A.S. 13.11.110 and A.S. 13.11.185).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Surviving spouse may only elect within 9 months of death or within 6 months of probate of will, whichever period last expires. (A.S. 13.11.090).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

A.S. 13.11.115. All children not named or provided for in will take intestate share unless; 1) it appears from the will that the omission was intentional; 2) the testator had one or more children and devised substantially all of the estate to the other parent of the omitted child; 3) the testator provided for the child by transfer outside the will and the intent that the transfer be in place of a testamentary provision as shown by statements of the testator or from the amount of the transfer or other evidence, or

- a) If at the time of the execution of the will the testator believes the child to be dead, the child receives a share as if the testator had died intestate, or
- b) In satisfying a share as stated above, devise is made by the will abate as provided in A.S. 13.16.540 (A.S. 13.11.115).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A will or any provision of one is not invalid because the will is signed by an interested person (A.S. 13.11.170).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Pursuant to A.S. 13.11.240, "If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if the devisee predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and, if they are all of the same degree of kinship to the devisee, they take equally, but, if of unequal degree, then those of more remote degree take by representation. A person who would have been a devisee under a class gift if the person has survived the testator is treated as a devisee...whether the person's death occurred before or after the execution of the will".

Except as provided in A.S. 13.11.240, if a devise other than a residuary devise fails for any reason it becomes part of the residue. If the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, that share passes to the other residuary devisee, or to other residuary devisees in proportion to their interest in the residue. (A.S. 13.11.240 and A.S. 13.11.245).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will executed outside of state in accordance with law of place where executed has same force and effect as if executed in accordance with law of state. (A.S. 13.11.175).

INCORPORATION BY REFERENCE

No limitation so long as language of will manifests intent to do so and describes the writing sufficiently to permit its identification. (A.S. 13.11.195).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

1. Living will (terminal illness declaration) statute enacted 1994, Alaska Statutes 18.12.010 et seq.

- a) Must be in writing and made by any competent person at least 18 years of age.
- b) Effective only if declarant's condition is later found to be terminal and declarant is not able to make treatment decision.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

- c) Must be signed by declarant or another acting under his or her direction. Must be witnessed by two persons or by a person qualified to take acknowledgements (e.g., notary, clerk of court, U.S. Postmaster, etc.).
- d) Effective only as to attending physician or health care person acting under the guidance of attending physician.
- e) Physician must record his determination that declarant is terminal and place declaration and his determination with the patient's medical records.

HEALTH CARE PROXY

Statutory Power of Attorney Act (health care proxy) enacted in 1995, Alaska Statutes 18.26.332 et seq. Among other things, this statute authorizes appointment of an agent for "health care services." However, as health care services are defined in AS 13.26.344(1), they do not include surgery of any type, psychiatric care involving convulsive therapy, psychosurgery, sterilization or abortion. As a consequence, the health care powers of any such agent appointed are cosmetic only.

ARIZONA

Richard H. Whitney
Phoenix, Arizona
November 17, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid whether or not witnessed if the signature and material provisions are in testator's handwriting.

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two are required. They may be any person generally competent to be a witness.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Wills may be revoked by a subsequent will, expressly or by inconsistency, and by being burned, torn, canceled, obliterated or destroyed, with intent to revoke, by testator or any other person at testator's direction and in testator's presence.

A surviving spouse who married the testator after execution of the will receives the same share as the spouse would have received if there was no will, unless it appears from the will the omission was intentional or the testator provided for the spouse outside the will with intent that such transfer be in lieu of the will. In satisfying such a share, abatement is statutorily provided for. Dissolution or annulment revokes any disposition or appointment of property to the former spouse or to any issue of the former spouse who are not also issue of the testator. The will is not otherwise revoked.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

None. The surviving spouse may claim statutory allowances.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

A child born or adopted after the execution receives a share in the estate equal to the child's intestate share unless:

- (a) It appears from the will that the omission was intended,
- (b) When the will was executed, testator had one or more children and devised substantially whole estate to the other parent of the omitted child,
- (c) Testator provided for the child outside the will and intended that transfer to be in lieu of devise by will.

A child mistakenly believed to be dead and omitted from the will receives intestate share.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A will or any provision thereof is not invalid because the will is signed by an interested witness.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

A devisee must survive the testator by 120 hours unless the will contains some language dealing with simultaneous death or common disaster or requiring another period of time. If a devisee who is a grandparent or a lineal descendant of a grandparent predeceases, the issue of the deceased devisee who is survived by 120 hours take by representation.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A will is valid in Arizona if valid in the state where executed.

INCORPORATION BY REFERENCE

In Arizona, 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. (This section is identical with Section 2-510 of the Uniform Probate Code).

In addition, Arizona adopted UPC Section 2-513 providing that a will may refer to a written statement or list to dispose of items of tangible personal property.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Arizona has statutory forms for a living will, health care power of attorney, pre-hospital medical directive, autopsy directive and organ donation directive. The use of these forms is not required and any written directive by an individual is entitled to be enforced if his or her signature is notarized or witnessed by at least one adult.

ARKANSAS

Oscar Fendler
Blytheville, Arkansas
July 31, 1996

AGE OF TESTATOR

Real Estate	Personal Property
18	18

(Arkansas Code of 1987 Annotated 28-25-101, effective December 31, 1987).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Where body of will and signature are in handwriting of the testator may be established by the evidence of 3 disinterested witnesses. (Ark. Code of 1987 28-25-104).

NUNCUPATIVE (ORAL)

No provision.

NUMBER AND AGES OF WITNESSES

Two. 18 years of age (Ark. Code 28-25-102).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Revoked by subsequent will; or by being burned, torn, canceled, obliterated or destroyed with intent to revoke by testator or at his direction by another person in his presence who will not benefit by the revocation. Subsequent divorce revokes all provisions in favor of the testator's spouse (Ark. Code 28-25-109).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Election to take against will such portion of property as would have come to spouse on intestacy may be made within one month after time limit for filing claims or within one month of final order on other matters in litigation (Ark. Code 28-39-403).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Birth or adoption of child subsequent to execution of will revokes will as to such child. Failure to mention child or as member of a class creates intestacy to him (Ark. Code 28-25-407(b)).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Does not invalidate will, but unless the will is also attested to by two qualified disinterested witnesses, an interested witness forfeits so much of the provision made for him as exceeds his intestate share (Ark. Code 28-25-102(b)).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

No lapse as to child or descendant leaving surviving issue (Ark. Code 28-25-104).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will executed outside state in manner prescribed by law of place

where executed or by law of testator's domicile is valid as if executed in accordance with law of state (Ark. Code 28-25-105).

INCORPORATION BY REFERENCE

Any writing in existence when will is executed may be incorporated by reference if the language of the will manifests that intent and describes the writing sufficiently to permit its identification. Further, a will may refer to a written statement or list to dispose of items of tangible personal property not specifically disposed of by the will other than money, evidence of indebtedness, documents of title, securities and properties used in trade or business. This writing, to be admissible, must either be in handwriting of the testator and signed by him and describe the items and devisees with reasonable certainty. The writing may be referred to as one 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. It may be a writing that has no significance apart from its effect upon the dispositions made by the will. *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1927) *Deal v. Huddleston*, 288 Ark. 96, 702 S.W.2d 404 (1986) (Ark. Code 28-25-107).

Trust powers may be incorporated by reference pursuant to Act 153 of the Acts of the 1961 Arkansas General Assembly, same as Arkansas Statutes Annotated 1947, Section 58-115, same as Arkansas Code of 1987 Annotated 28-69-303.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

The Arkansas General Assembly in 1987 adopted Act 713, same as Arkansas Code of 1987 Annotated, Sections 20-17-201, *et seq.*, effective July 20, 1987, titled "The Arkansas Rights of the Terminally Ill Act or Permanently Unconscious Act." This 1987 law, repealing all prior laws, provided that an individual of sound mind and eighteen or more years of age may execute a declaration governing the withholding or withdrawal of life sustaining treatment. The declaration must be signed by the declarant or by another at declarant's direction and witnessed by two individuals. A form of declaration is provided in the statute that can be used where the patient has a terminal condition, but the use of the form is not mandatory. Another form of declaration is printed in the statute where the patient is permanently unconscious. Provisions as to when declarations are operative, as to revocation and other pertinent provisions are also included in the Act.

CALIFORNIA

Edmond R. Davis
Los Angeles, California
March 4, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

(See Probate Code §6100)

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid (See Probate Code §6111).

NUNCUPATIVE (ORAL)

Not valid.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

NUMBER AND AGES OF WITNESSES

Two. No age requirement but must be competent to be a witness in court (See Probate Code §6110 & 6112).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Will revoked by subsequent will which revokes prior will expressly or by inconsistency, or by burning, tearing, canceling, obliterating, or destroying with intent to revoke (See Probate Code §6120). Marriage after making will revokes will as to surviving spouse unless spouse is otherwise provided for, the will makes it apparent that the failure to provide was intentional, or surviving spouse waives right (See Probate Code §§6560 and 6561).

Unless the will expressly provides otherwise, dissolution or annulment of marriage revokes bequests to the former spouse, any provision conferring a general or special power of appointment, and a nomination of surviving spouse as executor, trustee, conservator or guardian. Remarriage to the former spouse revives the foregoing revoked matters. The foregoing applies only to final judgment of dissolution or annulment after January 1, 1985 (See Probate Code §6122).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

None, but as to community property, if one spouse attempts testamentary disposition of more than half of the community property, the surviving spouse may be required to elect whether to take under the will or to take his or her half of the community property. Also, certain restrictions are provided for with reference to quasi-community property on the death of the acquiring spouse (See Probate Code §§101 and 102).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any child of the testator born or adopted after execution of the will and not provided for in the will or otherwise, may take an intestate share unless the will makes it apparent that the testator's failure to provide was intentional, or under certain circumstances if the estate is devised to the other parent of the omitted child (See Probate Code §§6570-6573).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

The will is not invalid. If there are two other disinterested witnesses, the interested witness may take the devise. If there are not two other disinterested witnesses, the bequest to a witness creates a presumption that the witness procured the bequest by duress, menace, fraud, or undue influence. If the presumption is not overcome, the interested witness may take intestate share. (See Probate Code §6112).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Legacy lapses if devisee fails to survive the testator unless there is a contrary provision in the will, except a devise to kindred of the testator, or of the spouse of a testator, leaving issue surviving, in which case the devise goes to such issue (See Probate Code §21.109 and 21.110).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A written will is valid if its execution complies with (1) the provisions of California law; (2) or the law at the time of execution of the place where the will is executed; (3) or the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national. (See Probate Code §6113).

INCORPORATION BY REFERENCE

A writing in existence when a will is executed may be incorporated by reference in the will (see Probate Code §6130), and a will may dispose of property by reference to acts of independent significance (See Probate Code §6131).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

A statutory form of living will, entitled a "Declaration," is valid (See Health and Safety Code §§7185-7194.5), and a Durable Power of Attorney for Health Care is valid (See Probate Code §§4600-4806).

COLORADO

J. Michael Farley
Denver, Colorado
March 8, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

15-11-501

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid. 15-11-502. A will not executed in compliance with statute, can be treated as if it had been so executed if proponent establishes by clear and convincing evidence that a decedent intended a will to constitute the decedent's will. 15-11-503.

NUNCUPATIVE (ORAL)

Not valid.

NUMBER AND AGES OF WITNESSES

Two. No age requirement stated, but must be generally competent to be a witness. 15-11-505.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Wills may be revoked by being burned, torn, canceled, obliterated, or destroyed with intent and for purposes of revoking, or by a subsequent will which revokes prior will expressly or by inconsistency. Divorce or annulment revokes as to former spouse. will not revoked by marriage or birth of issue or any other change of circumstances. 15-11-507, 508, 804.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Notwithstanding provision of testator's will, until July 1, 1995, surviving spouse shall have the option to take one-half of the testator's augmented net estate. Beginning July 1, 1995, the

elective share amount is determined by the length of time the surviving spouse and the decedent were married to each other, in accordance with a schedule set out in the statute, with a floor of \$50,000 in certain circumstances. 15-11-201.

Election must be made by filing a petition within nine months after the date of the decedent's death or within six months after decedent's will is admitted to probate, whichever limitation expires later. Court may extend time for election, on petition filed prior to none months after decedent's death. 15-11-205.

Spouse entitled, in addition, to exempt property allowance and to share in family allowance. 15-11-206, 402, 403.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

If no child was living when will was executed, children born or adopted after the execution of a will, if not provided for, take intestate shares unless the will devised all or substantially all of the estate to the other parent of the omitted child and the other parent survives the testator. If one or more children were living when will was executed, and living children are devised property, the omitted after-born or after-adopted child takes as if the testator had included all omitted after-born or after-adopted children with children to whom devises were made, and had given an equal share to each child. If omission appears to be intentional or that transfer in lieu of a testamentary disposition exists, the child does not take. 15-11-302.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A will or any provision thereof is not invalid because will is signed by interested witness. 15-11-505.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

No limitation.

EFFECT OF LAPSED LEGACY

If deceased devisee is a grandparent or a lineal descendant of a grandparent of the testator or of the donor of a power of appointment exercised by the testator's will, "a substitute gift" for surviving descendants of the devisee is provided for. Mere "if he survives me" or "to my surviving children" are not sufficient to prevent application of section and language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" is required. An "alternate devise" with respect to a devise for which a substitute gift is so created supersedes the substitute gift if expressly designated devisee of the alternative devise is entitled to take under the will. Surviving descendants of a deceased appointee under a power of appointment can be substituted for the appointee. 15-11-603.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will is valid if executed according to Colorado law, complies with law of place of execution, or the law of place where at time of execution or death testator is domiciled, has a place of abode, or is a national. 15-11-506; Uniform International wills Act adopted 15-11-1001.

INCORPORATION BY REFERENCE

Any writing in existence when will is executed may be incorporated by reference if will manifests intent and describes writing sufficiently to identify. 15-11-510.

A will may devise property to the trustee of a revocable or irrevocable trust established or to be established during testator's lifetime by testator or any other person or at testator's death by a devise to the trustee if the trust is identified in the testator's will and its terms are as set forth in a written instrument, executed before, concurrently with or after the execution of testator's will or in will of another who has predeceased testator. Devise is not invalid because trust amended after execution of will or after testator's death. Revocation or termination of trust before death of testator results in lapse unless caused by exhaustion of trust corpus or unless testator provides that in the event of revocation or termination, the devise shall constitute a devise to the trustee of the trust identified in testator's will, and on the terms thereof as they existed at the time of the execution of testator's will, or as they existed at the time of revocation or termination, as testator's will provides. 15-11-511.

A will may dispose of property by reference to acts and events that have significance apart from their effect upon disposition made by will, whether they occur before or after execution of the will or before or after testator's death, and execution or revocation of another individual's will is such an event. 15-11-512.

Tangible personal property may be disposed of by written statement or list referred to in will if in handwriting of testator or signed by testator and devisees with reasonable certainty. Writing must be in existence at testator's death but may be prepared before or after execution of will, may be altered after preparation and may be a writing with no significance apart from effect upon dispositions made by will. 15-11-513.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Declaration as to medical or surgical treatment, directing withdrawal or withholding of life sustaining procedures, including artificial nourishment (15-18-101), proxy decision-makers (15-18.5-101), health care powers of attorney (15-14-506) all authorized by statute.

CONNECTICUT

Martin Wolman
Hartford, Connecticut
March 9, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

45a -250.

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not valid if executed in Connecticut. Valid if made outside of state, and according to the laws of the state or country where executed. 45a-251. *Houghton v. Brantingham*, 86 Conn. 630, 86 A. 664 (1913) (holographic will executed in France).

NUNCUPATIVE (ORAL)

Invalid. *Stone's Appeal*, 74 Conn. 301 (1901).

NUMBER AND AGES OF WITNESSES

Two. No age requirement, but must be competent. 45a-251.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Express revocation by burning, canceling, tearing or obliteration, or by a later will or codicil. 45a-257 (b). Marriage, divorce, annulment or dissolution of marriage or subsequent birth or adoption of a minor child or birth of a child by A.I.D. revokes the will, if no provision is made for such contingency. 45a-257 (a). However, divorce, annulment or dissolution of marriage does not operate as revocation if testator's spouse was not a beneficiary under the will. 45a-257 (a).

A.I.D. is discussed in Sections 45a-771 through 45a-779. These sections clarify that any child conceived as a result of heterologous artificial insemination is legitimate if born to a married woman during wedlock. The phrase heterologous artificial insemination is artificial insemination with the semen of a donor, referred to in these sections as A.I.D. It may be performed only by persons certified to practice medicine in Connecticut with the written consent and request of the husband and wife desiring the utilization of A.I.D. for the purpose of conceiving a child or children.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

The surviving spouse may elect to take a life estate of one-third in value of all property legally or equitably owned by the other at death. 45a-436. Election limited to assets in probate estate.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

The will is revoked by the subsequent birth or adoption of a child, if no provision made for child. 45a-257. Such a provision may be some statement or declaration in the will making it clear that the child has not passed over through inadvertence. *Strong v. Strong*, 106 Conn. 76, 137 A. 17 (1927).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A testamentary gift to a subscribing witness, or husband or wife of a subscribing witness, is void unless the witness or spouse is an heir of the testator, or unless the will is legally attested without such witness's signature. 45a-258.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

In the case of a deceased devisee or legatee who was a child, stepchild, grandchild, brother or sister of the testator, issue of such deceased inherits; if no issue, the legacy lapses. 45a-441. If a specific devise of real property in a will executed after October 1, 1947, is void or lapses, that property, except as provided in 45a-441, in the absence of any provision in the will for such contingency, shall be disposed of by the residuary clause in the will. 45a-442. A lapsed bequest of personal property, except as provided in 45a-441, shall also be disposed of by the residuary clause of the will. *Bridgeport Trust Co. v. Parker*, 97 Conn. 245 (1922). A lapsed gift of all or part of the residue, except as provided in 45a-441, shall pass by intestacy. *DaBoli v. DaBoli*, 101 Conn. 142 (1924).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's state"

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A will executed in compliance with the laws of the state or country where executed shall be effective to pass any property. 45a-251.

INCORPORATION BY REFERENCE

Subject to certain statutory exceptions, incorporations by reference of documents not signed and attested as wills is not permitted in Connecticut. *Hatheway v. Smith*, 79 Conn. 506, 65 A. 1058 (1907). The exceptions include: bequests to existing trusts, 45a-260; incorporation of certain state statutes, e.g., the Fiduciary Powers Act, 45a-233 through 45a-236; and reference to sections of the Internal Revenue Code, 45a-264.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Any person eighteen years of age or older may execute a living will. 19a-575. Any person eighteen years of age or older may appoint a health care agent and/or attorney-in-fact for health care decisions. 19a-576, 19a-577 and 1-54a. In addition, any person eighteen years of age or older may execute a document which combines a living will, the appointment of a health care agent, the appointment of an attorney-in-fact for health care decisions, the voluntary designation of a conservator of the person for future incapacity and a document of anatomical gifts. Public Act 93-407.

DELAWARE

Richard G. Bacon
Wilmington, Delaware
March 6, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Void.

NUNCUPATIVE (ORAL)

Void.

NUMBER AND AGES OF WITNESSES

Two. Any credible person.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Cancellation by testator by subsequent will or other writing of another person in testator's presence and at his direction and subscribed to by two witnesses, or by implication. Divorce or annulment revokes disposition in favor of former spouse.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

A surviving spouse may elect to take one-third of the elective estate less the amount of transfers to the spouse by the decedent. The elective estate is the decedent's adjusted gross estate less deductions allowable under §§2053 and 2054 of the Internal Revenue Code and certain *inter vivos* transfers made by the decedent with the consent or joinder of the spouse that are included in the adjusted gross estate. (12 Dec. C. §901 et seq.)

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

A child born after the execution of its parent's will and for whom no provision has been made, by will or otherwise, is entitled to receive a share equal to that which such child would have received had such child's parent died intestate (12 Del. C. §301).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Valid.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Grandparent or lineal descendants of a grandparent of legatee who survive testator by 120 hours take per stirpes.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will executed in compliance with law of place where executed effective to pass estate.

INCORPORATION BY REFERENCE

Generally, a writing may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification, and if the document to be incorporated indicates by its language that it was in existence at the time of the execution of the will, refers to the testator's last will and testament, and corresponds to the description of it in the will. However, writings relating to the disposition of items of tangible personal property may be incorporated by reference whether or not prepared prior to the execution of the will, so long as the writing is signed by the testator or handwritten by him, and identifies the items and legatees with reasonable certainty (12 Del. C. §212). It should also be noted that the amendment of *inter vivos* trust agreements following the execution of pour-over wills is permitted (12 Del. C. §211).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

So-called living wills are valid if executed in accordance with Delaware law (16 Del. C. §2502).

DISTRICT OF COLUMBIA

J. Bruce Kellison
Washington, D.C.
October 4, 1996

AGE OF TESTATOR

Real Estate	Personal Property
18	18

D.C. Code Ann. Sec. 18-102 (1981)

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Not valid, except that person in actual military or naval service or a mariner at sea may dispose of his personal property by word of mouth. Requirements:

1. proof of two witnesses who were present and were requested by testator to bear witness that the disposition was his last will, and
2. made during last illness, and
3. substance reduced to writing within 10 days.

D.C. Code Ann. Sec. 18-107 (1981)

NUMBER AND AGES OF WITNESSES

Two. Witnesses must be "credible," but no statutory provision regarding age. D.C. Code Ann. Sec. 18-103 (1981). Witness who was nearly 17 was found competent in *Peters v. Peters*, 78 F.2d 215 (App. D.C. 1935).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

1. By implication of law.
2. By later will, codicil or other writing declaring the revocation, executed
 - a. in writing signed by testator or another who signs by testator's express direction while in testator's presence and attested by two witnesses in testator's presence [D.C. Code Ann. Sec. 18-103 (1981)] or
 - b. as a valid nuncupative will (see above) [D.C. Code Ann. Sec. 18-107 (1981)].
3. By burning, tearing, cancelling, or obliterating with intention of revoking by testator or a person at express direction, consent, and in presence of testator.

D.C. Code Ann. Sec. 18-109 (1981).

Marriage of a person and birth of a child, capable of inheriting, revokes a prior will, if both occurred after the execution thereof, especially where the child is born after the death of his parent. *Pascucci v. Alsop*, 147 F.2d 880 (D.C. Cir.), cert. denied, 325 U.S. 868 (1945).

Divorce coupled with a property settlement/division revokes will's bequest to former wife by implication of law. *Luff v. Luff*, 359 F.2d 235 (D.C. Cir. 1966). Presumption of revocation of a will in favor of a former spouse is conclusive and decedent's estate passes as if he died intestate. *Estate of Liles*, 435 A.2d 379 (D.C. 1981).

Under the doctrine of revocation by implication of law, a divorce automatically revokes any existing will's bequest to the former spouse, regardless of the actual intent of the testator. *Bolle v. Hume*, 619 A.2d 1192 (D.C. 1993).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Surviving spouse or guardian/fiduciary of spouse who is unable

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

to act for himself/herself may so elect by filing in the Probate Court a written renunciation within six months from the later of the will being admitted to probate or final determination of a suit instituted to construe the will. For reasonable cause and upon notice the time may be extended before expiration by the Probate Court for periods up to six months.

Form:

"I, A B, widow [or surviving husband] of ____ late of ____, deceased, renounce and quit all claim to any devise or bequest made to me by the last will of my husband [or wife] exhibited and proved according to law; and I elect to take in lieu thereof my legal share of the real and personal estate of my deceased spouse (except that in lieu of my legal share of the real estate, I elect to take dower in all the real estate of my deceased spouse to which that right is applicable)."

D.C. Code Ann. 19-113 (1981)

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

No rights where a married person makes a will prior to the birth of children not mentioning children. *Allen v. Heron*, 157 F.2d 707 (D.C. Cir. 1946). *In Re Allen's Estate*, 64 F. Supp. 107 (D.D.C. 1946).

See comment under "Revocation and Revocation By Marriage/Divorce" above.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Any beneficial devise, legacy, estate, interest, gift or power of appointment of or affecting real or personal estate is void as to a necessary attesting witness or persons claiming under him unless the witness-legatee is also an heir at law, then he, or those claiming under him, shall take such proportion of the devise or bequest as does not exceed his share had the decedent died intestate. D.C. Code Ann. Sec. 18-104 (1981)

If there are three attesting witnesses, two of whom are disinterested, bequest to third witness is valid. *In Re Estate of Pye*, 325 F. Supp. 321 (D.D.C. 1971).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Unless will provides that testamentary gift should lapse, if pre-deceased legatee leaves issue surviving testator they take. Lapsed or void legacies deemed included in residuary estate, if any, contained in will.

D.C. Code Ann. Sec. 18-308 (1981)

VALIDITY OF WILL EXECUTED OUTSIDE STATE

The will is void unless executed

- a. in writing signed by testator or another who signs by testator's express direction while in testator's presence and attested by two witnesses in testator's presence [D.C. Code Ann. Sec. 18-103 (1981)], or

- b. as a valid nuncupative will (see above) [D.C. Code Ann. Sec. 18-107 (1981)].

D.C. Code Ann. Sec. 18-103 (1981).

INCORPORATION BY REFERENCE

A. Documents

"Pour-over" will permitted to transmit title to property to trustees of a

1. preexisting, identified *inter vivos* trust, or a contemporaneously executed trust agreement, even if trust instrument is amended or modified after the will was executed, or

2. testamentary trust created by another's will or codicil even if not in existence at time "pour-over" will was executed so long as the person creating the testamentary trust predeceases the testator and his will or codicil is probated.

Trust need not be created according to legal requirements for execution of wills.

D.C. Code Ann. Sec. 18-306 (1981)

An extrinsic document, clearly identified as the instrument to which will refers, and in existence at the date of the will or republishing codicil, may be incorporated into the will. *Vestry of St. John's Parish v. Bostwich*, 8 App. D.C. 452 (1896).

B. Statutes

No statutory provisions relating to incorporation by reference of statute in will. There would seem to be no legal prohibition.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

Adults (18 years old) may request life-sustaining procedures be withheld or withdrawn when they are terminal. Such declaration must be in writing, dated and signed by declarant or another in declarant's presence and at his express direction in the presence of two adult witnesses who state the declarant is of sound mind. There are restrictions on who can witness. See form in code.

D.C. Code Ann. Sec. 6-2422 (1981).

HEALTH CARE PROXY

Competent adults, in a durable power of attorney for health care, may designate a person to make health-care decisions for them if they are not able to make or communicate their wishes. Requirements: writing, dated and signed by principal and two adult witnesses who affirm the principal was of sound mind and free from duress, including language substantially similar to either "this power of attorney shall not be affected by the subsequent incapacity of the principal" or "this power of attorney becomes effective upon the incapacity of the principal." There are restrictions on who can witness.

D.C. Code Ann. 21-2205 (1981).

A sample form is in the code, but any form that conforms to the requirements is acceptable.

D.C. Code Ann. 21-2207 (1981).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

AGE OF TESTATOR

Real Estate	Personal Property
18	18

F.S. §732.501

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized. F.S. §732.502. However, if a valid last will refers to a separate writing, such separate writing, if signed by the testator, may be sufficient to dispose of items of tangible personal property. The separate writing need not be in the testator's handwriting and need not be witnessed. F.S. §732.515.

NUNCUPATIVE (ORAL)

Not recognized. F.S. §732.502.

NUMBER AND AGES OF WITNESSES

Two witnesses, F.S. §732.502.

No minimum age: Any person "competent to be a witness" may be a witness to a will. F.S. §732.504.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Express revocation by physical act: Burning, tearing, canceling, defacing, obliterating or destroying, with intent to revoke. F.S. §732.506.

Express revocation by subsequent writing: A subsequent will, codicil or other writing with the same formalities required for a will execution, expressly revoking the prior will. Partial revocation is permitted. F.S. §732.505(2).

Implied revocation by subsequent writing: Revocation by subsequent inconsistent will or codicil to the extent of the inconsistency. F.S. §732.505(1).

Revival by revocation: Revocation of a will that revokes the former will shall not revive the first or former will. Revocation of a codicil reinstates that part of the will revoked or amended by the codicil. F.S. 732.508.

Subsequent marriage: Subsequent marriage does not revoke a former will, F.S. §732.507(1), but pretermitted spouse is entitled to intestate share unless (1) precluded by a prenuptial or postnuptial agreement; (2) the spouse is provided for in will; or (3) will discloses intention not to make provision for the spouse. F.S. §732.301.

Subsequent divorce: Subsequent divorce voids will as it affects the surviving divorced spouse. F.S. §732.507(2).

Of a codicil: A codicil may be revoked in the same manner as a will. Revocation of a will automatically revokes all codicils to that will. F.S. §732.509

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

The surviving spouse of decedent not domiciled in Florida has no election to take an intestate share; however, the surviving

spouse of a right to an elective share, F.S. §732.201, 732.205. The elective share is 30% of fair market value (reduced by all valid claims paid or payable from the estate and by mortgages, liens, and security interests) on date of death of all property of the decedent wherever located that is subject to administration, except real property not located in Florida. F.S. §732.206 and §732.207, and is in addition to homestead property, exempt property, and the family allowance, F.S. §732.208. The election must be made within 4 months of the first publication of the Notice of Administration or 40 days after termination of proceedings involving the extent of the estate subject to the elective share, by the surviving spouse or by guardian of the property of the surviving spouse through a court determination. F.S. §732.210, 732.212. The election may not be made by executor of subsequently deceased surviving spouse.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

A child, born or adopted after the execution of a will, takes a child's intestate share of the net estate if (1) the will makes no provision for any children born or adopted after the will made; (2) the child has not received by way of advancement any part of the testator's property equivalent to a child's intestate share; (3) it does not appear from the will that the omission was intentional; and (4) the testator did not both (a) have one or more children when the will was executed, and (b) devise substantially all the estate to the parent of the pretermitted child. F.S. §732.302.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Neither a will, codicil, nor part of either, is invalid because signed by an interested witness. F.S. §732.504(2).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None. Prior limitation contained in F.S. §732.803 ruled unconstitutional in *Shriners Hospital v. Zrillic* 563 So.2d 64 (Fla. 1990). Repealed 1991.

EFFECT OF LAPSED LEGACY

Absent a contrary will provision:

A devise which lapses passes under the testator's residuary clause, F.S. §732.604. If the will does not contain a residuary clause, the property passes by intestate succession. F.S. §732.101(1).

A devise to the testator's grandparent or a lineal descendant of a grandparent will not lapse upon death of the devisee. The descendants of the deceased devisee take *per stirpes*. If there are no such descendants, the devise lapses. F.S. §732.603.

A devise to anyone else (including spouse, stepchild, or foster child) lapses. F.S. §732.604(1).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A will (other than a holographic or nuncupative will) executed by a non-resident is valid (as to its execution) if it was valid at the time of execution under the laws of the state or country in which it was executed. F.S. §732.502(2).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

SELF-PROOF OF WILL

A will or codicil may be made self-proved at the time of execution or subsequent thereto, by the testator's acknowledgment and the affidavit of the witnesses, each made before an officer authorized to administer oaths and evidenced by the officer's certificate in substantially the statutory form. F.S. §732.503.

INCORPORATION BY REFERENCE

A will can incorporate by reference a writing in existence at the time the will is executed. F.S. §732.512(1).

A will can dispose of property by reference to acts or events which have independent significance, including execution or revocation of a will or trust by another person. Such acts and events may occur before or after the execution of the will or the testator's death. F.S. §732.512(2).

A separate writing which is referenced in a will can dispose of tangible personal property (other than money and property used in a trade or business) not otherwise specifically disposed of by the will. F.S. §732.515.

VALIDITY OF LIVING WILL

LIVING WILL

Living will recognized as a valid and binding document. Must be signed by principal in presence of two subscribing witnesses, one of whom may not be a spouse or a blood relative of the principal. F.S. 765.302

HEALTH CARE PROXY

Proxy (surrogate in Florida) to make health care decisions, as well as an alternate proxy, may be designated by principal in writing signed by the principal in the presence of two attesting adult witnesses. F.S. 765.202. The proxy may not be a witness and at least one of the witnesses may not be a spouse or a blood relative of the principal. The proxy will be effective in the event the principal's capacity to make health decisions for himself is lacking, which condition is to be so evaluated by two physicians. F.S. 765.204.

GEORGIA

Julian R. Friedman
Savannah, Georgia
October 30, 1996

AGE OF TESTATOR

Real Estate	Personal Property
14	14

(O.C.G.A. §53-2-22).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized (O.C.G.A. §53-2-40).

NUNCUPATIVE (ORAL)

Valid when made during last sickness if testator asks some persons present to bear witness to will. Must be reduced to writing

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

within 30 days and proved by 2 competent witnesses. Application for probate must be made within 6 months after death. (O.C.G.A. §§53-2-48, 53-2-49, 53-3-16(a)).

NUMBER AND AGE OF WITNESSES

Two. Age not explicitly prescribed, sole requirement being competency. However, while competency (or lack) is rebuttable for most purposes, it is unlikely that a witness under 14 would qualify, since person of that nonage (1) is considered as lacking in capacity to execute a will and (2) is implicitly ineligible to attest self-proving wills. (O.C.G.A. §§53-2-40, 53-2-22, 53-2-40.1(b)).

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Express: By written annulment executed and attested with same formality as for execution, or by destruction or material obliteration of will (or duplicate) by or at direction of testator with intent to revoke. Doctrine of dependent relative revocation applies (O.C.G.A. §§53-2-72(b), 53-2-73(a), 53-2-74).

Implied: By subsequent inconsistent will; or subsequent marriage, divorce, or the birth or adoption of a child unless event was contemplated in will (O.C.G.A. §§53-2-72(c), 53-2-76).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

No election of intestate share. However, on application within 3 years of decedent's death, a portion of estate (testate or intestate) may be set aside in fee as "year's support" for unmarried surviving spouse and/or minor children. Minimum family award is \$1,600 (or estate, if less). Other resources may be considered in making award. Additional applications may be made in successive years the estate is open if assets are sufficient to pay known debts and claims. Decedent's will can require election between year's support and will provisions (O.C.G.A. §53-5-1 et seq.).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Will revoked by subsequent birth (or adoption) of child unless contemplated in will (O.C.G.A. §53-2-76).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Witness is competent, but legacy or devise is void in absence of at least two non-beneficiary subscribing witnesses (O.C.G.A. §53-2-45(a)).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

Testamentary disposition of more than 1/3 of the first \$200,000 of estate to any charitable, religious, educational or civil institution by testator leaving spouse, child, or other descendant is void if will was executed less than 90 days before testator's death. (O.C.G.A. §53-2-10).

EFFECT OF LAPSED LEGACY

No lapse of absolute gift if legatee (or devisee) leaves issue surviving testator. Otherwise, lapsed bequest passes with residue and lapsed devise descends to heirs (or, on failure of stated contingency, passes with residue). (O.C.G.A. §§53-2-103, 53-2-104).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Unprobated foreign will devising Georgia real property may be probated in county of the property's situs if will executed and attested in conformity with Georgia law. But unprobated foreign will bequeathing Georgia personalty must be executed and attested under laws of the state or country of testator's residence at death to be probated in Georgia. Foreign will admitted to probate in state of testator's residence at death is admissible to like probate in Georgia on production of authenticated certified copies of foreign probate proceedings (O.C.G.A. §§53-3-42, 53-3-43, 53-3-41).

SELF-PROOF OF WILL

A will is made self-proving (dispensing with witnesses' testimony at probate, assuming no caveat) by affidavits made before authorized officer by testator and witnesses at or subsequent to execution of will. Affidavits are evidenced by officer's certificate, substantially in prescribed form, annexed to will (O.C.G.A. §53-2-40.1).

INCORPORATION BY REFERENCE

Statutory authority is provided for incorporation by reference of various fiduciary powers into wills, trusts, or other written instruments (O.C.G.A. §53-12-232). No explicit statutory provision for incorporation of separate documents by reference, but Georgia probably would follow general rule permitting incorporation if documents were in existence before execution of will and description is sufficiently clear to leave their identity free from doubt.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

Competent adult person may make written living will instructing physician to withhold or withdraw life-sustaining procedures in the event of terminal condition, coma, or persistent vegetative state (O.C.G.A. §31-32-1(d)). Statute requires at least two competent adult witnesses who are unrelated to declarant, would not be entitled to any of declarant's estate by will or inheritance, are not the attending physician or employee thereof or employee of hospital or nursing facility in which declarant is a patient, are not financially responsible for declarant's medical care, and have no claim against declarant's estate (O.C.G.A. §31-32-3(a)). If a patient in a hospital or nursing home, declarant must sign in presence of certain enumerated staff (O.C.G.A. §31-32-4). Suggested form is provided by statute (O.C.G.A. §31-32-2-3(b)).

HEALTH CARE PROXY

May be created by writing signed by the principal or another person in presence and at express direction of principal. Must be attested and subscribed in principal's presence by two or more competent witnesses at least 18 years of age (and, if principal is a patient in a hospital or nursing facility, additionally including the attending physician) (O.C.G.A. §31-36-5(a)). Health care provider involved in the patient's health care is ineligible to serve as agent (O.C.G.A. §31-36-5(b)). While agent is available, a principal's living will is not operative; furthermore, the agent generally has priority over any other person (including a guardian of the person) in all matters covered by the health care agency (O.C.G.A. §31-36-11). Suggested form is provided by statute (O.C.G.A. §31-36-10(a)).

NOTE: The Georgia probate laws have been extensively revised effective for decedents dying on or after January 1, 1997. The

summaries on this page reflect the status of the law for decedents dying prior to January 1, 1997.

HAWAII

Daniel H. Case
Honolulu, Hawaii
March 2, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

Hawaii Rev. Stat. §560:2-501 (1985 Repl.).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized except foreign wills admitted to probate. Hawaii Rev. Stat. §560:2-506 (1985 Repl.).

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two. No age given; "competent." Common law governs. Hawaii Rev. Stat. §560:2-505 (1985 Repl.).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

If, after making a will, the testator is divorced or his marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, guardian of the property, or guardian of the person, unless the will expressly provides otherwise. Remarriage to a former spouse shall not revive any provision previously revoked by operation of Hawaii Rev. Stat. §560:2-508 (1985 Repl. Supp.).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

The Hawaii law of dower and curtesy is applicable only to rights accruing prior to July 1, 1977. Hawaii Rev. Stat. §560:8-101(6) (1985 Repl.).

Surviving spouse may elect against will. The elective share is one-third of the "net estate" (estate which, in the absence of the election, would have been disposed of under the decedent's will or by intestate succession, reduced by all enforceable claims) Hawaii Rev. Stat. §560:2-201 (1985 Repl.).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Same as Official Text of Uniform Probate Code Section 2-302. Hawaii Rev. Stat. §560:2-302 (1985 Repl.).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Interest does not disqualify a person as a witness, nor does it invalidate the will. Hawaii Rev. Stat. §560:2-505 (1985 Repl.).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Where deceased devisee was a grandparent or lineal descendant of a grandparent of the testator, the gift to the deceased devisee will not lapse, but will go to the surviving issue of the deceased devisee, on the principle of representation. Hawaii Rev. Stat. §560:2-605 (1985 Repl.).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Written will valid if execution complies with law at time of execution of place where executed, or law at time of execution of testator's domicile or residence. Hawaii Rev. Stat. §560:2-506 (1985 Repl.).

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. Hawaii Rev. Stat. §560:2-510 (1985 Repl.).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

A competent person who has attained the age of 18 may execute a declaration directing the provision, continuation, withholding, or withdrawal of life-sustaining procedures. This declaration must be in writing, dated, signed, notarized, and witnessed by two persons at least 18 years of age and not related by blood, marriage, or adoption to the declarant, nor physicians or health care employees attending to the declarant. Hawaii Rev. Stat. §327D-3 (1992 Supp.)

HEALTH CARE PROXY

A competent person who had attained the age of 18 may execute a power of attorney authorizing an agent to make any lawful health care decisions during the principal's incapacity. This power of attorney must be in writing, dated, signed, notarized, and witnessed by two persons at least 18 years of age and not related by blood, marriage, or adoption to the principal, nor physicians or health care employees attending to the principal. The agent may be any person except the treating physician. Hawaii Rev. Stat. §551D-2.5 (1992 Supp.)

IDAHO

Robert S. Erickson
Boise, Idaho
August 13, 1996

AGE OF TESTATOR

Real Estate 18 or any emancipated minor.	Personal Property 18 or any emancipated minor.
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Idaho Code §15-2-501.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Holographic wills are valid if the signature and material provisions are in the handwriting of the testator, whether witnessed or not. Idaho Code §15-2-503.

NUNCUPATIVE (ORAL)

Not valid.

NUMBER AND AGES OF WITNESSES

Two. Witnesses must be 18 or more years of age and generally competent. Idaho Code §15-2-505.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

(a) By a subsequent will which revokes the prior will or part expressly or by inconsistency.

(b) 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.

(c) If after executing a will the testator is divorced or the testator's marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, and revokes any provision conferring a general or special power of appointment on the former spouse and any nomination as executor (personal representative), trustee, conservator or guardian, unless the will expressly provides otherwise. The provisions of the will so revoked by the divorce or annulment are revived by testator's remarriage to the former spouse. Idaho Code §15-2-507, §15-2-508.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Except as to the surviving spouse's rights in one half of the augmented quasi-community property, and subject to the homestead allowance (if none has been selected during life), exempt property allowance, and family allowance, the surviving spouse may not elect to take an intestate share in preference to a testamentary provision. Idaho Code §15-2-201, §15-2-203, §15-2-401, §15-2-403.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

If a testator fails to provide in his will for any of the testator's children born or adopted after the execution of his or her will, the omitted child receives a share in the estate equal in value to that which the child would have received if the testator had died intestate. Idaho Code §15-2-302.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A will or any provision thereof is not invalid because the will is signed by an interested witness. Idaho Code §15-2-505.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

If a devisee who is a grandparent or lineal descendant of a

grandparent of the testator is dead at the time of the execution of the will, fails to survive the testator, or is treated as if he or she predeceased the testator, the issue of the deceased devisee who survived the testator by 120 hours take in place of the deceased devisee. Idaho Code §15-2-605.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A written will is valid if executed in compliance with §15-2-502 or §15-2-503 of the Idaho Code, or if its execution complies with the law at the time of execution of the place where the will is executed, or the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national. Idaho Code §15-2-506.

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. Idaho Code §15-2-510.

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 disposed of by the will, other than money, evidences of indebtedness, documents of title, securities and property used in trade or business. Idaho Code §15-2-513.

UNIFORM TRUSTEE’S POWERS ACT

The powers conferred under the Uniform Trustee’s Powers Act are conferred upon the trustee of a testamentary trust unless the powers are limited in the will. Idaho Code §68-104, §68-105.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Under Idaho law, any emancipated minor or any person 18 years of age or older who is of sound mind may execute a Living Will. The Living Will will act as a directive to any concerned person regarding the individual’s desire for health care should that person have an incurable injury, disease, illness or condition certified to be terminal by two medical doctors, and where the application of life-sustaining procedures of any kind would serve only to prolong artificially the moment of the individual’s death. The Living Will directive must be in writing, signed by the individual, and signed by two witnesses. Idaho Code Section 39-4504.

In order to implement the general desires of an individual as expressed in his or her Living Will, an emancipated minor or any person 18 years of age or older who is of sound mind may execute a Durable Power of Attorney for Health Care, which will take effect only when the individual is unable to communicate rationally. The individual may appoint any adult person to exercise the Durable Power of Attorney for Health Care. The Durable Power of Attorney for Health Care must be in writing, signed by the individual, witnessed by two qualified adult witnesses, and notarized by a notary public. Idaho Code Section 39-4505.

ILLINOIS

Dale Park, Jr.
Chicago, Illinois
March 5, 1995

AGE OF TESTATOR

Real Estate
18

Personal Property
18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not valid.

NUNCUPATIVE (ORAL)

Not valid.

NUMBER AND AGES OF WITNESSES

Two. No age requirement. Statute requires two “credible” witnesses and courts have said this means “competent” (5/4-3).

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Burning, cancelling, tearing, obliterating, or by later will or other document signed and witnessed according to testamentary requirements declaring the revocation, or by the inconsistent provisions of a later will to the extent of such inconsistencies. Marriage does not revoke a will. Dissolution of a marriage or annulment of marriage of the testator revokes every legacy, interest or power of appointment given to, or nominations to fiduciary office of, the testator’s former spouse in a will executed before the entry of the judgment of dissolution of marriage or annulment; and the will takes effect in the same manner as if the former spouse had died before the testator. A will which is totally revoked may not be revived except by due re-execution or by an instrument in writing declaring the revival, and signed and attested as required for will. If a will is partially revoked by an instrument which is itself revoked, the revoked part of the will is revived. (5/4-7).

PROOF OF WILL

When each of two attesting witnesses states (1) that he saw the testator (or some person in the testator’s presence and by his direction) sign the will in the presence of the witness or the testator acknowledged it to the witness as his act, (2) that the will was attested by the witness in the testator’s presence, and (3) he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will, the will can be admitted to probate unless there is proof of fraud, forgery, compulsion or other improper conduct. The required statements of a witness may be made by (a) testimony before the court, (b) an attestation clause signed by the witness and forming a part of or attached to the will, or (c) an affidavit signed by the witness at or after the time of attestation and which forms a part of the will or is attached to the will or an accurate facsimile of the will (5/6-4).

Form of Attestation Clause

We certify that the above instrument was on the date thereof signed and declared by [testator] as his will in our presence and that we, at his request and in his presence and in the presence of each other, have signed our names as witnesses thereto, believing [testator] to be of sound mind and memory at the time of signing.

(Witness) _____

(Witness) _____

* For additional discussion of this issue, see ACTEC Study 10, “Surviving Spouse’s Right to Share in Deceased Spouse’s Estate”

STATE OF _____

COUNTY OF _____

We, the undersigned being the testator and the witnesses, respectively, whose names are signed to the foregoing instrument, and being first duly sworn, do hereby declare to the undersigned authority that the testator in the presence of witnesses signed the instrument as his last will, that he signed willingly 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 and in the presence of each other, signed the will as a witness and that to the best of his or her knowledge the testator was at the time of legal age, of sound mind, and under no constraint or undue influence.

(Testator) _____

(Witness) _____

(Witness) _____

Signed and sworn to before me by the testator, and by each of the above witnesses on this _____ day of _____ 19 _____

Notary Public

RENUNCIATION OF WILL BY SURVIVING SPOUSE

Renunciation is effected by filing in court where will was admitted to probate a written declaration of renunciation signed by the spouse within seven months after admission of will to probate or within such further time as court allows upon filing verified petition within such seven months or any extension, setting forth pendency of litigation which affects spouse's share. Filing of instrument is complete bar to any claim of surviving spouse under will.

In case of renunciation, (a) surviving spouse takes, after payment of Federal estate tax and other claims, one-third of entire estate if testator leaves descendant, or one-half of entire estate if testator leaves no descendant, (b) any future interest to take effect in possession or enjoyment at or after termination of estate or other interest given by will to surviving spouse takes effect as if surviving spouse had predeceased testator, unless will expressly provides against acceleration in case of renunciation; and (c) if the legacies to other persons are thereby diminished or increased in value, the court, when the estate is settled, shall apportion the loss or advantage among the legatees in proportion to the amount and value of their legacies (5/2-8).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

After-born children take intestate's share unless will shows intention to disinherit or provision is made in the will for the after-born child (5/4-10).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Persons, or spouses of persons, incompetent as attesting witnesses because of interest are by statute rendered competent and may be compelled to testify, but such persons are deprived of any interest under will, except so much as does not exceed amount witness would be entitled to were will not established. Such persons are not so deprived if the will is duly attested by 2 other witnesses. Fact that employee or partner of individual or employee or shareholder of corporation attests execution of will or testifies thereto does not disqualify said individual or corporation from acting or from receiving compensation for acting in any fiduciary capacity with respect to will of decedent. No attorney is disqualified to act or to receive compensation by reason of fact that such attorney is attesting witness or is employee or partner of attesting witness (5/4-6).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Unless testator clearly provides otherwise, (1) if a legacy of a present or future interest is to testator's descendant who dies before or after the testator, the legatee's descendants living when the legacy is to take effect take *per stirpes* the estate so bequeathed; (2) if such a legacy is to a class, and any member of the class dies before or after the testator, the members of the class living when the bequest is to take effect take the deceased member's share except, if the deceased member is a descendant of the testator, the descendants of the deceased member take *per stirpes* his share; and (3) except as provided in (1) and (2), if a legacy lapses by reason of the legatee's death before the testator, the estate shall pass as part of the residue, to be taken by the legatees (or remaining legatees) of the residue in proportions and upon estates corresponding to their respective interests in the residue (5/4-11).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if admitted to probate outside of Illinois, or executed in accordance with law of Illinois, of testator's domicile or of place of execution (5/7-1).

BEQUESTS AND DEVISES TO TRUSTS

Testator may bequeath or appoint to a trust evidenced by an instrument, including the will of another who predeceased the testator, which is in existence when the testator's will is made, even though the trust is subject to amendment, revocation or termination. Unless the testator directs otherwise, the estate so bequeathed or appointed shall be governed by the terms of the other instrument, including any amendments in writing made at any time before or after the execution of the testator's will and before, or after if the testator's will so directs, the testator's death. The existence, size or character of the *corpus* of the trust is immaterial to the validity of the bequest. If the trust is terminated prior to the testator's death by revocation of the trust, or of the portion of the instrument creating the trust, the bequest or appointment is effective according to the terms of the instrument creating the trust as they existed at the time of termination, unless the testator's will provides otherwise (5/4-4)

INCORPORATION BY REFERENCE

In order to incorporate a separate paper so as to become a part of a will, (1) the will must refer to the paper (a) as being in exis-

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

tence when the will is executed, (b) in such a way as to reasonably identify the paper, and (c) in such a way as to show testator's intention to incorporate the paper into his will, and (2) the paper must in fact be in existence when the will is executed, and must be shown to be the instrument referred to.

The provisions of the Illinois Trusts and Trustees Act (ILCS, 1992, Ch. 760 §§ 5/1-5/20) apply to each trust created by will or other instrument whenever executed unless the provisions of the statute are inconsistent with the provisions of the will, except that the provisions dealing with trustee powers apply only to trusts executed on or after 10/1/73.

INDEPENDENT ADMINISTRATION

Testator by his will may direct independent administration; if so, supervised administrator will be required only if the court finds good cause. Independent administration (5/28-1 to 5/28-12) eliminates court filings of an estate's inventory and accounts, although copies must be provided to all interested persons; it also grants broad administrative powers to the independent executor, exercisable without court order, unless inconsistent with the will.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

Living wills are authorized by statute in Illinois. See §35/3 for suggested language. Declaration must be witnessed by 2 disinterested adults.

HEALTH CARE POWERS OF ATTORNEY

Principal may delegate authority to an agent to make personal and health care decisions for the principal. Principal's attending physician and any other person providing health care to the principal may not act as agent. Provisions of the power of attorney for health care form set out in the statute must be substantially followed if agent is to be protected from civil or criminal liability to the principal (§45/4-10).

HEALTH CARE SURROGATE

If a minor or an adult patient has no known operative living will and no acting agent under a power of attorney for health care, and if the patient has a terminal condition, is permanently unconscious, or has an incurable or irreversible condition, a surrogate decision-maker may be identified by a health care provider from a list of 8 categories of persons, in an order of priority set out in the statute (§40/25). Thereafter, the surrogate may make decisions as to whether to forego life-sustaining or other medical treatment for the patient.

Note: References in parentheses are to sections of the Illinois Probate Act, Ill. Compiled Statutes (ILCS), 1994, Ch. 755.

INDIANA

Aline F. Anderson
Indianapolis, Indiana
October 30, 1995

AGE OF TESTATOR

Real Estate
18

Personal Property
18

A person must be 18 years of age in order to execute a valid will governing real or personal property. Exception to this general rule is a minor who is a member of the armed forces or Merchant Marine of United States or its "allies;" such an individual can execute a valid will and be under the age of 18. [I.C. 29-1-5-1]

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

A document of this nature is valid up to \$1,000 of personal property. The exception to this rule is a person in active military service may be in times of war dispose of personal property up to \$10,000. [I.C. 29-1-5-4]

NUNCUPATIVE (ORAL)

Valid up to \$1000 of personal property, except soldier in active military service may in times of war dispose of personal estate to extent to \$10,000.

NUMBER AND AGES OF WITNESSES

In order for a will to be valid it must be witnessed by two individuals who are 18 years of age. [I.C. 29-1-5-3]

REVOCAION AND REVOCATION BY MARRIAGE/DIVORCE

Mutilation or destruction with intent to revoke a will serves as a revocation, as well as the execution of a new will revoking a prior will. [I.C. 29-1-5-6] Marriage does not revoke a will, but divorce or annulment revokes only those provision in favor of the former spouse. [I.C. 29-5-8]

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Surviving spouse has statutory right to elect against deceased spouse's will. Per election surviving spouse entitled to 1/2 of net personal and real estate. However, if surviving spouse is subsequent childless spouse, spouse is only entitled to 1/3 of net personal estate and a 1/3 life estate in real property. [I.C. 29-1-3-1]

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Children born after execution of will are entitled to intestate share, unless it appears from will that such omission was intentional, or unless testator had one or more children known to him to be living and devised substantially all of his estate to the spouse who survives him. [I.C. 29-1-3-8]

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Subscribing witnesses whose testimony is required to prove will cannot benefit, but may take intestate share not exceeding benefit under will. [I.C. 29-1-5-2]

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

EFFECT OF LAPSED LEGACY

None as to descendant leaving issue. If not a descendant, then legacy lapses and is added to residue. [I.C. 29-1-6-1]

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will is valid if executed in accordance with law of place of execution, or with law of domicile of testator at time of execution, or at time of death. [I.C. 29-1-5-6]

INCORPORATION BY REFERENCE

Statutory rules for interpretation of wills permit the incorporation into a will of a writing of any kind as it existed at the time of execution of the will, provided the will clearly identifies the writing. [I.C. 29-1-6-1]

Also, incorporation by reference may be made to a trust even though the trust is amended after the execution of the will.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Living Will Declarations are valid. They can be made by any individual who is 18 years of age, competent and of sound mind, and must be properly witnessed in accord with statutory provisions. [I.C. 16-8-11-12]

A Health Care Representative may be designated by an individual to make medical decisions. An appointment made under this statute must be in writing, signed by the appointer or by a designee in the appointer's presence and witnessed by an adult other than the designated representative. [I.C. 16-36-1-7]

IOWA

Charles A. Kintzinger
Dubuque, Iowa
August 13, 1996

AGE OF TESTATOR

Real Estate
Full Age

Personal Property
Full Age

(Full age is defined as having obtained the age of 18 years or having married).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized, except: if executed outside Iowa, valid in the state of execution, if in writing and signed.

NUNCUPATIVE (ORAL)

Not authorized.

NUMBER AND AGES OF WITNESSES

Two. Competent witnesses 16 years of age or older.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Cancellation or destruction or execution of subsequent will. Will not revoked by marriage but provisions in favor of spouse are revoked by divorce. Will reinstated, however, if parties remarry.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

If not made within two months after the date of second publication of Notice of Admission to Probate, notice must be given to surviving spouse, if the spouse is not executor of the estate. Death of surviving spouse without election is conclusive that surviving spouse takes under will. If spouse is executor and if the spouse does not make an election within four months of notice, the spouse takes under the will.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

When a testator fails to provide in his will for children born or adopted after execution of the will (whether born or adopted before or after testator's death), the children shall take an intestate share unless it appears from the will that such omission was intentional.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Subscribing witnesses to will limited to share they would take by intestate succession, unless will also attested by two other disinterested witnesses.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

No limitation, other than the surviving spouse's right to take against the will.

EFFECT OF LAPSED LEGACY

The devise to a spouse of the testator, where the spouse does not survive the testator, shall lapse unless from the will a contrary intent is shown. A devise to an individual, who is not survived by issue who also survive the testator, shall lapse unless a contrary intent is shown in the will. No other devise lapses unless contrary intent is shown.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with the law of the place of execution or the law of domicile, provided it is in writing and subscribed by the testator.

INCORPORATION BY REFERENCE

A devise or bequest may be made in a will to a trustee of a trust provided the trust's terms are set forth in a written instrument executed before or concurrently with the will.

Tangible personal property (excluding tangible personal property used in a trade or business) may be bequeathed by separate writing if the writing is dated and hand written by testator or signed by testator. This separate writing may be prepared before or after execution of the will; however, the separate writing must be referred to in the body of the will.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Both Living Wills and Durable Powers of Attorney for health care decisions are valid in Iowa and include the option of withholding the provision of nutrition and hydration which is required to be provided parenterally (i.e., by some way other than through the digestive tract) or through intubation.

KANSAS

Joseph S. Davis, Jr.
Olathe, Kansas
March 3, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

(or rights of majority).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

If made in last sickness and reduced to writing and subscribed by 2 disinterested witnesses within 30 days after speaking of testator's words, effective only as to personal property.

NUMBER AND AGES OF WITNESSES

Two. Competent witnesses. No age requirement.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By other will or some other writing executed with same formalities as will or by burning, tearing, canceling, obliterating or destruction. Will is revoked by marriage if testator has a child by birth or adoption. Divorce also revokes will as to provisions in favor of divorced spouse.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Must be made within 6 months. The share of a surviving spouse electing to take an elective share rather than under the decedent's will is a graduated amount varying from 3% for a one year marriage to 50% for a marriage of a duration of 15 years or more. The augmented estate includes nonprobate transfers to others. See Chapter 132, 1994 Session Laws of Kansas.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

None unless included in a general class.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void except as to intestate's share.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

No limitation.

EFFECT OF LAPSED LEGACY

No lapse as to lineal descendants or adopted child or blood relative within the 6th degree leaving issue.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of Kansas, place of execution, or testator's residence at death or at time of execution, if in writing and subscribed by testator.

INCORPORATION BY REFERENCE

May incorporate as a separate list disposing of personal property other than money, evidence of debt, documents of title, securities and property used in business. Must be in handwriting of, or signed by testator. May be referred to as one to be in existence at time of death and may be altered by testator after preparation. See K.S.A. 59-623.

May adopt by reference any paper or document in existence at time of execution of will by express reference. See 157 P 407.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Living will recognized and form provided in K.S.A. 65-28, 103.

Durable Health Care Power of Attorney recognized in K.S.A. 58-6425.

KENTUCKY

W. Allen Schmitt
Louisville, Kentucky
March 10, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

For exceptions see KRS 394.030.

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Recognized. KRS 394.040.

NUNCUPATIVE (ORAL)

(No longer valid). Repealed in 1972.

NUMBER AND AGES OF WITNESSES

Two. No specific age requirement.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Will may be revoked: (1) subsequent will or codicil, or by a writing declaring such intention and executed in the same manner as a will (KRS 394.080); (2) cutting, tearing, burning, obliterating, canceling or destroying with intent to revoke (KRS 394.080); (3) subsequent marriage, unless will expressly provides otherwise, or, unless will is made in exercise of power of appointment under certain conditions. A will that expressly provides for the person who subsequently becomes the spouse is not revoked by the marriage (KRS 394.090); (4) divorce as to former spouse unless will expressly provides otherwise (KRS 394.092).

Will once revoked can only be revived by re-execution of revoked will or by execution of a codicil with an expression of that purpose (KRS 394.100).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

Provisions of a will revoked because of divorce, are revived by remarriage of the same persons (KRS 394.092).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Yes, within six months after probated. District Court may, on application, extend for six more months KRS 392.080 and 392.020). Intestate share would be 1/2 surplus personalty and 1/3 real estate.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

After-born children take as if there were no will, if not provided for with certain conditions (KRS 394.382).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Devise or bequest void not only as to attesting witness, but also to husband or wife of attesting witness (except to extent he would receive a share if there was intestacy) (See KRS 394.210).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None as to amount but see KRS 140.060 as to conditions of exemption from inheritance tax.

EFFECT OF LAPSED LEGACY

No lapse as to issue of deceased beneficiary (KRS 394.400); otherwise lapsed legacy passes under residual clause unless will directs otherwise. KRS 394.500.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will of person domiciled outside state valid. KRS 394.120. Will executed with required formalities by a resident may be executed anywhere.

INCORPORATION BY REFERENCE

Reference in a will to a later writing in regard to disposition of personal property has been held to validate the later writing *Dixon v. Damerons*, admr., 77 S.W. 2d 6, 256 Ky., 722; *Hendren v. Brown*, 364 S.W. 2d 329. Fiduciary powers granted automatically under KRS 395.195, unless restricted by will. Uniform Testamentary Additions to Trusts Act, KRS 394.075, requires will to identify the trust which is the subject of a devise.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL DIRECTIVE

Living Will Directive recognized as a valid instrument. KRS 311.623. Execution by grantor may be acknowledged before notary public or in presence of two adult witnesses. A witness may not be a blood relative, a beneficiary of an intestate estate, an employee of the health care facility, the attending physician for grantor, or any person directly financially responsible for grantor's health care.

Form of instrument suggested. KRS 311.627.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

HEALTH CARE SURROGATE

Health care surrogate may be appointed in living will directive. KRS 311.625. Form suggested. KRS 311.625.

LOUISIANA

Marguerite A. Noonan
New Orleans, Louisiana
July 30, 1996

AGE OF TESTATOR

Real Estate	Personal Property
16	16

TYPES OF WILLS

There are 5 classes of testaments which are spelled out in much detail in the Louisiana Civil Code and Revised Statutes:

first, the statutory testament which must be signed in presence of a notary and 2 witnesses (La. R.S. 9:2442);

second, the holographic, which must be wholly written, dated and signed in the testator's hand, no witnesses needed (C.C. Art 1588);

third, the nuncupative or open testament, which is made by a public act received orally by a notary public in presence of 3 witnesses (if residents of place where will is executed) or 5 witnesses (if not residents of that place) (C.C. Art. 1578);

fourth, the nuncupative by private act, either written by the testator or by someone from his dictation, in presence of 5 witnesses (if all are residents of the place where the will is received), or 7 witnesses (if not residents) (C.C. Art. 1581);

and fifth, the mystic, secret or sealed testament where the testator has caused the document to be placed in an envelope, closed, sealed and declared, to a notary public and 3 witnesses, it to be his testament, (C.C. Art. 1584).

Only the nuncupative testament by public act is selfproving (C.C. Art. 2891).

Witnesses to the forms listed above (except for the holographic will, for which no witnesses are required) must be at least 16 years of age. Persons are incapable of being witnesses to a will if they fall within the following classifications: (1) are under the age of 16; (2) are insane, deaf (except in limited situations), or blind; or (3) are persons whom the criminal laws declare incapable of exercising civil functions (C.C. Art. 1591).

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By formal revocation or intentional destruction or by birth or adoption of legitimate child not provided for (C.C. Art. 1705); or by the making of a new will which expressly revokes the prior will (C.C. 1693). Marriage does not revoke a will.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Referred to as the "marital portion" and may only be claimed when deceased spouse "dies rich in comparison." (C.C. Art. 2432).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

May have the testament revoked if child not provided for thereunder (C.C. Art. 1705).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Except for witnesses to a mystic testament, the legacy to the witness will be declared a nullity (C.C. Arts. 1592, 1593).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None, other than Louisiana law of forced heirship. *Inter vivos* charitable donations are not subject to reduction by forced heirs if made more than three years prior to the testator's death (La. R.S. 9:2372).

EFFECT OF LAPSED LEGACY

No lapse where legacy is made jointly to two or more persons without assigning shares. Survivor takes all. (C. C. Art. 1707). If shares are apportioned, lapsed legacy goes to residuary legatees, or if none, goes intestate. (C.C. Art. 1709).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid. See Uniform Probate Law (La. R.S. 9:2421, *et seq.*).

INCORPORATION BY REFERENCE

Adoption by reference of a statutory provision is not prohibited, but adoption by reference to another writing for the purpose of manifesting the substance of a wish or desire is prohibited.

NOTE AS TO LAWS OF LOUISIANA GOVERNING WILLS

Louisiana has the law of "forced heirship." Children cannot be deprived of their right to inherit. When there are children of the deceased, only the following portions of the estate may be disposed of by will: Three-fourths if there is one child and one-half if there are two or more children (C.C. Art. 1493). Although other heirs may be excluded by a mere omission or disinherited without cause, a forced heir may only be deprived of the forced portion or "legitime" by specific disinheriton for legal cause. A child may be disinherited if (without later having been forgiven) he has (1) struck or raised his hand to strike the parent; (2) been guilty toward the parent of cruelty, of a crime or grievous injury; (3) attempted to take the life of either parent; (4) accused the parent of any capital crime except high treason; (5) having means to afford it, refused sustenance to a parent; (6) neglected to take care of a parent who became insane; (7) refused to ransom a parent when detained in captivity; (8) used any act of violence or coercion to hinder a parent from making a will; (9) having the means, has refused to become surety for a parent in order to take him out of prison; (10) being a minor, married without the consent of his or her parents; (11) been convicted of a felony authorizing life imprisonment or death as a penalty and; (12) failed, without just cause, to communicate with parent for 2 years. The testator must express the reason he disinherits the child (C.C. Art. 1621). A forced heir who is denied his right to his full forced portion has the right to reduce the excessive donations at the death of the donor (C.C. Art. 1502). This right is not available to the forced heir's creditors but is available to his trustee in bankruptcy.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Declaration directing the withholding or withdrawal of life-sustaining procedures in the event of terminal and irreversible con-

ditions may be executed in the presence of two witnesses. The form of the declaration is provided by statute La. R.S. 40:1299.58.3. Further, a person may appoint an agent to make health care decisions, other than declarations of life-sustaining procedures, which may include surgery, medical expenses, nursing home residency, or medication, if such power is specifically granted to the agent in power of attorney (C.C. Art. 2997).

MAINE

Jeffrey W. Jones
Ellsworth, Maine
March 23, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

(See Probate Code §2-501).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator (See Probate Code §2-503).

NUNCUPATIVE (ORAL)

Invalid.

NUMBER AND AGES OF WITNESSES

Two persons who are generally competent to act as witnesses. (See Probate Code §§2-502, 505).

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By a subsequent will which revokes the prior will or part expressly or by inconsistency; or 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 his presence and by his direction. Divorce or annulment revokes as to former spouse, but provisions revived by remarriage to former spouse. Will not revoked by marriage or any other changes of circumstances (See Probate Code §§2507, 508).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Election must be made within 9 months after date of death or within 6 months after probate, whichever limitation expires last. Time may be extended for cause shown before time has expired (See Probate Code §2-205).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Omitted child receives intestate share, unless it appears from the will that the omission was intentional, or if when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child, or the testator provided for the omitted 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 from the amount

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

of the transfer or other evidence. Child omitted because believed to be dead receives intestate share (See Probate Code §2-302).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Does not affect validity of will, and an interested witness may take under the will and is competent to testify to prove execution of the will (See Probate Code §§2-505 and 3-406).

EFFECT OF LAPSED LEGACY

No lapse if devisee, who is a grandparent or lineal descendant of a grandparent of testator, leaves issue surviving testator. If a devise fails, it becomes part of the residue (See Probate Code §§2-605, 606).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national (See Probate Code §2-506).

INCORPORATION BY REFERENCE

Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests his intent and describes the writing sufficiently to permit its identification (Probate Code §2-510).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

An individual of sound mind 18 years or older may execute a "declaration governing the withholding or withdrawal of life-sustaining treatment." The declaration may be a direction to the attending physician or it may designate another individual of sound mind and 18 years or older to make decisions governing the withholding or withdrawal of life sustaining treatment. In either case, the declaration must be signed by the declarant, or signed by another at the declarant's directions, and witnessed by two individuals. A declaration prepared under this statutory authorization need not be acknowledged before a notary public. There is a statutory form for a declaration constituting a direction to the attending physician and another for a declaration appointing another individual, but use of the forms is not mandatory. 18A M.R.S.A. §5-702.

The declaration becomes operative when it is communicated to the attending physician and the declarant is in a terminal condition or a persistent vegetative state (statutorily defined) and no longer able to make or communicate decisions regarding treatment. M.R.S.A. §5-703

The declaration can be revoked at any time in any manner by the declarant without regard to his or her mental or physical condition. M.R.S.A. §5-704.

Both the declaration itself and any revocation, when made known to the attending physician, must be made a part of the declarant's medical record. 18A M.R.S.A. §5-702(e) and 704(b).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

Likewise, the determination that a declarant is in a terminal condition or a persistent vegetative state must be recorded in the declarant's medical record. 18A M.R.S.A. §5-705.

If an individual is in a terminal condition or a persistent vegetative state and no longer able to make or communicate decisions regarding administration of life sustaining treatment and has not made an effective declaration, an attorney-in-fact appointed by that individual under a durable power of attorney for health care may exercise the authority to consent or withhold consent to life sustaining treatment, unless the power of attorney expressly provides that treatment should be continued, or provides that the attorney-in-fact does not have this authority. M.R.S.A. §5-707. M.R.S.A. §5-706 provides for a durable power of attorney for health care. It must contain words to the effect that either the power is not affected by the subsequent disability of the principal, or that the power becomes effective only upon the subsequent disability of the principal, must be signed by the principal or another person at the direction of the principal, and witnessed by two individuals other than the designated attorney in fact. It may be revoked at any time by the principal, but may be revoked by a fiduciary of the principal only with court approval. M.R.S.A. §5-501 and 5-506.

There is a statutory priority list of other persons who have the power to consent to the withholding or withdrawal of life sustaining treatment in the absence of either a declaration, appointment of a proxy, or a durable power of attorney for health care. An individual may disqualify any persons on the statutory list from consenting to the withdrawal or withholding of life sustaining treatment by any signed writing which designates those disqualified. M.R.S.A. §5-707.

An attending physician or other health care provider who is unwilling to comply with an individual's declaration is required to transfer the patient to another health care provider who is willing. M.R.S.A. §5-708.

A declaration executed in another state will be honored if it either complies with the law of the state where it was executed, or if it complies with Maine law. M.R.S.A. §5-713. Instruments executed before passage of the Maine Uniform Rights of the Terminally Ill Act (1989) are effective if they substantially comply with the requirements of §5-702. 18A M.R.S.A. §5-714.

MARYLAND

Winston T. Brundige
Baltimore, Maryland
March 3, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid if entirely in handwriting of testator and signed outside the U.S. while serving in armed services until one year after discharge (if still possessing testamentary capacity).

NUNCUPATIVE (ORAL)

Invalid.

NUMBER AND AGES OF WITNESSES

Two. No age requirement.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By will or codicil, destruction, marriage coupled with birth, adoption or legitimation, and by final decree of absolute divorce or annulment (as to spouse only).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

For share of net estate (one-third if surviving issue or one-half if no surviving issue), within seven months after first appointment of a personal representative (unless extended by court).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

If provision made for existing child of decedent who survives, but no provision for child subsequently born, adopted or legitimated, and not expressly omitted, the latter (or descendant) entitled to lesser of intestate share or a share in all legacies to children of decedent.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Valid.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Goes to persons who would have taken property if legatee had died testate or intestate owning the property as of date of death of testator.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if in writing, signed by testator and executed according to law of place where executed, or of testator's domicile, or of Maryland.

INCORPORATION BY REFERENCE

Terms of any writing in existence when will executed, including recorded administrative provisions and fiduciary powers, may be incorporated into will by reference to extent will manifests intent to do so and describes writing sufficiently to permit identification.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Living will and Advance (Medical) Directive (appointment of health care agent and furnishing health care instructions) are valid. Directives are to be written, signed and witnessed (2) except that oral directives are valid if made in presence of attending physician and on witness and documented in individual's medial records.

MASSACHUSETTS

Francis S. Moulton Jr.
Boston, Massachusetts
March 2, 1995

AGE OF TESTATOR

Real Estate
18

Personal Property
18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Soldier in actual military service or mariner at sea may make nuncupative will of personal property.

NUMBER AND AGES OF WITNESSES

Two. Any person of sufficient understanding is competent as a witness.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Burning, tearing, canceling or obliterating with intention of revoking it, or some other writing executed as required for a will. Marriage operates as revocation unless the will itself shows that it was made in contemplation thereof. If testator was divorced or his marriage annulled, provisions in favor of former spouse are revoked unless will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce shall pass as if former spouse failed to survive testator. Provisions revoked solely by divorce or annulment are revived if testator remarries former spouse, the foregoing shall not apply to a statutory will unless the will otherwise provides.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Surviving spouse may file within 6 months after probate of will; if testator leaves issue, surviving spouse takes 1/3 of personal property and 1/3 of real estate or, if testator leaves kindred but no issue, surviving spouse takes \$25,000 and 1/2 of remaining personal property and 1/2 of remaining real estate, but in either case, if surviving spouse's share would thus exceed \$25,000, he or she receives only the income from the excess, the personal property to be held in trust and the real property vested in him or her for life; if testator leaves neither issue nor kindred, surviving spouse takes \$25,000 and 1/2 of remaining personal property and 1/2 of remaining real estate outright. Estate subject to surviving spouse's election includes *inter vivos* trust, created or amended after 01/23/84, to extent of decedent's power to revoke or power of appointment over same, *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572 (1984).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Children or issue of deceased children omitted in testator's will, whether born before or after testator's death, take share they would have taken if testator had died intestate unless provided for by testator during his or her life or unless omission intentional and not by accident or mistake. Claims of shares in real property must be filed within one year after approval of executor's bond.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Gift to subscribing witness or to spouse of such witness is void unless 2 other subscribing witnesses not similarly benefited.

EFFECT OF LAPSED LEGACY

Unless different disposition made or required by will, a devise or

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

bequest to a child or other relation of testator who dies before testator leaving issue surviving testator passes to such issue. The words "child," "issue" and "other relation" include adopted children.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of domicile or place of execution, but must be in writing and signed by testator.

INCORPORATION BY REFERENCE

Any document, paper, or other instrument may be incorporated by reference in a duly executed will if the same is referred to in the will, was in existence at the time of the execution of the will and is clearly identified as the paper referred to in such will. For instruments executed after March 23, 1982, statutory short form fiduciary powers may be incorporated by reference in a will or trust instrument by adoption or employment of certain defined terms. See G.L. Ch. 184B. These terms include "Statutory Optional Fiduciary Powers" which give the fiduciary certain administrative powers; "Statutory Disability Discretionary Powers" which permit the fiduciary to make distributions to, or for the benefit of, a minor, a person under any other specified age or a person unable to care for his or her property by reason of advanced age, mental weakness or physical incapacity; and "Statutory Principal Discretionary Powers" which enable a fiduciary, under certain circumstances, to distribute principal to or for the benefit of the "primary" (or income) beneficiary and the beneficiary's spouse, issue and spouses of such issue. For instruments executed after 1987, will may incorporate Massachusetts Uniform Statutory will Act (G.L. Chapter 191 B).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

There is no statutory authorization in Massachusetts for a living will. By G.L. Chapter 201D, any competent adult may appoint a health care agent and an alternate health care agent in writing signed by such adult in the presence of two adult witnesses. The witnesses shall affirm in writing that the principal was at least eighteen years old, of sound mind and under no constraint or influence. The named agent may not be a witness.

MICHIGAN

Raymond H. Dresser
Sturgis, Michigan
April 5, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid, whether or not witnessed, if it is dated, if the signature appears at the end of the will and the material provisions are in the handwriting of the testator.

NUNCUPATIVE (ORAL)

Not recognized. There is no specific statutory language or case law permitting. Former Probate Code did indicate recognition.

NUMBER AND AGES OF WITNESSES

Two. No specific age requirement. They must be competent.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Subsequent will; destruction with intent and purpose; divorce or annulment unless the will expressly provides otherwise. Provisions not revoked by any means except through divorce or annulment revived by testator's remarriage to the former spouse.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Any surviving spouse (male or female) may elect to abide by the terms of the will or if the spouse elects to take against the will, the spouse will take 1/2 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by 1/2 of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death. The election may be exercised only during the lifetime of the surviving spouse and shall be made within 60 days after the date for presentment of claims, or within 60 days after filing proof of service of the inventory upon the surviving spouse, whichever is later.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Children or issue of deceased children omitted from will by accident or mistake take share to which entitled in case of intestacy; also after-born children.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Subscribing witness may not take under will unless there are 2 other competent witnesses except as to intestate's share.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None. Only limitation is that language cannot be too vague. The "cy pres" doctrine is recognized in Michigan.

EFFECT OF LAPSED LEGACY

Any devise to a lineal descendant of a grandparent, as a devisee or under a class gift, who dies either before or after execution of the will, goes to the issue by representation if the issue survived testator by 120 hours. If a devise (other than residuary) fails, it becomes part of the residue (except certain devises of securities). If the residue is devised to two or more persons and the share of one residuary devisee fails for any reason, the share passes to other residuary devisees in proportion to their interests in the residue.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A will is valid if executed in compliance with the laws of this state or with the law at the time of execution of the place where the will is executed, or with the law of the place where at the time of execution or at the time of death the testator is domiciled, has his habitual residence, or is a national.

INCORPORATION BY REFERENCE

A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and

describes the writing sufficiently to permit its identification. The 1979 Revised Probate Code provides that Article 8 thereof, including the powers provided therein, which were derived essentially from the Uniform Trustee's Powers Act, applies to any trust established before or after the effective date of the Act, July 1, 1979. It does not effect the validity of an act of the trustee prior to that date. The powers of a trustee may be incorporated by reference to Section 821-833 of Public Act 642 of 1978, the Revised Probate Code. A devise or bequest may be made by will to the trustee of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator. The devise shall not be invalid because the trust is amendable or irrevocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless a testator's will provides otherwise, the property so devised becomes a part of the trust to which it is given and is not deemed to be held under a testamentary trust. The devise is administered under the terms of the trust to which it is given, including any amendments thereto made before the death of the testator, regardless of whether made before or after the execution of the testator's will, and if the testator's will so provides, including any amendments to the trust made after the death of the testator. This is effective regardless of the date of the will.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Living will per se is not recognized. A Patient Advocate statute exists which acknowledges a health care durable power of attorney. Statutory requirements must be complied with. Requirements pertain to execution; one patient advocate (authorized person) with individual successors. No corporate patient advocate is permitted. Authority of patient advocate is limited to disability of patient determined by medical advice. Termination of life-sustaining devices not included.

MINNESOTA

Honnen S. Weiss
 Minneapolis, Minnesota
 February 12, 1996

AGE OF TESTATOR

Real Estate	Personal Property
18	18

Minn. Stat. (See §524.2-501).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized (See Minn. Stat. §524.2-502).

NUNCUPATIVE (ORAL)

Not recognized (See Minn. Stat. §524.2-502).

NUMBER AND AGES OF WITNESSES

Two. Any person generally competent to be a witness. Discretionary with court usually (See Minn. Stat. §§595.02, 595.06 and §524.2-502, 524.2-505).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Subsequent will expressly or by inconsistency or by burning, tearing, canceling, obliterating the will or any part thereof by testator or in testator's conscience presence and direction with intent to revoke by testator. Burn, tear or cancellation need not touch any words of the will. Marriage does not revoke will. Generally, spouse is entitled to a limited intestate share. Divorce or dissolution revokes only provisions as to testator's former spouse (See Minn. Stat. § 524.2-507, § 524.2-301, § 524.2-804).

ELECTION BY SURVIVING SPOUSE TO TAKE ELECTIVE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Written election must be filed with court within nine (9) months of date of death or within six (6) months after probate of will, whichever is later, unless extended (See Minn. Stat. §524.2-211).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any children born or adopted after execution of will (unless intentionally omitted or intentionally provided for by transfer outside of will in lieu of testamentary provision) would take by intestacy if testator had no children when will was executed unless testator devised substantially all of the estate to the other surviving parent of the omitted child. If testator had one or more children living when will executed, and will devised property or interests therein to one or more then living children, then after born or adopted children share in devises made to living children. (See Minn. Stat. § 524.2-302.)

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

None (see Minn. Stat. §524.2-505(b)).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

No lapse as to devise or bequest to testator's grandparent or lineal descendant of testator's grandparent leaving issue. Except for relationships above, if there is more than one residuary devisee, failing share passes to other residuary devisees. All other devises lapse (see Minn. Stat. §524.2-603, 524.2-604).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will valid if in accordance with the law of place of execution. (See Minn. Stat. §524.2-506.)

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 (see Minn. Stat. §524.2-510).

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, evidences of indebtedness, documents of title, and securities, and property used in trade or

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

business. Lists may be in handwriting of or signed by testator and may be prepared before or after execution of the will (see requirements of Minn. Stat. §524.2-513).

Twenty-nine (29) statutory powers of Personal Representative under Section 524.3-715 are “incorporated” into every will, except as restricted or otherwise provided by will.

Statutory Trustee powers under Minn. Stat. §501B.81, the Minnesota Trustee’s Powers Act, may be incorporated by reference into a will or into an *inter vivos* trust.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Minn. Stat. § 145B.04 et seq., allows the execution of a “health care declaration” in the format substantially as provided in the statute. The declaration is only effective if signed by the declarant and two witnesses or a notary public and must state the declarant’s preferences regarding whether the declarant wishes to receive or not receive artificial administration of nutrition and hydration or that the declarant wishes a proxy to make decisions regarding the administration of artificially administered nutrition and hydration for the declarant if the declarant is unable to make health care decisions.

Neither witness can be someone who is entitled to take any part of the estate if the declarant under will then existing or by operation of law. Neither the witnesses nor the notary may be named as a proxy in a declaration. The declaration may be revoked in whole or in part at any time and in any manner by communicating the desire to revoke to the attending physician or other health care provider. The declaration becomes operative when it is delivered to the declarant’s physician or other health care provider. A declaration executed in another state is effective if it substantially complies with Minnesota statutes.

The Minnesota Legislature, in its 1993 regular session, enacted Minn. Stat. §145C.01 et seq., which establishes a durable power of attorney for health care, defined as an instrument authorizing an agent to make health care decisions for the principal if the principal is unable, in the judgment of the attending physician, to make or communicate health care decisions. A format is provided by statute.

MISSISSIPPI

F.M. Bush, III
Tupelo, Mississippi
March 10, 1995

AGE OF TESTATOR

Real Estate
18

Personal Property
18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Recognized.

NUNCUPATIVE (ORAL)

Valid if made during last illness of testator at his residence; if value of bequest exceeds \$100, must be proven by 2 witnesses; at least 14 days must have elapsed since date of death and widow and heirs given note before probate can be taken; cannot

* For additional discussion of this issue, see ACTEC Study 10, “Surviving Spouse’s Right to Share in Deceased Spouse’s Estate”

be proved if more than 6 months have elapsed since date of speaking testamentary words, unless words were reduced to writing within 6 days after spoken.

NUMBER AND AGES OF WITNESSES

Two witnesses required; must be witnessed in presence of testator; no specific age required of witness, but witness must be “credible.”

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Will is revoked by destruction, cancellation or obliteration by testator, or by testator causing it to be done in his presence, or by subsequent will, codicil or written declaration. Marriage does not revoke will.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Spouse may renounce within ninety (90) days after probate and take a child’s share (but not more than one-half) of the estate; generally the share of the renouncing spouse is reduced by the value of the spouse’s separate property. If no provision for spouse, renunciation not necessary; rights of spouse are as if will had been renounced.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Children may be disinherited. Generally, children born after making of will take as if parent died intestate, if not provided for otherwise.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Bequest to witness void if will cannot be proved without testimony of such witness; nevertheless, the witness may take his intestate’s share, not to exceed value of the devise or bequest. Such witness is competent to prove the remainder of the will.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None effective March 10, 1993.

EFFECT OF LAPSED LEGACY

No lapse in case of legacy or devise to child or other descendant leaving issue.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid.

INCORPORATION BY REFERENCE

Bequest to trust evidenced by written instrument is valid notwithstanding the fact that trust is revocable or may be amended and that the trust was not executed in the manner required for wills, and notwithstanding the fact that trust was amended after execution of will. However, an entire revocation of the trust prior to the testator’s death will invalidate the devise or bequest. Trust must be in existence at the time will is executed and must be identified in the will.

Under the Uniform Trustee's Powers Law of Mississippi, a trustee has all powers enumerated in the statute unless otherwise restricted by the will.

No other statutory provisions for incorporation by reference.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

Individuals age 18 and older may authorize withdrawal of life-saving mechanisms by executing Declaration of Intent which must be filed with Bureau of Vital Statistics of State Board of Health. Decisions to withdraw lifesaving mechanisms must be made by individual's physician and two other physicians. Declaration of Intent must be signed by individual and witnessed by two witnesses. Witnesses must not be related to individual, must not have a claim against individual's estate, must not be entitled to any of individual's estate and must not be an attending physician or an employee of attending physician. Declaration may be revoked by a Revocation signed by individual and two witnesses. Revocation must be filed with Bureau of Vital Statistics of State Board of Health.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Individual may authorize attorney-in-fact to make health care decisions including consent, refusal of consent or withdrawal of consent to health care if principal is unable to give such consent. Principal must specifically authorize attorney-in-fact to make health care decisions. Durable Power of Attorney for Health Care must contain date of execution and must be acknowledged or witnessed by two individuals. Witnesses must not be a health care provider, an employee of a health care provider or attorney-in-fact and at least one must not be a relative of principal or an individual entitled to a portion of principal's estate. Treating health care provider or an employee of treating health care provider cannot be attorney-in-fact. Durable Power of Attorney for Health Care must contain notice to principal which provides information regarding principal's rights and consequences of execution of Durable Power of Attorney. Attorney-in-fact can make all health care decisions principal could make and can make anatomical gifts, authorize autopsy and direct disposition of remains. Durable Power of Attorney for Health Care remains in effect until revoked by principal.

either of disinterested witnesses within 30 days and submitted to probate within 6 months as to personal property not exceeding \$500.

NUMBER AND AGES OF WITNESSES

Two, age 18.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Divorce revokes all provisions in favor of divorced spouse. Marriage does not revoke will, but omitted spouse might take intestate share under Section 474.235, R.S. Mo. 1986.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

1/2 of net estate augmented by property received by spouse from decedent if no lineal descendants; otherwise 1/3 of augmented estate. Election must be made within 10 days after expiration of time for contesting will. Property passing to spouse outside the will is taken into consideration .

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any child born or adopted after execution of the will who is not provided for in the will takes intestate share unless it appears from the will the omission was intentional, at the time of the will's execution the testator had a least one other child and the testator devised substantially all of his estate to the other parent of the omitted child, or the testator provided for the omitted child by transfer outside the will intending such transfers to be in lieu of testamentary provision.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Will not invalidated because attested by an interested witness, but interested witness shall, unless will is also attested by 2 disinterested witnesses, forfeit so much of the provisions made for him, as exceeds in value as of date of testator's death, what he would have received had testator died intestate.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

A lapsed legacy (other than residuary) falls to residuary. A lapsed residuary legacy to two or more persons passes to the other residuary legatee(s). No lapse as to child or grandchild or other relative leaving lineal descendants who survive the testator by 120 hours.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A written will is valid if executed in compliance with: (1) The laws of this state; (2) The laws, as of the time of execution, of the place where the will is executed; or (3) The laws of the place where, at the time of execution or the time of the testator's death, the testator is domiciled, has a place of abode or is a national.

INCORPORATION BY REFERENCE

There is no general statutory provision for a will's incorporation by reference of other documents or statutory provisions. See

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

MISSOURI

John C. Davis
Kansas City, Missouri
October 27, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

No provision in Missouri.

NUNCUPATIVE (ORAL)

Valid if made in presence of 2 disinterested witnesses in imminent peril of death and death results therefrom and reduced to writing by

Hourigan v. McBee, 130 S.W. 2d 661 (Mo. App. 1939) allowing a will's incorporation of deeds by reference.

Under Section 456.232, R.S.Mo. 1983, a devise or bequest may be made by will to a trust which is identified in the will and which is in written instrument. The trust may be revocable. The transfer is valid even if the trust is amended after the execution of the will.

Under Section 474.333, R.S. Mo. 1980, certain items of tangible personal property may be effectively bequeathed by a list referenced in the will which is signed by the testator or is in his handwriting and which is dated. The list may be prepared before or after execution of the will and may be altered at any time.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

A durable power of attorney for health care is authorized. 404.800, R.S.Mo. 1991. To confer authority to withhold hydration and nutrition specific reference is required. A person may direct the withholding or withdrawal of death prolonging procedures for himself by an instrument in writing signed by or in the presence and at direction of the person, dated, and (if not all in the person's handwriting) witnessed by two persons. 459.010 et seq., R.S.Mo. 1985. Specific reference must be made to the withholding of hydration and nutrition.

MONTANA

George D. Goodrich
Missoula, Montana
March 6, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

Every person over the age of 18 years of sound mind may dispose of all his real and personal estate (Sec. 72-2-521, Montana Code Annotated (MCA)).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid if signature and "material" provisions are in handwriting of testator (72-2-522(2), MCA).

NUNCUPATIVE (ORAL)

None — Repealed (Montana 1974 Session Laws, Chapter 365).

NUMBER AND AGES OF WITNESSES

At least two witnesses required, who are "competent" (72-2-522 and 72-2-525, MCA). "Every person" is a competent witness, except those "incapable" of understanding, or expressing themselves (Montana Rule of Evidence 601).

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Will, or portion thereof, is revoked by subsequent will which expressly revokes, or is inconsistent with prior will or affected portion thereof, or is revoked by being torn, burned, canceled, or destroyed with intent to revoke (72-2-527, MCA).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

Will not revoked by marriage (72-2-528, 72-2-814, MCA). Spouse may claim share of augmented estate (72-2-221, MCA). Divorce revokes any disposition to former spouse contained in will (72-2-814, MCA).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

The surviving spouse's elective share of the augmented estate depends on the length of the marriage, ranging from 3% for a marriage of between 1 and 2 years, and 50% for marriages of 15 years or more. There is also a supplemental elective-share amount of up to \$50,000 if the surviving spouse's entitlements are below that figure (72-2-221 (2), MCA).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Unless it appears omission was intentional, after-born omitted child takes according to statute, essentially as in intestacy, unless provided for outside of will or unless substantially all of the estate is devised to other parent of the child (72-2-332, MCA).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Signing by an interested witness does not invalidate any provision of a will (72-2-525, MCA).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED DEVISE

Subject to the described antilapse provisions, a lapsed devise becomes part of the residue of the estate (72-2-614, MCA). There are antilapse provisions if the devisee was a grandparent of the testator, a descendant of a grandparent of the testator, a descendant of a stepchild of the testator, or a descendant of the donor of a power of appointment exercised by the testator's will. The antilapse statute (72-2-613, MCA) should be consulted.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of place where executed or where domiciled and has a place of abode, or is a national (72-2-326, MCA).

INCORPORATION BY REFERENCE

A writing in existence when a will is executed may be incorporated by reference if the language of the will shows the intent to incorporate and describes the writing sufficiently to permit identification. 72-12-530, MCA.

Montana practitioners commonly assume "writing" also may mean a statute and incorporate by reference such things as the statutory sections prescribing powers of trustees.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Living wills are approved. Statutory form is found at 50-9-103, MCA. Montana had no statutory or case law authority that would authorize the giving of a Health Care Proxy. A court appointed "full guardian" may consent to health care procedures under 72-5-321, MCA.

NEBRASKA

Howard E. Tracy
Grand Island, Nebraska
March 13, 1995

NOTE: Nebraska Probate Code is Uniform Probate Code with Modifications.

AGE OF TESTATOR

Real Estate	Personal Property
18	18

Married persons under age of 18 may devise and dispose of property by will.

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid if signature, material provisions and indication of date of signing are in testator's handwriting.

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two witnesses to signing by testator or to acknowledgement of signature by testator are required. No age specified for witnesses. Any individual generally competent to be a witness may act as witness to a will.

SELF-PROVED WILL

Any will may be made self-proved at or after execution by acknowledgement of testator, affidavits of witnesses and certificate of officer authorized to administer oaths in state of execution all substantially in form prescribed in probate code.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Burning, tearing, canceling or obliterating, or by subsequent will or codicil. Revocation will not be implied by change in condition or circumstances, except divorce revokes provisions for former spouse and remarriage to that spouse revives them.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Election to take one-half of augmented estate must be made within six months after the probate of the decedent's will or nine months after death, whichever is later.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any after-born child not provided for takes intestate share unless it appears omission was intentional; or testator had other children at time of will and left substantially all of estate to pretermitted's other parent; or pretermitted received amount equivalent to intestate share outside of the will.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Interested witness may testify. If there is a least one disinterested witness, provisions for interested witnesses will stand; however, if all witnesses are interested, each is limited to his intestate share, if any.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

If a devisee related to testator in any degree of kinship is (1) dead at time of execution of will, or (2) fails to survive testator, or (3) is treated as if he predeceased the testator, the issue of the deceased devisee who survives the testator by 120 hours take in place the deceased devisee. Take equally if all of same degree of kinship; otherwise, issue take by representation. "Devisee" and "issue" are defined terms.

A devisee who does not survive testator by 120 hours is treated as if he predeceased testator, unless the will (1) contains language dealing explicitly with simultaneous deaths, or deaths in common disaster, or (2) requires that the devisee survive the testator, or survive the testator for a stated period, in order to take under will.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Written will is valid if valid at time and place of execution or place where at time of execution or time of death testator is domiciled, has a place of abode or is a national.

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. Also, a devise may be made to trustee if existing written trust is identified, whether trust is amendable or revocable. If trust is revoked prior to testator death, devise lapses.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

An adult of sound mind may execute a signed declaration governing the use of life-sustaining treatment, which must be witnessed by two adults or a notary public. Neither the notary nor more than one witness shall be employee of health care provider for declarant. No witness or notary shall be employee of life or health insurance provider to declarant. Declaration executed in another state in compliance with the law of that state or of Nebraska is valid.

HEALTH CARE POWER OF ATTORNEY

Written power of attorney for health care signed, dated, identifying attorney in fact, witnessed by two adults or notarized and specifically authorizing attorney in fact to make health care decisions for principal who is incapable is valid. Health care power may be included in durable or other form of power of attorney. Health care power executed in another state and valid there is valid in Nebraska.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

NEVADA

Charles William Johnson
Las Vegas, Nevada
March 18, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid. Must be dated and signed.

NUNCUPATIVE (ORAL)

Valid up to estate of \$1,000 if proved by testimony of 2 witnesses and if made during last illness.

NUMBER AND AGES OF WITNESSES

Two. No age prescribed. Must be "competent" witness.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Burning, tearing, canceling, obliteration or destroying, or by another will or codicil. Marriage revokes will as to spouse unless spouse is provided for in marriage contract or other will or contrary intention is expressed in the will. Divorce revokes will as to former spouse as though former spouse had predeceased testator.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

In Nevada, the surviving spouse has no such right of election to take intestate share in preference to testamentary provision.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any child born after execution of parent's will takes intestate share unless appears omission from will was intentional.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void unless there are 2 other competent witnesses.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

No lapse to child or other relation leaving lineal descendants, unless otherwise provided. Other lapsed gifts go intestate.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if in writing and subscribed by the testator and if valid where executed or where testator was domiciled.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

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 this intent and describes the writing sufficiently to permit identification. Written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will. Also, Statutory Trustees' Powers (NRS 163.265 through 163.410).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Both are valid. Uniform Act on Rights of the Terminally Ill (NRS 449.535 to 449.690) and Durable Power of Attorney for Health Care (NRS 449.800 to 449.860).

NEW HAMPSHIRE

Robert P. Bass Jr.
Concord, New Hampshire
April 6, 1995

See in general, DeGrandpre, 7 N.H. PRACTICE: WILLS, TRUSTS & GIFTS, 2d Ed., Chaps. 3 and 4.

AGE OF TESTATOR

Real Estate	Personal Property
18	18

Married persons under age of 18 may devise and dispose of property by will (RSA 551:1).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Invalid where the personal estate bequeathed exceeds \$100.00 "unless declared in the presence of three witnesses who were requested by the testator to bear witness thereto, in his last sickness and in his usual dwelling, except when he was taken sick from home and died before his return." A memorandum of the noncupative will must be reduced to writing within six days, and presented for probate within six months from the making (RSA 551:16). For a noncupative will to be valid, it must appear that the testator's declarations were intended as the final directions for the disposition of his or her estate. *Dockum v. Robinson*, 26 N.H. 372 (1853).

NUMBER AND AGES OF WITNESSES

To be valid, a will or codicil to a will executed on or after January 1, 1993 must be (i) made by a testator qualifying under RSA 551:1 (ii) in writing, (iii) signed by the testator, or by some person at his or her express direction in his or her presence, and (iv) be signed by two or more credible witnesses who, at the testator's request and in the testator's presence, attest to the testator's signature (RSA 551:2). "Credible" within the context of this section means "competent" to testify and prove the will's execution; there is no specified age requirement. See *Hodgman v. Kittredge*, 67 N.H. 254, 32 A. 158 (1892). Prior to 1984, the statute required that a will be attested and subscribed by three witnesses. A will may be qualified as self-proved if the signatures of the testator and witnesses are followed by a sworn acknowledgement made before a Notary Public or a Justice of the Peace or other official authorized to administer oaths in the place of execution in substantially the form prescribed by the statute (RSA 551:2-a).

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Must be by some other valid will or codicil, or by some writing executed in the same manner or by canceling, tearing, obliterating, or otherwise destroying the same by the testator, or by some person by his consent and in his presence. The will may be revoked by implication of law from change in the circumstances of the testator or his family, devisees, legatees or estate occurring between the time of making the will and the death of the testator (RSA 551:13, 14). The N.H. Supreme Court has never found a will to be revoked by implication of law. It has specifically ruled that a divorce and attendant property settlement do not constitute sufficient change of circumstance to qualify for revocation (*In the Matter of Rice*, 118 N.H. 528, 390 A 2d 1146 (1978)).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

The surviving spouse may waive provisions of the will in his or her favor and take instead a distributive share (RSA 560:10) by filing such waiver within six months after appointment of an executor or administrator, and not afterwards, unless by permission of the Judge of Probate for a good cause shown. Where real estate is involved, the waiver must be recorded in the registry of deeds of the county where the real estate is situated (RSA 560:14).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Every child born after the decease of the testator and every child or issue of a child of the deceased not named or referred to in the will takes that portion of the estate to which he would have been entitled had the testator died intestate (RSA 551:10).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Any testamentary gift to a subscribing witness or to the spouse of such a witness is void unless there are two other subscribing witnesses. However, the subscribing witness is otherwise a competent witness to the attestation of the will. Therefore if a will is subscribed and attested to by the required number of witnesses, one of whom benefits from the will, the will is still valid but the benefited witness does not take under the will. A witness to a will is not disqualified by a will provision providing for the payment of a debt to the witness (RSA 551:3).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

The issue of a legatee or devisee deceased before the testator takes the legacy or devise of such predeceased legatee or devisee (RSA 551:12).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with the law of the place where executed (RSA 551 :5).

INCORPORATION BY REFERENCE

Uniform Testamentary Additions to Trusts Acts (RSA 563-A).

The doctrine of incorporation by reference is judicially recognized. *Hastings v. Bridge*, 86 N.H. 247, 166 A. 273 (1933). For successful incorporation by reference, the document must be in

existence at the time the will is executed and must be referred to as being in existence; there can be no indication that the document sought to be incorporated is to be prepared in the future. *Kellom v. Beverstock*, 100 N.H. 329, 126 A.2d 127 (1956).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

A "Living Will" or "Terminal Care Document" is valid if in the form prescribed and executed as required by the statute (RSA 137-H). The statute was substantially revised in 1991, and, *inter alia*, extended the use of such documents to include situations in which a person is "permanently unconscious." A "Health Care Proxy" or "Durable Power of Attorney for Health Care" is also valid if in the form prescribed and executed as required by the statute (RSA137-J).

NEW JERSEY

Howard G. Wachenfeld
Newark, New Jersey
March 2, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid. (N.J.S. 3B:3-3).

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two. No minimum age, but must be generally competent.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By being burned, torn, canceled, obliterated, or destroyed with intent to revoke by the testator or another person in testator's presence and at his direction, or by a subsequent will. A divorce or annulment revokes provision for former spouse unless will expressly provides otherwise. A marriage subsequent to will gives spouse intestate share unless omission appears intentional (N.J.S. 3B:3-13,14).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

A surviving spouse has a right of election to take one-third of augmented estate of New Jersey domiciliary dying after May 28, 1980 if at time of death they had not been living apart under circumstances rising to a cause of action for divorce. The election is made by filing a complaint in the Superior Court within 6 months of appointment of personal representative. The elective share is offset by the value of all property owned by surviving spouse from whatever source acquired plus any interest she receives from decedent whether or not renounced. A life estate is valued at one-half of value of the property or trust *corpus*. Life insurance is not included in augmented estate if proceeds are received by a person other than the surviving spouse (N.J.S. 3B:8-1 *et seq.*).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

After-born children receive intestate share unless (a) it appears omission was intentional, (b) substantially all the estate is devised to other parent of omitted child and testator had a child when will was executed, and (c) provided for outside of will (N.J.S. 3B:5-16).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Gift is valid (N.J.S. 3B:3-8).

EFFECT OF LAPSED LEGACY

No lapse as to grandparents or lineal decedents of grandparents and members of a class (N.J.S. 3B:3-35).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in compliance with law of place where executed, or with law of place where at time of execution or at time of death the testator was domiciled, had a place of abode or was a national (N.J.S. 3B:3-9).

INCORPORATION BY REFERENCE

A signed statement or list referred to in a will may dispose of tangible personal property (other than money, evidences of indebtedness, documents of title, and securities and property used in trade or business) if it describes the property and devisee with reasonable certainty. The statement or list may be prepared before or after execution of the will and may be altered by testator after its preparation (N.J.S. 3B:3-11).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Valid, requires two witnesses who are not health care representatives, or may be acknowledged. Can be revoked even if incompetent. Effective January 1, 1992 (NJSA 26:2H-53).

NEW MEXICO

Joseph A. Sommer
Santa Fe, New Mexico
March 17, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18 or over	18 or over
"sound mind"	"sound mind"

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two. No age requirement as long as credible.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any children or issue not named or provided for in will inherit as though died intestate; but with certain statutory exceptions, except in certain situations, issue of a deceased child of a testator may be considered to be pretermitted children.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

No effect — interested witness may attest.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

No statutory provision.

EFFECT OF LAPSED LEGACY

Becomes a part of residuary estate, except the issue of a devisee related to testator by kinship take his devise if he is dead at the time of execution of the will or predeceased the testator.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of (a) place where executed, (b) where testator is domiciled at time of execution, or (c) at the time of his death.

INCORPORATION BY REFERENCE

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. The writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be (a) referred to as one in existence at the time of the testator's death, (b) prepared before or after the execution of the will, (c) altered by the testator after its preparation, or (d) a writing that has no significance apart from its effect on the dispositions made by the will. Section 45-2-513, NMSA 1978. A devise or bequest may be made to the trustee of a trust established, or to be established by the trustee, or other persons, including a funded or unfunded life insurance trust, if the trust is identified in the will and its terms are set forth in a written instrument, other than the will, executed before or concurrently with the execution of the testator's will or in a valid last will of a person who predeceased the testator. The trust may be amendable or revocable, or both, and may be amended after the execution of the will, or after the death of the testator. This is more fully set out in the Uniform Testamentary Additions to Trusts Act, Article 5, Title 46, NMSA 1978.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

An individual of sound mind and having reached eighteen years of age may execute a document directing that if he is ever certified under the Right to Die Act [Section 24-7-1 through 24-7-10, NMSA 1978] as suffering from a terminal illness or being in an irreversible coma, maintenance medical treatment shall not be utilized for the prolongation of his life. To be valid the document must be executed with the same formalities as required by a valid will. The Right to Die Act requires certification in writing by the physician in charge of that individual that he is terminally ill

or in an irreversible coma, and another physician after which certification maintenance medical treatment may be withheld without liability therefor to the physician. If one under the age of eighteen has been so certified, a spouse, parent or guardian must execute the document has been certified by the District Judge, following an evidentiary hearing, maintenance medical treatment may be withheld without liability therefor to the physician. Pursuant to a written acknowledged power of attorney that is stated to be not affected by the incapacity of the principal, and which specifies such authority, an attorney-in-fact or agent is authorized to make all decisions that the principal may make regarding lifesaving and life prolonging medical treatment, surgical treatment, nursing care, medication, hospitalization, institutionalization in a nursing home or other facility and home health care. Section 45-5-501, NMSA 1978.

NEW YORK

Peter J. Brevorka
Buffalo, New York
October 2, 1996

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

During a war declared or undeclared or other armed conflict in which members of the armed forces are engaged, any person who serves in actual military or naval service, or accompanying persons may make a holographic will. Becomes invalid on the expiration of 1 year following discharge from service, provided testator has capacity to make new will at that time. If not it continues until 1 year after he regains testamentary capacity. Holographic will valid though unattested.

Holographic will made by a mariner while at sea becomes invalid upon the expiration of 3 years from the time such will was made, provided testator has capacity to make new will at that time.

NUNCUPATIVE (ORAL)

Same as holographic wills except must be made in hearing of 2 witnesses and the execution and tenor thereof proved by at least 2 witnesses.

NUMBER AND AGES OF WITNESSES

Two.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

By will or other writing executed with same formalities as a will, or by burning, tearing, cancellation, obliteration or destruction with intent to revoke (i) by testator, or (ii) by another in testator's presence and by his direction and consent and if proved by 2 witnesses, neither of whom performed revocation. Holographic or nuncupative declaration may revoke. Divorce, annulment, declaration of nullity or dissolution on grounds of absence revoke disposition under will as to former spouse and any provision naming former spouse fiduciary revoked unless contrary intent expressed. Such revoked disposition shall take effect as if former spouse had died immediately before testator.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

As to persons dying before 9/1/92:

As to will executed after 8/31/30 and prior to 9/1/66, personal right given to the surviving spouse to take elective share, equal to 1/3 of the net estate, wherever located, if decedent survived by one or more issue and in all other cases 1/2 of such net estate, but if the elective share is over \$2,500 and a trust is created in an amount equal to or greater than the elective share, the income of which is payable to the surviving spouse for life, the spouse has the right to elect to take \$2,500 absolutely which shall be deducted from the principal of the trust. Where the elective share does not exceed \$2,500 the surviving spouse may take that share absolutely, in lieu of any other provision under the will. For other detailed provisions see EPTL Sec. 5-1.1(a)(1) (A)-(H).

As to persons dying after 8/31/66, statute provides for a broader definition of "testamentary provisions" included in net estate for purposes of determining surviving spouse's elective share. Included are: (a) gifts *causa mortis*, (b) Totten Trusts (where money deposited after 8/31/66), (c) joint bank accounts, (d) revocable trusts or transfers (made after 8/31/66), and (e) certain other joint assets. Only available to estates of New York domiciliaries, or with regard to non-domiciliary decedent's New York property if he elects to have New York law govern. Excluded are (a) retirement or death benefits (b) profit sharing benefits (c) insurance proceeds and (d) United States Savings Bonds payable to a designated person. For decedent with will executed after 8/31/66, the elective share shall be 1/3 of the net estate, if decedent survived by one or more issue, and 1/2 of the net estate in all other cases after deducting debts and funeral and administration expenses. Limited right of election over trust increased to \$10,000. EPTL Sec. 5-1.1(c).

As to persons dying on or after 9/1/92:

Regardless of when will executed, surviving spouse has right to an elective share in the pecuniary amount equal to the greater of (i) \$50,000 (or the entire net estate if less than \$50,000), or, (ii) 1/3 of the net estate. As to persons dying after 8/31/94, a trust, the principal of which is the elective share, with income payable to the spouse for life will not satisfy the elective share. Unless the decedent provides otherwise, an election has the effect with respect to any interest which passes to the spouse other than absolutely as though the spouse died immediately before the decedent. As to persons dying before 9/1/94, if a trust is used to satisfy the elective share, limited right of election over trust is increased to \$50,000.

For persons dying on or after 9/1/92, the definition of "testamentary provisions" is further expanded from the law effective 8/31/66 to include (a) gifts made after 9/1/92 and within 1 year of death which are not excludable from taxable gifts under IRC 2503; (b) any disposition or contractual arrangement to the extent the decedent retained an income interest or the right to revoke either alone or in conjunction with another who did not have an adverse interest; (c) assets of a savings, retirement, pension, deferred compensation, profit sharing account [see EPTL 5-1.1-A (b) (G) for limitations]; (d) property subject immediately prior to death to a presently exercisable general power of appointment, or, which power was within 1 year of death

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

released or exercised in favor of another. U.S. Savings bonds in joint name or payable on death are now specifically subject to the right of election. Life insurance proceeds are no longer specifically excluded from, nor are they specifically included as subject to, the right of election with respect to persons dying on or after 9/1/92.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Child born after execution of will and not provided for by any settlement and not provided for or mentioned in any way in the will may take a share of estate as follows:

If testator had no children living when he executed his will, after-born child receives his intestate share.

If testator had one or more children living when he executed will:

1. And made provision for one or more such children, after-born child shares equally with the children provided for, but only in the portion of the state provided for such children.

2. And made no provision for any children, after-born child not entitled to share in estate.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void if will can't be proved with testimony of such witness, but witness may receive so much of intestate share as does not exceed disposition in will.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None (Prior limitations repealed 7/7/81).

EFFECT OF LAPSED LEGACY

No lapse as to issue or brother or sister who predecease testator leaving issue surviving testator, unless will provides otherwise. For wills executed on or after 9/1/92, such surviving issue take by representation. For earlier wills, such surviving issue take per stirpes.

A gift to issue, brothers or sisters, as a class will not lapse, except that no benefit conferred upon the surviving issue of an ancestor who died before the execution of the will in which the disposition to the class was made.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will, if in writing and subscribed by testator, admitted to probate if executed in accordance with law of New York, the place of execution, or the testator's domicile (either at time of execution or death); validity not affected by change of testator's domicile subsequent to execution of will.

INCORPORATION BY REFERENCE

Pour over to existing *inter vivos* trusts permitted by Statute, EPTL 3-3.7. No specific statutory authority for incorporation by reference of other documents. Cases which have sustained incorporation by reference of pre-existing wills of another person

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

state that rule's purpose is "to safeguard against fraud and mistake." It would appear that statutory provisions could be incorporated by reference, but memoranda directing disposition of tangible personal property could not.

HEALTH CARE PROXIES AND LIVING WILLS

Health care proxy designating a health care agent is specifically recognized by statute. (Article 29-C Public Health Law) Must be in writing and witnessed by two adults. Must designate a health care agent or proxy. Upon determination of incapacity of the principal by attending physician, the agent may make all health care decisions, including withholding or withdrawal of life support, but in the latter case a second physician must additionally confirm principal's lack of capacity. The agent may not make decisions about artificial nutrition and hydration unless the document specifically recites that the principal has made known his or her wishes in that regard to the agent. Health care proxy may not be contained in a power of attorney. Health care proxy or similar instrument executed in another state, if valid there, will be recognized in New York.

Living wills are commonly used, and are recognized by the courts, but have not been recognized by statute.

In addition to Health Care Proxies, Orders Not to Resuscitate are recognized (Article 29-B, Public Health Law). Adults may consent in advance to an order not to resuscitate by a physician. Consent must generally be in writing and witnessed by two adults. In the case of an incompetent patient, surrogates listed in the statute (in order of priority: a guardian of the person, spouse, a child, a parent, a sibling, a close friend) may consent to an order not to resuscitate. Non-hospital orders not to resuscitate may be issued with respect to emergency medical services personnel.

NORTH CAROLINA

Carl W. Hibbert
Raleigh, North Carolina
March 14, 1995

AGE OF TESTATOR

Real Estate
18 or over

Personal Property
18 or over

(N.C.G.S. 31-1)

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid if written entirely in handwriting of testator (N.C.G.S. 313.2-3.4).

NUNCUPATIVE (ORAL)

Valid (personal property only) if last made orally before two (2) competent witnesses during testator's last sickness or imminent peril and testator does not survive (N.C.G.S. 31-3.5).

NUMBER AND AGES OF WITNESSES

Two. Any competent person, including executor (N.C.G.S. 318. 1-9). Beneficiaries — competent witness but interest rendered void unless there are two other disinterested witnesses (N.C.G.S. 31-10).

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By subsequent written will or codicil — by burning, tearing, canceling, obliterating, etc. (N.C.G.S. 31-5.1).

Nuncupative will, similarly (N.C.G.S.31-5.2).

Will not revoked by marriage but subject to dissent by surviving spouse from will made prior to marriage (N.C.G.S. 31 -5.3).

Divorce does not revoke will, but unless otherwise specifically provided in will, divorce revokes only provisions relating to former spouse (N.C.G.S. 31-5.4).

No will revoked can be revised other than be re-execution or execution of another will incorporating by reference the revoked document (N.C.G.S. 31-5.8).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Spouse may elect to take fractional part of intestate share (N.C.G.S. 29-30). Intestate share varies depending upon number of decedent's children of marriage and prior marriages, etc. Minimum part of intestate share: one-third (1/3); second marriage without children but children of prior marriages: one-sixth (1/6). (N.C.G.S. 29-14, 30-1 and 30-3).

SELF-PROVED WILLS

Attested wills may be made self-proved by compliance with specific provisions of N.C.G.S. 31-11.6.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Will not revoked by subsequent birth or adoption but such entitled to share unless provision made in will or it is apparent from will that testator intentionally did not make any specific provision for such child (N.C.G.S. 31-5.5).

No revocation by subsequent conveyance (N.C.G.S. 31-5.6).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void — unless 2 other disinterested witnesses (N.C.G.S. 3110).

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

No lapsed legacy in case of beneficiaries leaving issue (N.C.G.S. 3142).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will valid as to personal property if executed in accordance with law of place of execution; as to real property valid only if executed in accordance with law of North Carolina (N.C.G.S. 31 -27).

CAVEAT TO WILL

At time of application of probate in common form or any time within three (3) years thereafter any person entitled under the will or interested in the estate personally or by attorney may *caveat* before the Clerk of the Superior Court. If such person under disability with three (3) years of removal of disability (N.C.G.S. 31-32).

INCORPORATION BY REFERENCE

A. Separate documents: No comprehensive statutory provision, but incorporation is a general practice.

B. Powers of fiduciaries: N.C.G.S. 32-26 provides for the incorporation by reference of statutory fiduciary powers of N.C.G.S. 32-27.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

A living will is valid in North Carolina (N.C.G.S. 90-320).

A Health Care Power of Attorney is valid in North Carolina (N.C.G.S. 32A-15 to 32A-26).

NORTH DAKOTA

William L. Guy, III
Moorhead, Minnesota
November 15, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid, whether or not witnessed if signature and material provisions are in handwriting of testator.

NUNCUPATIVE (ORAL)

No provision for.

NUMBER AND AGES OF WITNESSES

Two. No minimum age. Any person competent to be a witness generally may witness a will.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By a subsequent will which revokes the prior will or part, expressly or by inconsistency, or by being burned, torn, canceled, obliterated or destroyed with the intent and for the purpose of revocation. No provision for revocation of will by subsequent marriage. Divorce or annulment of marriage revokes any disposition, appointment of property, or a nomination as executor, trustee, conservator, or guardian made by the will to the former spouse or to a relative of the former spouse, unless will expressly provides otherwise.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Surviving spouse has right of election to take an elective share of one-half of the augmented estate under limitations and conditions imposed by statute. Omitted spouse of testator (who fails to provide by will for his or her surviving spouse where marriage occurred after execution of will) shall receive the same share of the estate he or she would have received if the decedent had left no will unless it appears from the will that such omission was intentional or that he or she was provided for by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of testator or from the amount of the transfer or other evidence.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Where testator fails to provide for any of his children born or adopted after execution of his will, the omitted child receives an intestate's share unless it appears that the omission was intentional or that when the will was executed the testator had one or more children and devised substantially all of the estate to the other parent of the omitted child or that 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.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

The will, or any provision thereof, is not invalid because the will is signed by an interested witness.

EFFECT OF LAPSED LEGACY

No lapse as to grandparent or lineal descendant of a grandparent of testator. The lapse of a devise other than residuary becomes part of the residue. If the lapse occurs in the residuary estate which has been devised to two or more persons, the share of the deceased residuary devisee passes to the other residuary devisee or devisees in proportion to their interest in the residue.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Written will valid if execution complies with the law at the time of execution in the place where the will is executed or law of the place where at the time of execution or the time of death the testator is domiciled, has a place of abode or is a national.

INCORPORATION BY REFERENCE

Any identifiable writing, in existence when the will is executed, may be incorporated in a will by reference to the writing (NDCC §30.1-08-10 UCC 2-510).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

The living will is statutorily recognized at NDCC Chapter 23-06.4.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

The Durable Power of Attorney for Health Care is statutorily recognized at NDCC Chapter 23-06.5.

OHIO

Robert M. Brucken
Cleveland, Ohio
March 3, 1995

AGE OF TESTATOR

Real Estate
18

Personal Property
18

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Valid as to personal estate only if made in last sickness and reduced to writing and subscribed by 2 competent disinterested witnesses within 10 days. Must be offered for probate within 6 months after testator's death.

NUMBER AND AGES OF WITNESSES

Two. A witness must be competent and may be a minor, but minority may give rise to presumption of incompetency.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Tearing, canceling, obliterating or destroying will with intent to revoke or by other will or codicil. Marriage does not revoke will but spouse may elect to take statutory share. Divorce (or separation under settlement agreement finally settling property rights) revokes provisions in will for spouse, and remarriage to spouse (or termination of the settlement agreement) revives such provisions. Election against will or divorce cancels provisions for spouse in decedent's revocable trust if it is a beneficiary of the estate.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Spouse may elect to take 1/2 of net estate unless 2 or more of decedent's children survive, in which event spouse takes 1/3. Election must be made before or within 1 month after service of a citation to elect issued by the Court.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

After-born child takes an intestate share unless provision has been made for him in the will or by settlement or it appears by the will that the testator intended to disinherit him. However, gifts in the will to a surviving spouse do not abate; and if the will leaves all to a surviving spouse, no after-born child takes any share.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void if the witness is one of only two witnesses, except valid to the extent of any intestate share of the witness.

EFFECT OF LAPSED LEGACY

No lapse as to relatives leaving issue.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with (1) law in force at time of execution in jurisdiction where executed; or (2) law in force in Ohio at time of death; or (3) law in force in jurisdiction where testator was domiciled at time of death.

INCORPORATION BY REFERENCE

An existing document, book, record or memorandum may be incorporated in a will by reference, if referred to as being in existence.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Both living will declarations and durable powers of attorney for health care are authorized. The complicated statute and its requirements are satisfied by special 12-page printed forms prepared jointly by The Ohio State Bar Association and The Ohio State Medical Association and recognized by the Ohio Hospital Association. Foreign living wills are recognized if they comply with the foreign law, but foreign durable powers of attorney for health care must also substantially comply with the very detailed Ohio requirements (or be effective under any non-statutory law).

OKLAHOMA

W. Thomas Coffman
Tulsa, Oklahoma
March 23, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, DATED, SIGNED, UNWITNESSED)

Recognized.

NUNCUPATIVE (ORAL)

Valid where the estate does not exceed \$1,000.00, where the testator was in actual military service and was in contemplation, fear or peril of death. There must be two witnesses.

NUMBER AND AGES OF WITNESSES

Two. No statutory provision as to age of witnesses. Since statute requires testator to be 18 or over, suggest witnesses be 18 or over and competent.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Formal writing or burning, canceling or destruction with intent. If, after making a will, the testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked. Annulment of the testator's marriage shall have the same effect as divorce. In the event of either divorce or annulment, the testator's former spouse shall be treated for all purposes under the will as having predeceased the testator. Provided, however, this shall not apply if the decree of divorce or annulment is vacated or if the testator remarries his former spouse, or following said divorce or annulment, executes a new will or codicil which is not revoked or held invalid.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Yes, except elective share is not the same as intestate share.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any child omitted from will may take intestate share unless it appears that omission was intentional.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void unless there are two other competent subscribing witness-

es, but if heir at law, may take intestate share up to amount of bequest.

EFFECT OF LAPSED LEGACY

No lapse as to child or other relative leaving lineal descendants. Spouse is not an other relative.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed according to law of place where made or place of testator's domicile.

INCORPORATION BY REFERENCE

Separate document may be incorporated into will if separate document is in existence at time will is executed and if described in such a way as to reasonably identify the document. *Miller v. First Nat'l. Bank & Trust Co.*, Okla. 1981, 637 P 2d 75.

Uniform Testamentary Additions to Trusts Act, adopted by Oklahoma, Title 84 Oklahoma Statutes Annotated §301 et seq.

Uniform Fiduciary Powers Act — Not in force.

Uniform Trust Act, adopted by Oklahoma, 60 O.S.A. §175.1 et seq., states unless otherwise provided by instrument creating the Trust, all powers of a trustee shall attach to the office. These powers are enumerated in this Act.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

The Advance Directive for Health Care (commonly referred to as a living will) is authorized in Oklahoma and recognizes a person's right to execute a document stating that the person does not want his or her dying artificially prolonged by (1) the use of life-sustaining treatment, and/or (2) the administration of food and water by tube. The person may also delegate to another (health care proxy) in an Advance Directive for Health Care the power or authority to make medical treatment decisions for the person, including those related to the withholding or withdrawal of (1) life-sustaining treatment, and/or (2) food and water.

OREGON

Michael M. Morgan
Portland, Oregon
March 14, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

(or person who has been lawfully married) (O.R.S. 112.225).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Not recognized.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

NUMBER AND AGES OF WITNESSES

Two. No age limitation.

REVOCAION AND REVOCATION BY MARRIAGE/DIVORCE

A will may be revoked or altered (1) by another will; (2) by being burned, torn, canceled, obliterated, or destroyed with intent and purpose of testator of revoking the will, by the testator or by another person at the direction of the testator. (The injury or destruction by a person other than the testator at the direction and in the presence of the testator shall be proved by a least two witnesses.); (3) by the subsequent marriage of the testator if the testator is survived by his spouse, unless the will evidenced intent that it not be revoked by subsequent marriage, or was drafted under circumstances established that it was in contemplation of the marriage, or the testator and his spouse entered into a written contract before the marriage; and (4) by divorce or annulment, which revokes all provisions in favor of former spouse and any provision naming former spouse as executor, unless a will evidences a different intent of the testator.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

If a decedent domiciled in Oregon, surviving spouse has a right to elect against will. The elective share consists of one-fourth of the value of the net estate, but will be reduced by the value of the following willed to the surviving spouse: property given outright; the present value of legal life estates; and the present value of the right of the surviving spouse to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will that is capable of valuation with reasonable certainty without regard to the powers forfeited under the following.

Except as to property applied under the above to reduce the elective share, an election to take an elective share forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, the spouse by electing to take under this section retains the power only if it is not a general power of appointment as defined in subsection (5) of ORS 118.010 and the testator has not provided otherwise, but the spouse forfeits any general power of appointment. A power to pay more than the income or annuity or withdrawals, the value of which reduced the elective share under the first aforementioned, or to apply additional principal or income in behalf of the electing spouse, may not be exercised in favor of the electing spouse. The right to elect may be barred, limited, or denied, or the share reduced under appropriate statutes. (ORS 114.115, ORS 114.125, ORS 114.135). The right of the surviving spouse to elect may be barred by a written agreement signed by both parties before or after marriage.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

"Pretermitted child" means a child of a testator who is born or adopted after the execution of the will of the testator who is neither provided for in the will nor in any way mentioned in the will and who survives the testator.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

If a testator leaves one or more children living when he executes his will and no provision is made in the will for any such living child, a pretermitted child shall not take a share of the estate of the testator disposed of by the will.

However, if a testator has one or more children living when he executes his will, and provision is made in the will for one or more of such living children, a pretermitted child is entitled to share in the estate of a testator disposed of by will as follows: (a) pretermitted child shares only in the portion of the estate devised to the living children by will, (b) share of each pretermitted child shall be the total value of the portion of the estate devised to the living children by the will, divided by the number of pretermitted children, plus the number of living children, for whom the provision, other than nominal provision, is made in the will; and (c) to the extent feasible, the interest of a pretermitted child shall be the same character, whether equitable or legal, as the interest the testator gave to the living children by will. If a testator has no child living when he executes his will, a pretermitted child shall take a share of the estate as though the testator had died intestate.

EFFECT OF THE TESTAMENTARY GIFT TO ATTESTING WITNESSES

A will attested by an interested witness is not thereby invalidated. An interested witness is one to whom is devised a personal and beneficial interest in the estate. "Devise" includes "bequest."

EFFECT OF LAPSED LEGACY

No lapse as to relative leaving lineal descendants.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Lawfully executed if in writing, signed by or at the direction of the testator and otherwise executed in accordance with the law of:

- (a) Oregon at the time of execution or at the time of the death of the testator;
- (b) Domicile of the testator at the time of execution or at the time of his death;
- (c) The place of execution at the time of execution.
- (d) A will is also lawfully executed if it complies with the Uniform International Wills Act.

INCORPORATION BY REFERENCE

Uniform Testamentary Additions to Trusts Act adopted by Oregon (except §2), ORS 112.265. Intention of testator to incorporate document in a will must clearly appear in the will.

See *Witham v. Witham*, 66 P2d, 281, 156 Or. 59, 110 ALR, 253 (1937) .

Any part of Uniform Trustee's Powers Act may be incorporated in any instrument which is not a trust. ORS 128.007(2).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Oregon has a new law regarding health care proxies and living wills effective November 4, 1993 (although powers of attorney for

health care and directives to physicians signed before that date and complying with prior Oregon law will continue to be effective).

The new law prescribes a form for appointing a "health care representative," and allows the principal to give the health care representative power to make decisions regarding life support and tube feeding, and to list any other special conditions of the appointment or instructions to the representative.

The law also prescribes a form of "health care instruction." This form allows expression of specific or general instructions regarding the use of life support, and can be used whether or not a health care representative has been appointed.

Both prescribed forms are set out in ORS §127.005 et. seq.

PENNSYLVANIA

Bruce L. Castor
Phil., Pennsylvania
November 2, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid, but not because it is holographic.

NUNCUPATIVE (ORAL)

No longer recognized.

NUMBER AND AGES OF WITNESSES

Subscribing witnesses are not required. At the time of probate wills must be proved by oath or affirmation of two "competent" witnesses and proof by subscribing witnesses is preferred to the extent readily available. "Self-proved" wills are acceptable for probate unless there is a contest with respect to the validity of the will.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By some other will or codicil in writing; some other writing declaring the same, executed and proved in the manner required of wills; or being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revocation, by the testator or by another person in testator's presence and by testator's express direction. If the act is done by someone other than the testator, the direction of testator must be proved by two competent witnesses.

Marriage does not revoke will, but spouse automatically becomes entitled to intestate share, unless the will bequeaths an even larger share or unless it appears from will that will was made in contemplation of marriage to the spouse. Divorce revokes all provisions in will in favor of or relating to divorced spouse unless it appears from will that the provision was intended to survive the divorce.

In addition, any beneficiary designation of an insurance policy or other contractual arrangement which could have been changed after divorce shall be ineffective unless intended to survive divorce.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

In 1978 a modified version of the augmented estate proposed in the Uniform Probate Code was adopted. The spouse has the right to take one-third of the probate estate and of certain lifetime conveyances in lieu of the interest given in the will. However, the spouse must disclaim or give credit towards the elective share for interests in certain jointly held property, life insurance, employee plans, trusts, gifts, community property, annuities, appointed property and property subject to the spouse's election not awarded to the spouse as part of his elective share.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Shall receive out of testator's property not passing to a surviving spouse such share as he would have received if testator had died unmarried and intestate and owning only that portion of his estate not passing to a surviving spouse; shall receive no share if it appears from the will that testator intended not to provide for after-born or adopted children.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

None.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Devise or bequest to issue of testator, or to his brother or sister or a child of his brother or sister, shall not lapse but shall pass to the issue of the beneficiary; but such a gift to a brother or sister or to a child of a brother or sister shall lapse to the extent it will pass to the testator's spouse or issue as part of the residuary estate or by intestacy. A lapsed bequest not in the residuary clause shall be included in the residuary estate. A lapsed bequest in the residuary clause shall pass to the other residuary beneficiaries in proportion to their respective shares.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in compliance with Pennsylvania law or law of testator's domicile either at time of execution of will or at time of death.

INCORPORATION BY REFERENCE

There is no statutory authority for incorporation by reference. However, a devise or bequest may be made to the trustee of a trust established in writing before, concurrently with, or after the execution of the will and it is not invalid because the trust is amendable or revocable or was in fact amended.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Advance Directives for Health Care are valid in Pennsylvania whether or not they follow the statutory form prescribed in 20 Pa. C.S.A. §5401 et seq. The person may specify which treatments

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

are to be withheld and may designate a surrogate decision-maker. The directive becomes operative when the patient is found to be incompetent and in a terminal condition or a state of permanent unconsciousness by an attending physician.

RHODE ISLAND

Nathan W. Chace
Providence, Rhode Island
March 2, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized except as to soldier or seaman who may dispose of personal estate by holographic will.

NUNCUPATIVE (ORAL)

Soldier or airman in military service or mariner at sea may make a valid nuncupative will.

NUMBER AND AGES OF WITNESSES

Two. No age requirement. Question is one of competency of witness.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By will or other formal writing or by destruction. Marriage revokes will unless it appears from will it was made in contemplation of marriage. That portion of a will which exercises a power of appointment is not revoked by subsequent marriage if, in default of appointment, the property appointed would not pass to those persons who would have received it had the person making the appointment died intestate with the appointed property as part of his estate. Divorce revokes provisions for benefit of former spouse unless made in contemplation of divorce. No will may be revoked by any presumption of intention on the ground of alteration of circumstances.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Dower and courtesy abolished. Surviving spouse is entitled to statutory life estate in all real estate owned in fee simple by deceased spouse. Any devise or bequest of real or personal property to such surviving spouse bars such life estate unless the surviving spouse, within 6 months after probate, files waiver of benefit provisions of will and elects statutory life estate. A surviving spouse has no right of election over personal property.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Children may be disinherited, but after-born children, issue of children dying after execution of the will, and issue born after execution to a child dying before execution, take an intestate share unless omission is intentional and not occasioned by accident or mistake.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void. Executor not rendered incompetent as a witness to the will. An attesting beneficiary is deemed a legal witness, even if he dies prior to testator.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

No lapse as to a legatee or devisee leaving issue unless contrary intent appears.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid where executed in manner required by place of execution or of testator's domicile, provided in writing and subscribed by testator.

INCORPORATION BY REFERENCE

Devise, bequest or appointment may be made to trust in writing, in existence when will executed and identified in will, including unfunded life insurance trust, even though trust is amendable or revocable, property so added to the trust to be administered and disposed of according to the terms of the trust, including amendments, as it appears at testator's death.

No other statutory authority for incorporation by reference.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Written durable powers of attorney for health care recognized — no statutory form required after January 1, 1993. Living wills recognized — no statutory form required.

SOUTH CAROLINA

James C. Hardin, III
Rock Hill, South Carolina
November 27, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18 (or married)	18 (or married)

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two. Infant can be witness if he can testify and is a credible individual.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Subsequent will or codicil or by destruction. Marriage after execution of will does not revoke will, but if testator fails to provide

for surviving spouse whom he married after the execution of the will, the surviving spouse receives an intestate share, unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will. Divorce subsequent to the execution of the will revokes the will to the extent property is devised to the ex-spouse or the ex-spouse is appointed to an office.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Surviving spouse may take an elective share of one-third of the probate estate. Assets in the testator's revocable trust may be included in the probate estate in some circumstances.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Children born or adopted after the execution of the will receive a share in the estate equal in value to that which they would have received if the testator had died intestate, with certain exceptions.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void to the extent testamentary gift exceeds interest to which such witness or spouse of such witness would be entitled under intestacy laws.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

No statutory limitations, other than surviving spouse's right of election and right of pretermitted children.

EFFECT OF LAPSED LEGACY

No lapse as to devises to great-grandparent or lineal descendant of great-grandparent of the testator. Lapsed specific devise passes to residuary beneficiaries. Lapsed residuary devise passes to other residuary devisees, and not by intestacy.

INCORPORATION BY REFERENCE

Right is afforded by statute. A written document may be incorporated by reference if it exists when the will is executed, the will indicates the intent to incorporate it, and the will sufficiently identifies the document to be incorporated.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

South Carolina statutes authorize living will (S.C. Code Ann. §§ 44-77-10 to 160 [Law Co-op. Supp. 1995]) and health care powers of attorney (S.C. Code Ann. §§ 62-5-504 to -505 [Law. Co-op. Supp. 1995]). Both statutes set forth required form.

SOUTH DAKOTA

Lewayne M. Erickson
Brookings, South Dakota
March 10, 1995

AGE OF TESTATOR

Real Est.
18

Pers. Prop.
18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid.

NUNCUPATIVE (ORAL)

Invalid in cases of estate over \$1,000. Decedent must have been in actual military service in the field or on shipboard at sea doing duty and in contemplation, fear or peril of death, or must have been at the time in expectation of immediate death from injury received the same day. Must be reduced to writing within 30 days, and filed for probate within 6 months after spoken and not sooner than 14 days after death.

Must be proved by 2 witnesses present at time of making, one of whom was asked to bear witness that this was testator's will.

NUMBER AND AGES OF WITNESSES

Two. No age limit.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

By will or other formal writing declaring revocation, or by burning, cancellation, tearing, obliteration or destruction with intent to revoke. Will revoked by marriage. Divorce or annulment revokes as to former spouse.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

No right to waive will and take any specified share of estate, however, surviving spouse may elect to take share which is greater of \$100,000 or one-third of augmented estate under provisions substantially in conformance with the Uniform Probate Code. Additionally, there is right to exemptions, allowances and life use of homestead.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any child not provided for in will takes intestate's share.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void, unless two other subscribing witnesses. If witness whose share is voided would have been entitled to share in estate if will not established, succeeds to portion of share not exceeding devise or bequest in will.

EFFECT OF LAPSED LEGACY

Bequest or devise to child or other relation of testator descends to lineal descendants. Devise or bequest to others fails.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of place where made or testator's domicile.

INCORPORATION BY REFERENCE

Doctrine of incorporation is recognized where the extrinsic writing is incorporated into the testamentary instrument of the place of reference.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Living will is specifically authorized by statute. Durable power of attorney for health care decisions is specifically authorized by statute.

TENNESSEE

Albert W. Secor
Chattanooga, Tennessee
March 6, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Recognized if signature and all material provisions in handwriting of testator and his handwriting proved by two witnesses.

NUNCUPATIVE (ORAL)

May be made only by persons in imminent peril of death and shall be valid only if the testator dies as a result of the impending peril and must be declared to be his will by the testator before two disinterested witnesses, reduced to writing by or under the direction of one of the witnesses within thirty (30) days after such declaration and submitted for probate within six (6) months after the death of the testator. Further, the nuncupative will may dispose of personal property only to an aggregate value not exceeding \$1,000.00; however, for persons in active military, air or naval service in time of war, the aggregate amount may be \$10,000.00. A nuncupative will neither revokes nor changes an existing written will.

NUMBER AND AGES OF WITNESSES

Two. No particular age requirement.

SELF-PROVED WILL

TCA §32-2-110 provides a will may be self-proved by an Affidavit of the attesting witness stating the facts required to prove the will.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

By a subsequent will with intent to revoke or burning, cancellation, tearing, obliteration or destruction with intent and capacity to revoke; subsequent marriage plus birth of child to such marriage; but not marriage alone, or birth of child alone. Divorce revokes will as to spouse as beneficiary or fiduciary.

TCA §32-1-201 (2) permits revocation of a will by a document of revocation executed with the formalities of an attested or holographic will. The document of revocation does not need to include any dispositive provisions.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Yes.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

If not provided for by will, or settlement, and not disinherited, then an after-born child takes an intestate share. Other children may be disinherited.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void except for intestate share, unless there are two disinterested witnesses and then fully allowed.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

No limitations.

EFFECT OF LAPSED LEGACY

No lapse as to any devisee or legatee leaving issue.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of place where made or law of testator's domicile at time of execution.

INCORPORATION BY REFERENCE

A document then in existence referred to in the will provided proof of the document propounded for probate as part of the will was written before the will was made and proof of the identity of such documents with that referred to in the will is given. If such document meets these qualifications, it will be treated as if set forth in the will in full. The rule incorporating documents by reference does not apply to a holographic will.

Also by statute: (a) fiduciary powers under Tenn. Code Ann. §35-50-110 (not Uniform Fiduciary Powers Act) and (b) devise or bequest under terms of a separate trust agreement under Tenn. Code Ann. §32-3-106, Uniform Testamentary Additions to Trusts Act.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

TCA §32-11-101, et seq. authorizes the signing of living wills and TCA §34-6-201 et seq. authorizes the health care powers of attorney.

TEXAS

Edward V. Smith, III
Dallas, Texas
November 22, 1996

AGE OF TESTATOR

Real Estate	Personal Property
18	18

(or who is or has been lawfully married or who is a member of the armed forces, or of maritime service, at time will is made).

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid.

NUNCUPATIVE (ORAL)

Valid as to personal property only and under very limited circumstances. Must be made at time of last sickness.

NUMBER AND AGES OF WITNESSES

Two, above age 14.

SELF-PROVED WILL

May be self-proved by Affidavit evidenced by Certificate of Officer with seal attached in form set forth in Tex. Prob. Code §59.

Note: Strict construction as to language of affidavit.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Subsequent will or codicil or by destruction or cancellation. Not revoked by marriage, divorce voids provisions relating to divorced spouse. A person who is divorced from the decedent or whose marriage to decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Yes.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Provision is made for such children under numerous different fact situations.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void except for intestate share not exceeding value of bequest unless corroborated by a disinterested witness.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

No limitation.

EFFECT OF LAPSED LEGACY

No lapse as to descendant of testator or testator’s parent. Descendants of the devisee must survive by one hundred and twenty (120) hours in order to receive assets from an estate. Class gift does not apply to persons who were deceased when the will was executed.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Will of testator not domiciled in Texas at death admitted to probate upon proof that it stands probated elsewhere. If will probated where testator domiciled at death, authenticated copy of foreign proceedings admissible. No further citation or notice required. Will admitted to probate in jurisdiction other than domicile of testator at death requires showing of all facts required for domestic will and citation by registered or certified mail to any devisee, legatee or possible heir. Original probate of will of a testator who dies domiciled outside Texas which upon probate would operate upon any property in this state and which is valid under Texas law, may be granted in Texas in the same manner as other wills if the will has not been rejected by another jurisdiction where testator died domiciled. (See §95 of Texas Probate Code.)

INCORPORATION BY REFERENCE

A writing or document may be incorporated in or made a part of

a will by reference. The extraneous writing must be so identified in the will and there is no reasonable probability of mistake. The extraneous writing must be in existence when the will is executed to be incorporated in the will. The provisions of an extraneous trust document may be incorporated by reference if the testator makes specific reference to the instrument as being then in existence, and sufficiently identifies such.

Note: The word “attached” is not equivalent to the words “incorporated herein”.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Texas provides for a form of a living will in a Directive to Physicians. The Directive must be witnessed by two persons. Texas also has enacted a statute which provides for a Durable Health Care Power of Attorney. This allows third persons to make certain health care decisions for the person giving the power. It must be witnessed by two persons and notarized.

UTAH

David E. Salisbury
Salt Lake City, Utah
October 30, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid if signature and material provisions are in testator’s handwriting. If more than one holographic will, the last executed controls. If impossible to determine which is last, consistent provisions are valid and inconsistent provisions are invalid.

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two. 18 years, or over.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

A will, or part thereof, may be revoked by a subsequent will which revokes either expressly or by inconsistency. Also revoked by being burned, torn, canceled, obliterated, or destroyed by the testator, with the intent to revoke, or by another in his presence at his direction. Will not revoked by marriage, but spouse receives intestate share, unless spouse’s omission appears from the will to be intentional, or testator intentionally provided for spouse by transfers outside of will, in lieu of will. Divorce or annulment revokes any disposition to spouse or issue of spouse who are not issue of testator, any power of appointment conferred upon such persons, and their nomination as a fiduciary unless the will expressly provides otherwise.

* For additional discussion of this issue, see ACTEC Study 10, “Surviving Spouse’s Right to Share in Deceased Spouse’s Estate”

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

The surviving spouse (husband or wife) may elect to take one-third of the Augmented Estate multiplied by the decedent's marital property, and divided by the Augmented Estate before reduction for expenses, allowances, and claims. The Augmented Estate generally is the Augmented Estate as defined by the Uniform Probate Code. Marital property does not include property owned before marriage, or acquired by gift, devise, or descent, property acquired in exchange for such property, and the increase, rents, issues and profits therefrom. The election must be made during the lifetime of the surviving spouse and within one year after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Children born or adopted after the execution of the will and not provided for in the will shall receive intestate shares, unless (1) it appears that the omission was intentional; (2) when the will was executed the testator had one or more children and left substantially all of his estate to or for the benefit of the other parent of the omitted child; or (3) the testator provided for the child by transfer outside the will with the intention that it be in lieu of a testamentary provision for the child.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Does not invalidate will or provision, but the witness who is a legatee or devisee (or a beneficiary of a trust, established by the will) is limited to the lesser of the amount provided in the (1) will (or testamentary trust); or (2) his intestate share.

EFFECT OF LAPSED LEGACY

A devisee or bequest to an heir of the testator who predeceases the testator, whether before or after the execution of the will, does not lapse; the devisee's or legatee's issue take by representation.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A written will is valid if it complies with Utah's requirements for execution, or if it complies with the law at the time of execution of the place where executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

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.

A will may dispose of property by reference to acts and events which 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.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

A will may refer to a written statement or list to dispose of tangible personal property, other than money, evidences of indebtedness, documents of title and securities, and property used in a trade or business, if the writing is either in the testator's handwriting or is signed by him. The writing may be referred to as one to be in existence at the death of the testator; 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 altered by the testator after its preparation; and it may be a writing which has no independent legal significance.

A will may incorporate by reference any section or subsection of Utah's Uniform Trustees' Powers Provisions.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

A person 18 years of age or older may execute a directive to physicians and providers of medical services relating to the withholding of life-sustaining procedures if substantially in the form provided by Utah law. The directive must be in writing, signed by the declarant (or by another at his direction), dated, and signed by two witnesses eighteen years of age or older. The witnesses may not have signed on behalf of the declarant, be related to declarant by blood or marriage, be entitled to any portion of the declarant's estate (by intestacy or otherwise), be directly financially responsible for the declarant's medical care, or be an agent of a health care facility in which the declarant is a patient at the time.

A person 18 years of age or older (the "principal") may designate another person 18 years of age or older to execute the directive described above on behalf of the principal after the principal incurs an injury, disease, or illness which renders him unable to make a directive. Such designation may be made by executing a special power of attorney before a notary public if substantially in the form provided by Utah law.

A person 18 years of age or older, after incurring an injury, disease, or illness, may execute a directive to physicians and providers of medical services directing his or her care. The directive must meet the same requirements for executing a directive relating to the withholding of life-sustaining procedures and must also be signed, completed, and verified by the declarant's attending physician. However, if the declarant is unable to give current directions, the directive may be signed by certain persons as proxy by order of priority. Such persons include a person designated by the special power of attorney described above, a legal guardian, spouse, parents, and certain other family members.

VERMONT

Emily R. Morrow
Burlington, Vermont
March 15, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Recognized for estates up to \$200. Memorandum, in writing,

must be signed within 6 days after making by a person present at the time of making the will and must be presented to probate within 6 months from the death of the testator. However, nothing to prevent a soldier or sailor disposing of his wages as he might have done at common law (14 V.S.A. 6,7).

NUMBER AND AGES OF WITNESSES

Three. No statutory age requirement.

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

A will shall not be revoked except by implication of law otherwise than by some will, codicil or other writing, executed as provided in case of wills; or by burning, tearing, canceling or obliterating the same with the intention of revoking it.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Surviving spouse may elect to relinquish provision for her in will and take statutory interest.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

After-born child for whom no provision is made shall take as if testator died intestate unless contrary intention apparent from will.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Void except as to heir at law who attests will, or spouse of attesting heir at law, unless there are 3 other competent witnesses. "Such person so attesting shall be admitted as a witness as if such devise, legacy or interest had not been made or given." (14 V.S.A. 10).

EFFECT OF LAPSED LEGACY

Devise or legacy to child or other kindred does not lapse where devisee or legatee leaves issue who survived testator.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of place where made or with law of testator's domicile.

INCORPORATION BY REFERENCE

Trust established or to be established by the testator or a third person whether or not amendable, and if identified in the testator's will and executed before or concurrent with the execution of the will may be incorporated by reference. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse (14 V.S.A. §2329).

There appears to be no appellate court decision on incorporation by reference, and no other statutory authority therefor.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

An individual may execute a terminal care document under Vermont's enactment of the Uniform Terminal Care Document Act. Further, pursuant to 14 V.S.A. 3451 et. seq., an individual may designate an agent under a durable power of attorney for health care who can be authorized to make any and all health care decisions on the principal's behalf.

VIRGINIA

Robert C. Nusbaum
Norfolk, Virginia
March 9, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Valid if entirely in the handwriting of, and signed by, the testator, and proved by two disinterested witnesses. (Sec. 64.1-49)

NUNCUPATIVE (ORAL)

A soldier in actual military service or a mariner or seaman at sea may dispose of personal property by nuncupative will. (Sec.64.1-53)

NUMBER AND AGES OF WITNESSES

Two witnesses of age to be competent to testify in court. (Sec. 64.1-49)

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Subsequent will or codicil, or mutilation or destruction. (Sec. 64.1-58.1). Divorce *a vinculo matrimonii* or annulment revokes all provisions in a testator's will in favor of the divorced spouse. (Sec. 64.1-59). Surviving spouse, omitted from will signed before marriage, takes same share as though decedent died without will, unless it appears in will or in premarital or marital agreement executed or validated under the Premarital Agreement Act that omission was intentional. (Sec. 64.1-69.1). Marriage does not revoke, but see next paragraph below.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Dower and Curtesy have been abolished effective for decedents dying after 1/1/91/ Within six months from the later of probate or qualification, the spouse may renounce the will and claim an elective share in the decedent's augmented estate. (Sec. 64.1-13). The elective share shall equal one third of the augmented estate if there are surviving children, one half of the augmented estate otherwise. (Sec. 64.1-16). The augmented estate includes the probate estate plus certain other property the decedent owned during life. (Sec. 64.1-16.1).

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Unless expressly excluded by the will, an after-born or after-adopted child takes the lesser of an intestate share or the equivalent in amount to the largest share devised or bequeathed to any child named in the will (See Sec. 64.1-70,71).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Gift is valid. Except to prove handwriting of a holographic will no person is incompetent as a witness because of interest (See Sec. 64.1-51).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

EFFECT OF LAPSED LEGACY

Absent contrary intention in will, if a devisee or legatee is (i) a grandparent or descendant of a grandparent of testator and (ii) dead at time of execution of will or testator's death, such deceased beneficiary's issue who survive testator take such beneficiary's share per *stirpes* (Sec. 64.1-64.1).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Place of execution immaterial if testator is Virginia domiciliary and will meets Virginia requirements. Will probated in another state can be probated in Virginia and is presumed valid as to personal property if executed according to law of domicile; as to real property, only valid if it meets Virginia requirements unless self-proving and authenticated copy from another jurisdiction. (Sec. 64.1-92).

INCORPORATION BY REFERENCE

Devise or bequest to educational, charitable, or eleemosynary trust may incorporate by reference any written matter, instrument, printed resolution or declaration identified as existing prior to the execution of such will, provided the trust agreement has been recorded and indexed in the same manner as a deed. (See Sec. 55-32).

Fiduciary powers may be incorporated by reference into a will. (See Sec. 64.1-57).

Devise or bequest (including the exercise of a power of appointment) to revocable or amendable *inter vivos* trust valid if identified in testator's will and terms set forth in written instrument executed before or concurrently with the will. Amendment of the trust subsequent to the will does not invalidate the devise or bequest. Trustees may be required to meet certain residency requirements (Sec. 64.1-73).

Devise or bequest to testamentary trust identified in testator's will valid if trust terms set forth in valid will of person predeceasing testator (will executed before or concurrently with the testator's will). (See Sec. 64.1-73).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Any competent adult may, at any time, make a written advance directive signed in the presence of two witnesses, or upon diagnosis by an attending physician of a terminal condition, and oral advance directive in the presence of the attending physician and two witnesses, authorizing the providing, withholding or withdrawal of life-prolonging procedures, and/or appointing an agent to make health care decisions if such person becomes incompetent. (Sec. §54.1-2983).

An advanced directive may be revoked at any time by a signed, dated writing, by physical cancellation or destruction, or by oral expression of intent to revoke. The revocation is effective when communicated to the attending physician (Sec. 54.1-2985).

NOTICE OF PROBATE AND QUALIFICATION

For estates of persons dying on or after January 1, 1994, written notice of qualification or probate to certain persons must be accomplished (Sec. 64.1-122.2).

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

WASHINGTON

Alan H. Kane
Seattle, Washington
March 3, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Good for wages or personal property of member of Armed Forces or person employed on vessel of merchant marine, or for personal property of others not exceeding \$1,000.00 in value; must be made at last sickness, in declaration made before two witnesses, reduced to writing, and offered within six months of making.

NUMBER AND AGES OF WITNESSES

Two. Must be over 18 (R.C.W. 11.12.025).

REVOCATION AND REVOCATION BY MARRIAGE/DIVORCE

Subsequent will or by burning, canceling, tearing, or obliterating. Subsequent marriage revokes will as to spouse allowing spouse intestate share if spouse living at death of testator and if no provision for spouse is made. Also subsequent divorce revokes will as to divorced spouse (R.C.W. 11.12.040 and .050).

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

No right of election. Testator cannot dispose of more than one-half of the community property.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

Any surviving child or descendants of child not provided for although born after making of will or death of testator may take intestate share (R.C.W. 11.12.090).

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

Gift void unless two other competent witnesses; if void, may still receive intestate share not to exceed the value of the gift (R.C.W. 11.12.160).

EFFECT OF LAPSED LEGACY

No lapse as to a devise or legacy to a relative leaving issue (R.C.W. 11.12.110).

VALIDITY OF WILL EXECUTED OUTSIDE STATE

Valid if executed in accordance with law of place where made or of the testator's domicile (R.C.W. 11.12.020).

INCORPORATION BY REFERENCE

Any nontestamentary document may be incorporated by reference provided it is in existence at the time the will is executed, it is iden-

tified with sufficient certainty to eliminate any doubt as to which document is referred to and will manifest intent to incorporate (R.C.W. 11.12.255) A separate writing in the handwriting of signed by the testator may be used to dispose of tangible personal property if the writing is referred to in the will (R.C.W. 11.12.260).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

LIVING WILL

Any adult person may execute a directive directing the withholding or withdrawal of life sustaining treatment in a terminal condition or permanent unconscious condition. The directive must be signed by the declarer in the presence of two witnesses who are not related by blood or marriage, and who would not be entitled to any portion of estate by will or operation of law, by attending physician, his or her employee, employee of health facility, or by any person having a claim on estate (R.C.W. 70.122.030).

HEALTH CARE PROXY

A principal may designate another to act as his attorney-in-fact or agent by a writing indicating that it is not affected by disability of the principal or becomes effective upon the disability of the principal. The principal may authorize his or her attorney-in-fact to provide informed consent for health care decisions on the principal's behalf. Unless he or she is the spouse, adult child, or brother or sister of the principal none of the following may act as attorney-in-fact: the principal's physician; the physician's employees; or the owners, administrators or employees of the health care facility where the principal resides or receives care. This authority is subject to the limitations applicable to guardians under R.C.W. 11.92.040 (3) (a) through (d) (R.C.W. 11.94.010).

tate share of that portion of estate that is not devised and does not pass to child of testator born before the marriage who is not the child of the surviving spouse, or to the issue of such a child, unless the will is made in contemplation of the marriage, or provides that it is to be effective notwithstanding subsequent marriage.

Divorce or annulment revokes a will only as to any disposition of property to, or any power of appointment given to, the former spouse, and revokes any nomination of the former spouse as executor, trustee, conservator or guardian, unless the will expressly provides otherwise.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY DISPOSITION*

Election must be filed within nine months after the decedent's death, or six months after probate of decedent's will, whichever is later.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

If not provided for or excluded by the will, after-born children take their intestate share.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A devise or bequest to an attesting witness, or to the spouse of an attesting witness, is void except as to the intestate share of the beneficiary, unless the will may be otherwise proved.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

If a devisee or legatee predeceases the testator, or is dead when the will is made, leaving issue who survive the testator, such issue take the devise or bequest unless the will provides otherwise. If a devise or bequest is made to several persons jointly, and one or more predecease the testator without issue, the part given to such deceased joint devisee or legatee does not go to the other joint devisees or legatees, but, unless the will provides otherwise, descends or passes as if the testator had died intestate.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

If the testator was domiciled in another state, and the will proved there, it is valid as to personal property in West Virginia, and, if the will was executed so that it would be a valid will under the law of West Virginia, it is valid as to West Virginia real estate.

INCORPORATION BY REFERENCE

A document extrinsic to a will may be incorporated by reference if the document so referred to was in existence at the time the will was executed and is identified and described with reasonable certainty in the will. *Wible v. Ashcraft*, 116 W. Va. 54, 178 S.E. 516 (1935). There is no authority on the question of incorporation by reference of a statutory provision, except that W. Va. Code §§44-5A-2 & 3 provide for incorporation by reference of the fiduciary powers set out in §3.

WEST VIRGINIA Charles B. Stacy
Charleston, West Virginia
November 4, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Recognized.

NUNCUPATIVE (ORAL)

Soldiers in actual military service and mariners or seamen being at sea may dispose of personal estate as at common law.

NUMBER AND AGES OF WITNESSES

At least two witnesses age eighteen or over.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Revocation may be made by subsequent will or codicil, a writing declaring intention to revoke executed in same manner as will, or by cutting, tearing, burning, obliterating, canceling or destroying will or signature thereto with intent to revoke.

Marriage does not revoke a will executed before the marriage. The surviving spouse is entitled to receive not less than his or her intestate

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

West Virginia has adopted a so-called "Living Will" statute (W. Va. Code, Ch. 16, Art. 30); a Medical Power of Attorney Act (Ch. 16, Art. 30A), a Health Care Surrogate Act (Ch. 16, Art. 30B), and a Do Not Resuscitate Act (Ch. 16, Art. 30C).

WISCONSIN

E. Clarke Arnold
Columbus, Wisconsin
March 1, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Not recognized.

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two witnesses, must be competent to testify in court.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

Cancellation, burning, tearing or obliterating with intent to revoke or by new will or codicil, or similarly executed statement.

A will is revoked by the subsequent marriage of the testator if the testator is survived by his spouse, unless:

(a) The will indicates an intent that it not be revoked by subsequent marriage or was drafted under circumstances indicating that it was in contemplation of the marriage or makes provision for issue of the decedent; or

(b) Testator and the spouse have entered into a contract before or after marriage, which makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator.

Any provision in a will in favor of the testator's spouse is revoked by an annulment of the marriage to such spouse or by an absolute divorce.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

As each spouse has an undivided one-half interest in marital property, the right of the surviving spouse to elect is limited under the Wisconsin Marital Property Act. The election of the surviving spouse to claim an interest in deferred marital property and augmented marital property cannot exceed one-half of such property, and the claim must be made in writing within six months next following date of death of the deceased spouse. Restrictions on elections are set forth in Chapter 861, Wisconsin Statutes, and the election should be made only after a very careful and thorough analysis of the results of such an election; some

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"

elections may result in the forfeiture of the interest provided in the will of the deceased spouse.

Surviving spouse has no elective right against individual property of the one-half interest in marital property owned by the decedent spouse.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

After-born children, unless apparently intended otherwise, and child unintentionally omitted from will take intestate share.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

A will is not invalidated because signed by an interested witness; but, unless the will is also signed by 2 disinterested witnesses, any beneficial provisions of the will for a witness or his spouse are invalid to the extent that such provisions in the aggregate exceed in value what the witness or his spouse would have received had the testator died intestate.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

No lapse in the case of devise or legacy to a child or other relation leaving issue. Widow is not a relative.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A will is validly executed if it is in writing and executed in accordance with either of the following:

- (a) The law of the place where the will is executed; or
- (b) The law of the place where the testator is domiciled at the time of execution of the will.

INCORPORATION BY REFERENCE

Wisconsin has adopted the doctrine of incorporation by reference by which any validly executed will or codicil may incorporate the language of another document by reference, thereby giving testamentary validity to the incorporated document. This doctrine has been recognized and approved through Wisconsin case law for a number of years.

However, the four (4) minimum necessary elements for incorporation by reference into a will were first laid out in *Estate of Erbach*, 41 Wis. 2d 335, 164 N.W. 2d 235 (1969). These elements are:

1. There must be an intention to incorporate;
2. The incorporated paper or document must be in existence when the incorporated testamentary document is executed;
3. The incorporated paper or document must be sufficiently identified; and
4. The incorporating testamentary document must be executed in accordance with statutory requirements.

Although the incorporated document must be in existence when the incorporating testamentary document is executed, the fact that it is not in its final form at the time of the will or codicil's exe-

cution does not prevent it from being incorporated by reference. *Estate of Brandenburg*, 13 Wis. 2d 217, 108 N.W. 2d 374 (1961). In addition, the intent of the testator to incorporate the document referred to must be clear and mere reference thereto without evidence of such intention is insufficient. *First National Bank v. Nelson*, 355 F.2d 546 (1966).

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Wisconsin recognizes two distinct medical directive forms to provide guidance to physicians; the Power of Attorney for Health Care and the Declaration to Physicians (more commonly referred to as a "Living Will").

The Declaration to Physicians directs the treating physician to discontinue life-sustaining medical treatment under conditions set forth in the document. This document applies to those individuals who have a "terminal condition" or who are in a "persistent vegetative state" as defined in Chapter 154 of the Wisconsin Statutes.

The Power of Attorney for Health Care is governed by Chapter 155 of the Wisconsin Statutes. This document allows the individual executing the form (the principal) to designate a health care agent to make a broad range of health care decisions regarding the principal's medical treatment in the event the principal is incapacitated. Under Chapter 155, "health care decision" is defined as "an informed decision in the exercise of the right to accept, maintain, discontinue or refuse health care."

A person must be eighteen years of age or older and of sound mind in order to execute either of these documents. Additionally, the execution of said documents must be voluntary and witnessed by two persons. No witness to the execution of either document may, at the time of the execution, be any of the following:

- (a) Related to the declarant by blood, marriage or adoption.
- (b) Have knowledge that he or she is entitled to or has a claim on any portion of the declarant's estate.
- (c) Directly financially responsible for the declarant's health care.
- (d) An individual who is a health care provider, as defined in Section 155.01(7), who is serving the declarant at the time of execution, and employee, other than a chaplain or social worker, of the health care provider or employee, other than a chaplain or social worker, of an inpatient health care facility in which the declarant is a patient.

WYOMING

Joseph F. Maier
Cheyenne, Wyoming
March 3, 1995

AGE OF TESTATOR

Real Estate	Personal Property
18	18

HOLOGRAPHIC (HANDWRITTEN, UNWITNESSED)

Recognized.

NUNCUPATIVE (ORAL)

Not recognized.

NUMBER AND AGES OF WITNESSES

Two. Statute says "two competent witnesses." No decision of court. Recommend witnesses be 18 or over.

REVOCAION AND REVOCAION BY MARRIAGE/DIVORCE

A subsequent will revokes a prior will by inconsistency or express revocation; burning, tearing, canceling, obliterating or destroying with intent of revocation by testator or another person in his presence and by his direction. Divorce or annulment revokes provisions for former spouse. Will provisions are reinstated by remarriage to former spouse. No revocation by marriage.

ELECTION BY SURVIVING SPOUSE TO TAKE INTESTATE SHARE IN PREFERENCE TO TESTAMENTARY PROVISION*

Spouse may take "elective share" of one-half; spouse may take one-quarter if decedent is survived by children of a previous marriage.

RIGHTS OF CHILDREN BORN AFTER EXECUTION OF WILL

No statutory procedures as to rights of children whether living at time of execution of will or born thereafter.

EFFECT OF TESTAMENTARY GIFT TO ATTESTING WITNESSES

No subscribing witness may derive any benefit from the will, unless there to two disinterested and competent witnesses, but if the witness would be an heir in intestacy, the witness may receive the lesser of intestate share or bequest in the will.

LIMITATION, IF ANY, ON CHARITABLE BEQUEST

None.

EFFECT OF LAPSED LEGACY

Antilapse statute.

VALIDITY OF WILL EXECUTED OUTSIDE STATE

A will is valid in Wyoming if meets Wyoming requirements for execution, or execution complies with law at the time of execution of place where executed, or execution complies with law of place where at time of execution or at time of death testator is domiciled, has a place of abode or is a national.

INCORPORATION BY REFERENCE

Common-law doctrine of incorporation by reference for preexisting documents. Statutes permit pour-over to preexisting irrevocable and revocable trusts pour-over is valid even though trust is subject to amendment, modification, revocation or termination subsequent to execution of will. Incorporation of statutory provisions permitted in practice.

VALIDITY OF LIVING WILL AND/OR HEALTH CARE PROXY

Statutes validate living wills and durable powers of attorney for health care. Living wills authorizes attending physician not to commence, or to terminate, medical procedures, intervention or nourishment by artificial means under certain prescribed conditions.

* For additional discussion of this issue, see ACTEC Study 10, "Surviving Spouse's Right to Share in Deceased Spouse's Estate"