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STATE OF MINNESOTA

COUNTY OF CARVER

DISTRICT COURT

FIRST JUDICIAL DISTRICT
PROBATE DIVISION
Case Type: Special Administration

In the Matter of:

Estate of Prince Rogers Nelson,

Decedent,

Court File No. 10-PR-16-46

SUPPLEMENTAL OBJECTION OF BRIANNA NELSON AND V.N. TO THE PROTOCOL PRIOR TO POTENTIAL GENETIC TESTING PROPOSED BY THE SPECIAL ADMINISTRATOR

Brianna Nelson and V.N., through her mother Jeannine Halloran, hereby submit their Supplemental Objection to the Protocol Prior to Potential Genetic Testing proposed by the Special Administrator. Brianna Nelson and V.N. appreciate the additional time the Court has granted them to fully investigate the relationship between the current Minnesota Probate Code and Minnesota Parentage Act as well as the continuing validity of several Minnesota Supreme Court decisions in light of recent amendments to the Probate Code. As a result of that research and analysis, Brianna Nelson and V.N. hereby withdraw their previous Objection to the Proposed Genetic Testing Protocol and submit this Supplemental Objection in its stead.

Under the proposed genetic testing protocol, there are exactly two ways for a person to be considered an heir in this intestacy proceeding: (1) satisfying the requirements of the Parentage Act; or (2) demonstrating a direct genetic link to Decedent Prince Rogers Nelson. The Minnesota

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Probate Code does not limit heirs in this way. Even if the Probate Code did permit such limitations, the protocol's blanket exclusion of entire classes of family relationships violates the fundamental protections of due process and equal protection accorded by the United States Constitution.

INTRODUCTION

Brianna and V.N. are the niece and grandniece, respectively, of Decedent Prince Rogers Nelson. Brianna and V.N. are the daughter and granddaughter, respectively, of Prince's brother, the late Duane J. Nelson.

There was no family member who had as close a relationship with Prince as Duane Nelson. In junior high school and high school, Prince and Duane referred to each other as brothers and spent a great deal of time together playing basketball and hanging out. When Duane finished college, he returned to the Twin Cities to live near his family – the Nelson family. Prince put Duane in charge of his personal security. When Prince traveled, Duane was with him. When Prince was at Paisley Park, Duane was with him.

Prince and Duane were both sons of John L. Nelson. They had different mothers so they did not grow up in the same home. Although John Nelson was married to Prince's mother (Mattie Shaw Nelson) when Duane was born, his name and Vivian Nelson's name appear on Duane's birth certificate.

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John Nelson was proud to be Duane's father. He was proud that Duane went to college and was a successful high school and college basketball player. John Nelson traveled from the Twin Cities to Milwaukee a number of times to visit Duane while he was in college.

John Nelson held himself out as the father of both Duane and Prince during his lifetime. Other family members also recognized Duane as their brother. For example, Norinne Nelson identified Duane as the son of John Nelson and brother of Prince in Duane's 2011 obituary as well as in the obituary of Duane's sister Lorna Nelson. In a lawsuit for copyright infringement brought by Lorna Nelson, the defendants are identified as Lorna's "half-brother Prince Rogers Nelson; her brother, Duane J. Nelson; her father, John L. Nelson; and PRN Productions, Inc." *Nelson v. PRN Productions, Inc.*, 873 F.2d 1141, 1141 (8th Cir. 1989).

Duane's relationship with Prince deteriorated as he succumbed to mental illness. Duane's behavior changed over the years, becoming more disruptive. Eventually Prince fired Duane. Duane's mental state further declined. For the last decade of his life, Duane was a recluse who seldom left his apartment or answered his door.

THE PROPOSED GENETIC TESTING PROTOCOL

The proposed protocol does not recognize family relationships like that which Duane had with John Nelson, Prince, and other family members. The proposed protocol does not recognize the fact that Prince likely spent more time with his brother Duane than anyone else and that Prince held him out as his brother. The proposed protocol does not recognize that John Nelson held out Duane as his son.

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The protocol proposed by the Special Administrator recognizes just two of the ways that a person might be an heir in an intestacy proceeding. Under the protocol the only two ways to demonstrate that a person is an heir are: (1) satisfying the requirements of the Parentage Act; or (2) demonstrating a direct genetic link to Decedent Prince Rogers Nelson.

The Special Administrator concludes that this narrow definition of potential heirs is valid based upon a single reference to the Paternity Act in the definition of "genetic father." From that single solitary clause, the Special Administrator concludes that the Paternity Act controls all determinations of parent-child relationships in probate.

The term "genetic father" was not included in the Probate Code until 2010. Thus, the term is relatively new and has not yet been interpreted by the courts. Under the Probate Code, the term "genetic father" is defined as follows:

> "Genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. ***If the father-child relationship is established under the presumption of paternity under chapter 257*** [Paternity Act], "genetic father" means only the man for whom that relationship is established.

Minn. Stat. 524.1-201(22) (emphasis added). From this one definition, the Special Administrator argues that the Minnesota legislature intended that the Paternity Act be the supreme authority in determining parent-child relationships for the purposes of intestate succession. The Special Administrator pushes even farther arguing that section 524.2-103(3) means:

> To qualify as a sibling or half-sibling, the person must be a direct descendant of one or both of Decedent's parents. In other words, brothers or sisters of one of Decedent's half siblings only qualify as heirs if they share a common genetic parent with Decedent.

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June 24, 2006 Response of Special Administrator, at 2. That is a stretch from the statutory language stating "if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation." Minn. Stat. 524.2-103(3). Yet, the Special Administrator argues that the definition of "genetic father" somehow transforms this statutory provision into a requirement of a genetic relationship with Prince's parents.

THE PROBATE CODE PROVIDES FOR A NUMBER OF WAYS TO ESTABLISH THAT A PERSON IS A DESCENDANT

Recently, the Minnesota legislature enacted substantial changes to the Minnesota Probate Code including additional ways to establish that a person is a descendant of a decedent for the purposes of intestate succession. Those amendments are in the 2010 Minnesota Act S.F. No. 2427 (the "2010 Amendments" attached as Exhibit A).

The 2010 Amendments did not change the Probate Code's use of parent-child relationships to determine the identity of descendants for the purposes of intestate succession. The definition of "descendant" did not change. It remains as follows:

> "Descendant" of an individual means all of the individual's descendants of all generations, with the ***relationship of parent and child*** at each generation being determined by the definition of child and parent contained in this section.

Minn. Stat. 524.1-201(11) (emphasis added). Rather, the 2010 Amendments broadened the types of relationships that constitute parent-child relationships.

The Probate Code does not define "parent-child relationship" in the definition section. Nor does the Probate Code define "parent," "mother," or "father." The way that the Probate Code defines a parent-child relationship is through a number of provisions describing them and

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their effects. The 2010 Amendments included the following six provisions addressing different parent-child relationships:

Effect of Parent-Child Relationship	Section 524.2-116
Parent-Child Relationship with Genetic Parents	Section 524.2-117
Adoptee and Adoptee's Adoptive Parent or Parents	Section 524.2-118
Adoptee and Adoptee's Genetic Parents	Section 524.2-119
Child Conceived by Assisted Reproduction	Section 524.2-120
No Effect on Equitable Adoption	Section 524.2-122

Section 524.2-116 provides: "Except as otherwise provided in section 524.2-119, subdivisions 2 to 5, if a parent-child relationship exists or is established under this part [the Probate Code], the parent is the parent of the child and the child is the child of the parent for the purpose of intestate succession." Section 524.2-117 provides that a parent-child relationship exists between genetic parents and a child, regardless of the parents' marital status: "Except as otherwise provided in section 524.2-114, 524.2-119, or 524.2-120, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status."

Another section expressly provides for the recognition of a parent-child relationship in the absence of a genetic or formal legal relationship. In Section 524.2-122, the Minnesota legislature provides "This chapter does not affect the doctrine of equitable adoption." Thus, a parent-child relationship may be established in the absence of a genetic relationship or formal legal proceeding like the Parentage Act.

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Other sections address parent-child relationships established through various legal and genetic means. Far from requiring that there be only one father -- under these provisions a child could simultaneously have a parent-child relationship for intestate succession purposes with genetic parents and adoptive parents. *See* Minn. Stat. 524.2-118-119. In cases of assisted reproduction, the Probate Code specifies when it will rely upon birth records to establish presumptive paternity and when it will rely upon the father's behavior. See Minn. Stat. 524.2-120.

The Minnesota legislature expressly directs that equitable principles should govern the application of the Probate Code – not formalistic legal rules. To guide courts in interpreting the Code, the Minnesota legislature sets forth the purpose of the Probate Code and the applicable rules of construction in Minn. Stat. 524.1-102. That section states, that the Probate Code "[s]hall be liberally construed and applied to promote the underlying purposes and policies." The underlying purposes and policies of the Probate Code are identified as:

> (1) to simplify and clarify the law concerning affairs of decedents, missing persons, protected persons, minors and incapacitated persons;
>
> (2) to discover and make effective the intent of a decedent in distribution of property;
>
> (3) to promote a speedy and efficient system for liquidating the estate of decedent and making distribution to successors;
>
> (4) to make uniform the law among the various jurisdictions.

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Minn. Stat. 524.1-102(b). The Minnesota legislature further directs courts that "unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions." Minn. Stat. 524.1-103.

In sum, the Probate Code recognizes a number of ways to establish a parent-child relationship for purposes of intestate succession. A parent-child relationship may be established through genetic testing or a formal legal proceeding such as an adoption or divorce proceeding. The Probate Code includes provisions establishing a parent-child relationship based upon identification of a father on a birth certificate and testimonial and other evidence of a parent-child relationship. The Probate Code provides for certain circumstances in which a child may inherit through intestate succession from genetic and adoptive parents. Thus, the proposed protocol violates the Probate Code.

THE PROBATE CODE DOES NOT DEFER TO THE PARENTAGE ACT'S REQUIREMENTS FOR DETERMINING A PARENT-CHILD RELATIONSHIP

Although the language of the Minnesota Probate Code does not defer to the Minnesota Parentage Act for the determination of a parent-child relationships, the Special Administrator maintains that this is so. The Special Administrator bases its position on its reading of the Probate Code's definition of "genetic father" in isolation as well as several Minnesota cases. The definition of "genetic father" is discussed above. With respect to the cases cited by the Special Administrator, we hereby adopt the positions of Darcell Gresham Johnston's June 20, 2016 Objection at pages 4-8 and Estabon Bennermon's July 7, 2016 Objection at pages 8-12 concerning the reasoning of *Estate of Jotham*, 722 N.W.2d 447 (Minn. 2006), *Estate of*

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Martignacco, 689 N.W.2d 262 (Minn. Ct. App. 2004), and *Estate of Palmer*, 658 N.W.2d 197 (Minn. 2003).

The Probate & Trust Section of the Minnesota Bar Association ("Probate and Trust Section") reached the same conclusion when the 2010 Amendments were adopted – that the Probate Code does not defer to the Parentage Act. In June 2010, the Minnesota State Bar Association Probate & Trust Section presented a session on the 2010 Amendments -- enacted under S.F. No. 2427. Attached as Exhibit B. These materials provide guidance on each section of the 2010 Amendments as well as the Section's analysis of the interplay between the Parentage Act and the Probate Code.

The Probate & Trust Section noted several times that the 2010 Amendments do not require that a determination of parent-child relationships be made under the Minnesota Parentage Act:

> **Section 524.2-116** states that a parent-child relationship established under these provisions is conclusive for purposes of inheritance rights. ***This eliminates the prior statute's reliance on the Parentage Act provisions, which could conflict with these provisions or have differing policy considerations supporting it.***
>
> * * *
>
> **Section 524.2-120** addresses assisted reproduction and extends and clarifies current law. Currently, under Minnesota Parentage Act, a third party donor of sperm is not considered a parent, however it is not clear that a third party donor of an egg is not a parent. In addition, that law has not caught up with technology that currently exists and is commonly used to conceive and bar children. Also, ***because it is possible that there could develop inconsistencies between the Parentage Act's and the Probate Code's treatment of parent-child relationships, it is preferable for the Probate Code to specifically address these issues, rather than defer to the Parentage Act.***

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Exhibit B at 4 (emphasis added). The language of the Probate Code as amended is clear – the 2010 Amendments eliminate the Probate Code's reliance upon the Parentage Act, particularly when the Parentage Act is inconsistent with the Probate Code.

The Probate & Trust Section commented on the new definitions of "genetic parent," "genetic father," and "genetic mother." In this commentary, the Probate & Trust Section recognized that a child can have a genetic parent ***and*** an adoptive parent:

> **(22) (23) (24)** Add definitions of "genetic parent," "genetic father" and "genetic mother," to provide that those terms mean the person who provides the genetic material (sperm or egg) to create the child. ***The genetic parent must be distinguished from an adoptive parent or a person determined by the later rules governing assisted reproduction to be the parent.*** A person determined to be a father under Minnesota's existing Paternity Act is treated as a genetic father for purposes of these proposed provisions.

Exhibit B at 2 (emphasis added). While a Parentage Act proceeding is one route to conclusively establish a parent-child relationship, it is not the only route under the Probate Code. The Probate & Trust Section's guidance is directly contrary to the Special Administrator's interpretation of the definition of "genetic father."

THE PROPOSED PROTOCOL VIOLATES CONSTITUTIONAL PROTECTIONS OF EQUAL PROTECTION AND DUE PROCESS

Even were the proposed genetic testing protocol consistent with the Probate Code, it would still violate the equal protection and due process clauses of the U.S. Constitution. The U.S. Supreme Court has often struck down classification schemes that draw distinctions that exclude children born outside of wedlock (often called illegitimate children) from treatment as children and/or siblings. As the Supreme Court noted, a classification scheme based upon

irrebuttable presumptions must be "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." *Trimble v. Gordon*, 420 U.S. 762, ftn. 14 (1977).

The U.S. Supreme Court has invalidated a number of rigid classification schemes such as the proposed protocol. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 656-7 (1972) (invalidating statute that presumed all unwed fathers were unfit to have custody of children); *Trimble v. Gordon*, 420 U.S. 762 (1977) (invalidating legal presumption in intestate succession proceedings that children of born to unwed parents could not be heirs of fathers). As the *Stanley* Court noted:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure ... explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley v. Illinois, 405 U.S. 645, 656-7 (1972). Blanket exclusions are prohibited when more precise tests are available. *Id.* at 655. As the Court observed in *Weber v. Aetna Casualty & Surety Co.*, the essential inquiry into any classification system is: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" 406 U.S. 164, 173 (1972) (invalidating statute barring dependent unacknowledged illegitimate children from recovering workers' compensation benefits on an equal basis with dependent legitimate children).

The Special Administrator will undoubtedly point out that the U.S. Supreme Court has on occasion found that irrebuttable presumptions of paternity comport with the requirements of equal protection and due process. Certainly, the Special Administrator will point out the Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), where the Court upheld a California

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statute establishing an irrebuttable presumption of a husband's paternity. In *Michael H.*, the Court noted that [w]here, [] the child is born into an extant marital family, the natural father's unique opportunity [to be a parent] conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter." *Id.* at 129. Thus, a plurality of the Supreme Court concluded that permitting the genetic father to proceed with an action to establish paternity and obtain visitation with a minor child born into an existing marital relationship would be "destructive of family integrity and privacy." *Id.* at 120.

That is not the case here. Here, the inquiry into parentage and granting of rights is not going to destroy the family integrity and privacy of a family. Thus, the use of irrebuttable presumptions is not defensible.

For the above-stated reasons, Brianna Nelson and V.N. respectfully object to the genetic testing protocol.

Respectfully submitted,

Dated: July 15, 2016

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Exhibit A

CHAPTER 334–S.F.No. 2427

An act relating to property held in trust; clarifying status of certain distributions; changing certain relationship and inheritance provisions; changing certain estate taxation provisions; providing for emergency and temporary conservators; amending Minnesota Statutes 2008, sections 289A.10, subdivision 1; 291.03, by adding a subdivision; 501B.64, subdivision 3; 524.1-201; 524.2-114; Minnesota Statutes 2009 Supplement, sections 291.005, subdivision 1; 524.5-409; proposing coding for new law in Minnesota Statutes, chapter 524.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2008, section 289A.10, subdivision 1, is amended to read:

Subdivision 1. **Return required.** In the case of a decedent who has an interest in property with a situs in Minnesota, the personal representative must submit a Minnesota estate tax return to the commissioner, on a form prescribed by the commissioner, if:

(1) a federal estate tax return is required to be filed; or

(2) the federal gross estate exceeds ~~$700,000 for estates of decedents dying after December 31, 2001, and before January 1, 2004, $850,000 for estates of decedents dying after December 31, 2003, and before January 1, 2005, $950,000 for estates of decedents dying after December 31, 2004, and before January 1, 2006, and~~ $1,000,000 ~~for estates of decedents dying after December 31, 2005~~.

The return must contain a computation of the Minnesota estate tax due. The return must be signed by the personal representative.

EFFECTIVE DATE. This section is effective for estates of decedents dying after December 31, 2005.

Sec. 2. Minnesota Statutes 2009 Supplement, section 291.005, subdivision 1, is amended to read:

Subdivision 1. **Scope.** Unless the context otherwise clearly requires, the following terms used in this chapter shall have the following meanings:

(1) "Commissioner" means the commissioner of revenue or any person to whom the commissioner has delegated functions under this chapter.

(2) "Federal gross estate" means the gross estate of a decedent as required to be valued and otherwise determined for federal estate tax purposes ~~by federal taxing authorities pursuant to the provisions of~~ under the Internal Revenue Code.

(3) "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended through March 31, 2009, but without regard to the provisions of sections 501 and 901 of Public Law 107-16.

(4) "Minnesota adjusted taxable estate" means federal adjusted taxable estate as defined by section 2011(b)(3) of the Internal Revenue Code, increased by the amount of deduction for state death taxes allowed under section 2058 of the Internal Revenue Code.

(5) "Minnesota gross estate" means the federal gross estate of a decedent after (a) excluding therefrom any property included therein which has its situs outside Minnesota, and (b) including therein any property omitted from the federal gross estate which is includable therein, has its situs in Minnesota, and was not disclosed to federal taxing authorities.

(6) "Nonresident decedent" means an individual whose domicile at the time of death was not in Minnesota.

(7) "Personal representative" means the executor, administrator or other person appointed by the court to administer and dispose of the property of the decedent. If there is no executor, administrator or other person appointed, qualified, and acting within this state, then any person in actual or constructive possession of any property having a situs in this state which is included in the federal gross estate of the decedent shall be deemed to be a personal representative to the extent of the property and the Minnesota estate tax due with respect to the property.

(8) "Resident decedent" means an individual whose domicile at the time of death was in Minnesota.

(9) "Situs of property" means, with respect to real property, the state or country in which it is located; with respect to tangible personal property, the state or country in which it was normally kept or located at the time of the decedent's death; and with respect to intangible personal property, the state or country in which the decedent was domiciled at death.

EFFECTIVE DATE. This section is effective the day following final enactment and applies regardless of when the decedent died.

Sec. 3. Minnesota Statutes 2008, section 291.03, is amended by adding a subdivision to read:

Subd. 1b. **Qualified terminable interest property.** For estates of decedents dying after December 31, 2009, and before January 1, 2011, if no federal estate tax return is filed the executor may make a qualified terminable interest property election, as defined in section 2056(b)(7) of the Internal Revenue Code, for purposes of computing the tax under this chapter. The election may not reduce the taxable estate under this chapter below $3,500,000. The election must be made on the tax return under this chapter and is irrevocable. All tax under this chapter must be determined using the qualified terminable interest property election made on the Minnesota return. For purposes of applying sections 2044 and 2207A of the Internal Revenue Code when computing the tax under this chapter for the estate of the decedent's surviving spouse, regardless of the date of death of the surviving spouse, amounts for which a qualified terminable interest property election has been made under this section must be treated as though a valid federal qualified terminable interest property election under section 2056(b)(7) of the Internal Revenue Code has been made.

EFFECTIVE DATE. This section is effective for estates of decedents dying after December 31, 2009.

Sec. 4. Minnesota Statutes 2008, section 501B.64, subdivision 3, is amended to read:

Subd. 3. **Regulated investment company; real estate investment trust.** Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from short-term or long-term capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

Sec. 5. Minnesota Statutes 2008, section 524.1-201, is amended to read:

524.1-201 GENERAL DEFINITIONS.

Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in chapters 524 and 525:

(1) "Adoptee" means an individual who is adopted.

(2) "Application" means a written request to the registrar for an order of informal probate or appointment under article III, part 3.

(3) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse.

(4) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.

(5) "Birth mother" means a woman who gives birth to a child, including a woman who is the child's genetic mother and including a woman who gives birth to a child of assisted reproduction. "Birth mother" does not include a woman who gives birth pursuant to a gestational agreement.

(6) "Child" includes any individual entitled to take as a child under law by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.

~~(6)~~ (7) "Child of assisted reproduction" means a child conceived by means of assisted reproduction by a woman other than a child conceived pursuant to a gestational agreement.

(8) "Claims" includes liabilities of the decedent whether arising in contract or otherwise and liabilities of the estate which arise after the death of the decedent including funeral expenses and expenses of administration. The term does not include taxes, demands or disputes regarding title of a decedent to specific assets alleged to be included in the estate, tort claims, foreclosure of mechanic's liens, or to actions pursuant to section 573.02.

~~(7)~~ (9) "Court" means the court or branch having jurisdiction in matters relating to the affairs of decedents. This court in this state is known as the district court.

~~(8)~~ (10) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

~~(9)~~ (11) "Descendant" of an individual means all of the individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this section.

~~(10)~~ (12) "Devise," when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

~~(11)~~ (13) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

~~(12)~~ (14) "Disability" means cause for appointment of a conservator as described in section 524.5-401, or a protective order as described in section 524.5-412.

~~(13)~~ (15) "Distributee" means any person who has received or who will receive property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee with respect to property which the trustee has received from a personal representative only to the extent of distributed assets or their increment remaining in the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

~~(14)~~ (16) "Divorce" includes an annulment, dissolution, and declaration of invalidity of marriage.

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

~~(16)~~ (18) "Fiduciary" includes personal representative, guardian, conservator and trustee.

~~(17)~~ (19) "Foreign personal representative" means a personal representative of another jurisdiction.

~~(18)~~ (20) "Formal proceedings" means those conducted before a judge with notice to interested persons.

~~(20)~~ (21) "Functioned as a parent of the child" means behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.

(22) "Genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. If the father-child relationship is established under the presumption of paternity under chapter 257, "genetic father" means only the man for whom that relationship is established.

(23) "Genetic mother" means the woman whose egg was fertilized by the sperm of a child's genetic father.

(24) "Genetic parent" means a child's genetic father or genetic mother.

(25) "Gestational agreement" means an agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent or intended parents.

(26) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

~~(21)~~ (27) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

~~(22)~~ (28) "Incapacitated person" is as described in section 524.5-102, subdivision 6, other than a minor.

~~(23)~~ (29) "Incapacity" when used in sections 524.2-114 to 524.2-120 means the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

(30) "Informal proceedings" means those conducted by the judge, the registrar, or the person or persons designated by the judge for probate of a will or appointment of a personal representative in accordance with sections 524.3-301 to 524.3-311.

~~(24)~~ (31) "Intended parent" means an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a woman by means of assisted reproduction, including an individual who has a genetic relationship with the child.

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

~~(27)~~ (33) "Lease" includes an oil, gas, or other mineral lease.

~~(28)~~ (34) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

~~(30)~~ (35) "Mortgage" means any conveyance, agreement or arrangement in which property is used as security.

~~(31)~~ (36) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of death.

~~(32)~~ (37) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity.

~~(35)~~ (38) "Person" means an individual, a corporation, an organization, or other legal entity.

~~(36)~~ (39) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

~~(37)~~ (40) "Petition" means a written request to the court for an order after notice.

~~(38)~~ (41) "Proceeding" includes action at law and suit in equity.

~~(39)~~ (42) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

~~(40)~~ (43) "Protected person" is as described in section 524.5-102, subdivision 14.

~~(42)~~ (44) "Registrar" refers to the judge of the court or the person designated by the court to perform the functions of registrar as provided in section 524.1-307.

~~(43)~~ (45) "Relative" means a grandparent or a descendant of a grandparent.

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

~~(44)~~ (47) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution and closing.

~~(45)~~ (48) "Special administrator" means a personal representative as described by sections 524.3-614 to 524.3-618.

~~(46)~~ (49) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

~~(47)~~ (50) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

~~(48)~~ (51) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under the decedent's will, this chapter or chapter 525. "Successors" also means a funeral director or county government that provides the funeral and burial of the decedent, or a state or county agency with a claim authorized under section 256B.15.

~~(49)~~ (52) "Supervised administration" refers to the proceedings described in sections 524.3-501 to 524.3-505.

~~(51)~~ (53) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

~~(53)~~ (54) "Third-party donor" means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(i) a husband who provides sperm, or a wife who provides eggs, that are used for assisted reproduction by the wife;

(ii) the birth mother of a child of assisted reproduction; or

(iii) a man who has been determined under section 524.2-120, subdivision 4 or 5, to have a parent-child relationship with a child of assisted reproduction.

(55) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of

an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in chapter 528, custodial arrangements pursuant to sections 149A.97, 318.01 to 318.06, 527.21 to 527.44, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

~~(54)~~ (56) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

~~(55)~~ (57) "Ward" is as described in section 524.5-102, subdivision 17.

~~(56)~~ (58) "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

Sec. 6. Minnesota Statutes 2008, section 524.2-114, is amended to read:

524.2-114 ~~MEANING OF CHILD AND RELATED TERMS~~ PARENT BARRED FROM INHERITING IN CERTAIN CIRCUMSTANCES.

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

~~(1) An adopted child is the child of an adopting parent and not of the birth parents except that adoption of a child by the spouse of a birth parent has no effect on the relationship between the child and that birth parent. If a parent dies and a child is subsequently adopted by a stepparent who is the spouse of a surviving parent, any rights of inheritance of the child or the child's descendant from or through the deceased parent of the child which exist at the time of the death of that parent shall not be affected by the adoption;~~

~~(2) In cases not covered by clause (1), a person is the child of the person's parents regardless of the marital status of the parents and the parent and child relationship may be established under the Parentage Act, sections 257.51 to 257.74.~~

(a) A parent is barred from inheriting from or through a child of the parent if:

(1) the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or

(2) the child died before reaching 18 years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of this state other than this chapter on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

(b) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

Sec. 7. **[524.2-116] EFFECT OF PARENT-CHILD RELATIONSHIP.**

Except as otherwise provided in section 524.2-119, subdivisions 2 to 5, if a parent-child relationship exists or is established under this part, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

Sec. 8. **[524.2-117] PARENT-CHILD RELATIONSHIP WITH GENETIC PARENTS.**

Except as otherwise provided in section 524.2-114, 524.2-119, or 524.2-120, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.

Sec. 9. **[524.2-118] ADOPTEE AND ADOPTEE'S ADOPTIVE PARENT OR PARENTS.**

Subdivision 1. **Parent-child relationship between adoptee and adoptive parent or parents.** A parent-child relationship exists between an adoptee and the adoptee's adoptive parent or parents.

Subd. 2. **Individual in process of being adopted by married couple; stepchild in process of being adopted by stepparent.** For purposes of subdivision 1:

(1) an individual who is in the process of being adopted by a married couple when one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent's surviving spouse; and

(2) a child of a genetic parent who is in the process of being adopted by a genetic parent's spouse when the spouse dies is treated as adopted by the deceased spouse if the genetic parent survives the deceased spouse by 120 hours.

Subd. 3. **Child of assisted reproduction in process of being adopted.** If, after a parent-child relationship is established between a child of assisted reproduction and a parent under section 524.2-120, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subdivision 2, clause (2).

Subd. 4. **In the process of adoption.** An individual is "in the process of being adopted" if there exists clear and convincing evidence of the intention of the deceased spouse to adopt that individual.

Sec. 10. **[524.2-119] ADOPTEE AND ADOPTEE'S GENETIC PARENTS.**

Subdivision 1. **Parent-child relationship between adoptee and genetic parents.** Except as otherwise provided in subdivisions 2 to 5, unless otherwise decreed, a parent-child relationship does not exist between an adoptee and the adoptee's genetic parents.

Subd. 2. **Stepchild adopted by stepparent.** A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and the genetic parent whose spouse adopted the individual. No parent-child relationship exists between an individual and the other genetic parent unless the other genetic parent was deceased at the time of the child's adoption and then only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through that other genetic parent.

Subd. 3. **Individual adopted by relative of genetic parent.** A parent-child relationship exists between both genetic parents and an individual who is adopted by a

relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

Subd. 4. **Individual adopted after death of both genetic parents.** A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic parent.

Subd. 5. **Child of assisted reproduction who is subsequently adopted.** If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents under section 524.2-120, the child is adopted by another or others, the child's parent or parents under section 524.2-120 are treated as the child's genetic parent or parents for the purpose of this section.

Sec. 11. **[524.2-120] CHILD CONCEIVED BY ASSISTED REPRODUCTION.**

Subdivision 1. **Third-party donor.** A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

Subd. 2. **Parent-child relationship with birth mother.** A parent-child relationship exists between a child of assisted reproduction and the child's birth mother.

Subd. 3. **Parent-child relationship with husband whose sperm were used during his lifetime by his wife for assisted reproduction.** Except as otherwise provided in subdivision 9, a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

Subd. 4. **Official birth record; presumptive effect.** An official birth record identifying a man as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that man.

Subd. 5. **Parent-child relationship with another.** Except as otherwise provided in subdivisions 6, 8, and 9, and unless a parent-child relationship is established under subdivision 4, a parent-child relationship is presumed to exist between a child of assisted reproduction and a man who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the man:

(1) before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the man's consent; or

(2) in the absence of a signed record under clause (1):

(i) functioned as the other parent of the child no later than two years after the child's birth; or

(ii) intended to function as the other parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances, if that intent is established by clear and convincing evidence.

Subd. 6. **Record signed more than two years after the birth of the child: effect.** For the purpose of subdivision 5, clause (1), neither a man who signed a record more than two years after the birth of the child, nor a relative of that man who is not also a relative of

the birth mother, inherits from or through the child unless the man functioned as a parent of the child before the child reached 18 years of age.

Subd. 7. **Presumption; birth mother is married or surviving spouse.** (a) Paragraphs (b) and (c) apply to subdivision 5, clause (2).

(b) If the birth mother is married and no divorce proceeding is pending, in the absence of clear and convincing evidence to the contrary, her spouse satisfies subdivision 5, clause (2), item (i) or (ii).

(c) If the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subdivision 5, clause (2), item (ii).

Subd. 8. **Divorce before placement of eggs, sperm, or embryos.** If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record or such consent is established by clear and convincing evidence that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

Subd. 9. **Withdrawal of consent before placement of eggs, sperm, or embryos.** If, in a record or through clear and convincing evidence, a man withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that man, unless the man subsequently satisfies subdivision 4 or 5.

Subd. 10. **Exclusion of posthumously conceived children.** Notwithstanding any other provision of this section and subject to section 524.2-108, a parent-child relationship does not exist between a child of assisted reproduction and another person unless the child of assisted reproduction is in gestation prior to the death of such person.

Sec. 12. **[524.2-121] NO EFFECT ON GESTATIONAL AGREEMENTS.**

This chapter does not affect law of this state regarding gestational agreements.

Sec. 13. **[524.2-122] NO EFFECT ON EQUITABLE ADOPTION.**

This chapter does not affect the doctrine of equitable adoption.

Sec. 14. **[524.2-712] DECEDENTS DYING AFTER DECEMBER 31, 2009, AND BEFORE JANUARY 1, 2011; FORMULA CLAUSES TO BE CONSTRUED TO REFER TO FEDERAL ESTATE TAX AND FEDERAL GENERATION-SKIPPING TRANSFER TAX LAWS.**

(a) A governing instrument, including a will or trust agreement, of a decedent who dies after December 31, 2009, and before January 1, 2011, that contains a formula or provision referring to the "unified credit," "estate tax exemption," "applicable exemption amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "GST exemption," "marital deduction," "maximum marital deduction," "unlimited marital deduction," "inclusion ratio," "applicable fraction," or any section of the Internal Revenue Code relating to the federal estate tax or federal generation-skipping transfer tax, or that measures a share of an estate or trust by reference to federal estate taxes or federal generation-skipping transfer taxes, is deemed to refer to the federal estate tax and federal generation-skipping transfer tax laws as they applied with

respect to the estates of decedents dying on December 31, 2009. This paragraph does not apply to a governing instrument, including a will or trust agreement, that manifests an intent that a contrary rule will apply if the decedent dies on a date on which there is no then-applicable federal estate or federal generation-skipping transfer tax.

(b) If the federal estate or federal generation-skipping transfer tax becomes effective before January 1, 2011, then the reference to January 1, 2011, in paragraph (a) is deemed to refer to the first date on which this tax becomes legally effective, instead of January 1, 2011.

(c) The personal representative, trustee, or any interested person under the governing instrument, including a will or trust agreement, may bring a proceeding to determine whether the decedent intended that a formula or provision described in paragraph (a) be construed with respect to the law as it existed after December 31, 2009. This proceeding must be commenced by December 31, 2011.

EFFECTIVE DATE. This section is effective retroactive to January 1, 2010.

Sec. 15. Minnesota Statutes 2009 Supplement, section 524.5-409, is amended to read:

524.5-409 FINDINGS; ORDER OF APPOINTMENT.

Subdivision 1. **Limited or unlimited conservator.** (a) The court may appoint a limited or unlimited conservator for a respondent only if it finds that:

(1) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance, or because the individual is missing, detained, or unable to return to the United States;

(2) by a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money; and

(3) the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance.

(b) Alternatively, the court, with appropriate findings, may enter any other appropriate order, or dismiss the proceeding.

(c) The court, whenever feasible, shall grant to a conservator only those powers necessitated by the protected person's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the protected person's maximum self-reliance and independence.

(d) Within 14 days after an appointment, the conservator shall send or deliver to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, and counsel if represented at the hearing, a copy of the order of appointment accompanied by a notice which advises the protected person of the right to appeal the conservatorship appointment in the time and manner provided by the Rules of Appellate Procedure.

(e) Each year, within 30 days after the anniversary date of an appointment, a conservator shall send or deliver to the protected person and to interested persons of

record with the court a notice of the right to request termination or modification of the conservatorship or for any order that is in the best interests of the protected person or for other appropriate relief.

(f) The appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person.

Subd. 2. **Emergency and temporary conservator.** (a) If the court finds that compliance with the procedures of this article will likely result in the immediate loss, waste, or dissipation of the individual's assets or income unless management is provided, or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency conservator whose authority may not exceed 60 days and who may exercise only the powers specified in the order. A county that is acting under section 626.557, subdivision 10, by petitioning for appointment of an emergency conservator on behalf of a vulnerable adult may be granted authority to act for a period not to exceed 90 days. Immediately upon receipt of the petition for an emergency conservatorship, the court shall appoint a lawyer to represent the respondent in the proceeding. Except as otherwise provided in paragraph (b), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

(b) An emergency conservator may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from affidavit or other sworn testimony that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency conservator without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within five days after the appointment.

(c) Appointment of an emergency conservator, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency conservator at any time. An emergency conservator shall make any report the court requires. In other respects, the provisions of this article concerning conservators apply to an emergency conservator.

(e) If the court finds that a conservator is not effectively performing the conservator's duties and that the security and preservation of the protected person's assets requires immediate action, the court may appoint a temporary substitute conservator for the protected person for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute conservator so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited conservator previously appointed by the court is suspended as long as a temporary substitute conservator has authority. If an appointment is made without previous notice to the protected person or the affected conservator within five days after the appointment, the court shall inform the protected person or conservator of the appointment.

(f) The court may remove a temporary substitute conservator at any time. A temporary substitute conservator shall make any report the court requires. In other

respects, the provisions of this article concerning conservators apply to a temporary substitute conservator.

Sec. 16. **[RENUMBERING INSTRUCTION.]**

The revisor of statutes shall renumber section 524.2-115 as 524.2-123 in the next and subsequent editions of Minnesota Statutes.

Sec. 17. **EFFECTIVE DATE.**

Sections 4 and 15 are effective the day following final enactment. Sections 5 to 13 are effective August 1, 2010, and apply to the rights of successors of decedents dying on or after August 1, 2010, and to any instruments executed before August 1, 2010, unless there is a clear indication of contrary intent in the instrument.

Presented to the governor May 11, 2010

Signed by the governor May 13, 2010, 9:58 a.m.

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Exhibit B

The 36th Annual Probate & Trust Law Section Conference

Minnesota State Bar Association
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PLENARY DAY 1

MN Legislative Update

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Minneapolis

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MSBA PROBATE & TRUST SECTION LEGISLATION

A. House File No. 2825/Senate File No. 2427

Sections 1 & 2. Clarification of Minnesota estate return filing requirements.

Section 3. Adoption of a MN QTIP provision. Allows a QTIP election when a federal return is not required, but only allows the election to reduce the taxable estate to $3.5 million. An estate will still pay Minnesota estate tax on the gap between $1 million and $3.5 million.

Section 4. The proposal clarifies that distributions of short-term capital gains (and long-term capital gains) by regulated investment companies and real estate investment trusts will be treated as distributions of principal for purposes of trust accounting. The change will clarify the issue, which some practitioners find ambiguous under the current statute. This can be a trust accounting issue for distributions of income and principal, and is distinct from tax principles.

Sections 5-13. The proposed provisions apply when a person dies without a Will, or when another instrument, such as a trust, provides for disposition of property according to the laws of intestacy. The summary of the changes is as follows:

Section 524.1-201 is amended as to the following subsections:

(1) Adds a definition of "adoptee" because no prior definition existed. Where more extensive adoption provisions are being proposed in the sections discussed later, this definition is necessary. This definition does not limit adoption to minors, but also includes adults who are adopted in accordance with Minnesota law.

(3) Adds a definition of "assisted reproduction" because no prior definition existed. Where extensive provisions are being added in the sections discussed later to define inheritance rights of children conceived through "assisted reproduction," this definition is necessary. This definition broadly defines assisted reproduction as any method of causing pregnancy other than sexual intercourse.

(5) Adds a definition of "birth mother" because no prior definition existed. Where extensive provisions are being added to define the rights of children conceived through "assisted reproduction," this definition is necessary. This definition includes any woman who gives birth to a child, except if under a gestational agreement because the Probate Code does not yet address inheritance rights of children born under gestational agreements.

(7) Adds a definition of "child of assisted reproduction" because no prior definition existed. Where extensive provisions are being added in the sections discussed later to define the rights of children conceived through "assisted reproduction," this definition is necessary. This definition excludes a child born under a gestational

agreement because the Probate Code does not yet address inheritance rights of children born under gestational agreements.

(16) Adds a definition of "divorce" because no prior definition existed, and the term is used in the later provisions so it is necessary to define it.

(21) Adds a definition of "functioned as a parent of the child" because no prior definition existed. Where extensive provisions are being added in the sections discussed later to define the rights of children conceived through "assisted reproduction," this definition is necessary. This definition is necessary because the proposed provisions giving inheritance rights to children conceived through assisted reproduction recognize that a person who functions as a parent (but would otherwise not be a parent under prior provisions) can be a parent for inheritance purposes.

(22) (23) (24) Add definitions of "genetic parent," "genetic father" and "genetic mother," to provide that those terms mean the person who provides the genetic material (sperm or egg) to create the child. The genetic parent must be distinguished from an adoptive parent or a person determined by the later rules governing assisted reproduction to be the parent. A person determined to be a father under Minnesota's existing Paternity Act is treated as a genetic father for purposes of these proposed provisions.

(25) Adds a definition of "gestational agreement." The proposed assisted reproduction provisions exclude surrogacy arrangements and agreements entered into on behalf of a deceased person. Minnesota law does not have a settled body of law (or a settled practice) that recognizes the validity of and requirements for gestational agreements, so these intestacy provisions do not affect or validate any of those practices and arrangements. Rather, these proposed assisted reproduction and adoption provisions would govern those arrangements. Where these proposed provisions would yield unintended results for parties participating in surrogacy or gestational arrangements, those parties would have to complete adoption proceedings and/or affirmatively plan their estates to avoid those results.

(29) Adds a definition of "incapacity" because no prior definition existed. This term is used in the assisted reproduction provisions so it was necessary to define it.

(31) Adds a definition of "intended parent" solely for the purpose of excluding gestational and surrogacy arrangements from the proposed provisions.

(45) Adds a definition of "relative" because no prior definition existed. The term is used in the proposed provisions for adoption and assisted reproduction.

(54) Adds a definition of "third party donor" because no prior definition existed. The term includes a man who donates sperm or a woman who donates eggs. The definition is necessary to exclude such donors from the defined parent-child

relationship in assisted reproduction situations, as discussed later.

Section 524.2-114 adds a section stating that a parent (whether, genetic, adoptive or defined under these provisions) is barred from inheriting from or through a child if the parent's parental rights were terminated (and not re-established), or if the child died before age 18 and there is clear and convincing evidence that the parent's parental rights could have been terminated under other provisions of applicable law. This provision improves the provisions of current law by incorporating, rather than paraphrasing, the standards for termination of parental rights, and applying those to inheritance rights. Old Section 524.2-114 is replaced by Section 524.2-116 and the later proposed provisions relating to adoption and assisted reproduction.

Section 524.2-116 states that a parent-child relationship established under these provisions is conclusive for purposes of inheritance rights. This eliminates the prior statute's reliance on the Parentage Act provisions, which could conflict with these provisions or have differing policy considerations supporting it.

Section 524.2-117 states the provision of old 524.2-114(2) that, except as excepted elsewhere in these sections, a parent-child relationship exists between a child and the child's genetic parents irrespective of the parents' marital status.

Section 524.2-118 Adds new provisions to govern the rights of adoptees and adoptive parents to inherit from each other. This provision significantly expands and clarifies the provisions of prior law contained in old Section 524.2-114(1).

(1) States the general rule that a parent-child relationship is established for purposes of intestate succession between an adoptee and the adoptee's adoptive parent(s).

(2) Provides that if one spouse of a married couple dies or the spouse of a genetic parent dies while "in the process of" adopting a child, the parent-child relationship is deemed to exist between that deceased person and the adoptee, as long as the adoption is completed or the genetic parent survives. This circumstance was not covered by prior law.

(3) Recognizes the parent-child relationship where the spouse/adopting parent dies "in the process of" the adoption, where the child is determined to be a child of the other spouse by assisted reproduction. This puts children born by assisted reproduction on the same footing as genetic and adopted children. This circumstance was not covered by prior law.

(4) Defines the phrase "in the process of being adopted" to require a showing of clear and convincing evidence of both the intention to adopt and the identification of the child to be adopted to warrant recognition of the parent-child relationship.

Section 524.2-119 Adds a new provision to govern the right of adoptees and their genetic parents to inherit from one another. These provisions expand and change prior law to recognize genetic relationships in certain circumstances and provide for a right to inherit from and through that relationship in those circumstances, despite the adoption.

(1) States the general rule that, except as provided in situations described in Subsections (2) through (5), a parent-child relationship does not exist between any adoptee and the adoptee's genetic parents. This section recognizes that a familial relationship between the adopted child and non-custodial genetic parents is unlikely to exist, except in certain circumstances.

(2) Provides that a person remains a child of a genetic parent where that parent's spouse adopts the person. No parent-child relationship exists with the other (non-custodial) genetic parent except for purposes of the child inheriting from or through that other genetic parent, and only if that other genetic parent is deceased at the time of the child's adoption.

(3) Continues to recognize the child's right to inherit from and through both genetic parents, despite adoption of that child by a relative of a genetic parent or the spouse of a relative of a genetic parent. In this case, there would likely remain a familial relationship with the genetic parents' families. No right to inherit from or through the adoptee exists in the adoptive parents.

(4) Continues to recognize a child's right to inherit from and through both of his or her genetic parents where the child is adopted by someone else after the death of both genetic parents. Again, there would likely remain a familial relationship with the genetic parents' families. No right to inherit from or through the adoptee exists in the adoptive parents.

(4) Maintains these same rules for a child conceived by assisted reproduction.

Section 524.2-120 addresses assisted reproduction and extends and clarifies current law. Currently, under Minnesota's Parentage Act, a third party donor of sperm is not considered a parent, however it is not clear that a third party donor of an egg is not a parent. In addition, that law has not caught up with technology that currently exists and is commonly used to conceive and bear children. Also, because it is possible that there could develop inconsistencies between the Parentage Act's and the Probate Code's treatment of parent-child relationships, it is preferable for the Probate Code to specifically address these issues, rather than defer to the Parentage Act.

(1) States existing law that a third party donor, whether of sperm or eggs, is not a parent.

(2) States that a parent-child relationship exists between the child of assisted reproduction and the birth mother.

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(3) States that a husband of a birth mother is a parent if he provided the sperm during his lifetime.

(4) Contains a presumption that the persons listed on a birth certificate are the parents of a child of assisted reproduction.

(5) Provides that a parent-child relationship is presumed to exist between a child of assisted reproduction and an individual other than the birth mother who consented to be the other parent of the child. That consent is shown by the existence of a signed record that shows consent, or in the absence of a signed record, by that person functioning as a parent or intending to so function (but being precluded from actually functioning as a parent by death, incapacity, etc.). This provision allows a spouse or significant other to be a parent of a child of assisted reproduction even if that person is not genetically related to the child nor adopted the child.

(6) States that a record of consent that is signed more than 2 years after the birth of a child of assisted reproduction is not effective to create inheritance rights in the parent or his relatives unless that person also functioned as a parent during such child's minority. This prevents someone from signing a consent just to inherit from the child.

(7) States the presumption that the husband of the birth mother is presumed to be a parent of a child of assisted reproduction, even if he is deceased before such child is born, in the absence of clear and convincing evidence otherwise.

(8) States that if a married couple is divorced, the former husband is not a parent unless he consented to the placement after divorce of eggs, sperm or embryos in a record or there is clear and convincing evidence of his consent.

(9) Provides that if consent is withdrawn prior to placement of eggs, sperm or embryos, no parent-child relationship exists.

(10) In accordance with existing law, no parent-child relationship exists for a child of assisted reproduction if such child was not in gestation prior to the death of a deceased purported parent. Too many issues would arise if inheritance rights were granted to and through children of assisted reproduction where posthumous placement of eggs, sperm or embryos occurred, including determinations of heirs and beneficiaries in probate proceedings and estate and GST tax implications of dispositions of property. There would also be issues raised about assets of other family members that could possibly pass to children produced by posthumous placement of eggs, sperm or embryos under irrevocable provisions that rely on these intestacy provisions.

Section 524.2-12 1 provides that this chapter does not affect gestational agreements. The status and enforceability of those types of arrangements is not currently clear under Minnesota law and this chapter should not seek to affect or validate those arrangements.

Section 524.2-122 provides that this chapter also does not affect equitable adoption.

Section 14. The legislation provides certainty in most cases where a Decedent dies in 2010 and has documents referencing repealed sections of the Internal Revenue Code, and also allows the estate administrator to petition the Court for a differing interpretation if it is believed that the Decedent intended for the document to be interpreted consistent with federal estate tax repeal. This option for the estate administrator should extinguish any serious procedural due process argument.

Section 15. The proposal adds a new Minn. Stat. §524.5-409A to provide a procedure for appointment of a conservator on an emergency or temporary basis. The provision is a companion to the existing Minn. Stat. §524.5-311, which allows appointment of an emergency guardian. This will fill a gap where the Court may find it necessary to appoint a conservator on a temporary or emergency basis.

B. Explanation of Section 14.

Background

- The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) repealed the federal estate and generation-skipping transfer (GST) taxes for 2010. EGTRRA reinstates the federal estate and GST taxes in 2011.

- Many Wills and Trusts executed in Minnesota allocate assets among beneficiaries by reference to terms or concepts that are defined in the now-repealed federal estate and GST tax provisions of the Internal Revenue Code (*e.g.*, "marital deduction," "estate tax exemption").

- References to such repealed terms or concepts will introduce ambiguity into the Wills and Trusts of decedents who die in 2010 and may even unintentionally disinherit beneficiaries.

- Proposed Minn. Stat. § 524.2-712 attempts to eliminate any such ambiguity from the Wills and Trusts of decedents who die in 2010. We anticipate that proposed Minn. Stat. § 524.2-712 would resolve controversies and prevent much litigation over the interpretation of otherwise ambiguous Will and Trust provisions related to the federal estate and GST taxes.

- This Will and Trust interpretation problem affects approximately half of the states in the Union. Of those states, at least 12 are reviewing or have passed legislation similar to this proposal.

Operation

- Paragraph (a) of proposed Minn. Stat. § 524.2-712 sets forth a default rule of interpretation for the Wills and Trusts of decedents who die in 2010. Unless a contrary intent is manifest in the Will or Trust, any reference to a term that is defined in repealed estate or GST tax provisions will be deemed to refer to the estate or GST tax provisions in effect on December 31, 2009.

- If a personal representative, trustee, or other interested party believes that the decedent had a contrary intent, such person may petition the probate court to determine what the decedent's intention was.

- This is a temporary Will and Trust construction proposal; it has no effect on state of federal tax law. For budgeting purposes, the Department of Revenue has indicated that the proposal is revenue-neutral.

Applicability

- This proposal would be effective retroactive to January 1, 2010 and would apply to the Wills and Trusts of decedents who die in 2010. If federal estate and GST taxes were enacted and became effective prior to 2011, this proposal would automatically expire.

States Proposing Similar Legislation:

Florida (requires court order)
Idaho
Maryland
Michigan
Missouri
Nebraska
New York
Ohio
South Dakota
Tennessee
Virginia
Washington
Wisconsin

C. Intestacy Provisions

APPLICATION

- Provisions apply only when a person dies without a will or when a trust references intestacy provisions.
- Scenarios not covered by SF2427 can always be covered in a will.

INTERPLAY WITH PARENTAGE ACT

- Current probate law allows parentage to be proven pursuant to the Parentage Act.
- Parentage Act applies during lifetime (e.g. custody arrangement and support obligations).
- SF2427 defines parental relationships for inheritance rights.

GENERAL RULES OTHER THAN ASSISTED REPRODUCTIVE TECHNOLOGY SCENARIOS

- **Genetic Parents:** Parent-child relationship exists except as otherwise provided in circumstances involving adoption, parental rights termination, or assisted reproductive technology.
- **Adoptive Parents:** Parent-child relationship exists even if adoption was "in process" at death of one parent but completed later.
- **Genetic Parents of Adoptee:** Parent-child relationship does not exist except if: (i) adoptive parent is spouse of genetic parent; (ii) one genetic parent is deceased at adoption, and then only through that parent; (iii) adoptive parents are relatives of genetic parents; or (iv) both genetic parents are deceased.
- **Parental Rights Termination:** Parent-child relationship is severed for purposes of parent inheriting through child.

ASSISTED REPRODUCTION SITUATIONS

- **Third Party Egg Donor:** Does not have relationship with child.
- **Mothers:** If a woman is the birth mother (excluding surrogacy) or a wife who donates eggs used by her for assisted reproduction with her husband, she is the mother.
- **Third Party Sperm Donor:** No relationship with child.
- **Fathers:** A man is presumed to be the father if he: (i) is listed on the birth certificate; (ii) consents to be the father; or (iii) is married to the birth mother.

SURROGACY

- Surrogacy arrangements are generally excluded from SF2427 because laws governing surrogacy arrangements need to be more well-defined.
- In those circumstances, wills or adoption can be used to effectively distribute estate assets.

D. Factual Illustrations

1. Assumptions

a. Application of Statute. The statute's intestacy provisions only apply in certain situations as follows:

- Where a person dies without a Will or other governing instrument that effectively disposes of his or her estate. Thus, for many situations, the person should or will have a Will or other instrument that provides for children as they desire, rather than die intestate, so as to opt out of the intestacy provisions in the statute.

- Where a trust or other instrument incorporates the intestacy provisions by reference (such as providing for heirs, descendants, etc.) providing for disposition of property according to the laws of intestacy.

b. Interplay with Parentage Statute. The Parentage Act sets forth rules and presumptions for parentage for purposes of determining rights of children and parents in many contexts. Current probate law allows parentage to be proven pursuant to the Parentage Act's provisions. That Act applies to men, but also to women who are alleging and who allege to be mothers. For example, genetic parentage can be established by scientific testing, or by consent or a recognition of parentage. The Parentage Act applies in contexts of custody arrangements, support obligations and the like, which are obligations and rights defined both for the parents and the children during lifetime.

With our legislation, we take the position that we should determine parentage mostly independently of the Parentage Act because we think the probate code can define what parental relationships should be recognized for inheritance rights. We validate relationship of a birth mother and child, and define a genetic father to include those situations in which a man is determined to be the genetic parent under the Parentage Act because we believe that that Act's presumptions for paternity are reliable and are aligned with the purposes of the provisions of the inheritance laws. Whereas the Parentage Act applies to maternity, such that surrogacy arrangements might be covered by that Act, we generally exclude surrogacy arrangements because we have taken a conservative approach until the laws governing surrogacy arrangements are more well defined. Rather in those circumstances, people should create wills and/or adopt the children in order to distribute their estates as they desire.

2. General Rules Other than Assisted Reproduction.

The general rules

applicable to the parent-child relationship will govern determinations for the most common situations.

a. **Genetic Parents.** Except where otherwise provided in the adoption context, the termination of parental rights context, and the assisted reproduction context, a parent-child relationship exists between a child and his or her genetic parents (the persons who provided the egg and sperm). However, third party donors providing egg or sperm for assisted reproduction do not have that relationship unless: (i) the donor was the wife providing eggs or her husband providing sperm and the wife gives birth to the child, (ii) that donor is the birth mother, or (iii) a man who is determined to be a father under the assisted reproduction provisions of the statute. Examples are discussed under the assisted reproduction section below.

b. **Adoptive Parents.** A parent-child relationship exists between adoptive parents and the adopted child, even if the adoption was "in process" at the death of one of those adoptive parents but completed later. Thus, adoption is one option to create a parent-child relationship where a person is not otherwise defined as a parent under these statutory provisions.

c. **Genetic Parents for Adoptee.** If a child is adopted, no parent-child relationship exists between that child and his or her genetic parents except: (i) if the adoptive parent is the spouse of a genetic parent, (ii) the other genetic parent is deceased at the adoption, and then only for the child inheriting from or through that other genetic parent; (iii) if the adoptive parents are relatives of the genetic parents and then only for the child inheriting from or through that other genetic parent; or (iv) if both genetic parents are deceased, and then only for the child inheriting from or through those genetic parents.

d. **Termination of Parental Rights.** In cases where termination of parental rights has been effected or would be appropriate, the parent-child relationship is severed for purposes of the parent inheriting from or through the child.

e. **Status of Assisted Reproduction Children.** For purposes of these provisions, children of assisted reproduction and their parent-child relationships established under those provisions mean that those parents are considered the genetic parents for purposes of the above provisions.

f. **Examples.**

(i) Child's parents are deceased and Child is in the process of being adopted by Husband and Wife and Husband dies during the process. Wife completes the adoption.

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- The parent-child relationship exists between Child and Husband and Wife for all purposes.

- The parent-child relationship still exists between genetic parents and Child for purposes of Child inheriting from or through Husband and Wife, but that relationship does not exist for purposes of Child's genetic parents inheriting from and through Child.

(ii) Child's genetic parents are both alive and unmarried. Child's mother, Wife, is married to Husband who is not the genetic parent. Husband adopts Child (or dies during the process, and Wife completes the adoption).

- For purposes of Husband and Wife inheriting from or through Child, and for purposes of Child inheriting from or through Husband and Wife, the parent-child relationship exists between Child and Husband and Wife.

- For purposes of Child inheriting from and through Child's genetic father, the parent-child relationship no longer exists between Child's genetic father and Child, and also does not exist for purposes of Child's genetic father inheriting from and through Child. If Child's genetic father was deceased before the adoption, Child could inherit from and through Child's genetic father, but Child's genetic father could not inherit from and through Child.

(iii) Child's genetic parents are both alive and unmarried. Child's grandmother adopts Child.

- For purposes of Child's grandmother inheriting from or through Child, and for purposes of Child inheriting from or through Husband and Wife, the parent-child relationship exists between Child and grandmother.

- For purposes of Child inheriting from and through Child's genetic parents, the parent-child relationship exists, but it does not exist for purposes of Child's genetic parents inheriting from and through Child.

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3. Illustrations of the Statute's Provisions in Assisted Reproduction Situations.

a. Only Applies to Assisted Reproduction. Assisted reproduction only includes situations in which pregnancy is caused other than by sexual intercourse.

b. No Relationship with Third Party Donor. No relationship exists with a third party donor of egg or sperm. A third party donor is someone who provides sperm or eggs other than:

- a husband who provides sperm or a wife who provides eggs that are used for assisted reproduction by the wife;
- the birth mother; and
- a man determined under the latter provisions to have a parent-child relationship.

c. Relationship with Birth Mother. A birth mother (which excludes surrogacy arrangements) has a parent-child relationship with the child.

d. Relationship with Husband of Birth Mother. The husband of the birth mother who provides the sperm has a parent-child relationship with the child.

e. Father on Birth Certificate. The man listed on the birth certificate is presumed to have a parent-child relationship with the child. Usually, the woman who is the birth mother is the listed mother.

f. Father by Consent. A man can consent to have a parent-child relationship in various ways, including by signing a consent record, functioning as a parent of the child within certain timeframes.

g. Father by Marriage. A man is presumed to consent if he is married to the birth mother and functions as a parent of the child.

h. Examples.

(i) Wife provides the eggs and Husband provides the sperm for in vitro fertilization and embryo is implanted into Wife who is the birth mother.

- Wife is the genetic mother and the birth mother and

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has a parent-child relationship.

- Father is the genetic father and the husband of the birth mother and has a parent-child relationship.

(ii) Husband provides sperm for artificial insemination of Wife who is the birth mother.

- Wife is the genetic mother and the birth mother and has a parent-child relationship.

- Father is the genetic father and the husband of the birth mother and has a parent-child relationship.

(iii) Egg Donor provides egg and Husband of Wife provides sperm and embryo is implanted into Wife who is the birth mother.

- Wife is the birth mother and has a parent-child relationship.

- Father is the genetic father and the husband of the birth mother and has a parent-child relationship.

- Egg Donor is a third party donor and has no parent-child relationship.

(iv) Sperm Donor provides sperm and Wife provides egg whether in in-vitro or in artificial insemination and Wife is the birth mother.

- Wife is the birth mother and has a parent-child relationship.

- Father is the husband of the birth mother and has a parent-child relationship in the absence of clear and convincing contrary evidence and/or if his consent is signified in writing or through functioning as a parent.

- Sperm Donor is a third party donor and has no parent-child relationship.

(v) Sperm Donor provides sperm and Egg Donor provides egg whether in in-vitro or in artificial insemination and Wife is the birth mother.

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- Wife is the birth mother and has a parent-child relationship.

- Father is the husband of the birth mother and has a parent-child relationship in the absence of clear and convincing contrary evidence and/or if his consent is signified in writing or through functioning as a parent

- Sperm Donor is a third party donor and has no parent-child relationship.

(vi) In all cases where there is a Surrogate or Gestational Carrier (hereinafter Surrogate), because this Act does not address those types of arrangements, the following would apply:

- Surrogate is birth mother and has a parent-child relationship.

- Any woman seeking establishment of a parent-child relationship would have to adopt or provide for child in her Will.

- Any man seeking establishment of a parent-child relationship would have to adopt, provide for child in his Will, be named in the birth certificate, consent or function as a parent of the child.

- Husband of Surrogate would be presumed to be father, absent contrary proof that he did not consent or function as a parent.

E. <u>Assisted Reproduction</u>

<u>Women</u>

For assisted reproduction (production of a child other than through sexual intercourse) using egg donors (necessarily women):

(1) If the woman is a third party donor, she does not have a relationship with the child produced from the egg. A third party donor (woman) is a woman who produces eggs used for assisted reproduction who does not fall into one of the following groups:

(a) wife who provides the eggs that are used by her for assisted reproduction

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(b) birth mother

In other words, if the woman is the birth mother or a wife who donates the eggs that are used by her for assisted reproduction with her husband, she is the mother.

(2) Under the assisted reproduction provisions, the relationship is with the birth mother, not the third party donor of eggs or anyone else (absent adoption by someone else). The birth mother is obviously the woman who gives birth. But we exclude surrogacy from that definition.

Conclusion

So, if you have a woman who gives birth to a child using her own egg, she is a birth mother (as well as the genetic mother) and has a relationship. If a woman uses donated eggs and gives birth to the child, she is a birth mother and has a relationship but the donor of the eggs does not.

Men

For men, there is not as clear a bright line as giving birth. Under our act, we are crafting a brighter line where assisted reproduction occurs:

(1) Under the assisted reproduction provisions, there is no relationship with the third party donor of sperm. A third party donor (man) produces sperm used for assisted reproduction who does not fall into one of the following groups:

(a) husband who provides sperm that are used by wife for assisted reproduction

(b) a man who proves under our assisted reproduction act that he should be the father

(2) Otherwise our assisted reproduction provisions say:

(a) a man listed on the birth certificate is presumed a father (it is almost invariably the case that the woman giving birth is listed as the mother)

(b) a man who consents to be the father is presumed a father

(c) a man who is married to a birth mother is presumed a father

Conclusion

So, while different, the concepts are the same. Women are treated a little differently because we incorporate the Paternity Act's rules for determining the genetic father in our definition of genetic father, but we do not do that for the determination of the genetic mother,

because we think the Parentage Act can be construed by women in a way that surrogacy situations could be included; because we are specifically excluding those arrangements in favor of a conservative approach (and because people can adopt and adjust their wills accordingly) we did not incorporate those presumption provisions as they apply to women (which they already do to some degree under 257.71 if someone raises the issue).