CHAPTER 30.1-09.1
RULES OF CONSTRUCTION OF GOVERNING INSTRUMENT

30.1-09.1-01. (2-701) Scope.

In the absence of a finding of a contrary intention, the rules of construction in this chapter control the construction of a governing instrument. The rules of construction in this chapter apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of provisions or governing instrument.

30.1-09.1-02. (2-702) Requirement of survival by one hundred twenty hours.

1. For the purposes of this title, except as provided in subsection 4, an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by one hundred twenty hours is deemed to have predeceased the event.
2. Except as provided in subsection 4, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by one hundred twenty hours is deemed to have predeceased the event.
3. Except as provided in subsection 4, if it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by one hundred twenty hours, one-half of the property passes as if one had survived by one hundred twenty hours and one-half as if the other had survived by one hundred twenty hours and there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by one hundred twenty hours, the property passes in the proportion that one bears to the whole number of co-owners. For purposes of this subsection, the term "co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others.
4. Survival by one hundred twenty hours is not required if:
   a. The governing instrument contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;
   b. The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specific period or expressly requires the individual to survive the event by a specific period, but survival of the event or the specified period must be established by clear and convincing evidence;
   c. Imposition of a one-hundred-twenty-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under subdivision a of subsection 1, subdivision a of subsection 2, or subdivision a of subsection 3 of section 47-02-27.1, or to become invalid under subdivision b of subsection 1, subdivision b of subsection 2, or subdivision b of subsection 3 of section 47-02-27.1, but survival must be established by clear and convincing evidence; or
   d. The application of a one-hundred-twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition, but survival must be established by clear and convincing evidence.
5. a. A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in good-faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other third party received written notice of a claimed lack of entitlement under this section. A payer or other third party is liable for a payment

made or other action taken after the payer or other third party received written notice of a claimed lack of entitlement under this section.

b. Written notice of a claimed lack of entitlement under subdivision a must be mailed to the payer's or other third party's main office or home by registered mail or served upon the payer or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payer or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payer or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

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

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

30.1-09.1-03. (2-703) Choice of law as to meaning and effect of governing instrument.

The meaning and legal effect of a governing instrument is determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in chapter 30.1-05, the provisions relating to exempt property and allowances described in chapter 30.1-07, or any other public policy of this state otherwise applicable to the disposition.

30.1-09.1-04. (2-704) Power of appointment - Meaning of specific reference requirement.

If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.

30.1-09.1-05. (2-705) Class gifts construed to accord with intestate succession - Exceptions.

1. In this section:
   a. "Adoptee" has the meaning set forth in section 30.1-04-14.
   b. "Child of assisted reproduction" has the meaning set forth in section 30.1-04-19.

c. "Distribution date" means the time when an immediate or a postponed class gift is to take effect in possession or enjoyment.
d. "Functioned as a parent of the adoptee" has the meaning set forth in section 30.1-04-14, substituting "adoptee" for "child" in that definition.
e. "Functioned as a parent of the child" has the meaning set forth in section 30.1-04-14.
f. "Genetic parent" has the meaning set forth in section 30.1-04-14.
g. "Gestational child" has the meaning set forth in section 30.1-04-20.
h. "Relative" has the meaning set forth in section 30.1-04-14.

2. A child of assisted reproduction, a gestational child, and except as otherwise provided in subsections 3 and 4, an adoptee and a child born to parents not married to each other, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. Terms of relationship in a governing instrument which do not differentiate relationships by the half blood from those by the whole blood, such as brothers, sisters, nieces, or nephews, are construed to include both types of relationships. Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or nephews, are construed to exclude relatives by marriage unless:
   a. When the governing instrument was executed, the class was then and foreseeably would be empty; or
   b. The language or circumstances otherwise establish that relatives by marriage were intended to be included.
3. In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of that parent unless the parent, a relative of the genetic parent, or the spouse or surviving spouse of a relative of the genetic parent functioned as a parent of the child before the child reached eighteen years of age.
4. In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:
   a. The adoption took place before the adoptee reached eighteen years of age;
   b. The adoptive parent was the adoptee's stepparent or foster parent; or
   c. The adoptive parent functioned as a parent of the adoptee before the adoptee reached eighteen years of age.
5. The following rules apply for purposes of the class-closing rules:
   a. A child in utero at a particular time is treated as living at that time if the child lives one hundred twenty hours after birth.
   b. If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent's death, the child is treated as living on the distribution date if the child lives one hundred twenty hours after birth and was in utero not later than thirty-six months after the deceased parent's death or born not later than forty-five months after the deceased parent's death.
   c. An individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

30.1-09.1-06. (2-706) Life insurance - Retirement plan - Account with payable on death designation - Transfer-on-death registration - Deceased beneficiary.

1. In this section:
   a. "Alternative beneficiary designation" means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

b. "Beneficiary" means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes a class member if the beneficiary designation is in the form of a class gift and includes an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.
c. "Beneficiary designation" includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.
d. "Class member" includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had the individual survived the decedent.
e. "Descendant of a grandparent", as used in subsection 2, means an individual who qualifies as a descendant of a grandparent of the decedent under the rules of construction applicable to a class gift created in the decedent's beneficiary designation if the beneficiary designation is in the form of a class gift or rules for intestate succession if the beneficiary designation is not in the form of a class gift.
f. "Descendants", as used in the phrase "surviving descendants" of a deceased beneficiary or class member in subdivisions a and b of subsection 2, mean the descendants of a deceased beneficiary or class member who would take under a class gift created in the beneficiary designation.
g. "Stepchild" means a child of the decedent's surviving, deceased, or former spouse, and not of the decedent.
h. "Surviving" in the phrase "surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under section 30.1-09.1-02.

2. If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:
a. Except as provided in subdivision d, if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.
b. Except as provided in subdivision d, if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", "family", or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this subdivision, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.
c. For purposes of section 30.1-09.1-01, words of survivorship, such as in a beneficiary designation to an individual "if the individual survives me", or in a beneficiary designation to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.
d. If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by

subdivision a or b, the substitute gift is superseded by the alternative beneficiary designation if:

(1) The alternative beneficiary designation is in the form of a class gift and one or more members of the class is entitled to take; or

(2) The alternative beneficiary designation is not in the form of a class gift and the expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

3. If, under subsection 2, substitute gifts are created and not superseded with respect to more than one beneficiary designation, and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

a. Except as provided in subdivision b, the property passes under the primary substitute gift.

b. If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

c. In this subsection:

(1) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(2) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

(3) "Younger-generation beneficiary designation" means a beneficiary designation that is to a descendant of a beneficiary of the primary beneficiary designation, is an alternative beneficiary designation with respect to the primary beneficiary designation, is a beneficiary designation for which a substitute gift is created, and would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(4) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

4. a. A payer is protected from liability in making payments under the terms of the beneficiary designation until the payer has received written notice of a claim to a substitute gift under this section. Payment made before the receipt of written notice of a claim to a substitute gift under this section discharges the payer, but not the recipient, from all claims for the amounts paid. A payer is liable for a payment made after the payer has received written notice of the claim. A recipient is liable for a payment received, whether or not written notice of the claim is given.

b. The written notice of the claim must be mailed to the payer's main office or home by registered mail, return receipt requested, or served upon the payer in the same manner as a summons in a civil action. Upon receipt of written notice of the claim, a payer may pay any amount owed by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds and, upon its determination under this section, shall order disbursement in accordance with the determination. Payment made to the court discharges the payer from all claims for the amounts paid.

5. a. A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a

person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item or property or benefit, to the person who is entitled to it under this section.

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

30.1-09.1-07. (2-707) Survivorship with respect to future interests under the terms of a trust - Substitute takers.

1. In this section:
   a. "Alternative future interest" means to an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.
   b. "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.
   c. "Class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date.
   d. "Descendants", in the phrase "surviving descendants" of a deceased beneficiary or class member in subdivisions a and b of subsection 2, mean the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.
   e. "Distribution date", with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.
   f. "Future interest" includes an alternative future interest and a future interest in the form of a class gift.
   g. "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.
   h. "Surviving" in the phrase "surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 30.1-09.1-02.
2. A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:
   a. Except as provided in subdivision d, if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

b. Except as provided in subdivision d, if the future interest is in the form of a class gift, other than a future interest to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this subdivision, "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants.

c. For purposes of section 30.1-09.1-01, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.

d. If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by subdivision a or b, the substitute gift is superseded by the alternative future interest if:

(1) The alternative future interest is in the form of a class gift and one or more members of the class is entitled to take in possession or enjoyment; or

(2) The alternative future interest is not in the form of a class gift and the expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

3. If, under subsection 2, substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

a. Except as provided in subdivision b, the property passes under the primary substitute gift.

b. If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

c. In this subsection:

(1) "Primary future interest" means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interest who left surviving descendants survived the distribution date.

(2) "Primary substitute gift" means the substitute gift created with respect to the primary future interest.

(3) "Younger-generation future interest" means a future interest that is to a descendant of a beneficiary of the primary future interest, is an alternative future interest with respect to the primary future interest, is a future interest for which a substitute gift is created, and would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary of beneficiaries of the primary future interest.

(4) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.

4. Except as provided in subsection 5, if, after the application of subsections 2 and 3, there is no surviving taker, the property passes in the following order:

a. If the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in

the transferor's will. For purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

b. If no taker is produced by the application of subdivision a, the property passes to the transferor's heirs under section 30.1-09.1-11.

5. If, after the application of subsections 2 and 3, there is no surviving taker and if the future interest was created by the exercise of a power of appointment:
   a. The property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and
   b. If no taker is produced by the application of subdivision a, the property passes as provided in subsection 4. For purposes of subsection 4, "transferor" means the donor if the power was a nongeneral power and means the donee if the power was a general power.

30.1-09.1-08. (2-708) Class gifts to descendants, issue, or heirs of the body - Form of distribution if none specified.

If a class gift in favor of "descendants", "issue", or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift.

30.1-09.1-09. (2-709) Per capita at each generation - Representation - Per stirpes.

1. In this section:
   a. "Deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under section 30.1-09.1-02.
   b. "Distribution date", with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.
   c. "Surviving ancestor", "surviving child", or "surviving descendant" means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 30.1-09.1-02.
2. If a governing instrument calls for property to be distributed "per capita at each generation", the property is divided into as many equal shares as there are surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.
3. If an applicable statute or a governing instrument calls for property to be distributed "by representation" or "per stirpes", the property is divided into as many equal shares as there are surviving children of the designated ancestor and deceased children who left surviving descendants. Each surviving child is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.
4. For the purposes of subsections 2 and 3, an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

30.1-09.1-10. (2-710) Worthier-title doctrine abolished.

The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs at law", "next of kin", "distributees", "relatives", "family", or language of similar import does not create or presumptively create a reversionary interest in the transferor.

30.1-09.1-11. (2-711) Future interests in heirs and like.

If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual's "heirs", "heirs at law", "next of kin", "relatives", or "family", or language of similar import, the property passes to those persons, including the state, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.