

Estate Planning in Light of New Developments in Same-Sex Relationships and Reproductive Science

Wendy S. Goffe

Stoel Rives LLP
600 University Street, Suite 3600
Seattle, Washington 98101
(206) 386-7565 (direct)
wgoffe@stoel.com
www.stoel.com
Twitter: @wendysgooffe

Wendy Goffe is of counsel with the law firm of Stoel Rives LLP, Seattle, Washington and a regular contributor to Forbes.com. She is a Fellow of the American College of Trust and Estate Counsel (ACTEC), and a member of the ACTEC Program Committee. She has a comprehensive estate planning practice that involves all aspects of estate planning for high net worth individuals and families, advising both individuals and charitable organizations concerning planned giving, probate, and trust administration. Wendy has an extensive and constantly updated analysis of the legal and tax implications of same-gender and other non-traditional family relationships, and an active part of her practice involves this work. She is a former Adjunct Instructor at Seattle University Law School. She is currently a member of the YWCA Planned Giving Advisory Committee, The Nature Conservancy Planned Giving Committee, The Seattle Foundation Professional Advisory Council, and the Children's Legacy Council of the Children's Hospital Foundation. She is a past member of the ABA Taxation Section Community Property Comment Project, the Executive Committee of the Estate Planning Council of Seattle, the Acquisition Committee of the Tacoma Art Museum, the Executive Committee of the WSBA Real Property, Probate and Trust Section, and the Ethics Committee of Valley Medical Center. She is also a past member of the Board of Directors and Grants Committee of The Women's Endowment Foundation, a supporting organization of the Jewish Federation of Greater Seattle.

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I. Introduction

When an individual or couple uses ART to conceive a child, it's typically taken for granted that the child is intended to be an heir. On the other hand, whether that individual or couple's ancestors had contemplated a third party using genetic material after the death of a descendant to conceive more beneficiaries is an entirely different question.

The law has not kept pace with scientific advances in the area of reproductive medicine. Assisted reproductive technology ("ART") typically includes artificial insemination, *in vitro* fertilization ("IVF"),¹ use of a gestational carrier and cryopreservation² of gametes or embryos. For the purposes of this outline, it will be broadly defined to include egg and embryo donation, embryo adoption, intrauterine insemination, embryo transfer, gamete or zygote intrafallopian transfer, gestational surrogacy, tradition surrogacy, and post-death gamete harvesting or conception. It is estimated that worldwide there are 250,000 babies born using some form of ART annually.

The questions raised by ART become especially important in certain areas of estate planning, including the efficient administration of a decedent's estate, carrying out the decedent's intent and serving the best interests of children.

Many of the issues affected by ART hinge on a person's right to inherit under the applicable state intestacy statutes. These issues include determining who is an heir for purposes of testamentary documents, intestacy statutes and pretermitted heir statutes; whether a person is a dependent for purposes of Social Security, other entitlement programs, life insurance and retirement plans; and whether a person is a member of a class when a testamentary disposition or intestacy statute includes a general provision using broad terms such as "spouse," "children," "heirs," or "descendants."

Adoption, while a very different way of becoming a parent, raises similar issues. Thus it is also discussed below.

ART and estate planning considerations are intricately intertwined with the U.S. government's current definitions of "family" and "child," especially in the area of postmortem reproduction. The law is slow to catch up with the reality as to what these terms can mean. For now, federal family-based benefits, such as children's Social Security or benefits for veterans and active members of the military, depend on the existence of a legal family, and often biological children.

Fifty years ago, the median age for women marrying was 20.1 years, and 23.1 years for

¹ The process by which ova are placed in a medium and fertilized by sperm outside the body, with the resulting embryo later implanted in the uterus for gestation. The American Heritage Stedman's Medical Dictionary 637 (28th ed. 2005).

² Cryopreservation is the freezing of tissue or cells in liquid nitrogen at negative 195 degrees centigrade. See Lee Kuo, *Lessons Learned from Great Britain's Human Fertilization and Embryology Act: Should the United States Regulate the Fate of Unused Frozen Embryos?*, 19 Loy. L.A. Int'l & Comp. L.J. 1027, 1030 (1997).

men.³ The latest Census shows the median age for women marrying today is 26.1 years, and 28.2 years for men.⁴ More unmarried couples are raising children than ever before. The National Institutes of Health reports that “In 2006–2010, 22% of first births to women occurred within cohabiting unions, up from 12% in 2002.”⁵ Likewise, couples, same-sex and opposite-sex, are increasingly having children using assisted reproductive technology.⁶

One of the more recent examples of the disparity and inequity in the law brought about by ART -- in this case, cryopreservation -- is illustrated by *Astrue v. Capato*,⁷ in which the U.S. Supreme Court was asked to determine whether a signed agreement to donate preserved sperm to the donor’s wife in the event of his death was sufficient to constitute consent to being the “parent” of a child conceived by artificial means after the donor’s death under Utah intestacy law, Utah Code Ann. §78B-15-707. Shortly after Mr. Capato’s death in 2002, Mrs. Capato conceived a child using the frozen sperm of her deceased husband and gave birth to twins on September 23, 2003, 18 months after his death. The Social Security Administration denied Mrs. Capato’s application for Social Security benefits on behalf of her twins based on their father’s earnings record. The Third Circuit held that an agreement leaving preserved frozen semen to the deceased donor’s wife does not, alone, confer on the donor the status of a parent for purposes of Social Security benefits.⁸ They further held that extrinsic evidence of the decedent’s intent, other than “content in a record” pursuant to Utah law, was inadmissible.

As technology progresses, issues like those raised in the *Capato* case will arise more frequently and become more complex. Case law, legislation, the Uniform Probate Code and scholars have all weighed in on these issues, many of which are unresolved or have conflicting results from jurisdiction to jurisdiction.

Because of the lack of clarity in this area of practice, it is critical for drafting attorneys to understand exactly what ART means. Different procedures, discussed below, raise different issues. In light of the frequency of ART and adoption, it is critical that we adjust the way we draft definitions of terms such as “child” and “descendant.”

³ *Vital Statistics of the United States 1960. Vol. 3 - Marriage and Divorce*, at 1-5 (U.S. Dept. of Health, Education, and Welfare, 1964).

⁴ U.S. Census Bureau Reports Men and Women Wait Longer to Marry, U.S. Census Bureau Press Release, Nov. 10, 2010, available at http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html.

⁵ Gladys Martinez, Ph.D., Kimberley Daniels, Ph.D., & Anjani Chandra, Ph.D., *Fertility of Men and Women Aged 15-44 Years in the United States: National Survey of Family Growth, 2006-2010*, 51 U.S. U.S. National Health Statistics Report (CDC Apr. 12, 2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf>.

⁶ Daphne Lofquist, *Same-Sex Couple Households*, United States Census Bureau brief (Sept. 2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>; see also Kristy Krivickas & Daphne Lofquist, *Demographics of Same-Sex Couple Households with Children*, U.S. Census Bureau, Fertility & Family Statistics Branch, SEHSD Working Paper Number 2011-11.

⁷ 132 S. Ct. 2021 (2012).

⁸ *Capato v. Comm’r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011).

For some estate planning attorneys, ART issues aren't on the radar -- the terminology isn't in their lexicon. But even those who are aware of the issues around ART may be hesitant to discuss them with clients in the planning phase. This reticence is understandable, given the public's unfamiliarity with the science involved, various moral and religious sensitivities, and the relative infrequency of ART as a factor in deciding case law. However, that frequency is rapidly increasing, and, in the context of estate planning, ART may be used by a beneficiary without the knowledge, and certainly beyond the control, of the testator. As advisors, we can't ignore the possibility that a beneficiary has used ART, creating beneficiaries not anticipated by the testator, and leave the results to chance (or litigation). We have a responsibility to discuss ART and its related complications with our clients and give them the opportunity to plan for them.

Whether to address ART and to what degree is up to clients. But they need to be educated to make an informed choice. This chapter introduces the topic of estate planning in light of ART, and presents some options and some forms to help estate planners carry out a client's intent.

II. Types of ART and Drafting Implications

A discussion of scientific background for the various types of assisted reproductive technology is beyond the scope of this outline.⁹ But an understanding of the basic techniques and terminology is necessary to have a meaningful discussion with our clients.

A. The Use of Donor Eggs and Sperm

Artificial insemination involves a birth mother being inseminated with sperm from a donor who may or may not be the legal father of that child. The intent is often different from the applicable law, a source of much litigation. Recently, a 43-year-old Kansas man, William Marotta, who donated his sperm to a lesbian couple, Angela Bauer and Jennifer Schreiner, in response to an ad on Craigslist was ordered by the Court to pay child support. The donor had signed a contract providing that the couple would "hold Marotta harmless 'for any child support payments demanded of him by any other person or entity, public or private, including any district attorney's office or other state or county agency, regardless of the circumstances or [sic] said demand.'"¹⁰

⁹ See Anne Hood Gibson & Marnin J. Michaels, *Determining Heirship In the World of Modern Reproduction*, 40 Est. Plan. 29 (Jan. 2013) (hereinafter "Gibson & Michaels") for an in-depth discussion of this topic and references to additional resources; Dominic J. Campisi, Claudia Lowder & Naznin Bomi Challa, *Heirs in the Freezer: Bronze Age Biology Confronts Biotechnology*, 36 ACTEC L.J. 179 (Summer 2010), in which the authors trace development of relevant law, philosophy, religion and legal issues arising from ART.

¹⁰ *Kansas pursues child support from sperm donor*, The Kansas City Star, Dec. 29, 2012, available at <http://www.kansascity.com/2012/12/29/3986152/state-pursuing-child-support-from.html#storylink=misearch>. The finding that the sperm "donor" is the legal father is not unique to Kansas. California so held in 1986 in *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986), as did New Jersey in *E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. Ch. 2011), because the state statute requiring the sperm be provided to a physician had not been followed.

Section 702 of the Uniform Parentage Act (“UPA”) provides that a donor of sperm or ova is not a parent of a child conceived by ART. Yet most states impose further qualifications to this rule as a matter of policy, to prevent children lacking legal parents.

Although the couple’s agreement purportedly waived the donor’s responsibility to provide financial support to the child, the Court determined that the contract was not valid, because the insemination was not handled by a licensed physician.

Some may feel that the outcome in this case imposed a harsh penalty, but the consequences could have been much worse. Artificial insemination outside of a licensed provider is a crime in some states. Georgia, for example, makes it a felony.¹¹

An anonymous donor egg may also be implanted in a birth mother, fertilized by the birth father’s sperm. Most states have a procedure for determining the legal parentage of a child involving properly executed documents through a licensed provider.¹²

As with surrogacy, discussed below, it is advisable that the intended parents and the donor enter into a contract defining the rights each will have once the genetic material is retrieved, and once a child is born.¹³ Many states, including Washington, presume that a contract regarding the disposition of embryos is enforceable at the time it was entered into.¹⁴ Typically, donors are compensated, which is not always true with gestational carrier agreements, discussed below.

See EXHIBIT A for a list of issues that should be contemplated in a sperm donation consent form.

When a wife conceives through a proper anonymous donor, and is married to a man, the presumption in most states is that he is the legal father. If no presumption applies, for example if a couple is not married, the second parent will need to go through an adoption proceeding to obtain parental rights.

Without a legal adoption, a situation that may occur if the couple intending to co-parent has broken up during the pregnancy -- as in *Parentage of L.B.* (discussed below) -- the second parent may be forced to turn to the equitable remedy of *de facto* parentage, discussed below

¹¹ Ga. Code Ann. §43-34-37: (a) Physicians and surgeons licensed to practice medicine in accordance with and under this article shall be the only persons authorized to administer or perform artificial insemination upon any female human being. Any other person or persons who shall attempt to administer or perform or who shall actually administer or perform artificial insemination upon any female human being shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than one year nor more than five years.

¹² See *The Egg Donor Handbook*, available at http://www2.massgeneral.org/womenscare/fertility_forms/donor%20egg%20pack.pdf, a useful handbook for potential egg donors published by Vincent Reproductive Medicine & IVF, Mass. General Hospital.

¹³ *Litowitz v. Litowitz*, 146 Wn. 2d 514, 48 P.3d 261, 268 (2002), cert. den., 537 U.S. 1191 (2003).

¹⁴ Washington’s Uniform Parentage Act, RCW ch. 26.26, governs surrogacy contracts.

in Section 0.

B. Traditional Surrogacy and the Use of a Gestational Surrogate

In traditional surrogacy a woman is artificially inseminated with the sperm of the father. This is common with male couples, where no mother is involved, or if the legal mother is unable to produce eggs or carry a child.

A gestational carrier is implanted with an embryo. The genetic material of both the intended legal mother and legal father may be used in this scenario. A gestational surrogate, on the other hand, provides the egg as well as giving birth, while a carrier uses a fertilized egg that is implanted in her.

While legal agreements can be used in these scenarios to protect the intended parents, state laws vary widely on the enforceability of gestational carrier agreements. As a result, there have been countless incidents where the surrogate refuses to give up custody of the child, often resulting in litigation.

The resulting cases fall into the following three categories:¹⁵ (i) states that recognize only the rights of the genetic parents of the child; (ii) states that recognize the birth mother as the legal parent and disregard the rights of the genetic parent or parents (except for the birth mother's husband, if she is married); and (iii) states that look to the intent of the parties.

Many states do not allow a genetic mother to relinquish her parental rights until after the birth of the child, regardless of the legal documents that may have been signed to that effect.¹⁶ Whether a gestational carrier may be compensated also differs from state to state. In Washington, Kentucky, and many other states, any contract providing for compensation is void.¹⁷ However, even in states where compensation is not permitted, expenses incurred due to the pregnancy may be reimbursed in some jurisdictions.

1. Gestational Surrogacy and Carrier Contracts.

A gestational surrogacy agreement is a contract between a woman providing her own egg, who agrees to be artificially inseminated. A gestational carrier agreement, in contrast with a gestational surrogacy agreement, is a contract by which the woman agrees to be a gestational carrier, where both the sperm and the egg of other adults are used. In either case, she agrees to relinquish parental rights to the child.

In some jurisdictions, the biological parents may be able to avoid an adoption proceeding,

¹⁵ Gibson & Michaels at 35.

¹⁶ See Jennifer Hauseman, *Modern Love: Three Mothers, One Bond*, The New York Times, Dec. 27, 2012, available at http://www.nytimes.com/2012/12/30/fashion/modern-love-three-mothers-one-bond.html?ref=modernlove&_r=0.

¹⁷ RCW 26.26.230, KRS 199.590(4).

and a birth certificate will be issued bearing the names of the biological parents at the time of birth. In some situations, such as when a surrogate is married, the biological father's consent may be necessary, even if he is the intended legal father.

Typically, the parental rights of the surrogate and the biological father (if not intended to be the legal parent) may only be terminated after the later of the passage of a certain number of days or hours from the birth or the signing of consents. In any other situation, such as where the child is also the biological child of the surrogate, an adoption proceeding or declaration of parentage will be necessary for the intended parents to become the legal parents.

See Section III.B regarding declarations of parentage and related issues.

2. The Uniform Probate Code v. The Uniform Parentage Act.

(a) The Uniform Probate Code.

The Uniform Probate Code ("UPC") addresses predominantly inheritance issues and provides default rules. The UPC also addresses children of ART. Notably the UPC has not adopted the definitions from other uniform acts; rather it contains its own definitions. However, a testator can express a contrary intent, unless void as against public policy.

The UPC provides for the following presumptions of parenthood:

- i. A husband or wife whose own sperm or eggs are used for ART by the wife. UPC §2-120(a)(3)(A).
- ii. The birth mother. UPC §2-120(a)(3)(B).
- iii. An individual identified on the child's birth certificate as the other parent. UPC §2-120(a)(3)(C) (referencing UPC §2-120(e)).
- iv. An individual who consents to ART with the intent to be treated as the other parent. UPC §2-120(a)(3)(C) (referencing UPC §2-120(f)). Note that consenting to ART does not necessarily evidence intent to be considered a parent. Most fertility clinic consent forms involve consent to the procedure and handling of the reproductive material that is not used, but do not necessarily include provisions for intent to be treated as the parent of a resulting child.

Application of these rules is complex. On the one hand, a *birth mother* is presumed to automatically have a parent-child relationship with a child of ART, whether or not she is the

genetic mother.¹⁸ This can be overly broad and result in the wrong person being considered a legal parent when the birth mother was intended only to be the gestational or surrogate carrier. On the other hand, the UPC rules with respect to *third-party donors* do not presume an automatic parent-child relationship; this rule contains both written and implied consent provision as a way of demonstrating parentage, not contained in the rule applied to genetic parents.

In 2008 the UPC was amended to address ART and gestational carriers, among other issues.¹⁹ The 2008 version of UPC §2-121 allows a parent-child relationship with a child of ART to exist either (i) as a result of judicial approval of a surrogacy contract by court order, or (ii) by the intended parent functioning as a parent within two years of the child's birth.²⁰ Once a parent-child relationship exists under the UPC, the child is considered a child of the parent for intestacy and class gift purposes. However, if subsequent to the birth, the birth mother places the child for adoption, UPC §§2-118(e), -119(a) and -119(e) provide that the parent-child relationship is severed and a new one formed with the adoptive parent or parents.

Because the 2008 revisions to the Uniform Probate Code have been adopted by 19 states as of the date of this outline, with a few other states adopting portions, its definitions can be a helpful starting point. Many have been incorporated into the forms provided below in Section VIII below. Attached as EXHIBIT E is a collection of sections from the UPC as amended in 2010, with some of the relevant comments, which may be helpful in drafting specifically for ART.²¹ Keep in mind the UPC's limitation with respect to adoption by an individual not married to the genetic parent, discussed in Section III.A.

Particularly complex is the process of establishing parentage for children born abroad using ART. The U.S. State Department and Sections 301 and 309 of the Immigration and Nationality Act require genetic parentage to pass citizenship to a child born abroad.²² Among other requirements, there must be a biological relationship between the child and a U.S. citizen parent or parents. If a woman goes abroad and gives birth using a donor embryo and donor sperm, the law regarding granting citizenship to her child is still developing. The State Department has recognized that:

Children born abroad to foreign surrogates and who are not biologically

¹⁸ UPC §2-120(c).

¹⁹ The UPC was again amended in 2010 to incorporate revisions outside the scope of this outline. It underwent a major overhaul in 2011 to update inconsistencies and to make technical and stylistic revisions.

²⁰ UPC §2-121(d). Colorado and North Dakota have adopted this provision, even in cases in which the agreement is otherwise unenforceable. Colo. Rev. Stat. §15-11-121; N.D. Cent. Code §30.1-04-20.

²¹ The 2010 UPC is available at <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf>.

²² 8 U.S.C. §§1401, 1409. See also U.S. Department of State, *Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad*, available at http://travel.state.gov/law/citizenship/citizenship_5177.html.

related to a U.S. citizen parent can have trouble entering the United States. If the child is not biologically related to a U.S. citizen parent, the child will not acquire U.S. citizenship automatically at birth. However, in some countries, the child will not acquire the citizenship of the country where he or she is born because the surrogate mother is not considered the parent of the child. In such a case, it may be impossible for that child to get a passport.²³

Yet, it has not provided solutions to this issue.

(b) The Uniform Parentage Act.

The Uniform Parentage Act (“UPA”) generally deals with surrogacy and the donation of sperm and ova. The laws on these issues vary from state to state and are in flux.²⁴ UPA §203 provides that a parent-child relationship established under the UPA as adopted by a particular jurisdiction would not apply if the jurisdiction had adopted another law (such as the UPC). Accordingly, if a state has adopted both statutes, the UPC trumps for purposes of resolving rights concerning intestacy and class gifts.

For the purposes of this discussion, UPA §803, concerning surrogacy contracts, is important. This section requires approval of the contract by a court. The parties to the contract must follow a similar procedure to adopt, including a home study demonstrating that the intended parents “meet the standards of suitability applicable to adoptive parents,” and that the parties to the agreement entered into it voluntarily and with full understanding.²⁵

The UPA is problematic in that it only contemplates heterosexual couples obtaining judicial approval. It provides that “[t]he man and the woman who are the intended parents must both be parties to the gestational agreement.”²⁶ A gestational carrier agreement in a UPA jurisdiction involving a same-sex couple as the intended parents cannot be validated by a court.²⁷

Several states have adopted modified versions of the UPA that are even stricter than the model rules.²⁸ Several other states have statutes regulating the enforceability of gestational

²³ http://travel.state.gov/law/citizenship/citizenship_5177.html.

²⁴ See RCW 26.26.700-.740 (adopted in 2002); Cal. Fam. Code §§7600-7606; see also Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171 (Winter 2008). E.g., surrogacy contracts are permitted in California, Cal. Fam. Code §7613. They are illegal in New York, N.Y., Dom. Rel. Law §122, and it is a felony for an attorney to assist in the preparation of such contracts. *Id.* §123.

²⁵ UPA §803.

²⁶ UPA §801(b).

²⁷ UPA §809.

²⁸ Utah requires one of the intended parents to be a genetic parent in order for the agreement to be enforceable against the gestational carrier. Utah Code Ann. §78-B-15-801. New Hampshire and Virginia require judicial approval of the agreement prior to ART. N.H. Rev. Stat. Ann. §168-B:16; Va. Code Ann. §20-160(A). On the (continued . . .)

carrier agreements.²⁹

Very few states have legislation governing surrogacy. Some have case law but not statutes, some impose criminal penalties, others consider surrogacy agreements to be void, and still others don't necessarily prohibit them but won't enforce them.³⁰ A few treat the intended parents as the legal parents upon implantation, others upon birth, and others only after a judicial determination of parentage.³¹ In the absence of legislation, the parents must resort to traditional adoption.

Attached as EXHIBIT F is a collection of sections from the UPA as amended in 2002.

3. Drafting Considerations.

Clinics will typically provide comprehensive forms for prospective parents, donors and gestational carriers. Because egg, sperm and embryo donation agreements must, in most jurisdictions, be entered into through a licensed medical provider, samples have not been included here. Attached as EXHIBIT B is a list of considerations for the terms of a gestational surrogacy contract. EXHIBIT C is a sample IVF contract. These checklists and forms are not meant to be exhaustive, merely suggestive of the issues the parties to the particular agreements may want to consider. A variety of sample forms is also available on the internet.³²

At a minimum, any agreement regarding stored genetic material should deal with what happens upon the death of either party, the termination of their relationship, the incapacity of a party, and the option to abandon the material.

C. **Postmortem Conception**

(. . . continued)

other hand, Florida requires judicial approval only after the birth. Fla. Stat. §742.16. Kristine S. Knaplund, "New Developments in Same-Sex Relationships and Reproductive Science and The Potential Impact on Probate Courts," National College of Probate Judges 2012 Fall Conference (Nov. 16, 2012).

²⁹ See, e.g., 750 Ill. Comp. Stat. 47/20, 47/25 (requiring proof of the medical need for a gestational carrier); Nev. Rev. Stat. Ann. §126.045 (allowing only married heterosexual couples to be declared the legal parents of a child born to a gestational carrier); N.D. Cent. Code §14-18-05 (declaring that surrogate contracts are void, while gestational carrier contracts are enforceable).

³⁰ See http://infertilityanswers.net/surrogacy_state_by_state and <http://www.creativefamilyconnections.com/50state.html> for surveys of surrogacy laws, state-by-state.

³¹ Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. Mich. J.L. Reform 899, 932-33 (Summer 2012).

³² See Charles P. Kindregan, Jr. & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science* (2d ed. 2011), for sample agreements and a checklist of issues to be covered. See also *Semen Donor Agreement (for use where second-parent adoption is available)* http://www.hrc.org/files/assets/resources/Donor_Agreement_YES_2nd_parent.pdf; *Egg Donation Contract* <http://www.surromomsonline.com/articles/eggdonorcontract.html>; *Embryo Donation Contract* <http://www.surromomsonline.com/articles/embryocontract.htm>.

Children may be conceived after the death of one of the genetic parents. This might involve frozen sperm or embryos. In the postmortem-conception context, there are two threshold issues that need to be considered separately. The first is whether a person is considered a child under state law. The second, assuming the person has been found to be a child, is whether he or she has the right to inherit for the purposes of the controlling document or under governing default legislation. The law is inconsistent from state to state with respect to recognition of children conceived after the death of a parent.³³ As a result, whether a child is an heir of the deceased parent or the deceased parent's ancestors is a frequent topic of litigation.³⁴

Whether any genetic material has been stored and what the plans are to use that material to conceive children now must be considered when drafting estate planning documents and coordinated with any other agreements a client may have with respect to ART.

Most states have adopted a form of the UPC §2-104, which provides that an individual in gestation at a decedent's death is deemed to be living at the decedent's death, if later born alive. The trend is also to consider a posthumously conceived child as a child of his or her deceased parent for inheritance purposes, if this intention was clearly expressed by the deceased parent and if the child was conceived within a certain period of time following the deceased parent's death. Further, under certain circumstances, the UPC treats a posthumously conceived child as in gestation on its parent's death.³⁵ There is a trend, for policy reasons, at least among the drafters of the uniform laws, to find the right to inherit of any person deemed by law to be a child.³⁶

Where a client intends later born children to be considered heirs, it is important to explain that the law is in flux and that such child may not be considered an heir for entitlement programs such as Social Security, as demonstrated in *Capato*,³⁷ discussed above. Furthermore, because of our mobile society, it is impossible to predict which state law may control at the time of a parent's death. Any consent forms signed by a client should contain

³³ See Kristine S. Knaplund, *Synthetic Cells, Synthetic Life, and Inheritance*, 45 Val. U. L. Rev. 1361, 1380 (2011), for a discussion regarding planning issues for children conceived by synthetic gametes and children conceived after one or both of the intended parents have died. See also Carole M. Bass, *What If You Die, And Then Have Children? Know How to Plan for Offspring Who Are Born – Sometimes Even Conceived – Posthumously. A State-by-State Guide*, 145 Tr. & Est. 20, 21 (Apr. 2006).

³⁴ See Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154, 165 (App. B) (Winter 2008) (hereinafter "Venturatos Lorio"), for a state-by-state analysis of the inheritance rights of postmortem children, current as of 2008.

³⁵ A child conceived using ART in utero not later than 36 months or born not later than 45 months after the parent's death is treated as if in gestation at parent's death. UPC §2-120(k).

³⁶ Allison Stewart Ellis, *Inheritance Rights of Posthumously Conceived Children in Texas*, 43 St. Mary's L.J. 413, 433 (Jan. 2012) (discussing the right to inherit on a state-by-state basis). For example, in Illinois, pursuant to 755 Ill. Comp. Stat. 5/2-3, posthumously born children are treated as if they were born during the decedent's lifetime.

³⁷ 132 S. Ct. 2021.

instructions as to the use of the reproductive material after death, how long it may be stored, how it may be used (e.g., research or reproduction), how many times it may be used, and when it must be destroyed. If not contained in the consent forms, separate instructions should be left by the testator.

While more comprehensive provisions regarding the definition of child and descendant are provided below in Section VIII, a testator should, at a minimum, describe his or her children as “my children, including children conceived or born before or after my death from my frozen genetic material” if this is the intent.³⁸ A more comprehensive definition, such as one of the samples provided below, would be preferable. These definitions are provided in recognition of the level of complexity many clients are willing to tolerate.

A grantor may not wish to provide for heirs conceived using a child’s genetic material, either posthumously or after the grantor’s child has become legally incapacitated. If that is the case, additional provisions must be included to provide that the intent of the grantor’s child to become a parent will be conclusively deemed revoked upon incapacity or death.

One option, proposed by Bruce Ross, an attorney with of Holland & Knight, LLP, in Los Angeles, is to require notice of revocation of intent to become a parent, to be delivered to the biological parent’s spouse (if married) or to the other biological parent (if not married). The following provision could be used to this end:

A biological parent’s intent to become a parent will be deemed conclusively to have been revoked if that biological parent is legally incapacitated when gestation occurs, unless the acknowledged written instrument signed by that biological parent expressly states that the intent to become a parent will not be revoked by that biological parent’s legal incapacity. The provisions of this clause do not apply to a mother who is both the biological and birth mother of that person.

He cautions that such provision is fraught with uncertainties and could lead to litigation to determine whether notice had been given effectively. He opines that a less risky approach would be to provide that children conceived by ART are not to be considered biological children for purposes of the dispositive instrument.

1. Approaches to Recognition.

Those states that have addressed postmortem conception are divided in their approach.³⁹ There are generally three methods to dealing with postmortem heirs: (i) More than two

³⁸ Venturatos Lorio at 163 (citing Margaret Ward Scott, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 Emory L.J. 963, 972 (2003)).

³⁹ See *In re Certified Question From the U.S. Dist. Court, Mattison v. Soc. Sec. Comm’r*, Case No. 144385493 Mich. S.Ct., Docket, entered Sept. 21, 2012). Table 1 sets forth the approaches to posthumously conceived children for probate purposes by jurisdiction.

dozen states have probate or parentage statutes regarding postmortem heirs based on a model or uniform act;⁴⁰ (ii) some have statutes not based on model or uniform codes and predating cryopreservation; and (iii) some have statutes not based on model or uniform codes but enacted with cryopreservation in mind.⁴¹ Attached as EXHIBIT D is a 50-state survey of some of the statutes applicable to posthumous-conception children, current as of January 2013.

Both the Uniform Probate Code and the Uniform Parentage Act have provisions regarding posthumously conceived children. These two sets of model rules impact this area of the law in unpredictable and inconsistent ways. The following is the progression that led to the development of these two model codes, which influence most state laws today.

(a) Uniform Status of Children of Assisted Conception Act.

The National Conference of Commissioners on Uniform State Laws first addressed postmortem reproduction in 1988 in the Uniform Status of Children of Assisted Conception Act (“USCACA”). In that act, the Commission provided that posthumously conceived children shall not be deemed children of the deceased parent for any purpose.⁴² This was a rigid rule; the only exception occurred if a decedent provided otherwise by testamentary instrument.

In 2000, the commissioners reversed that position and recognized a parent-child relationship, but only if the decedent had consented in writing to be that child’s parent. This provision was later added to the UPA, though the commissioners did not elaborate upon how this rule would apply in the probate context.

(b) Model Probate Code.

The Model Probate Code (“MPC”) included a postmortem heirs provision that required an heir to be living or in gestation at the time of a decedent’s death.⁴³

The UPC replaced the MPC. It generally provides default rules when a person dies intestate. The default rule would give the decedent’s property to members of the decedent’s family based on legal status. As with all default rules, they can be overcome by various estate planning instruments. The intestacy rules of the UPC are thought to be the probable intent of a decedent who dies without a will.

(c) Uniform Probate Code.

⁴⁰ Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 Cornell J.L. & Pub. Pol’y 347 (2012), n.77 and accompanying text.

⁴¹ *Id.* at 362.

⁴² USCACA §4(b).

⁴³ Model Probate Code §25 (1946).

The UPC incorporated the MPC postmortem heirs provision.⁴⁴ While amended and renumbered several times, current UPC §2-104(a) provides that:

(a) [Requirement of Survival by 120 Hours; Individual in Gestation.] For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (b), the following rules apply:

(1) An individual born before a decedent's death who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before a decedent's death survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period.

(2) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

UPC §2-104(a). Most important, in 2008, two new sections were added to the UPC, §2-120 (which applies when the birth mother intends to be the legal parent and no gestational carrier is involved) and §2-121 (where a gestational carrier is involved), both dealing with the parentage and inheritance issues arising with ART. These sections are broader than prior provisions, in that they deal with all types of reproductive material, not just sperm. They also apply uniformly to individuals using ART, whether married or not, whereas prior sections only applied to spouses. Further, they apply to gestational carriers and posthumously conceived children.

Some states still have the 1990 version of the UPC in their probate codes. While making some progress, this version also has significant limitations. A major goal of intestacy statutes is to make it easier to determine whether a person is eligible for support as an heir of a decedent. Unfortunately, the assumptions built into the UPC still do not clarify many situations that arise with the evolving modern construct of many families. In particular, the UPC requires a male partner, if he is the second intended parent, to give his written consent either before or after the child is born (and not withdraw that consent before the gametes are implanted), or to function as a parent no later than two years after the child's birth.⁴⁵ (The UPC contains an implied consent to be a legal parent, even in the event of posthumous conception if the decedent gave written consent, or if it can be proven that the decedent intended to function as a parent but was prevented from doing so because of death.⁴⁶)

The most recent version of the UPC (which does not have a written consent requirement) has

⁴⁴ UPC §2-108 (1969).

⁴⁵ UPC §2-120(f)(1) and §2-120(j).

⁴⁶ UPC §2-120(f).

been adopted by only two states, Colorado and North Dakota, which have also adopted the UPA, requiring written consent.⁴⁷ (The rules of construction provide that the UPC takes precedence over the UPA, thus how this discrepancy is actually handled isn't clear, but it is thought that written consent should not be required.) Only a handful of other states has legislatively addressed posthumously conceived children.

(d) Uniform Parentage Act.

In 2000 portions of the USCACA were incorporated into the UPA, but not §4(b), discussed above. Instead, the 2000 version of the UPA provided that a child conceived after a married parent's death would be deemed a child of that parent, provided that the decedent consented in writing to being a parent of a child by postmortem conception.⁴⁸

The 2000 version of UPA §707 requires written consent to be a parent if a *spouse* dies before placement of eggs, sperm, or embryos. In 2002 this section of the UPA was amended to apply to *any* individual who consents in writing to postmortem conception, rather than only to a spouse. UPA §704 (2002) requires a male partner, if he is the second intended parent, to give his written consent to being a parent or to have resided with the mother for the first two years after the child's birth, acting as a parent.

UPA §707 provides that the sole method for establishing parentage of a deceased parent of a child conceived using postmortem conception is with written consent. In contrast, UPC §2-120(f) allows for implied consent to be a legal parent, even in the event of posthumous conception, if the decedent gave written consent or if it can be proven that the decedent intended to function as a parent but was prevented from doing so because of death. The intent requirement can be satisfied if the mother is the surviving spouse and at her husband's death no divorce proceeding had been commenced.⁴⁹

As mentioned above, the UPA differs from the UPC in that the UPC deals with all reproductive material, and the UPA deals only with donated sperm. Because of this and many other differences between the two, depending upon which laws have been adopted by a state, a fact pattern can result in very different outcomes from one state to another.

A handful states have adopted the 2000 version of UPA §707,⁵⁰ including Alabama, Colorado, New Mexico, Texas, and Utah, which provides that a deceased spouse is only a parent if he or she consented in writing to being a parent while alive.⁵¹ Fewer states

⁴⁷ Colo. Rev. Stat. Ann. §19-4-106 (2006); N.D. Cent. Code §14-20-65 (2007).

⁴⁸ UPA §707 (2000).

⁴⁹ UPC §2-120(h).

⁵⁰ Cynthia E. Fruchtmann, *Tales From the Crib: Postmortem Reproduction and Art*, 33 Whittier L. Rev. 311, 319, n.42 (2012) (hereinafter "Fruchtmann").

⁵¹ Ala. Code §26-17-707 (2009) (adding the additional requirement that the signed record be maintained by a licensed physician); Colo. Rev. Stat. §19-4-106(8) (2005); N.M. Stat. Ann. §40-11A-707 (2010); Tex. Fam. (continued . . .)

(Delaware, North Dakota, Washington and Wyoming) have adopted the 2002 version of UPA §707, which applies to any *individual* (rather than only to a *spouse*) who consents in writing to postmortem conception.⁵²

(e) The New American Bar Association Model Act Governing Assisted Reproductive Technology.

In 2008, the American Bar Association adopted its own model act, *Model Act Governing Assisted Reproductive Technology*.⁵³ This act adopts §707(f) of the 2000 version of the UPA, which limits the class of posthumously conceived children who may be deemed the heir of a deceased parent to children of a parent who was married at the time of death.

2. Application of the Uniform Laws and Other Approaches.

Thirty-three states continue to follow the traditional children conceived before death but born within 10 months of the date of death approach, and, as a result, the status of posthumously conceived children in those states remains unclear. Idaho has a similar statute.⁵⁴ Virginia does not recognize any child born more than 10 months after the death of a parent.⁵⁵ New York does not allow a child conceived postmortem to claim a share of a testate decedent's estate under its omitted child statute unless intent was clearly expressed in the testamentary document.⁵⁶

Fewer than a dozen states still deny status to posthumously conceived children (and eight states, including California, Florida, New Hampshire, and Louisiana,⁵⁷ have granted status to posthumously conceived children in limited circumstances). At this time, a few states still have no statutes on postmortem-conception children, but courts have decided whether such children are eligible to inherit in intestacy from the decedent. Courts in Arizona,⁵⁸

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Code §160.707 (2008) (also requiring that the record be maintained by a licensed physician); Utah Code Ann. §78B-15-707 (2009).

⁵² Fruchtmann at 319, n.44 (*citing* Del. Code. tit. 13, §8-707 (2006); N.D. Cent. Code §14-20-65 (2007); Wyo. Stat. §14-2-907 (2009)). *See also* RCW 26.26.730 (2012).

⁵³ *See* Charles P. Kindregan, Jr., *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 Fam. L.Q. 203 (Summer 2008).

⁵⁴ Idaho Code §15-2-108.

⁵⁵ Va. Code §20-164.

⁵⁶ N.Y. Estates, Powers & Trusts Law § 5-3.2.

⁵⁷ Cal. Prob. Code §249.5(a)(3) (requires written consent and child must be in utero within 2 years of decedent's death); Fla. Stat. Ann. §742.17(4) (child can inherit if provided for in decedent's will); N.H. Rev. Stat. Ann. § 551:10; La. Prob. Code §9.391.1(A) (2010) (child must be born within 3 years of the decedent's death).

⁵⁸ *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (holding that posthumously conceived children were eligible for Social Security survivor benefits as legitimate children of the decedent under Arizona law), *reh'g den.* (9th Cir. Dec. 14, 2004).

Massachusetts⁵⁹ and New Jersey⁶⁰ have held that state law allows a decedent to be named the parent of a postmortem-conception child only if certain conditions (such as evidence of the decedent's consent) are met. Virginia and New York exclude postmortem children in most cases.

Courts in New Hampshire and Arkansas have held that only a child conceived before the death of a parent is eligible to inherit from a decedent.⁶¹ Similar laws exist in Indiana, Nebraska and Ohio.⁶²

III. Adoption

While not a form of artificial reproductive technology, many of the same issues regarding the right to inherit arise in the adoption context. Once a legal adoption has taken place, parentage is established, regardless of the age of the adoptee. UPC §2-115 treats adopted children as natural children for intestacy purposes. But as in the ART context, parental rights may be terminated and transferred to one or more other adults in an adoption proceeding.

A. Who May Adopt?

Adoption can take a number of forms.⁶³ It may be pursued by an individual alone or by a couple jointly, or as a second-parent adoption, in which one partner adopts his or her partner's biological or adopted child without terminating the original legal parent's rights. Same-sex adoption is not yet permitted in all states (Mississippi prohibits adoption by same-sex couples;⁶⁴ Utah prohibits adoption by any unmarried couples⁶⁵) but some states have gone so far as to revise their adoption statutes to be gender-neutral, paving the way for same-sex adoptions.⁶⁶

⁵⁹ *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002) (holding that a posthumously conceived child could inherit under the Massachusetts intestacy statute if a genetic relationship is proven and it is established that the decedent consented to both postmortem conception and to support the resulting child).

⁶⁰ *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. 2000) (holding that a posthumously conceived child could inherit under New Jersey's intestacy statute).

⁶¹ *Khabbaz v. Comm'r*, 930 A.2d 1180 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008).

⁶² Ind. Code §29-1-6-1; *Amen v. Astrue*, 822 N.W.2d 419 (Neb. 2012); Ohio Rev. Code. §2105.14.

⁶³ See www.theadoptionguide.com/files/StateAdoptionLaws.pdf and <http://www.hrc.org/laws-and-legislation/state> for an analysis of adoption, custody and visitation laws on a state-by-state basis. See also Susan L. Pollet, *Breaking Up Is Hard[er] To Do: Same-Sex Divorce*, 83 N.Y. State Bar J. 10, 19 (Mar./Apr. 2011), available at www.nycourts.gov/ip/parent-ed/pdf/SameSexDivorce.pdf, for a state-by-state chart of states permitting gay and lesbian adoption, second parent adoption and joint adoption.

⁶⁴ Miss. Code §93-17-3(5).

⁶⁵ Utah Code §78B-6-117(3)(b).

⁶⁶ Washington allows "[a]ny person who is legally competent and who is eighteen years of age or older" to be an adoptive parent. RCW 26.33.140(2). In *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007), a
(continued . . .)

California law permits an adult related to the child, a person named in a deceased parent's will, a legal guardian, or a person with whom the child has been placed for adoption, to petition to adopt.⁶⁷ It also specifically provides for step-parent adoption.⁶⁸ Some states have age cutoffs for adoption, where either the rights of the adoptee change or do not exist. See the discussion of adult adoption below in Section III.D. for situations where adoptions of adults are simply not recognized.

Those states subject to the UPC are most problematic where same-sex and unmarried-couple adoption is concerned. UPC §2-119 provides that adoption cuts off the right of inheritance between the genetic parent and child, replacing the right of inheritance between the adoptive parent and child. The UPC allows for the genetic parent's parent-child relationship to continue when a legal step-parent *spouse* adopts a child.⁶⁹ But it does not contemplate a second-parent adoption outside of marriage. When an *unmarried* partner adopts the child as the second parent, the UPC would terminate the genetic parent's parent-child relationship for inheritance purposes. In states that have adopted this rule, it is critical that the parents have valid wills in place.⁷⁰ See Section VIII.H for a definition of descendant specifically to deal with this issue.

B. Declaration of Parentage v. Adoption

Children may be born in a state that recognizes their parentage, and then move to a state that does not. The first state may put the names of both parents on the birth certificate, yet another state is not required to recognize the first state's birth certificate.⁷¹ Although the Full Faith and Credit Clause of the U.S. Constitution⁷² applies to judgments, it does not necessarily apply to a state's statutory laws. As a result, the federal government need not recognize a right created by statute, such as a same-sex marriage or a state's statutory presumption of parentage. Therefore, it is important that parents of ART children obtain an

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unanimous court held that a child may have three parents (in this case a former lesbian couple and the man who donated sperm to the couple).

⁶⁷ Cal. Fam. Code §8802.

⁶⁸ Cal. Fam. Code §§9000-9007 ; *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003).

⁶⁹ UPC §2-119(b).

⁷⁰ See Lee-Ford Tritt, *Parent Child Property Succession*, 148 Tr. & Est. 14 (Aug. 2009), for an in-depth discussion of the Uniform Probate Code's attempt to deal with the changing definition of family caused by new types of family structures and by artificial reproductive technologies. See also Kristine S. Knaplund, *The Changing Face of Families: The New Uniform Probate Code's Surprising Gender Inequities*, 18 Duke J. Gender L. & Pol'y 335 (Spring 2011) for a further discussion of this topic.

⁷¹ Diane Goodman, *Why Domestic Partners/Same Sex Spouses Still Need Adoptions or Court Orders of Parentage*, 31 Fam. L. News 27, 28 (2009) (citing *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007)).

⁷² U.S. Const. art. IV, §1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

order of parentage and not simply rely on statutory default provisions.⁷³ Without that court order a child could have a legal parent recognized in one state, but not in another, putting the child at risk of losing access to benefits or entitlement programs based on parentage.

C. Adoption Out

Once parental rights are relinquished and an adoption is final, under most state laws, based on UPC §2-119, the adopted child can only inherit from his or her adoptive ancestors and not the genetic ones. This is not always the case, however. For example, Texas Probate Code §40 provides that a child adopted out can still inherit by intestacy through genetic parents, provided that the child can still identify his or her genetic parents.

Where a trust refers to blood descendants, states have generally interpreted this to include adopted descendants. But it has also been argued that descendants placed for adoption remain a blood descendant of their family of origin. In *In re Cecilia Kinkaid Gift Trust for George*,⁷⁴ the issue was raised as to whether a child who had previously been adopted out of the family qualified as a blood descendant nonetheless. While the court in this case concluded that the adopted descendant had become the legal heir of her adoptive parents and not her genetic parents, the dissent did not foreclose the possibility that in some cases a grantor could have a contrary intent.

Even in jurisdictions where this area of law has been settled, careful drafting regarding who is a descendant is recommended.

D. Adult Adoption

One method by which same-sex couples have sought to obtain some certainty with respect to their estate planning intentions is to have one partner adopt the other.⁷⁵ There are several motivations behind this planning technique, including establishing a family relationship for

⁷³ While only available in Ohio, under Ohio Revised Code 2105.15 it is possible to obtain a designation of heir at law. This statute, which has been on the books since 1953 allows a person to appear before the probate judge in that person's county, in the presence of two disinterested witnesses, and file a written declaration designating another person to:

[T]o stand toward the person in the relation of an heir at law in the event of the person's death.

After a lapse of one year from the date of the designation, the declarant may have the designation vacated or changed by filing in that probate court an application to vacate or change the designation of heir; provided that there is compliance with the procedure, conditions, and prerequisites required in the making of the original declaration.

⁷⁴ *In re Cecilia Kinkaid Gift Trust for George*, 278 P.3d 1026 (Mont. 2012).

⁷⁵ For a thorough discussion of this topic see Terry L. Turnipseed, *Scalia's Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?* 32 Hamline L. Rev. 95 (Winter 2009), available at http://works.bepress.com/terry_turnipseed/2, and Sarah Ratliff, *Adult Adoption: Intestate Succession and Class Gifts Under the Uniform Probate Code*, 105 Nw. U. L. Rev. 1777 (2011) (hereinafter "Ratliff").

purposes of entitlements and other benefits (i.e., Social Security, health insurance, survivor benefits), creating a legal bond with another individual, and establishing a legal heir to secure inheritance rights.⁷⁶ Because estate intestacy laws do not allow for the distribution of a decedent partner's estate to his or her surviving partner, some unmarried couples resort to adoption, rather than rely solely upon other more conventional estate planning techniques.

Another reason an adult may wish to adopt a partner is to bring the adoptee within the class of beneficiaries under a pre-established estate planning instrument. For example, adoption may bring the partner into the permissible class of recipients of a trust share upon the death of the current income beneficiary. Adult adoptions may also provide an effective way to eliminate the status, as heirs, of the adopter's relatives, so that they no longer have standing to contest an estate plan.

In *Adoption of Patricia S.*,⁷⁷ Olive's parents established two trusts, one for her benefit and one for the benefit of her descendants. Olive had no natural descendants, so she adopted her partner, Patricia. The Trustees of the trusts filed a petition in the Maine Probate Court seeking annulment of the adoption and a declaratory judgment that the adoption is null and void. In it, they alleged that the couple obtained the adoption by fraud in that they did not disclose their relationship to the court, and because, as New York residents at the time, Patricia and Olive had not fulfilled the statutory requirements of living or residing in Maine necessary to give the Knox County Probate Court jurisdiction to issue the decree of adoption under 18-A Me. Rev. Stat. §9-315(a) (2008). The adoption was upheld on appeal.

On the other hand, in *Otto v. Gore*,⁷⁸ the Delaware Supreme Court held that the grantor's daughter's adoption of her ex-husband did not make him a grandchild, eligible to inherit under her parents' trust, because the adoption was intended to frustrate the intentions of the grantors.

Before reaching the conclusion that adoption will bring an individual into a class of beneficiaries, the dispositive intent set forth in the instrument and the state law applicable to adopted heirs must be carefully analyzed.⁷⁹ Historically, the common law stranger-to-the-adoption rules provided that an adopted child would be treated as a descendant of his or her parents, but not their ancestors.⁸⁰ That rule has been abolished for the most part. But it is

⁷⁶ See Gwendolyn L. Snodgrass, *Creating a Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 Brandeis J. Fam. L. 75 (1997-1998).

⁷⁷ 209 ME 76, 976 A.2d 966 (Me. 2009).

⁷⁸ 45 A.3d 120 (Del. 2012).

⁷⁹ See Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg Into a Round Hole*, 43 Creighton L. Rev. 815 (2010), for an analysis of the developing law in this area.

⁸⁰ This rule was applied in *In re Trust Under Agreement of Vander Poel*, 933 A.2d 628 (N.J. Super. Ct. App. Div. 2007), where the court held that a person adopted as an adult is therefore excluded from a class gift to the adoptive parent's issue in a trust created by the adoptive parent's mother even though the rule would not apply had the adoption taken place when the adopted person was a child.

often asserted in the adult adoption context.⁸¹

The statutory treatment of adult adoption and its effectiveness also differs in other ways from state to state.⁸² Not all states permit adult adoption.⁸³ The New York Court of Appeals elaborated that state's public policy concerns, which differ, like attitudes toward same-sex marriage, widely among the states the case of *In re Adoption of Robert Paul P.*:⁸⁴

Adoption is not a means of obtaining a legal status for a nonmarital sexual relationship — whether homosexual or heterosexual. Such would be a "cynical distortion of the function of adoption." (*Matter of Adult Anonymous II*, 88 A.D. 2d 30, 38 [Sullivan, J. P., dissenting].) Nor is it a procedure by which to legitimize an emotional attachment, however sincere, but wholly devoid of the filial relationship that is fundamental to the concept of adoption.

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There are many reasons why one adult might wish to adopt another that would be entirely consistent with the basic nature of adoption, including the following: a childless individual might wish to perpetuate a family name; two individuals might develop a strong filial affection for one another; a stepparent might wish to adopt the spouse's adult children; or adoption may have been forgone, for whatever reason, at an earlier date. (See Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 Cornell L Rev 566, at p 571, n 26, and p 578.) But where the relationship between the adult parties is utterly incompatible with the creation of a parent-child relationship between them, the adoption process is certainly not the proper vehicle by which to formalize their partnership in the eyes of the law. Indeed, it would be unreasonable and disingenuous for us to attribute a contrary intent to the Legislature.

On the other hand, the dissent expresses its view of public policy, which more closely follows that of the states permitting adult adoption:⁸⁵

⁸¹ See Chelsi Honeycutt, *Careful Cutting Too Many Ties: Issues With Establishing a Parent-Child Relationship Via Adult Adoption in Texas and a Potential Solution*, 5 Est. Plan. & Comm. Prop. L.J. 171 (2012) for a discussion regarding the application of this rule in Texas.

⁸² For information concerning adoption in Washington, see *Washington Family Law Deskbook*, ch. 60 (Wash. St. Bar. Assoc. 2d ed. 2001 & Supp. 2006).

⁸³ *Id.* at 10 (citing Arizona, Florida, Idaho, Nebraska, New Jersey, Ohio and Puerto Rico). Wisconsin permits any adult to be adopted by another adult. Wisc. Stat. §882.01.

⁸⁴ 63 N.Y. 2d 233, 236 (1984).

⁸⁵ *Id.*

[N]othing in the [adoption] statute requires an inquiry into or evaluation of the sexual habits of the parties to an adult adoption or the nature of the current relationship between them. It is enough that they are two adults who freely desire the legal status of parent and child. The more particularly is this so in light of the absence from the statute of any requirement that the adopter be older than the adoptee, for that, if nothing else, belies the majority's concept that adoption under New York statute imitates nature, inexorably and in every last detail.

Some states require the adoptee to be younger than the adopter. UPC §2-705(f) (1990, rev. 2008), if incorporated into a state's probate code, requires an adopted individual, for purposes of inheritance under a third party's dispositive instrument, to have lived while a minor (before or after the adoption) as a regular member of the adopting parent's household.

Whether this statute may be retroactively applied has not been definitively determined. In *Anderson v. BNY Mellon, N.A.*⁸⁶ the Supreme Judicial Court of Massachusetts held that the statute may only be applied prospectively, and that a retroactive application would be unconstitutional, violating substantive due process rights. However, it did recognize that this was not a consistent view among the states. With respect to those rulings the court concluded that "the cases upholding retroactive application give insufficient weight to the substantiality of the interests enjoyed by the plaintiff and other biological beneficiaries and the bedrock principle that a *testator* is entitled to rely on the state of law at the time of execution of a testamentary instrument."⁸⁷ (Emphasis added.)

It is important to carefully consider who will adopt whom. The partner who is likely to die first should be the adopter. Another concern is that an adoptee loses the right to inherit by intestacy from biological relatives. Even if no law prohibits adult adoption, the possibility of prosecution for incest in the applicable state should also be considered before opting for this planning method.⁸⁸

Adult adoption also triggers income and estate tax considerations such as dependency exemptions and head of household status that should be considered. Where unmarried partners are separated by a great age difference, a transfer in excess of the exemption may

⁸⁶ 974 N.E. 2d 21 (Mass. 2012).

⁸⁷ *Id.* at 33.

⁸⁸ For example, Washington's incest statute, RCW 9A.64.020, only applies to adopted descendants *under* the age of eighteen. *But see* Restatement (Second) of Conflict of Laws §290 cmt. c (1971) (providing that a state may disallow inheritance in connection with out-of-state adoption where inheritance would violate strong local public policy); Restatement of Conflict of Laws §143 cmt. a, illus. (1934) (providing an example when adoption in one state will not be recognized for inheritance purposes in another state that does not permit such adoption). *E.g.*, Illinois' incest statute would make such adoptions illegal. 720 Ill. Comp. Stat. 5/11-11(2) and 755 Ill. Comp. Stat. 5/2-4 specifically provide that for trusts executed on or after January 1, 1998, an individual adopted as an adult is not considered a descendant. California permits adult adoption. Cal. Fam. Code §§9300-9340. Information and forms are available at <http://www.saclaw.lib.ca.us/pages/adult-adoption.aspx> (last visited Jan. 9, 2013).

result in the application of the GST.

A valid adoption of an unrelated individual, who would otherwise be considered a skip-person, may avoid the generation assignment rules based on age, and allow application of the generation assignment rules based upon lineage from the transferor. However, under regulations that went into effect on July 18, 2005, the IRS will analyze whether there is a bona fide parent/child relationship, or if the adoption was primarily for GST tax-avoidance purposes. This determination is made based upon all of the facts and circumstances, but the following requirements must be satisfied: (i) a legal adoption took place between the adoptee and the adoptive parent; (ii) the adoptee is a descendant of a parent or the adoptive parent (or the adoptive parent's spouse or former spouse); (iii) and the adoptee is under the age of 18 at the time of the adoption.⁸⁹

Courts have recently allowed adoptions to be vacated on the grounds that they previously entered into adult adoptions to obtain the only protections then available under the law, and greater protections are now available by way of marriage or other legal relationships.⁹⁰ But, clients need to understand that it is unlikely that an adoption may later be easily revoked or renounced once final.⁹¹

E. Class Gifts

When it comes to estate administration, a key issue with respect to ART is how descendants will be treated for class gift purposes. Class gift issues in the postmortem-conception context can raise complex issues. Will descendants conceived using ART be included in a class gift or not?

Two hurdles must be overcome to be considered part of a class. First, a child must be considered a class member. Second, the child must qualify under the class-closing rules. In other words, the child must have been "a life in being" when the class closed, which may be later than the date of death under the terms of the document or state law.

While large class gifts rarely pass by intestacy, intestacy statutes govern whether individuals are eligible to inherit.

Generally, the law is that if a deceased parent is considered the parent of a posthumously conceived child, it is presumed that the child is entitled to inherit from the parent.⁹² Most states following the UPA consider a posthumously conceived child eligible to inherit from a deceased parent, unless state statute provides to the contrary. The UPA does not provide a

⁸⁹ Treas. Reg. §26.2651-2(b).

⁹⁰ *H.M.A. v. C.A.H.W.*, 2013 WL 1748618 (Del. Fam. Ct. 2013) (Not reported in A3d), allowing an adoption to be vacated to allow the couple of 33 years to enter into Delaware civil union.

⁹¹ Ratliff at 1786.

⁹² *Restatement (Third) of Property: Wills and Other Donative Transfers* §14.8 (2009). Unlike the other uniform laws, the Restatement requires action to be taken within a "reasonable time." *Id.* §15.1.

time limit for the class closing. As a result, the UPC rules are preferable for purposes of certainty with respect to the class closing. Because of the statutory differences it is preferable to provide for a limitation in the document to avoid reliance upon default rules.

As of 2010, UPC §2-705 provides that a class gift that uses a term of relationship to identify the class members includes adopted children and children of ART, according to the rules of intestate succession applicable to parent-child relationships. Some state statutes, however, provide that death is considered to end a marriage, which causes even a child in gestation before a parent's death to be born out of wedlock and therefore disqualified from inheriting. UPC §2-705(b) specifically excludes children of ART from this limitation.

A problematic wrinkle for adult adoptees is that UPC §2-705(f) includes individuals adopted prior to turning age 18 in class gifts if the transferor is the adoptive parent, but excludes them from the class created by a third party. In an exception to this rule, the individual may inherit from the third party if he or she lived while a minor, before or after the adoption, as a regular member of the adopting parent's household. This could exclude adult adoptees from being able to inherit from anyone but their adoptive parent. Only a few states have adopted this provision, however.⁹³ As a result, third parties should specifically name an adult adoptee as a member of a class to avoid the gift being found statutorily void. Unfortunately, a third party may not even be aware of the adoptive relationship.

(As with other issues, pursuant to UPC §2-701, the UPC establishes a default rule and takes precedence over the UPA to the extent of any inconsistency, in the absence of contrary intent explicitly set forth in the testamentary document.)

Parentage of children born while a parent is alive, and therefore inclusion in a class gift, is rarely in question, except where a surrogate is involved and the birth mother, whether or not the genetic mother, establishes a parent-child relationship.⁹⁴ A second parent is also presumed if a spouse's sperm or egg is used for assisted reproduction by the birth-mother (so long as they are married at the time of insemination), if an individual is identified on the birth certificate as the other parent, or if an individual consented to ART with the intent to be treated as the other parent (and did not withdraw that consent prior to the use of his or her reproductive material).⁹⁵

UPC §2-120 and -121 provide that when the distribution date is a parent's date of death, the class closes for ART children if the child was in utero within 36 months or born within 45 months of the decedent's death and survives for at least 120 hours after birth.⁹⁶

While statutes and individual documents may be drafted to protect posthumously conceived

⁹³ See Ind. Code §29-1-6-1(d).

⁹⁴ UPC §2-120(b).

⁹⁵ UPC §2-120(a)(3).

⁹⁶ UPC §2-705(g)(2).

heirs, they can create untold havoc for the living. Where no time limit is imposed, or a very long one is allowed, an estate may already have been completely distributed when a new beneficiary becomes entitled to inherit. Recovering and redistributing property that has been distributed is a huge burden to impose on any estate administrator. Attorneys should balance the interests of the unborn and the living when drafting documents that contemplate a long period before a class closes.

IV. De Facto Parentage

When legal adoption or parentage has not been or cannot be established, several jurisdictions, including Delaware, Oregon, Washington, and the District of Columbia recognize the equitable concept of the “*de facto*” parent, in the absence of a legal adoption.⁹⁷

In *Parentage of L.B.*,⁹⁸ the Washington Supreme Court granted a lesbian mother parental rights to a child she helped raise with her former partner. Sue Ellen Carvin, the petitioner, lived with Paige Britain in a marital-like relationship for 12 years. During that time they had a child together. Britain was the biological mother. Carvin stayed at home with L.B., serving as primary caregiver. When L.B. was almost 6 years old, the couple separated, Britain married the sperm donor and cut off Carvin’s contact with the child. In this case the court recognized that a “*de facto* parent” has a fundamental right, equal to that of a biological or adoptive parent, in the care and custody of a child.

In *Parentage of L.B.*, the Washington Supreme Court has adopted the following four-part test to determine the existence of a *de facto* parent-child relationship:

- (a) The natural or legal parent consented to and fostered the parent-like relationship;
- (b) the petitioner and the child lived together in the same household;
- (c) the petitioner assumed obligations of parenthood without expectation of financial compensation; and
- (d) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

⁹⁷ See, e.g., Del. Code Ann. tit. 13, §8-201(a)(4), (b)(6) (2009); Or. Rev. Stat. §109.119; D.C. Code §16-831.01 (2001); see also *Tenth Annual Review of Gender and Sexuality Law: Family Law Chapter: Child Custody, Visitation & Termination of Parental Rights*, 10 Geo. J. Gender & L. 713, 740 (Meredith Larson, ed., 2009). Ohio provides a rarely-used procedure to declare someone an heir at law. Ohio Revised Code 2105.15 Designation of heir at law allows an individual to appear before a probate judge and appoint another individual as his or her heir at law. The appointee is conferred the status of a lawful child, although the designation is not equivalent to an adoption and is revocable.

⁹⁸ *In re Parentage of L.B.*, 155 Wn. 2d 679, 122 P.3d 161 (2005), cert. den., *Britain v. Carvin*, 547 U.S. 1143 (2006).

De facto parentage is not a remedy easily won. In *In re the Parentage of: Marnita Frazier*,⁹⁹ the Washington Supreme Court refused to extend the remedy of *de facto* parentage to a former stepfather who petitioned to be named a *de facto* third parent of his former stepdaughter. In this case the child already had two fit parents. The stepfather requested residential time with the child. The court held that recognition of *de facto* parent status would infringe on the parental rights of the child's existing parents, and a statutory remedy already existed by which a stepparent could obtain custody of a stepchild. In the dissent, three justices raised the possibility that a child could have more than two parents and questioned the majority's assumption that the child's two parents were fit.

While the *de facto* parent stands in legal parity with a legal parent, because it is an equitable remedy and not statutory, a legal adoption, or at a minimum a written agreement, is always preferable. In the absence of either a biological parent-child relationship or a legal adoption, there is little certainty with respect to the rights and responsibilities between an adult and child.

V. Legitimacy

One might think that the law concerning children born out of wedlock was settled by now. But as recently as 2012 the New York Surrogates Court held that "lawful issue" could only be interpreted to include marital children. In *In re Dwight*¹⁰⁰ the Court held that since 1971, when the trust as issued was executed, the law had been changed to allow children born out of wedlock to be adjudicated as legitimate and deemed lawful issue. But in this case, the trust was created in 1971, and at that time, a child born out of wedlock was not considered lawful issue. Thus a grandchild of the testator, who would otherwise have been considered a trust beneficiary, was excluded. The law allowing a beneficiary to be adjudicated as legitimate could not be applied retroactively.

Washington Courts have recognized that:

[T]he term "illegitimate child" is an offensive holdover from an era in which society was much less sensitive to the rights of children born out of wedlock . . . whose parents have not later remarried, and who has not been subsequently adopted.¹⁰¹

More often than not a state's parentage laws, rather than a concern with legitimacy, are relied upon to determine if an individual qualifies as a child.¹⁰²

⁹⁹ Case No. 1-81043-5 (*en banc*) (Wash. Apr. 1, 2010).

¹⁰⁰ 949 N.Y.S.2d 921 (N.Y. Sur. Ct. 2012).

¹⁰¹ *Pitzer v. Union Bank of California*, 141 Wn. 2d 539, 9 P.3d 805 n.1 (2000).

¹⁰² Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345 (2011) (discussing the ways in which the law continues to favor "legitimate" children). See [Downs v. Gilmore](#), No. 108,176, Kansas Court of Appeals (March 8, 2013) (unpublished), where the court allowed a woman standing to bring a parentage action to determine whether she had a mother-child relationship with the child she had raised with her former partner.

Until 1975, Washington law provided that a child born out of wedlock was deemed an heir of his or her biological parents under the following circumstances:

Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate in whole or in part as the case may be, in the same manner as if he had been born in lawful wedlock.¹⁰³

The 2002 UPA and 2008 UPC provide for parentage of a child born to unwed parents. But only the UPC's definition provides for recognition of illegitimate children of same-sex and single parents.¹⁰⁴

VI. Social Security and Other Federal Benefit Programs

Much of the case law related to ART has arisen in the area of Social Security survivor benefits, veteran's benefits and other entitlement programs.¹⁰⁵ Most of these cases turn on the intestacy law of the state in which the decedent last resided and whether a child is a "dependent."¹⁰⁶

ART has added a new wrinkle in how state law is applied. In *Capato*, Mrs. Capato was unable to demonstrate that her twins were family members or dependent on their genetic father, who predeceased them, under either Florida state intestacy law or the statutory eligibility standards. But the court acknowledged that had a different state's intestacy law been applied, the results could have been different.¹⁰⁷

Depending upon the applicable state statute, eligibility for survivor benefits must be established by demonstrating that the insured individual "acknowledged in writing that the applicant is his or her son or daughter," "had been decreed by a court to be the mother or father of the applicant," or "had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter."¹⁰⁸

¹⁰³ RCW 11.04.080, repealed and replaced by RCW 11.04.081 (1975) providing that the treatment of the parent-child relationship shall not depend upon whether the parents have been married, for purposes of inheritance.

¹⁰⁴ UPC §2-120; UPA §704.

¹⁰⁵ Fruchtman at 315.

¹⁰⁶ *Id.* See Joslin for an in-depth discussion concerning the historical development of federal benefit programs, qualifications and how they are applied in light of ART. See also Ronald R. Volkmer, *Posthumous Conception Begets Another Social Security Dispute*, 40 EPTL 38 (Jan. 2013).

¹⁰⁷ The Court specifically referred to the intestacy statutes of California, Colorado, Iowa, Louisiana, North Dakota, and the UPC.

¹⁰⁸ 42 U.S.C. §416(h)(3)(C) (2000); Social Security Act §216(h)(2)(A), 42 U.S.C. §416(h)(2)(A) (2006). However, stepchildren and adopted children, neither of whom is biologically related, are specifically included (continued . . .)

The Supreme Court has noted that the purpose of providing survivor benefits is to protect children from a loss of support resulting from the death of a parent.¹⁰⁹ Accordingly, the Social Security Act authorizes disbursement of survivor benefits for children who were dependent on a deceased worker before his death.¹¹⁰

A child conceived and born after a parent's death cannot rely solely on a genetic relationship with a deceased parent to qualify for Social Security survivor benefits.¹¹¹ To be eligible, an applicant must demonstrate that he or she is the "child" of the deceased wage earner¹¹² and was dependent on that person at the time of that person's death.¹¹³

Military survivor benefits have similar eligibility requirements to Social Security. However, postmortem reproduction is not specifically addressed by the military, even though banking genetic material prior to deployment is a common practice.¹¹⁴

VII. Advising Clients

For many planners, just introducing the topic of ART into the conversation is going to be challenging. Once the topic has been broached with a client, additional issues may become important to discuss. A few that the planner may want to discuss with a client include:¹¹⁵

(i) Who the parties wish to own the reproductive matter after a donor's death (and if ownership is contested how is the bill for continued storage to be paid while the issue is resolved).

There is currently no consensus as to whether genetic material is property in the traditional sense. Traditionally, property can be possessed and used, others can be excluded from it and it can be transferred. The traditional forms of ownership are difficult to apply to genetic material:¹¹⁶ Tenancy in common provides for undivided interests that are freely alienable, devisable and inheritable with equal rights of possession and the ability to partition. Joint

(. . . continued)

by the Social Security Act, beginning in 1939. Social Security Act Amendments of 1939, ch. 666, §202(4), 53 Stat. §1360, §1365 (codified as amended at 42 U.S.C. §416(3) (2006)).

¹⁰⁹ *Mathews v. Lucas*, 427 U.S. 495, 507 (1976).

¹¹⁰ 42 U.S.C. §402(d).

¹¹¹ 132 S. Ct. 2021.

¹¹² 42 U.S.C. §§402(d)(1), (2).

¹¹³ 42 U.S.C. §402(d)(1)(C)(ii).

¹¹⁴ Fruchtmann at 316.

¹¹⁵ David Shayne & Sarah S. Butters, *The Kids Are Fine, but Who Are the Parents*, Wealth Management.com (Nov. 6, 2012), available at www.wealthmanagement.com/estate-planning/kids-are-fine-who-are-parents.

¹¹⁶ Bridget M. Fuselier, *The Pre-embryo in Probate: Property, Person, or Something Else?*, 24 Prob. & Prop. 31 (Sept./Oct. 2010).

tenancy is similar to tenancy in common except that the property passes to the survivor upon the death of one owner, and it allows for a right of severance. Tenancy by the entirety is a form of joint tenancy allowed to spouses in some states. Washington treats genetic material as property, subject to any enforceable contracts the parties may have entered into with regard to that property.¹¹⁷

One option to couples entering into a contract involving genetic material is tenancy by the entireties modified by including a non-severable right of ownership, no right to partition, no right to transfer absent an agreement of both owners of the property, and no right to devise or inherit the property at the death of either party.¹¹⁸ While not a perfect solution, this proposal would be helpful to couples who later find themselves in the position of deciding how to determine ownership of genetic material, typically in a dissolution of their relationship.

(ii) Whether the donor will maintain control of reproductive matter by contract or whether it is personal property that can be disposed of by will or trust. This may be controlled by state law.

(iii) If genetic material is received from a donor, the parties should agree in writing that the donor will not have any parental rights and will agree, if necessary, to having any parental rights terminated (which may not be binding, but does memorialize the intent of the parties at the time of the agreement).

(iv) Whether the donor of the reproductive matter contemplated or consented to postmortem use of that matter.

(v) Whether the testator would like to make a distinction between posthumously conceived children and children who are the product of eggs that were implanted before death.

(vi) Whether marital status of parents at the time of death is an important factor to the testator.

(vii) When the class closes. How long of a period will the client allow to elapse between the birth, following the date of death of a testator, or the date of distribution from a trust.

(viii) Whether gifts to adopted descendants should be limited to descendants adopted by a certain age. The default rule is that there is no age cutoff. Some testators wish to limit inheritance rights to a beneficiary who is adopted by a certain age. Some drafters take the approach that the age of the adopted person be determined at the time of commencing the court proceeding for adoption, not the age when the adoption becomes effective.

(ix) How clients obtained parental status; and, if they are a couple, whether both are listed on the birth certificate. Did they both adopt, did one complete a second-parent adoption, or did

¹¹⁷ *Litowitz v. Litowitz*, 146 Wn. 2d 514, 530, 48 P.3d 261, 268 (2002), *cert. den.*, 537 U.S. 1191 (2003).

¹¹⁸ *Id.* at 33.

they obtain an order of parentage?

(x) For attorneys who use a questionnaire to gather information from clients, a form of the following is recommended, in order to capture information that clients may not feel comfortable discussing face to face:¹¹⁹

- (a) Have you donated or do you intend to donate reproductive material for the purpose of artificial reproductive technology?
- (b) If yes, (1) Have you entered into a written agreement regarding the disposition of such material in the event of your death, divorce or disability? (2) For what purpose was such donation made?
- (c) Upon your death, do you wish for your cryopreserved material to be destroyed? If not, who do you wish to take control of that material? What do you authorize that person to do with that material? Is this wish specified in a written agreement?
- (d) Do you authorize your genetic material to be used posthumously to conceive a child?

VIII. Drafting Definitions

Basic estate planning documents should define when a parent-child relationship exists not just by natural childbirth but when any form of ART has been used. It is essential that a testator or grantor carefully define who his or her immediate family is. If the definition of family eligible to inherit is different from the definition of immediate family, the document should also define who will be treated as an eligible beneficiary. It is incumbent upon the drafter to ask the right questions to elicit this information (see questions above).

The definition of “parent” and “child” should be carefully considered, especially in an age when science has made those definitions ambiguous. It may be important to define “children” and “descendants” to include children of a partner who are neither biologically related nor adopted, but whom the testator intends to provide for. It should also be kept in mind that anti-lapse statutes may not protect descendants of a predeceased child of a partner.¹²⁰ Furthermore, a client may still want to provide for children of a partner, even if the relationship with the partner has ended.

Keep in mind that definitions may apply immediately at the death of the testator. But they may also be construed years later (until the applicable rule against perpetuities, if one applies,

¹¹⁹ Adapted from Sean W. Kelley, *A Seminal Matter: Assisted Reproductive Technology and Its Effects on Florida Estate and Trust Lawyers*, 47th Annual U. Miami Heckerling Inst. on Est. Pl. Special Session 1-D (2013 Univ. of Miami).

¹²⁰ See, e.g., RCW 11.12.120.

has run), for example, when determining who is an eligible appointee under a power of appointment under §2041 or §2514 of the Code.

A. Spouse

My Spouse. The term “my spouse” means [NAME], if my marriage has not been terminated and we are living together as a married couple at the time of my death (or, with regard to any earlier distribution pursuant to the provisions of this Agreement). For this purpose, my marriage shall be deemed to have been terminated upon the entry of a decree of divorce or the entry of a legal separation, or annulment recognized under the laws of the jurisdiction in which either or both of us is domiciled at the time of my death or such other jurisdiction as may be legally authorized to terminate such marriage (or, with regard to any earlier distribution pursuant to the provisions of this Agreement). In addition, we shall be deemed not to be living together as married couple if we have been living separate and apart for a period of three (3) continuous months at the time of my death (or, with regard to any earlier distribution pursuant to the provisions of this Agreement). Notwithstanding any provision of the immediately preceding sentence of this Paragraph to the contrary, we shall not be deemed not to be living together as a married couple at the time of my death if we are living separately because of the ill health of one or both of us or due to conditions of employment, education, vacation and/or if either or both of us is residing in a nursing home. If at the time of my death (or, with regard to any earlier distribution pursuant to the provisions of this Agreement), my marriage to [NAME] has been terminated and/or we are not then living together as a married couple, [NAME] shall be deemed to have predeceased me for all purposes of this Agreement, including the provisions regarding trustees. [The term “spouse” **shall/shall not** include a spouse by common law marriage or ceremonial marriage.]

B. Partner

Partner. The term “Partner” shall mean _____, unless and until one of the following circumstances occurs:

A written notice of the termination of our relationship has been provided by one of us to the other.

We are no longer residing together and either party has no intention of resuming the committed intimate relationship.

If we file for legal domestic partnership, civil union, or a similar legal status, and either of us files for dissolution, termination or annulment of such legal relationship in a state that recognizes such legal relationship.

_____ and I marry, and subsequently either of us files for

dissolution, termination or annulment of the marriage in a state that recognizes such marriage.

_____ and I reside in a state that does not recognize a domestic partnership registration, civil union, a similar legal status, or a subsequent marriage of _____ and me, and I deliver to the Personal Representative/Trustee a signed, written instrument declaring that _____ is not my Life Partner.

Either party has filed a Petition for Dissolution of Relationship, Petition to Enforce Contract or Petition to Dissolve a Registered Domestic Partnership or any like lawsuit.

If any of the foregoing occurs, _____ shall be treated as if **he/she** predeceased me.

C. Spouse of Descendant

For purposes of this trust instrument, the term “spouse” and “surviving spouse” when used with reference to a descendant of mine means a person who is lawfully married to a descendant of mine or who was lawfully married to such descendant at the time such descendant died, regardless of whether he or she subsequently remarried; provided that the marriage was valid under the law of the jurisdiction in which the ceremony took place or in the jurisdiction in which the appointee resides, or a person joined with the descendant in a legally recognized civil union or domestic partnerships or like relationship valid under the law of the **jurisdiction in which the relationship was legalized or the jurisdiction of residence, [depending on the client]** and any person joined in a relationship with a descendant which relationship is **[and has been for at least X continuous years prior to the effective date of the bequest or appointment or from which children were born]** but without the benefit of any of the aforementioned legal recognition. A spouse may be of the opposite or same-sex. Two persons of the same-sex or opposite-sex shall be considered “lawfully married” for purposes of this definition, if the marriage is legally entered into and recognized as valid in the jurisdiction in which the marriage occurred, even though the purported marriage may later be found invalid. **[The term “spouse” shall/shall not include a spouse by common law marriage or ceremonial marriage.]** When confronting laws that restrict marriage to persons of the opposite sex, the Trustee shall resolve all matters under this **Will/Trust Agreement** consistent with my intention to treat all spouses, including spouses of the same-sex, with equality. **[The Trustee may take any action the Trustee deems appropriate to accomplish this goal, including but not limited to making equitable adjustments among the beneficiaries, moving the trust situs, and changing governing law after a change in situs.]**

D. Definition of Child Before Using ART

The following is a provision that could be used in a will to identify the testator's family, where a couple is likely or about to conceive children as a result of ART:

My partner, _____, (sometimes referred to hereafter as "____"), and I are planning to have children through assisted reproductive technology ("ART") and/or a gestational carrier arrangement. ____ and I agree, and both intend, that any child conceived by, born to (through ART), or adopted by either or both of us at any future time shall be deemed for all purposes to be the child of both of us from the moment of conception, regardless of whether the child has yet been born, or whether we are both named as parents on the child's birth certificate, or whether any legal proceeding has been commenced or completed to have us both recognized as the legal co-parents of said child. For purposes of this instrument, any reference to "my child," "my children" or "child of mine" shall include any biological or adopted child of mine or of ____ or of both of us, even while such child is *in utero*, and all children born as a result of an IVF embryo transfer or gestational carrier arrangement we may have entered into during my lifetime.

E. Descendants - Generally

For purposes of determining who is a child, grandchild or descendant of any person:¹²¹

1. Descendants. The term "descendants" means all individuals of all generations who are descended from the ancestor referred to provided that the individual in each degree in the line of descent is a child, as defined below, of the ancestor in the prior degree.
2. Child. The term "child" means a descendant in the first degree of the parent designated; but such term does not include a stepchild, a foster child, a grandchild or any more remote descendant, unless such individual is adopted prior to the age of _____.
3. Adoption. An adopted individual is the child of the adopting parents (and not of the birth parents) only if the individual was under the age of _____ at the date of adoption.

(See Section H below for alternative definitions of adopted individuals.)

F. Child of ART

¹²¹ My appreciation to Henry Grix, Dickinson Wright PLLC, Troy, Michigan, and Bruce Ross, Holland & Knight LLP, for allowing me to adapt their materials.

(Broad Definition)

A child born as a result of assisted conception shall be considered a child of the individual whose status as such child's parent determines whether such child becomes a beneficiary under this instrument. An individual shall be considered the natural parent of a child:

1. Children of Genetic Father in Marriage or Substantially Similar Relationship With the Genetic Mother. If such child was conceived using (i) such individual's ovum or sperm and the ovum or sperm of such individual's spouse, registered domestic partner, or partner under a civil union (hereinafter "spouse"), (ii) such individual's ovum or sperm and the ovum or sperm of a donor other than such individual's spouse, (ii) the ovum or sperm of a donor and the ovum or sperm of such individual's spouse; or the ovum and sperm of a donor; regardless of whether such ovum was fertilized *in utero*; and (iv) the fetus was carried to term by a gestational carrier, such individual or such individual's spouse;
 - (a) Regardless of whether such child has been legally adopted by such individual if such adoption is required under applicable law at the time of such child's birth to establish that such individual is such child's parent; and
 - (b) Regardless of whether any legal proceeding has been commenced or completed to have the individual recognized as the legal parent of said child; provided that such intent can be proven by a preponderance of the evidence. (THIS PARAGRAPH IS VERY BROAD, MAY NOT BE ENFORCEABLE, AND SHOULD BE CAREFULLY CONSIDERED.)
2. No Inheritance Rights of Surrogate or Gestational Carrier. Notwithstanding the foregoing, any individual who may be considered a natural parent of a child solely because of having donated ovum or sperm or having acted as a gestational carrier *and who would not otherwise be a beneficiary under this instrument*, and any other individual who is related to such individual by consanguinity or affinity, shall not be a beneficiary under this instrument.
3. Children in Gestation on the Parent's Death. A genetic child of a parent who was deceased at the time of such individual's conception shall be deemed to be a descendant of such parent only if such

individual was born within the Three Hundred (300) day¹²² [insert different length of time] period after such parent's death; [and such deceased parent would have had legal rights and obligations as a parent of such child upon his or her birth under local law].

4. Children Not in Gestation on the Parent's Death. A genetic child of a parent who was deceased at the time of such individual's conception shall be deemed to be a descendant of such parent only if such parent gave permission for the use of his or her genetic material to the surviving parent in connection with the conception of such individual by such parents in an instrument that was signed by the deceased parent; and such deceased parent would have had legal rights and obligations as a parent of such child upon his or her birth under local law.
5. Child of a Marriage or Substantially Similar Relationship Where One Spouse or Party Is Not a Genetic Parent. In the absence of an order of paternity, if a person is a child of a biological parent who was married when the child was conceived with someone who is not a biological parent of that person, the child will be treated as the child of the biological parent's spouse if the spouse acknowledged intent to become a parent in a written instrument signed by the spouse that was not revoked by a subsequently dated written instrument signed by that spouse before that person was in gestation.

[This provision can also be used to provide for the parentage of one or both members of a same-sex marriage, civil union or domestic partnership.]

(Narrower Definition)

1. Child Not Yet in Gestation on Unmarried Parent's Date of Death. Whether or not married, the biological parent of a person who was born after that biological parent's death and who was not in gestation on that biological parent's date of death will not be treated as the parent of that person, and that person will not be treated as the child of that biological parent, unless that biological parent acknowledged intent in a written instrument signed by that biological parent to become a parent through the use of genetic material that was not revoked by a subsequently dated written instrument signed by that biological parent, and the person was born within three years after that biological parent's date of death. The provisions of this clause do not apply to a mother who is both the biological and birth mother of that

¹²² Pursuant to RCW 26.26.116, Washington's statute regarding the presumption of paternity in the context of marriage.

person.

2. Definition Dependent Upon Intended Parents Being Married.

- (a) Child Conceived by Married Parents Using Artificial Reproductive Technology. An individual who is conceived by assisted reproductive technology shall be regarded as the child of his or her birth mother, except as otherwise modified herein, and a child of the man to whom she is (or “was” in the case of a widow) married, provided:
- i. If the man is living when the child is born, he has consented, or is deemed to have consented, to the use of such assisted reproductive technology to conceive a child with the mother (and if the man is deceased when the child is born, such consent shall be presumed); and
 - ii. If the man is living when the child is born, he claims the child as his own, or, if the man is deceased when the child is born, the child is conceived within 36 months of the date of his death and born within 45 months of the date of his death.

G. Definition of Descendant Where the Default Rule May Cause a Descendant Not to Be Otherwise Recognized

The term “descendants” shall mean all naturally born or legally adopted descendants of the person indicated. For the purpose of this instrument, a second parent adoption or joint adoption by a same-sex couple, or parent/child status granted by state law to children born during a domestic partnership, civil union, or marriage, shall be considered a valid, legally effective parent/child relationship. For the purpose of this instrument, all children or descendants deemed children or descendants of the person indicated by a civil union, domestic partner registration or marriage entered into by the person indicated are children or descendants for the purpose of this instrument.

H. Adoption

The following are provisions that could be used to define whether a person who has been adopted is an eligible beneficiary under the dispositive instrument.

1. Definition of Adopted Individual.

OPTIONAL CLAUSES: I direct that in the interpretation of this instrument:

- (a) A person adopted prior to having attained age _____ shall have the same rights and privileges, and be treated for all

purposes, under the terms of this instrument as a child of the adopting parent or parents.

- (b) An adopted individual is not a “child” for purposes of this instrument if a court terminates the legal parent-child relationship while the parent is alive.
- (c) An individual who is subsequently adopted (while under the age of _____) by the spouse of a birth parent or after the death of a birth parent is also the child of either birth parent unless the decree of adoption terminates such birth parent’s rights or the adopting parent substitutes for the birth parent under applicable state law.
- (d) If a parent dies and the legal relationship with the parent’s child had not been terminated before the parent’s death, the child and the child’s descendants will still be regarded as descendants of the deceased parent, even if another parent later adopts the child.
- (e) For the purpose of this instrument, an adoption, as described in Section (a) above, shall include a second-parent adoption or joint adoption by a same-sex couple, or parent/child status granted by state law to children born during a domestic partnership, civil union, or marriage, and shall be considered a valid, legally effective parent/child relationship;
- (f) An adoption begun before the adopting parent’s death, which is legally finalized [by the deceased person’s spouse] [within two years after such death], shall be deemed accomplished prior to the death; [(provided the adopted child is under the age of eighteen (18) at the date of adoption), shall be deemed accomplished prior to the death].
- (g) An adoption shall not be considered lawful and effective until a final order, decree, or judgment is entered by a court of competent jurisdiction in an adoption proceeding.
- (h) No individual shall be considered the child or descendant of another person due to [*de facto* parentage,] equitable adoption, adoption by estoppel, or any other similar rule or application of the law.

2. Ordering Rules Where Adoption Results in Multiple Relationships.

- (a) Option 1 (relationship resulting in largest share trumps):

If, by reason of adoption, a person or his or her descendants become related to

another through more than one line of relationship, he, she, or they shall be entitled to only one share of any gift made to the issue or descendants of that other person, the share to be based on the line of relationship that entitles him, her, or them to the largest share.

(b) Option 2 (natural relationship trumps adoptive relationship):

If any person who has been adopted would appear, under the terms of this instrument, to be entitled to benefits as a result of both his or her (i) natural relationship and (ii) adoptive relationship, he or she shall be entitled to receive only those benefits which result from his or her natural relationship and none that would otherwise result from his or her adoptive relationship.

I. Recognition Under Equitable Principles

1. This provision does not permit the recognition of a descendant applying equitable principles.

No individual shall be considered the child or descendant of another person due to equitable adoption, adoption by estoppel, or any other similar rule or application of the law.

2. This is a broader variation of the previous provision.

An individual designated as a foster child, stepchild, equitably adopted child, or heir at law (as permitted by the laws of some states) shall not, by reason of such designation, gain any rights, powers or benefits hereunder.

J. Elimination of Surrogate Rights

For those who are concerned that a gestational carrier could obtain rights as a parent, the following provision could be used to assuage those concerns:

1. Gestational Carrier Not a Parent. An individual whose birth mother served as a gestational mother for another person shall not be a descendant of the gestational mother or her spouse.
2. Elimination of Donor or Surrogate Rights. Any donor or surrogate who becomes the natural parent of any issue of mine solely by reason of ovum or sperm donation or by surrogate motherhood shall be excluded as a taker hereunder, whether claiming by or through the issue of mine resulting from such donation or such surrogacy.

K. Limited Recognition of Illegitimate Heirs

For those clients who insist on recognizing “legitimate” heirs, the following might be used, which allows for the recognition of some children who would not otherwise be considered “legitimate.” For the client who only wants to recognize heirs born of married parents, this

provision would need to be modified:

1. Version 1:

Allows multiple avenues to overcome marriage requirement.

- (a) Child Born Out of Wedlock. An individual born out of wedlock shall be deemed to be a child of the female birth parent unless a decree of adoption terminates such female birth parent's parental rights.
 - i. An individual born out of wedlock shall, in the absence of an order of paternity, be deemed to be a child of the male birth parent only if the individual lived for a significant time during minority as a member of the household of such male birth parent or the household of that male birth parent's parent, brother, sister or the surviving spouse of such male birth parent, unless a decree of adoption terminates such male birth parent's parental rights.
 - ii. Whether an individual has "lived for a significant time during minority as a member of the household" shall be determined by Trustee, in Trustee's sole discretion, and Trustee's exercise of discretion shall not be subject to challenge except for abuse of discretion.
- (b) For the purposes of this Paragraph, the term "wedlock" shall include civil union, domestic partner registration or marriage recognized in the jurisdiction where it was entered into.
- (c) A person who is not otherwise treated as the child of that person's biological father under the preceding clauses will be treated as the child of the biological father only if: (i) the biological father acknowledged parentage of the person at any time after conception in a written instrument signed by the biological father; (ii) the biological father openly raised and acknowledged the person as his child; or (iii) parentage was established by adjudication.

2. Version 2:

This is a very narrow definition and should be considered carefully. It eliminates as an heir even a child born of a marriage intended and mistakenly thought to be valid:

A person shall be considered to be the "legitimate" child of his or her mother and father only if his or her father was

married to his or her mother at the time of his or her conception or birth.

L. Class Gifts

To include postmortem beneficiaries a trust would need to include a waiting period during which its beneficiaries could be determined. The waiting period would only be triggered if (i) the decedent left cryopreserved reproductive material; (ii) the decedent left written consent to use the material; and (iii) the surviving spouse or partner (depending upon applicable state law) has notified the trustee that he or she intends to use the material.¹²³

The longer the class remains open, the longer a probate administration must remain open. So the interests of the parties must be considered when setting a time limit. California's waiting period is 24 months. The waiting period under the UPC is 36 months. It is generally thought that the waiting period should allow grieving time prior to conception. Some believe that the time should be long enough to allow for the conception of siblings.

Where there is a longer waiting period, the trustee should be able to make distributions of at least income to the beneficiaries in the class.¹²⁴

1. Time Class Determined.

- (a) Class includes only living individuals at the time of death or distribution.

When a gift is made herein to the issue or descendants of a person, the class of beneficiaries shall be determined at the time of my death if the gift is immediate, and, if postponed, at the time the gift is to take effect in possession or enjoyment. Language indicating that the issue or descendants are to be alive, or living at the time the gift is to be distributed or become possessory, is intended to reinforce, and not to contradict or limit, this provision.

- (b) Class includes ART children of grantor.

"Issue" of grantor and grantor's spouse shall include any issue produced before grantor's death by donor artificial insemination, donor egg, in vitro fertilization, or other form of surrogate parenthood, whether or not such child was legally adopted by grantor before his/her death.

- (c) Class includes ART children of third parties.

"Issue" claiming through _____ shall include issue produced by him/her through donor artificial insemination, donor egg, in vitro fertilization, or other form of surrogate

¹²³ Kristine S. Knaplund, *Postmortem Conceptions and Its Effects on Estate Planning*, WSBA 56th Annual Estate Planning Seminar, Seattle, Washington (Nov. 2010).

¹²⁴ *Id.*

parenthood, whether or not such child was legally adopted by _____ before his death.

(d) Class may be reopened at a later date.

The following allows for the class to be reopened at a certain point and shares to be reallocated among the then living members of the class, who may not have been alive when the class was initially established:

Upon the death of the second of the grantors to die, the trustee shall combine all the shares created pursuant to Article I of this trust agreement as then constituted with all transfers to the trust occasioned by such grantor's death (including but not limited to all proceeds of any life insurance policies payable to the trustee), and shall divide such property into as many equal shares as are necessary to enable one share to be set apart for each child of the grantors who is then living and one share to be set apart for each child of the grantors who is not then living but who has issue then living. Any share so set apart for a deceased child of the grantors shall be set aside and distributed to that deceased child's then living issue, in per stirpes shares.

(e) Class may include children in gestation.

A child who is born after the death of a parent shall be included in a gift to the deceased parent's surviving child or children if the child survives birth by _____ days and provided:

- i. the child was conceived during both parents' lifetimes;
or
- ii. if the child was conceived posthumously through the use of assisted reproductive technology, the child meets the criteria set forth in paragraph (a), above.

(This could be modified so that individual need only be in gestation on date of death of testator or grantor.)

2. Provision to Keep the Class of Beneficiaries Open.

The following is a provision that could be used to allow an additional three-year waiting period for additional children of a deceased biological parent to be born and treated as descendants for purposes of the trust instrument. If one child is born in the three-year window, then the window is extended to six years to allow further siblings to be born.

Three-Year Waiting Period Before Termination of Interests

The provisions of this clause will be applicable to a trust created under this instrument on the first date after the death of the child for whom this trust is established when there is no then living descendant of that child, and will operate to extend the time for termination of the beneficial interests of the persons for whom such trust is held, but

only if the following conditions are met.

- A. A person eligible to receive distributions from that trust must give written notice to the Trustee during that person's lifetime in a written instrument signed by that person that (i) states the person's intent to become a parent through the use of genetic material, and (ii) identifies one or more persons to receive the notice under Section (B) from the Trustee after that person's death. A person who gives written notice to the Trustee of his or her intent to become a parent can revoke that intent, or can designate other persons to receive the notice under Section (B), in a subsequently dated written instrument signed by him or her that is delivered to the Trustee during his or her lifetime.
- B. If a beneficiary of a trust created under this instrument has given the Trustee written notice that meets the requirements of Section (A), the Trustee must give written notice within one month after the first date when there are no then living persons who are eligible to receive distributions from the trust under that clause to each person who was designated to receive it that he or she has a period of six months from the date of receipt of the notice to provide the Trustee with the following:
 - 1. evidence from a medical doctor or other licensed health care provider, clinic, institution, or authority confirming the existence of the genetic material (or one or more embryos produced with that genetic material) provided by the deceased beneficiary; and
 - 2. a written statement of intention signed by the person to whom the notice was given under penalties of perjury and in the presence of two witnesses that he or she intends to cause a biological child of the deceased beneficiary to be born within the period prescribed in clause ____ [clause concerning the number of days after a death a child is otherwise required to be born to be considered a "child"] above.
- C. The provisions of Section (A) will not be applicable with respect to any child or children conceived with genetic material (or with respect to any descendants of any such child or children) provided by a beneficiary of a trust created hereunder, and no such child or descendant of any such child conceived with that genetic material shall become a beneficiary of a trust created under this instrument if:
 - 1. the beneficiary who provided the genetic material fails to give the Trustee written notice complying with the requirements of Section (A), or
 - 2. the person designated to receive the notice under Section (B) fails to comply with the requirements under that clause on or before the expiration of six months from the date of receipt of the notice from the Trustee under Section (B).

If a person born within three years after a biological parent's date of death is treated as a child of that biological parent under the provisions of Section (A), each person who is a child of that biological parent born within six years after that biological parent's date of death will be treated as a child of that biological parent if all of the other requirements and conditions of clause _____ [clause concerning the number of days after a death a child is otherwise required to be born to be considered a "child"] are satisfied.

The provisions of Section (A) shall apply separately with respect to each member of a class of descendants for whom a trust is created hereunder. No child nor any descendant of a child who is conceived as a result of the use of genetic material and who is excluded as a member of the class of descendants eligible to receive distributions from a trust under Section (A) because of the failure to comply with the provisions of Section (A) shall ever become eligible to receive distributions even if there are other members of that class of descendants who are eligible to receive distributions because of compliance with the provisions of Section (A).

IX. Drafting Powers of Attorney

One may want to add a provision to a power of attorney allowing the attorney-in-fact to take any and all action necessary pertaining to any genetic material the principal may have stored, including its implantation or termination.

On the other hand, a client may want to specifically prohibit an attorney-in-fact from having any power over this material. The principal may also wish to limit the attorney-in-fact's power with respect to destruction of genetic material, or direct them to do so.

Note that the effectiveness of these suggestions is not tested and may not be enforceable at this time.

X. Dissolution

If a couple terminate their relationship, and they have not done a second-parent adoption or completed a parentage proceeding for the non-biological parent, it is important that the dissolution decree include a finding of parentage. If not completed previously, a parentage action should be initiated with the dissolution so that it can be established regardless of the parents' legal relationship. As discussed above, without a parent-child relationship, a child is likely to be unable to obtain access to entitlement programs based on parentage.

XI. Conclusion

Preservation and later use of genetic material has become a common occurrence. The science of reproduction is advancing faster than the laws governing it. Furthermore, reliance on law enacted prior to medical advances in this field has created an inconsistent patchwork of legal results.

Until legislatures can enact consistent and predictable schemes, it is incumbent upon the estate planning attorney to be aware of potential contingencies. It is not likely that clients will bring up ART and its related issues with their estate planners. Thus, we need to take the first step, and ask questions that elicit the information we need to be able to draft documents

that, to the best of our abilities, deal with each client's particular situation.

EXHIBIT A
ISSUES THAT SHOULD BE CONTEMPLATED IN A SPERM DONATION CONSENT
FORM¹²⁵

This list is provided by The Family Formation Law Center for informational purposes only; it is not intended to be used as a legal guide and should not be relied upon as legal advice. The topics listed below are not intended to be a comprehensive list of issues that may arise in an agreement between a sperm donor and the intended parent(s) or any other interested parties.

- Name of party(ies) who will become inseminated with the donor sperm?
- Is the party(ies) who will be inseminated with the donor sperm an intended parent?
- Will the sperm be used to conceive a child by inseminating a surrogate?
- Who will be the intended parent(s) of the child(ren) conceived with the donor sperm?
- If there is more than one intended parent, what is the relationship between the intended parents? Married? Registered domestic partners?
 - If there is no legal relationship between the intended parents, will the non-carrying parent legally adopt the child(ren) conceived with use of the donor sperm?
 - If not, will there be a written agreement between the intended parents regarding rights, obligations and limitations?
 - Will there be a separate, written agreement between the intended parents regarding parental roles, rights and responsibilities regardless of the legal relationship between the intended parents?
- What, if any, estate planning has been considered and/or implemented to protect parental rights, custody and assets?
- Who will donate the sperm? Is it an anonymous donor? A known donor?
 - If working with a known donor, what is the relationship between the donor and the intended parent(s)?
 - Was there an existing relationship prior to the agreement to donate sperm? If so, how long have the parties known each other?
 - Has the donor donated sperm to any other intended parent(s)?
 - If so, have the parents registered their information with a sibling registry?
 - Will you, as the intended parent(s), register with a sibling registry?
 - Do the sperm donor and the intended parent(s) have mutual friends or share a

¹²⁵ Adapted from The Family Formation Law Center, available at <http://www.cafamilyformationlaw.com/conversation-checklist-for-spe/>.

social circle?

- If so, have the parties discussed confidentiality?
- What level of confidentiality does each of the parties desire?
- How will this be addressed?
- Will there be a formal confidentiality agreement?
- What is the extent of the conversations that have taken place between the sperm donor and the intended parent(s)?
- The American Society of Reproductive Medicine guidelines state that to provide maximum protection to the intended parent(s) and child(ren), the sperm must be frozen and quarantined for at least 180 days before the intended mother's eggs are inseminated.¹²⁶ The parties may agree to waive this guideline and instead use the exception to the guidelines for known sperm donors, which do not require a six-month quarantine period.
 - Has this been discussed? What is the agreed upon quarantine period?
- At what point will the donor relinquish control over the donor sperm?
 - At the point of deposit with a sperm bank or fertility clinic?
 - At the point of insemination?
 - It is critical for the parties to address this question to avoid any disagreements regarding the disposition of the fetus should the intended mother experience difficulties with the pregnancy.
- Do all parties to this agreement understand that the applicable state law regarding children conceived by sperm donation from a known donor may not provide clear guidelines regarding support and custody of a child, and therefore, each party agrees to cooperate to complete all documents and/or actions that may be legally necessary or advisable to establish the intended parent(s) as the legal parent(s) of any child conceived as a result of this arrangement?
- Does the intended sperm donor agree not to contest the intended parent's(s') right to be the sole legal parent(s) of the child?
- Does the intended parent(s) agree not to seek child support or financial obligations for the child from the sperm donor?
- Does the sperm donor agree not to seek custody rights to the child?
 - Does the sperm donor agree that if he seeks any rights to the child, whether financial, legal, custodial or otherwise, he is doing so in violation of the terms of

¹²⁶ Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, *Recommendations for gamete and embryo donation A committee opinion*, 99 Fertility and Sterility 47 (Jan. 2013).

the proposed agreement between sperm donor and intended parent(s) and therefore all court costs, legal fees and expenses of all parties shall be his responsibility?

- Is the sperm donor free from serious medical and/or psychological problems?
- Does the intended parent(s) anticipate any future involvement with child rearing from the donor? If so, what type of relationship will the donor have with the child(ren)?
- What does the intended parent(s) expect from the donor?
- What does the donor expect of the intended parent(s)?
- What financial compensation has been agreed upon?
 - How was this agreement reached?
 - Are all parties in agreement that this will be the final and complete compensation and there will be no future compensation?
- What does the intended parent(s) want the donor to disclose to his friends and family?
- What does the donor want to disclose to his friends and family?
 - If there are differences of opinion regarding what information will be disclosed, how will this be handled?
- What kind of relationship does the intended parent(s) have with the donor now, and do the parties foresee a relationship in the future? If so, what will it look like?
- What information about the donor will be disclosed to the child(ren)? How? When?
- Will the donor cooperate if legal proceedings arise regarding establishing parental rights?
- If the sperm donor plans to donate sperm again, will he register with a donor registry?
- Will the intended parent(s) register with a sibling registry so that the child(ren) conceived using donor sperm will have access to possible siblings?
- Why is the sperm donor interested in donating?
- Has there been a formal background investigation?
 - If so, are there any red flags that need to be discussed with the donor or a professional?
- Has there been an informal background investigation?
 - If so, what has been discovered? What has been verified?
 - Is there any information that needs to be further investigated either formally or informally?
- Have there been any discrepancies in the information given by the donor and the information discovered through a formal or informal background investigation?
- Dispute Resolution. Mediation or arbitration rather than litigation?

EXHIBIT B
MISCELLANEOUS GESTATIONAL CARRIER CONTRACT PROVISIONS TO
CONSIDER:

1. Surrogate's representation that she is capable of gestating and birthing children.
2. Surrogate's representation as to mental fitness.
3. Consent by Surrogate's spouse and acknowledgement that he will freely surrender custody of the child and will do all that is necessary and required to rebut the presumption of paternity.
4. Agreement to the maximum number of attempts to achieve pregnancy and termination of the Contract if pregnancy has not occurred within a reasonable time.
5. Agreement between Surrogate, Wife and Husband regarding the legal and financial responsibilities if child is born with congenital abnormalities or other health issues.
6. Agreement by Surrogate's spouse or partner that he/she will not form or attempt to form a parent-child relationship with the child.
7. Agreement of Mother, Father and Surrogate:
 - a. to the assisted reproductive technology procedures involved with in vitro fertilization/artificial insemination/embryo transplantation.
 - b. regarding multiple births.
8. Agreement by Surrogate:
 - a. to provide all information readily available regarding Surrogate's family genetic and health history, history of mental illness, drug or alcohol abuse, and other information that could reasonably be anticipated to alter her health and the health or development of the child, including her personal medical and obstetrical records and the medical records of any of her children.
 - b. to provide details of the Surrogate's health insurance coverage and to keep health insurance coverage in full force and effect.
 - c. to refrain from smoking, drinking, and using illicit drugs during the pregnancy.
 - d. to follow a particular diet during pregnancy.
 - e. to allow testing of the fetus for genetic and congenital defects.
 - f. not to form or attempt to form parent-child relationship with the child and to terminate her parental rights upon the birth of the child.
9. Agreement regarding:
 - a. the financial terms of the arrangement (including Surrogate's attorney's fees for separate representation, reimbursement or payment for unreimbursed pregnancy related

expenses, medical expenses, psychological counseling expenses, payment for maternity wear, payment for lodging and other living expenses if the Surrogate relocates to be near the parent(s), payment of travel expenses and legal fees), including reimbursement or payment of expenses should the pregnancy not proceed to term.

g. any restrictions on Surrogate's activities during the pregnancy including sexual intercourse during the attempts to achieve a pregnancy or during the pregnancy.

c. Surrogate's disclosure of the child's sex to Mother and Father only upon Mother or Father's verbal request.

10. Agreement that Surrogate:

a. will submit to any psychological and/or medical testing requested by Mother and Father.

b. will obtain regular prenatal medical care, with/without Mother and Father in attendance.

c. will not terminate the pregnancy unless her own life is at risk.

11. Agreement that:

a. Mother and Father will/will not be present for the birth of the child.

b. Surrogate and her husband, if any, will have no claim to physical or legal custody of the child as a result of the surrogacy.

c. Mother and Father will have the sole and exclusive right to name the child.

d. it is in the best interests of the child that he/she be raised by Mother and Father.

e. Surrogate will consent and assist Mother and Father in obtaining a revised birth certificate naming Mother and Father as the parents of the child.

f. custody will be relinquished to Mother and Father as soon as possible after the birth.

g. Surrogate will provide immediate notice of onset of labor.

h. Mother and Father will be responsible for the medical care of the child immediately after birth, including but not limited to decisions to place child on life support.

12. Agreement as to:

a. termination of the pregnancy due to medical condition of the child.

b. whether Surrogate will have any contact with the child following the birth.

c. who will disclose to the child his or her genetic parentage/circumstances of birth.

d. legal ownership and disposition of reproductive materials (e.g., sperm, fertilized eggs) following termination of Contract.

e. limitation of medical expenses after birth of the child.

f. Surrogate's assumption of risks relating to pregnancy.

g. Surrogate's travel outside _____ state.

13. Confidentiality agreement.

EXHIBIT C
GESTATIONAL SURROGACY AGREEMENT

THIS AGREEMENT is made this ____ day of _____, ____ by and between _____ (hereinafter referred to as “Genetic Father and Genetic Mother” or collectively as “Genetic Parents”) and _____ (hereinafter referred to as “Embryo Carrier”). The Parties are aware that surrogate parenting remains a new and unsettled area of law and that this Agreement may be held unenforceable in whole or in part as against public policy.

I. Purpose and Intent. The sole purpose and intent of this Agreement is to provide a means for _____, Genetic Father, to fertilize in vitro an ovum from his wife _____, Genetic Mother, for transfer and implantation into _____, Embryo Carrier, who agrees to carry the ovum/embryo to term and relinquish custody of the child born pursuant to this Agreement to its Genetic Parents, _____.

II. Representations. _____ and _____ represent that they are a married couple, each over the age of 18 years, who desire to enter into this Agreement. _____ and _____ further represent that to the best of their knowledge they are respectively capable of producing semen and an ovum(s) of sufficient nature for in vitro fertilization and subsequent transfer into _____, Embryo Carrier, but make no representations as to _____’s ability or inability to conceive, carry to term or give birth to a child.

_____ represents that she is a married woman, over the age of 18 years, and that she desires to enter into this Agreement for the reasons stated above and not for herself to become the parent of any child conceived by _____ and _____ pursuant to this Agreement. _____ further represents that to the best of her knowledge she is capable of carrying an implanted ovum/embryo to term.

III. Selection of Physicians and Counselor.

A. Genetic Parents and Embryo Carrier will jointly select physician(s) to examine Embryo Carrier, order and review medical and blood tests for Genetic Parents, Embryo Carrier and Carrier’s Husband, and perform IVF procedures (the “Responsible Physician”). The parties will select a doctor in _____ to do the review and perform the IVF procedures.

B. The delivery doctor will be the Responsible Physician or Embryo Carrier’s regular OB-GYN, whichever the parties jointly select.

C. At any time that Genetic Parents are advised it is appropriate, Genetic Parents and Embryo Carrier will jointly select an infertility specialist to become the Responsible Doctor.

D. Genetic Parents and Embryo Carrier will jointly select a psychologist for testing before the IVF procedures and counseling/mediating during pregnancy. The parties have selected _____ (the “Responsible Counselor”) in _____, who is affiliated with _____.

IV. Physical Evaluations.

A. Embryo Carrier will have a medical examination, blood and other tests and psychological testing as determined by Genetic Parents and their advisors. _____ expressly waives the privilege of confidentiality and permits the release of any reports or information obtained as a result of said examination/testing to _____ and _____.

B. Embryo Carrier's Husband will have blood and sexually transmitted disease ("STD") tests as determined by the Responsible Physician. _____ expressly waives the privilege of confidentiality and permits the release of any reports or information obtained as a result of said examination/testing to _____ and _____.

C. Genetic Parents will have blood and STD tests as determined by the Responsible Physician. _____ expressly waives the privilege of confidentiality and permits the release of any reports or information obtained as a result of said examination/testing to _____ and _____.

V. Conditions.

All parties' obligations under this Agreement (other than the obligation of Genetic Parents to reimburse Embryo Carrier for expenses incurred) are conditioned on:

A. The approval of Genetic Parents and their advisors of results of Embryo Carrier's exams and tests.

B. The approval of Embryo Carrier and the Responsible Physician of results of Genetic Parents' STD tests.

VI. Medical Instructions.

A. _____ agrees to adhere to all medical instructions given to her, including abstention from sexual intercourse as directed by the IVF Physician. _____ agrees to follow a transfer and prenatal medical examination schedule set by the attending Physician.

B. Embryo Carrier will not smoke, drink alcoholic beverages or use illegal drugs, non-prescription medication or prescription medication without approval of the Responsible Physician.

C. Embryo Carrier will undergo prenatal medical exams as directed by the Responsible Physician, will submit to other medical tests, and will take only drugs and vitamins recommended or prescribed by the Responsible Physician.

D. Embryo Carrier will do everything reasonably appropriate for her good health and the good health of the fetus during pregnancy.

E. Embryo Carrier will not engage in any hazardous or inappropriate activity during the

pregnancy.

F. Embryo Carrier will not travel outside of _____ after second trimester of pregnancy, except in the event of extreme illness or death in the family (with doctor's approval).

VII. IVF Procedures. It is the parties' intention to do the following:

A. Try the number of cycles recommended by the Responsible Physician, but stop at any time that the physician recommends stopping.

B. Transfer a maximum of _____ embryos per cycle.

VIII. Early Termination of Agreement. Before Embryo Carrier becomes pregnant, the agreement may be terminated:

A. By Genetic Parents, if the Responsible Physician's opinion is that Embryo Carrier will not become pregnant within ____ cycles.

B. By Genetic Parents, if the Responsible Physician or counselor determines that Embryo Carrier is not a good candidate for carrying out this agreement.

C. By Genetic Parents or Embryo Carrier, if Embryo Carrier has not become pregnant after ____ cycles.

D. By Embryo Carrier, if the Responsible Physician determines that Genetic Parents are not good candidates for carrying out this agreement.

E. At the discretion of Genetic Parents or Embryo Carrier.

In the event of early termination, Genetic Parents will be responsible for Embryo Carrier's costs incurred up to date of termination.

IX. Termination of Pregnancy. The parties recognize that Embryo Carrier has the constitutional right to abort or not abort the pregnancy, however, the parties intend the following:

A. Genetic Parents and Embryo Carrier agree not to abort the pregnancy except to save the life of Embryo Carrier.

B. Genetic Parents and Embryo Carrier agree not to selectively reduce the number of fetuses in the case of a multiple pregnancy.

X. Birth.

A. Location. Embryo Carrier will give birth at _____ in _____, _____.

B. Notice of Birth. Embryo Carrier will notify Genetic Parents as soon as she goes into labor so

that Genetic Parents can join her at the hospital. Genetic Parents intend to be at the hospital and to be present during the delivery.

C. Responsibility for Child. Genetic Parents shall be responsible for any children born, whether healthy or not. Embryo Carrier waives the right to make medical decisions regarding the child after birth.

D. Child Born with Severe Birth Defects. If the child is born with birth defects so serious that life sustaining equipment is required and physician recommends that the child not be placed on such equipment or not be resuscitated, Genetic Parents will make the decision. If Embryo Carrier disagrees then she will be responsible for the child from that time, and Genetic Parents will have no further responsibility.

E. Name. Genetic Parents will name the child.

XI. Relinquishment/Adoption. Embryo Carrier will relinquish physical custody of the child to Genetic Parents upon birth. Embryo Carrier and Genetic Parents will cooperate in all proceedings for adoption of the child by Genetic Parents.

XII. Paternity Test. Embryo Carrier, Embryo Carrier's Husband and Genetic Parents agree that the child will have paternity tests, if Genetic Parents request.

XIII. After Birth Contact.

A. Embryo Carrier can see the child while in the hospital, but the child will be in the care of Genetic Parents from birth forward.

B. After Genetic Parents take the child from the hospital, Embryo Carrier and Embryo Carrier's Husband agree not to try to view or contact the child. Genetic Parents intend to keep Embryo Carrier informed by sending a picture and a letter about the child's progress at least on an annual basis, if Embryo Carrier wishes. Embryo Carrier agrees that she will be reasonably available if child has questions about his/her birth mother.

XIV. Counseling.

A. Counseling Sessions. It is the parties' intention that Embryo Carrier will attend at least _____ counseling sessions per month with the Responsible Counselor in _____ during the pregnancy. It is also the parties' intention that Embryo Carrier will attend more counseling sessions if:

(i) Embryo Carrier wants to attend the sessions; **(ii)** Genetic Parents want Embryo Carrier to attend the sessions; or **(iii)** Embryo Carrier's attendance is strongly recommended by the Responsible Counselor.

Embryo Carrier will use her reasonable efforts to attend the meetings, but will not be penalized for not attending if she does not feel well.

B. Disagreements. The parties intend that if they have disagreements among them that they are unable to resolve quickly or if there are issues that they want to bring up before a third party, that they will discuss the disagreements or issues in a conference call or meeting under the direction of the Responsible Counselor. The parties acknowledge that the Responsible Counselor is very experienced in surrogacy matters and agree to be guided by her recommendations.

XV. Fees, Reimbursement, Insurance, and Other Expenses.

A. Embryo Carrier's Fee.

1. Genetic Parents agree to pay Embryo Carrier as compensation for services provided the sum of \$_____. The compensation shall be paid in 10 equal monthly installments, the first being paid after the pregnancy is confirmed.

2. In the case of a multiple pregnancy, Genetic Parents agree to pay Embryo Carrier a bonus fee of \$_____ per additional child. Bonus fee will be added to the original fee of \$_____ and disbursed in equal monthly installments.

3. Escrow Account - Genetic Parents will open an escrow account and will place all fees in the account before IVF procedures begin. Genetic Parents' attorney will be authorized to disburse funds from the account per the payment schedule set out above (§XV, Part A, Paragraph 1 and 2).

4. Embryo Carrier will receive the total fees set out above (§XV, Part A, Paragraph 1 and 2), provided she carries the child(ren) at least 32 weeks.

5. In the event that a caesarean is ordered in either a single or multiple birth, Embryo Carrier will be paid an additional \$_____.

6. Genetic Parents will place \$_____ in the aforementioned escrow account (v) to pay for any medical expenses not covered by insurance.

7. For a completed cycle that does not result in a pregnancy, Embryo Carrier will be paid a sum of \$_____.

B. Termination of Pregnancy.

1. If Embryo Carrier miscarries (through no fault of her own) or is advised by the Responsible Physician that an abortion is necessary to save her own life, then the payment plan outlined in §XV, Part A, will cease and all payments to date will belong to Embryo Carrier. Any outstanding uninsured or unreimbursed medical expenses will be the responsibility of the Genetic Parents.

2. If Embryo Carrier aborts the pregnancy when not directed to do so by the Responsible Physician and Genetic Parents, Genetic Parents will have no responsibility for surrogacy fee or

expenses other than Embryo Carrier's expenses incurred to that date.

C. Insurance.

1. Genetic Parents will be responsible for term life insurance for Embryo Carrier.
2. The policy will be bought before the first IVF cycle and will remain in effect until two months after delivery or end of pregnancy. It will cost approximately \$_____ premium for \$250,000 face amount of insurance. The beneficiaries will be Embryo Carrier's Husband and Embryo Carrier's Children.

D. Counseling.

1. Genetic Parents responsible for costs of psychological screening for Embryo Carrier.
2. Genetic Parents responsible for costs of counseling for Embryo Carrier at a monthly rate of \$_____.
3. Genetic Parents responsible for up to ____ counseling sessions for Embryo Carrier with the Responsible Counselor after the birth, if needed.

E. Medical Payments.

1. Genetic Parents responsible for the reasonable costs of medical screening for Embryo Carrier, Embryo Carrier's Husband, Genetic Mother and Genetic Father.
2. Genetic Parents responsible for all medical costs related to conception, pregnancy and birth not covered by medical insurance.
3. Embryo Carrier's medical insurance policy will be the primary insurance coverage for medical costs related to pregnancy and birth.
4. If a medical specialist for high-risk pregnancy is recommended by the Responsible Physician and not covered by insurance, Genetic Parents will be responsible for all related costs.

F. Attorney's Fees. Genetic Parents responsible for Embryo Carrier's attorney's fees to review contract as well as those related to adoption procedure.

G. Other Payments.

1. Reimbursement for child care expenses related to Embryo Carrier's travels to doctor visits (\$_____/hr or ____/day for overnight care).
2. Reimbursement for gas and travel expenses at \$.____ per mile for car, airline tickets, and hotel in connection with doctor or counseling visits.

3. Household helper: Genetic Parents will provide \$_____ per week (paid monthly in advance) in the case of multiple pregnancy or high-risk pregnancy in which the Responsible Physician requires Embryo Carrier to be on bed rest or drastically reduce her activity.
4. Maternity clothes: \$_____.
5. Stillborn child: Genetic Parents will be responsible for any funeral or cremation expenses.
6. Genetic Parents are not responsible for any charges or costs unless provided for in this Agreement.

XVI. Other Issues.

A. Publicity/Confidentiality.

1. Embryo Carrier will not disclose information about Genetic Parents or about this arrangement to the media unless Genetic Parents approve the disclosure.
2. Genetic Parents will not disclose information about Embryo Carrier or about this arrangement to the media unless Embryo Carrier approves the disclosure.

B. Death of Genetic Mother or Genetic Father Precedes Birth of Child(ren).

1. If Genetic Father should die before child is born, the child shall be placed with Genetic Mother as the mother, and all terms of this Agreement continue.
2. If Genetic Mother should die before child is born, the child shall be placed with Genetic Father as the father, and all terms of this Agreement continue.
3. If both Genetic Mother and Genetic Father should die before child is born, they have chosen _____ to be child's guardian and take custody at birth.
4. In the event of the death of both Genetic Mother and Genetic Father, _____ will be responsible for all expenses related to the surrogacy.

XVII. Arbitration: Any and all disputes relating to this agreement or breach thereof shall be settled by arbitration in _____, _____, in accordance with the then current rules of the American Arbitration Association, and judgment upon the award entered by the arbitrators may be entered in any court having jurisdiction hereto. Costs of arbitration, including reasonable attorneys may be awarded to the prevailing party by the Arbitrator or Court. Should one party either dismiss or abandon the claim or counterclaim before hearing thereon, the other Party shall be deemed the "Prevailing Party" pursuant to this agreement. Should both parties receive judgment or award on their respective claims, the party in whose favor the larger judgment or award is rendered shall be deemed the "Prevailing Party" pursuant to this agreement.

This agreement shall insure to the benefit of and be binding on the parties, their heirs, personal representatives, successors and assigns. IN WITNESS WHEREOF, the parties have executed this agreement on the date first written above.

Dated this _____ day of _____, _____ at _____, _____

_____, Embryo Carrier

By:

_____, Genetic Father

By:

_____, Genetic Mother

By:

DECLARATION OF INTENT

I, _____, hereby acknowledge that I have agreed to carry and give birth to a child conceived via in vitro fertilization through the union of _____ ovum/ova and _____ sperm, so that _____ may have a child genetically related to them. I have no intention of having physical or legal custody or any parental rights or duties with respect to any child born of this gestational surrogacy process. Rather, it is my intention that the genetic and intended parents, _____, shall exclusively have such custody and all parental rights and duties.

I further acknowledge that it is in the best interests of the child born of this gestational surrogacy process for _____ to have sole custody of said child. I therefore agree to cooperate fully in allowing them to bond with and take custody of said child from the moment of its birth.

Date _____

Carrier _____

AFFIDAVIT OF CARRIER'S HUSBAND

I, _____, hereby acknowledge that I am over 18 years of age and have read and fully understand the foregoing Gestational Surrogacy Agreement among my wife and _____, including all attachments thereto.

I further acknowledge that I am in full agreement with the objectives of the Agreement and fully support the terms and provisions thereof. I hereby agree to cooperate with and assist my wife in fulfilling her obligations under said Agreement. Such cooperation shall include but not be limited to abstaining from sexual intercourse with my wife during the times the _____ instructs.

I understand that, as I will not be the biological father of the child or children here born of this gestational surrogacy process, I shall at no time attempt to assert any parental rights or seek any kind of custody or visitation with respect to said child and that it is intended that _____, as the intended and genetic parents of the child, shall exclusively have full physical and legal custody and all parental rights. I understand and agree that it is in the best interest of said child

that I not attempt to form any parental relationship with him/her, and immediately upon the birth of said child, I shall cooperate fully in allowing the Biological Parents to bond with and take custody of him/her.

I agree, in order to effectuate the intent and objectives of this Agreement to (i) cooperate in all proceedings that may be necessary or desirable, (ii) sign any and all affidavits and or documents that I can truthfully sign, as requested at any time by the Biological Parents, including but not limited to an Affidavit of Non-Access and/or an Affidavit of Non-Paternity, and (iii) assist in having the genetic and intended father, _____, listed on all documents as the father of said child.

I agree that, unless expressly permitted to do so by both Carrier and Biological Parents, I shall not provide, nor allow any agent of mine to provide, any information to the public, news media or any other individual or group that could lead to the disclosure of the identity of any party to the Agreement or said child or that reveals the provisions of this affidavit or the Agreement.

I hereby acknowledge that I read and understand the foregoing and intend to be legally bound thereby.

Carrier's Husband

Date_____

EXHIBIT D
50-STATE SURVEY OF STATUTES APPLICABLE TO POSTHUMOUS CONCEPTION
(current as of March 2013)

TABLE OF SELECTED POSTMORTEM-CONCEPTION STATUTES BY STATE			
	State	Citation	Relevant Portions of Statutes
1.	Alabama	Ala. Code §43-8-47 Ala. Code §26-17-707	Adopted the 2000 UPA: In order to inherit, child must have been conceived prior to death of parent. If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a signed record , maintained by the licensed assisting physician, that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.
2.	Alaska	Alaska Stat. §13-12-108	1990 UPC: An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.
3.	Arizona	Ariz. Rev. Stat. Ann. §14-2108	1990 UPC: A child in gestation at a particular time is treated as living at that time if the child lives at least 120 hours after its birth. Right to inherit of POSTMORTEM CONCEPTION child recognized by case law: <i>Gillett-Netting v. Barnhart</i> , 371 F.3d 593 (9th Cir. 2004), <i>reh'g den.</i> (9th Cir. Dec. 14, 2004).
4.	Arkansas	Ark. Code §28-9-210(a)	In order to inherit, child must have been conceived prior to death of parent. <i>Finley v. Astrue</i> , 372 Ark. 103, 270 S.W. 3d 849 (2008). Posthumous conception not recognized.
5.	California	Cal. Prob. Code §6407 Cal. Prob. Code §249.5-8	Similar to the UPA but the UPA has not been adopted: Relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent. A posthumous child may inherit if: (1) the decedent consented in writing to be treated as a parent; (2) the decedent designated an agent; (3) notice is given within 4 months of intent to use genetic material ; and (4) a child is conceived within 2 years after the decedent's death .
6.	Colorado	Colo. Rev. Stat. §19-4-106(8)	Adopted 2008 UPC and §707 of the UPA: If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of

		Colo. Rev. Stat. §15-11-120(6)	<p>the child.</p> <p>A person who consented to ART with the intent to be the parent is the parent if one of the following can be shown: (1) a signed record of consent; (2) that the person functioned as a parent to the child no later than two years after the birth of the child; or (3) the intent to so function if that intent was thwarted by circumstances such as death or incapacity.</p>
7.	Connecticut	Ct. Cen. Stat. §§45a-771 – -779	<p>Defines artificial insemination to include both intrauterine insemination and in vitro fertilization.</p> <p>No express statutory law.</p>
8.	Delaware	<p>Del. Code tit. 13, §8-707</p> <p>Del. Code tit. 12, §310, §505</p>	<p>Enacted §707 of the 2000 UPA.</p> <p>Deceased parent is not treated as a parent of a posthumously conceived child unless he consented in a record to be a parent of such child. Posthumous children of intestate parents are treated as if they were born during the decedent's lifetime. (No marriage requirement.)</p> <p>Posthumous children or children in the mother's womb, if born alive, are within the foregoing provisions respecting after-born children. Such children shall take any estate or property, real or personal, by descent, transmission, gift, devise, limitation or otherwise in the same manner as if absolutely born at the decease of its parent. If such child is not born alive, the effect shall be the same, to all intents and purposes, as if no such child had ever existed.</p>
9.	Florida	<p>Fla. Stat. §742.17</p> <p>Fla. Stat. §732.106</p>	<p>A posthumously conceived child will not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will. ART children are not recognized although there is a possibility that fertilized pre-embryos may constitute conception for purposes of eligibility.</p> <p>Heirs of the decedent conceived before his or her death, but born thereafter, inherit intestate property as if they had been born in the decedent's lifetime. (No reference to rights to a testate estate.)</p>
10.	Georgia	<p>Ga. Code §53-2-1(a)</p> <p>Ga. Code §53-2-1(b)</p>	<p>Children of the decedent who are born after the decedent's death are considered children in being at the decedent's death, provided they were conceived prior to the decedent's death, were born within 10 months of the decedent's death, and survived 120 hours or more after birth.</p> <p>In order inherit, child must have been conceived prior to death of parent.</p>
11.	Hawaii	Haw. Rev. Stat. §560:2-108	1990 UPC: A child in gestation at decedent's death is treated as the decedent's child if the child survives for

			120+ hours.
12.	Idaho	Idaho Code §15-2-108	In order for the child to inherit as if born during the decedent's lifetime, it must be conceived naturally or by artificial means before decedent's death, but born within 10 months. Posthumous conception not recognized.
13.	Illinois	755 Ill. Comp. Stat. 5/2-3	Posthumous children are treated as if they were born during the decedent's lifetime.
14.	Indiana	Ind. Code §29-1-2-6	Descendants of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the descent and distribution of intestate estates shall be determined by the relationships existing at the time of the death of the intestate.
15.	Iowa	Iowa Code §633.220A	Posthumous children inherit as if born during the decedent's lifetime if child is genetic child of decedent, decedent authorized use of genetic material in a record and child is born within 2 years of decedent.
16.	Kansas	Kan. Stat. §59-501	Posthumous children of intestate are treated as if they were born during the decedent's lifetime.
17.	Kentucky	Ky. Rev. Stat. §391.070	In order for a child to inherit from an intestate estate as if born within decedent's lifetime it must be born within 10 months after decedent's death. (No reference to rights to inherit from testate estate.) Posthumous conception not recognized.
18.	Louisiana	La. Rev. Stat. §9:391.1	Like the UPA (which was not adopted) with additional requirements: A posthumously conceived child may inherit from a deceased parent if the decedent authorized in writing for the surviving spouse to use his genetic material for posthumous conception, and the resulting child is born within 3 years of the decedent's death. Otherwise must be born within 10 months.
19.	Maine	Me. Rev. Stat. tit. 18-A, §2-108	In order to inherit, child must have been conceived prior to death of parent.
20.	Maryland	Md. Code Trusts & Estates §1-205 & §3-107 (eff. Oct. 1, 2012)	Deceased parent is not treated as a parent of a posthumously conceived child unless he consented in a record to be a parent of such child according to the requirements of Md. Code General Health §20-111 and the child is born within two years of the decedent's death. (No marriage requirement.)
21.	Massachusetts		Right of posthumously conceived child to inherit recognized by case law: <i>Woodward v. Comm'r of Soc. Sec.</i> , 760 N.E. 2d 257 (Mass. 2002). Posthumous children of intestate are recognized if facts are sufficient to prove the father's consent to posthumous conception including a genetic relationship, consent in

			a record, and consent to supporting the child.
22.	Michigan	Mich. Stat. §700.2108	1990 UPC: A child in gestation at decedent's death is treated as the decedent's child if the child survives for 120+ hours.
23.	Minnesota	Minn. Stat. §524.2-108 Minn. Stat. §524.2-120(10)	1990 UPC with additional requirements: An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth. 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.
24.	Mississippi	Miss. Code §91-1-15	Illegitimate children may inherit through mother, but through father only if an adjudication of paternity is made within specified time period.
25.	Missouri	Mo. Stat. §474.050	Posthumous children of intestate parents are treated as if they were born during the decedent's lifetime.
26.	Montana	Mont. Code §72-2-118	1990 UPC: A child in gestation at decedent's death is treated as the decedent's child if the child survives for 120+ hours.
27.	Nebraska	Neb. Rev. Stat. §30-2308	In order to inherit, child must have been conceived prior to death of parent.
28.	Nevada	Nev. Rev. Stat. §132.290	Posthumous children of intestate parents are treated as if they were born during the decedent's lifetime.
29.	New Hampshire	N.H. Rev. Stat. Title LVI, §551:10	Posthumous children of intestate parents are treated as if they were born during the decedent's lifetime. A father cannot deny a posthumous child the right to inherit in a will. <i>Khabbaz v. Comm'r</i> , 930 A.2d 1180 (N.H. 2007). Posthumous conception not recognized.
30.	New Jersey	N.J. Rev. Stat. §3B:5-8	1990 UPC: A child in gestation at decedent's death is treated as the decedent's child if the child survives for 120+ hours. <i>In re Estate of Kolacy</i> , 753 A.2d 1257 (N.J. Super. Ct. 2000) (holding that a posthumously conceived child could inherit under New Jersey's intestacy statute).
31.	New Mexico	N.M. Stat. §45-2-108 N.M. Stat. §40-11A-707	A child in gestation at decedent's death is treated as the decedent's child if the child survives for 120+ hours. Follows the 2000 UPA (parent must consent to posthumous conception). (No marriage requirement.)
32.	New York	N.Y. Estates, Powers & Trusts Law §2-1.3 N.Y. Estates, Powers & Trusts Law §5-3.2(a)-(b)	In order to inherit by intestacy, child must have been conceived prior to death of parent. Posthumous heirs may be recognized for class gift purposes only.
33.	North Carolina	N.C. Gen. Stat. §29-9	In order for a child to inherit under intestacy as if born within decedent's lifetime it must be born within 10

			months after decedent's death.
34.	North Dakota	<p>N.D. Cent. Code. §14-20-65 (Supp. 2009)</p> <p>N.D. Cent. Code §30.1-04-04</p>	<p>Enacted §707 of the 2008 UPA:</p> <p>Deceased parent is not treated as a parent of a posthumously conceived child unless he consented in a record to be a parent of such child. (No marriage requirement.)</p> <p>Requirement that heir survive decedent for at least 120 hours.</p>
35.	Ohio	Ohio Rev. Code §2105.14	Posthumous children conceived before an intestate person's death inherit as if born during the decedent's lifetime.
36.	Oklahoma	Okla. Stat. tit. 84, §84-228	Posthumous children of intestate parents are treated as if they were born during the decedent's lifetime.
37.	Oregon	Or. Rev. Stat. §112.075	In order to inherit, child must have been conceived prior to death of parent.
38.	Pennsylvania	20 Pa. Stat. Cons. Stat. §2104	Posthumous children conceived before the decedent's death inherit as if born during the decedent's lifetime.
39.	Rhode Island	<p>R.I. Gen. Laws §33-6-23</p> <p>R.I. Gen. Laws §33-1-4</p>	<p>When a testator omits to provide in his or her will for any child of his or hers born after the execution of his or her will, either during his or her lifetime or after his or her death, or for any issue of a deceased child of his or hers dying after the execution of his or her will, or for any issue born after the execution of his or her will of a deceased child of his or hers dying before the will's execution, that child or issue shall take the same share of the testator's estate as that child or issue would have been entitled to if the testator had died intestate, unless it appears that the omission was intentional and not occasioned by accident or mistake.</p> <p>No right in the inheritance shall accrue to any persons whatsoever other than to the children of the intestate, unless such persons are in being and capable in law to take as heirs at the time of the intestate's death.</p>
40.	South Carolina	<p>S.C. Code §27-5-120</p> <p>S.C. Code §62-2-108 (posthumous children not necessarily recognized except as provided in S.C. Code §27-5-120)</p>	<p>A posthumous child shall take under any will or settlement as though born in the lifetime of the father and shall not be liable to be defeated on the ground that the remainder was contingent and did not vest at the instant that the prior estate terminated and that there was no trustee to preserve the contingent remainder. (Emphasis added.)</p> <p>Issue of the decedent (but no other persons) conceived before his death but born within 10 months thereafter inherit as if they had been born in the lifetime of the decedent.</p>
41.	South Dakota	S.D. Laws §29A-2-108	An individual is treated as living at that time if the individual was conceived prior to a decedent's death, born within 10 months of a decedent's death, and survived 120 hours or more after birth.

		S.D. Laws §26-1-2	Posthumous heirs not recognized.
42.	Tennessee	Tenn. Code §31-2-108	In order to inherit, child must have been conceived prior to death of parent.
43.	Texas	<p>Tex. Fam. Code §160.707</p> <p>Tex. Prob. Code §41(a)</p>	<p>Enacted §707 of the 2000 UPA.</p> <p>If a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child. (Record must be maintained by licensed physician.)</p> <p>Persons Not in Being. No right of inheritance shall accrue to any persons other than to children or lineal descendants of the intestate, unless they are in being and capable in law to take as heirs at the time of the death of the intestate.</p>
44.	Utah	<p>Utah Code §78B-15-707</p> <p>Utah Code §75-2-105(1)(b)</p>	<p>Enacted §707 of the 2000 UPA.</p> <p>Deceased spouse is not treated as a parent of a posthumously conceived child unless he consented in a record to be a parent of such child.</p> <p>An individual in gestation at a decedent's death is considered to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived 120 hours after birth, it is considered that the individual failed to survive for the required period.</p>
45.	Vermont	Vt. Stat. tit. 14, §303	Non-UPC state but same language as 1990 UPC: Child must be in gestation at parent's death to be considered an heir.
46.	Virginia	<p>Va. Code §20-158(B)</p> <p>Va. Code. §20-164(i)</p>	<p>Similar to 2000 UPA but not adopted:</p> <p>Death of spouse - Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the 10-month period immediately preceding the birth, either party died.</p> <p>However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.</p> <p>A child born more than 10 months after the death of a parent shall not be recognized as such parent's child for</p>

			purposes of inheritance.
47.	Washington	<p>RCW 26.26.725</p> <p>RCW 26.26.730</p>	<p>Enacted §707 of the 2002 UPA:</p> <p>(1) If a marriage or domestic partnership is dissolved before placement of eggs, sperm, or an embryo, the former spouse or former domestic partner is not a parent of the resulting child unless the former spouse or former domestic partner consented in a signed record that if assisted reproduction were to occur after a dissolution, the former spouse or former domestic partner would be a parent of the child. (2) The consent of the former spouse or former domestic partner to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.</p> <p>Child of assisted reproduction – Parental status of deceased individual. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or an embryo, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a signed record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.</p> <p>RCW 26.26.011(23): “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.</p>
48.	West Virginia	<p>W. Va. Code §42-1-8</p> <p>W. Va. Code §42-1-3f</p>	<p>Any child in the womb of its mother at, and which may be born after, the death of the intestate, shall be capable of taking by inheritance in the same manner as if such child were in being at the time of such death.</p> <p>An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.</p>
49.	Wisconsin	Wis. Stat. §854.21(5)	1990 UPC: In order to inherit, child must have been conceived prior to death of parent and survive for 120+ hours.
50.	Wyoming	<p>Wyo. Stat. §14-2-907</p> <p>Wyo. Stat. §2-4-103</p>	<p>Enacted §707 of the 2000 UPA.</p> <p>Deceased parent is not treated as a parent of a posthumously conceived child unless he consented in a record to be a parent of such child. (No marriage requirement.)</p> <p>Persons conceived before the decedent’s death but born thereafter inherit as if they had been born in the lifetime of the decedent.</p>
51.	Washington, D.C.	D.C. Code §19.314	Child born after death of parent recognized as child.

EXHIBIT E
RELEVANT SECTIONS OF THE UNIFORM PROBATE CODE

UNIFORM PROBATE CODE (1969)
(Last Amended or Revised in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH COMMENTS

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Uniform Law Commission
National Conference of Commissioners on Uniform State Laws
111 N. Wabash Ave., Suite 1010 • Chicago, IL 60602
(312) 450-6600, Fax (312) 450-6601, www.uniformlaws.org

SECTION 1-102. PURPOSES; RULE OF CONSTRUCTION.

(a) This [code] shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this [code] are:

(1) to simplify and clarify the law concerning the 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 his property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

PART 2. DEFINITIONS

SECTION 1-201. GENERAL DEFINITIONS. Subject to additional definitions contained in the subsequent [articles] that are applicable to specific [articles,] [parts,] or sections and unless the context otherwise requires, in this [code]:

(5) “Child” includes an individual entitled to take as a child under this [code] by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(9) “Descendant” of an individual means all of his [or her] 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 [code].

(32) “Parent” includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this [code] by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(41) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(51) “Survive” means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event under Section 2-104 or 2-702. The term includes its derivatives, such as “survives,” “survived,” “survivor,” and “surviving.”

SECTION 2-104. REQUIREMENT OF SURVIVAL BY 120 HOURS; INDIVIDUAL IN GESTATION.

(a) [Requirement of Survival by 120 Hours; Individual in Gestation.] For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (b), the following rules apply:

(1) An individual born before a decedent’s death who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before a decedent’s death survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period.

(2) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

(b) [Section Inapplicable If Estate Would Pass to State.] This section does not apply if its application would cause the estate to pass to the state under Section 2-105.

Comment

This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. See Halbach & Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 Alb. L. Rev. 1091, 1094-1099 (1992). The 120 hour period will not delay the administration of a decedent's estate because Sections 3-302 and 3-307 prevent informal issuance of letters for a period of five days from death. Subsection (b) prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives for any period.

In the case of a surviving spouse who survives the 120-hour period, the 120-hour requirement of survivorship does not disqualify the spouse's intestate share for the federal estate-tax marital deduction. See Int. Rev. Code §2056(b)(3).

2008 Revisions. In 2008, this section was reorganized, revised, and combined with former Section 2-108. What was contained in former Section 2-104 now appears as subsections (a)(1) and (b). What was contained in former Section 2-108 now appears as subsection (a)(2). Subsections (a)(1) and (a)(2) now distinguish between an individual who was born before the decedent's death and an individual who was in gestation at the decedent's death. With respect to an individual who was born before the decedent's death, it must be established by clear and convincing evidence that the individual survived the decedent by 120 hours. For a comparable provision applicable to wills and other governing instruments, see Section 2-702. With respect to an individual who was in gestation at the decedent's death, it must be established by clear and convincing evidence that the individual lived for 120 hours after birth.

Historical Note. This Comment was revised in 2008.

SECTION 2-105. NO TAKER. If there is no taker under the provisions of this [article], the intestate estate passes to the state.

SECTION 2-113. INDIVIDUALS RELATED TO DECEDENT THROUGH TWO LINES. An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

Comment

This section prevents double inheritance. It has potential application in a case in which a deceased person's brother or sister marries the spouse of the decedent and adopts a child of the former marriage; if the adopting parent died thereafter leaving the child as a natural and adopted grandchild of its grandparents, this section prevents the child from taking as an heir from the grandparents in both capacities.

SECTION 2-114. PARENT BARRED FROM INHERITING IN CERTAIN CIRCUMSTANCES.

(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 [code] 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.

Comment

2008 Revisions. In 2008, this section replaced former Section 2-114(c), which provided: “(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.”

Subsection (a)(1) recognizes that a parent whose parental rights have been terminated is no longer legally a parent.

Subsection (a)(2) addresses a situation in which a parent’s parental rights were not actually terminated. Nevertheless, a parent can still be barred from inheriting from or through a child if 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 [code], but only if those parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

Statutes providing the grounds for termination of parental rights include: Ariz. Rev. Stat. Ann. §8-533; Conn. Gen. Stat. §45a-717; Del. Code Ann. tit. 13 §1103; Fla. Stat. Ann. §39.806; Iowa Code §600A.8; Kan. Stat. Ann. §38-2269; Mich. Comp. L. Ann. §712A.19b; Minn. Stat. Ann. §260C.301; Miss. Code Ann. §93-15-103; Mo. Rev. Stat. §211.447; Tex. Fam. Code §§161.001 to .007.

Subpart 2. Parent-Child Relationship

SECTION 2-115. DEFINITIONS. In this [subpart]:

(1) “Adoptee” means an individual who is adopted.

(2) “Assisted reproduction” means a method of causing pregnancy other than sexual intercourse.

(3) “Divorce” includes an annulment, dissolution, and declaration of invalidity of a marriage.

(4) “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.

(5) “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 [insert applicable state law], the term means only the man for whom that relationship is established.

(6) “Genetic mother” means the woman whose egg was fertilized by the sperm of a child’s genetic father.

(7) “Genetic parent” means a child’s genetic father or genetic mother.

(8) “Incapacity” means the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

(9) “Relative” means a grandparent or a descendant of a grandparent.

Legislative Note: *States that have enacted the Uniform Parentage Act (2000, as amended) should replace “applicable state law” in paragraph (5) with “Section 201(b)(1), (2), or (3) of the Uniform Parentage Act (2000), as amended”. Two of the principal features of Articles 1 through 6 of the Uniform Parentage Act (2000, as amended) are (i) the presumption of paternity and the procedure under which that presumption can be disproved by adjudication and (ii) the acknowledgment of paternity and the procedure under which that acknowledgment can be rescinded or challenged. States that have not enacted similar provisions should consider whether such provisions should be added as part of Section 2-115(5). States that have not enacted the Uniform Parentage Act (2000, as amended) should also make sure that applicable state law authorizes parentage to be established after the death of the alleged parent, as provided in the Uniform Parentage Act §509 (2000, as amended), which provides: “For good cause shown, the court may order genetic testing of a deceased individual.”*

Comment

Scope. This section sets forth definitions that apply for purposes of the intestacy rules contained in Subpart 2 (Parent-Child Relationship).

Definition of “Adoptee”. The term “adoptee” is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

Definition of “Assisted Reproduction”. The definition of “assisted reproduction” is copied from the Uniform Parentage Act §102. Current methods of assisted reproduction include intrauterine insemination (previously and sometimes currently called artificial insemination), donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

Definition of “Functioned as a Parent of the Child”. The term “functioned as a parent of the child” is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers. The Reporter’s Note No. 4 to §14.5 of the Restatement lists the following parental functions:

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

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

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

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

recreation, protecting the child's physical safety, and providing transportation;

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

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

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

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

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

(g) providing moral and ethical guidance;

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

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

(a) providing economic support;

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

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

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

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

Ideally, a parent would perform all of the above functions throughout the child's minority. In cases falling short of the ideal, the trier of fact must balance both time and conduct. The question is, did the individual perform sufficient parenting functions over a sufficient period of time to justify concluding that the individual functioned as a parent of the child. Clearly, insubstantial conduct, such as an occasional gift or social contact, would be insufficient. Moreover, merely obeying a child support order would not, by itself, satisfy the requirement. Involuntarily providing support is inconsistent with functioning as a parent of the child.

The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned as a parent of the child inherits from the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individual whom the child claims functioned as his or her parent.

Definition of "Genetic Father". The term "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 recognized by the law of this state, the term means only the man for whom that relationship is established. As stated in the Legislative Note, a state that has enacted the

Uniform Parentage Act (2000/2002) should insert a reference to Section 201(b)(1), (2), or (3) of that Act.

Definition of “Relative”. The term “relative” does not include any relative no matter how remote but is limited to a grandparent or a descendant of a grandparent, as determined under this Subpart 2.

SECTION 2-116. EFFECT OF PARENT-CHILD RELATIONSHIP. Except as otherwise provided in Section 2-119(b) through (e), if a parent-child relationship exists or is established under this [subpart], the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

Comment

Scope. This section provides that if a parent-child relationship exists or is established under any section in Subpart 2, the consequence is that the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession by, from, or through the parent and the child. The exceptions in Section 2-119(b) through (e) refer to cases in which a parent-child relationship exists but only for the purpose of the right of an adoptee or a descendant of an adoptee to inherit from or through one or both genetic parents.

SECTION 2-117. NO DISTINCTION BASED ON MARITAL STATUS. Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.

Comment

Scope. This section, adopted in 2008, provides the general rule that a parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status. Exceptions to this general rule are contained in Sections 2-114 (Parent Barred from Inheriting in Certain Circumstances), 2-119 (Adoptee and Adoptee’s Genetic Parents), 2-120 (Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier), and 2-121 (Child Born to Gestational Carrier).

This section replaces former Section 2-114(a), which provided: “(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].”

Defined Terms. *Genetic parent* is defined in Section 2-115 as the child’s genetic father or genetic mother. *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of a child’s genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child’s genetic mother.

SECTION 2-118. ADOPTEE AND ADOPTEE’S ADOPTIVE PARENT OR PARENTS.

(a) [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.

(b) [Individual in Process of Being Adopted by Married Couple; Stepchild in Process of Being Adopted by Stepparent.] For purposes of subsection (a):

(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.

(c) [Child of Assisted Reproduction or Gestational Child in Process of Being Adopted.] If, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, 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 subsection (b)(2).

Comment

2008 Revisions. In 2008, this section and Section 2-119 replaced former Section 2-114(b), which provided: "(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent". The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Subsection (a) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Section 2-119(a) and (b)(1) covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (b)(2) and (c), which are explained below.

Data on Adoptions. Official data on adoptions are not regularly collected. Partial data are sometimes available from the Children's Bureau of the U.S. Department of Health and Human Services, the U.S. Census Bureau, and the Evan B. Donaldson Adoption Institute.

For an historical treatment of adoption, from ancient Greece, through the Middle Ages, 19th- and 20th-century America, to open adoption and international adoption, see Debora L. Spar, *The Baby Business* ch. 6 (2006) and sources cited therein.

Defined Term. *Adoptee* is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

Subsection (a): Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents. Subsection (a) states the general rule that adoption creates a parent-child relationship between the adoptee and the adoptee's adoptive parent or parents.

Subsection (b)(1): Individual in Process of Being Adopted by Married Couple. If the spouse who subsequently died had filed a legal proceeding to adopt the individual before the spouse died, the individual is "in the process of being adopted" by the deceased spouse when the spouse died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Subsection (b)(2): Stepchild in Process of Being Adopted by Stepparent. If the

stepparent who subsequently died had filed a legal proceeding to adopt the stepchild before the stepparent died, the stepchild is “in the process of being adopted” by the deceased stepparent when the stepparent died. However, the phrase “in the process of being adopted” is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Subsection (c): Child of Assisted Reproduction or Gestational Child in Process of Being Adopted. Subsection (c) provides that if, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, 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 subsection (b)(2). An example would be a situation in which an unmarried mother or father is the parent of a child of assisted reproduction or a gestational child, and subsequently marries an individual who then begins the process of adopting the child but who dies before the adoption becomes final. In such a case, subsection (c) provides that the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). The phrase “in the process of being adopted” carries the same meaning under subsection (c) as it does under subsection (b)(2).

SECTION 2-119. ADOPTEE AND ADOPTEE’S GENETIC PARENTS.

(a) [Parent-Child Relationship Between Adoptee and Genetic Parents.] Except as otherwise provided in subsections (b) through (e), a parent-child relationship does not exist between an adoptee and the adoptee’s genetic parents.

(b) [Stepchild Adopted by Stepparent.] A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

(1) the genetic parent whose spouse adopted the individual; and

(2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(c) [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.

(d) [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.

(e) [Child of Assisted Reproduction or Gestational Child 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 2-120 or between a gestational child and a parent or parents under Section 2-121, the child is adopted by another or others, the child’s parent or parents under Section 2-120 or 2-121 are treated as the child’s genetic parent or parents for the purpose of this section.

Comment

2008 Revisions. In 2008, this section and Section 2-118 replaced former Section 2-114(b), which provided: “(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a

descendant of the child to inherit from or through the other natural parent”. The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Section 2-118(a) covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Subsections (a) and (b) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (c), (d), and (e), which are explained below.

Defined Terms. Section 2-119 uses terms that are defined in Section 2-115.

Adoptee is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor, but includes an individual who is adopted as an adult.

Genetic parent is defined in Section 2-115 as the child’s genetic father or genetic mother. *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of a child’s genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child’s genetic mother.

Relative is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

Subsection (a): Parent-Child Relationship Between Adoptee and Adoptee’s Genetic Parents. Subsection (a) states the general rule that a parent-child relationship does not exist between an adopted child and the child’s genetic parents. This rule recognizes that an adoption severs the parent-child relationship between the adopted child and the child’s genetic parents. The adoption gives the adopted child a replacement family, sometimes referred to in the case law as “a fresh start”. For further elaboration of this theory, see Restatement (Third) of Property: Wills and Other Donative Transfers §2.5(2)(A) & cmts. d & e (1999). Subsection (a) also states, however, that there are exceptions to this general rule in subsections (b) through (d).

Subsection (b): Stepchild Adopted by Stepparent. Subsection (b) continues the so-called “stepparent exception” contained in the Code since its original promulgation in 1969. When a stepparent adopts his or her stepchild, Section 2-118 provides that the adoption creates a parent-child relationship between the child and his or her adoptive stepparent. Section 2-119(b)(1) provides that a parent-child relationship continues to exist between the child and the child’s genetic parent whose spouse adopted the child. Section 2-119(b)(2) provides that a parent-child relationship also continues to exist between an adopted stepchild and his or her other genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that genetic parent, but not for purposes of inheritance by the other genetic parent and his or her relatives from or through the adopted stepchild.

Example 1 — Post-Widowhood Remarriage. A and B were married and had two children, X and Y. A died, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B’s children and under Section 2-118(a) as C’s children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A’s children for purposes of inheritance from and through A but not for purposes of inheritance from or through X or Y. Thus, if A’s father, G, died intestate, survived by X and Y and by G’s daughter (A’s sister), S, G’s heirs would be S, X, and Y. S would take half and X and Y would take one-fourth each.

Example 2 — Post-Divorce Remarriage. A and B were married and had two children, X and Y. A and B got divorced, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B’s children and under Section 2-118(a) as C’s children for all purposes of inheritance.

Under subsection (b)(2), X and Y are treated as A's children for purposes of inheritance from and through A. On the other hand, neither A nor any of A's relatives can inherit from or through X or Y.

Subsection (c): Individual Adopted by Relative of a Genetic Parent. Under subsection (c), a child who is adopted by a maternal or a paternal relative of either genetic parent, or by the spouse or surviving spouse of such a relative, remains a child of both genetic parents.

Example 3. F and M, a married couple with a four-year old child, X, were badly injured in an automobile accident. F subsequently died. M, who was in a vegetative state and on life support, was unable to care for X. Thereafter, M's sister, A, and A's husband, B, adopted X. F's father, PGF, a widower, then died intestate. Under subsection (c), X is treated as PGF's grandchild (F's child).

Subsection (d): Individual Adopted After Death of Both Genetic Parents. Usually, a post-death adoption does not remove a child from contact with the genetic families. When someone with ties to the genetic family or families adopts a child after the deaths of the child's genetic parents, even if the adoptive parent is not a relative of either genetic parent or a spouse or surviving spouse of such a relative, the child continues to be in a parent-child relationship with both genetic parents. Once a child has taken root in a family, an adoption after the death of both genetic parents is likely to be by someone chosen or approved of by the genetic family, such as a person named as guardian of the child in a deceased parent's will. In such a case, the child does not become estranged from the genetic family. Such an adoption does not "remove" the child from the families of both genetic parents. Such a child continues to be a child of both genetic parents, as well as a child of the adoptive parents.

Example 4. F and M, a married couple with a four-year-old child, X, were involved in an automobile accident that killed F and M. Neither M's parents nor F's father (F's mother had died before the accident) nor any other relative was in a position to take custody of X. X was adopted by F and M's close friends, A and B, a married couple approximately of the same ages as F and M. F's father, PGF, a widower, then died intestate. Under subsection (d), X is treated as PGF's grandchild (F's child). The result would be the same if F's or M's will appointed A and B as the guardians of the person of X, and A and B subsequently successfully petitioned to adopt X.

Subsection (e): Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted. Subsection (e) puts a child of assisted reproduction and a gestational child on the same footing as a genetic child for purposes of this section. The results in Examples 1 through 4 would have been the same had the child in question been a child of assisted reproduction or a gestational child.

SECTION 2-120. CHILD CONCEIVED BY ASSISTED REPRODUCTION OTHER THAN CHILD BORN TO GESTATIONAL CARRIER.

(a) [Definitions.] In this section:

(1) "Birth mother" means a woman, other than a gestational carrier under Section 2-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child's genetic mother.

(2) "Child of assisted reproduction" means a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

(3) "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:

(A) a husband who provides sperm, or a wife who provides eggs, that are

used for assisted reproduction by the wife;

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

(C) an individual who has been determined under subsection (e) or (f) to have a parent-child relationship with a child of assisted reproduction.

(b) [Third-Party Donor.] A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

(c) [Parent-Child Relationship with Birth Mother.] A parent-child relationship exists between a child of assisted reproduction and the child's birth mother.

(d) [Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime by His Wife for Assisted Reproduction.] Except as otherwise provided in subsections (i) and (j), 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.

(e) [Birth Certificate: Presumptive Effect.] A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that individual.

(f) [Parent-Child Relationship with Another.] Except as otherwise provided in subsections (g), (i), and (j), and unless a parent-child relationship is established under subsection (d) or (e), a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother 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 individual:

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

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

(A) functioned as a parent of the child no later than two years after the child's birth;

(B) intended to function as a 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; or

(C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.

(g) [Record Signed More than Two Years after the Birth of the Child: Effect.] For the purpose of subsection (f)(1), neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached [18] years of age.

(h) [Presumption: Birth Mother Is Married or Surviving Spouse.] For the purpose of subsection (f)(2), the following rules apply:

(1) 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 subsection (f)(2)(A) or

(B).

(2) 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 subsection (f)(2)(B) or (C).

(i) [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 that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

(j) [Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos.] If, in a record, an individual 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 individual, unless the individual subsequently satisfies subsection (f).

(k) [When Posthumously Conceived Child Treated as in Gestation.] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual's death; or

(2) born not later than 45 months after the individual's death.

Legislative Note: States are encouraged to enact a provision requiring genetic depositories to provide a consent form that would satisfy subsection (f)(1). See Cal. Health & Safety Code §1644.7 and .8 for a possible model for such a consent form.

Comment

Data on Children of Assisted Reproduction. The Center for Disease Control (CDC) of the U.S. Department of Health and Human Services collects data on children of assisted reproduction (ART). See Center for Disease Control, 2004 Assisted Reproductive Technology Success Rates (Dec. 2006) (2004 CDC Report), available at <http://www.cdc.gov/ART/ART2004>. The data, however, is of limited use because the definition of ART used in the CDC Report excludes intrauterine (artificial) insemination (2004 CDC Report at 3), which is probably the most common form of assisted reproductive procedures. The CDC estimates that in 2004 ART procedures (excluding intrauterine insemination) accounted for slightly more than one percent of total U.S. births. 2004 CDC Report at 13. According to the Report: "The number of infants born who were conceived using ART increased steadily between 1996 and 2004. In 2004, 49,458 infants were born, which was more than double the 20,840 born in 1996." 2004 CDC Report at 57. "The average age of women using ART services in 2004 was 36. The largest group of women using ART services were women younger than 35, representing 41% of all ART cycles carried out in 2004. Twenty-one percent of ART cycles were carried out among women aged 35-37, 19% among women aged 38-40, 9% among women aged 41-42, and 9% among women older than 42." 2004 CDC Report at 15. Updates of the 2004 CDC Report are to be posted at <http://www.cdc.gov/ART/ART2004>.

AMA Ethics Policy on Posthumous Conception. The ethics policies of the American Medical Association concerning artificial insemination by a known donor state that "[i]f semen is frozen and the donor dies before it is used, the frozen semen should not be used or donated for purposes other than those originally intended by the donor. If the donor left no instructions, it is

reasonable to allow the remaining partner to use the semen for intrauterine insemination but not to donate it to someone else. However, the donor should be advised of such a policy at the time of donation and be given an opportunity to override it.” Am. Med. Assn. Council on Ethical & Judicial Affairs, Code of Medical Ethics: Current Opinions E-2.04 (Issued June 1993; updated December 2004).

Subsection (a): Definitions. Subsection (a) defines the following terms:

Birth mother is defined as the woman (other than a gestational carrier under Section 2-121) who gave birth to a child of assisted reproduction.

Child of assisted reproduction is defined as a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

Third-party donor. The definition of third-party donor is based on the definition of “donor” in the Uniform Parentage Act §102.

Other Defined Terms. In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

Assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as 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. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic father is defined in Section 2-115 as the man whose sperm fertilized the egg of a child’s genetic mother.

Genetic mother is defined as the woman whose egg was fertilized by the sperm of the child’s genetic father.

Incapacity is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

Subsection (b): Third-Party Donor. Subsection (b) is consistent with the Uniform Parentage Act §702. Under subsection (b), a third-party donor does not have a parent-child relationship with a child of assisted reproduction, despite the donor’s genetic relationship with the child.

Subsection (c): Parent-Child Relationship With Birth Mother. Subsection (c) is in accord with Uniform Parentage Act Section 201 in providing that a parent-child relationship exists between a child of assisted reproduction and the child’s birth mother. The child’s birth mother, defined in subsection (a) as the woman (other than a gestational carrier) who gave birth to the child, made the decision to undergo the procedure with intent to become pregnant and give birth to the child. Therefore, in order for a parent-child relationship to exist between her and the child, no proof that she consented to the procedure with intent to be treated as the parent of the child is necessary.

Subsection (d): Parent-Child Relationship with Husband Whose Sperm Were Used

During His Lifetime By His Wife for Assisted Reproduction. The principal application of subsection (d) is in the case of the assisted reproduction procedure known as intrauterine insemination husband (IIH), or, in older terminology, artificial insemination husband (AIH). Subsection (d) provides that, except as otherwise provided in subsection (i), 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 were used during his lifetime by her for assisted reproduction and the husband is the genetic father of the child. The exception contained in subsection (i) relates to the withdrawal of consent in a record before the placement of eggs, sperm, or embryos. Note that subsection (d) only applies if the husband's sperm were used during his lifetime by his wife to cause a pregnancy by assisted reproduction. Subsection (d) does not apply to posthumous conception.

Subsection (e): Birth Certificate: Presumptive Effect. A birth certificate will name the child's birth mother as mother of the child. Under subsection (c), a parent-child relationship exists between a child of assisted reproduction and the child's birth mother. Note that the term "birth mother" is a defined term in subsection (a) as not including a gestational carrier as defined in Section 2-121.

Subsection (e) applies to the individual, if any, who is identified on the birth certificate as the child's other parent. Subsection (e) grants presumptive effect to a birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction. In the case of unmarried parents, federal law requires that states enact procedures under which "the name of the father shall be included on the record of birth," but only if the father and mother have signed a voluntary acknowledgment of paternity or a court of an administrative agency of competent jurisdiction has issued an adjudication of paternity. See 42 U.S.C. §666(a)(5)(D). This federal statute is included as an appendix to the Uniform Parentage Act.

The federal statute applies only to unmarried opposite-sex parents. Section 2-120(e)'s presumption, however, could apply to a same-sex couple if state law permits a woman who is not the birth mother to be listed on the child's birth certificate as the child's other parent. Even if state law does not permit that listing, the woman who is not the birth mother could be the child's parent by adoption of the child (see Section 2-118) or under subsection (f) as a result of her consent to assisted reproduction by the birth mother "with intent to be treated as the other parent of the child," or by satisfying the "function as a parent" test in subsection (f)(2).

Section 2-120 does not apply to same-sex couples that use a gestational carrier. For same-sex couples using a gestational carrier, the parent-child relationship can be established by adoption (see Section 2-118 and Section 2-121(b)), or it can be established under Section 2-121(d) if the couple enters into a gestational agreement with the gestational carrier under which the couple agrees to be the parents of the child born to the gestational carrier. It is irrelevant whether either intended parent is a genetic parent of the child. See Section 2-121(a)(4).

Subsection (f): Parent-Child Relationship with Another. In order for someone other than the birth mother to have a parent-child relationship with the child, there needs to be proof that the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. The other individual's genetic material might or might not have been used to create the pregnancy. Except as otherwise provided in this section, merely depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with the child.

Subsection (f)(1): Signed Record Evidencing Consent, Considering All the Facts and Circumstances, to Assisted Reproduction with Intent to Be Treated as the Other Parent of the Child.

Subsection (f)(1) provides that a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother 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 with intent to be treated as the other parent of the child is established if the individual signed a record, before or after the child's birth, that considering all the facts and circumstances evidences the individual's consent. Recognizing consent in a record not only signed before the child's birth but also at any time after the child's birth is consistent with the Uniform Parentage Act §§703 and 704.

As noted, the signed record need not explicitly express consent to the procedure with intent to be treated as the other parent of child, but only needs to evidence such consent considering all the facts and circumstances. An example of a signed record that would satisfy this requirement comes from *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, the New York Surrogate's Court held that a child of posthumous conception was included in a class gift in a case in which the deceased father had signed a form that stated: "In the event of my death I agree that my spouse shall have the sole right to make decisions regarding the disposition of my semen samples. I authorize repro lab to release my specimens to my legal spouse [naming her]." Another form he signed stated: "I, [naming him], hereby certify that I am married or intimately involved with [naming her] and the cryopreserved specimens stored at repro lab will be used for future inseminations of my wife/intimate partner." Although these forms do not explicitly say that the decedent consented to the procedure with intent to be treated as the other parent of the child, they do evidence such consent in light of all of the facts and circumstances and would therefore satisfy subsection (f)(1).

Subsection (f)(2): Absence of Signed Record Evidencing Consent. Ideally an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child will have signed a record that satisfies subsection (f)(1). If not, subsection (f)(2) recognizes that actions speak as loud as words. Under subsection (f)(2), consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual functioned as a parent of the child no later than two years after the child's birth. Under subsection (f)(2)(B), the same result applies if the evidence establishes that the individual had that intent but death, incapacity, or other circumstances prevented the individual from carrying out that intent. Finally, under subsection (f)(2)(C), the same result applies if it can be established by clear and convincing evidence that the individual intended to be treated as a parent of a posthumously conceived child.

Subsection (g): Record Signed More than Two Years after the Birth of the Child:
Effect. Subsection (g) is designed to prevent an individual who has never functioned as a parent of the child from signing a record in order to inherit from or through the child or in order to make it possible for a relative of the individual to inherit from or through the child. Thus, subsection (g) provides that, for purposes of subsection (f)(1), an individual who signed a record more than two years after the birth of the child, or a relative of that individual, does not inherit from or through the child unless the individual functioned as a parent of the child before the child reached the age of [18].

Subsection (h): Presumption: Birth Mother is Married or Surviving Spouse. Under subsection (h), if the birth mother is married and no divorce proceeding is pending, then in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B) or if the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, then in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

Subsection (i): Divorce Before Placement of Eggs, Sperm, or Embryos. Subsection (i) is

derived from the Uniform Parentage Act §706(b).

Subsection (j): Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos. Subsection (j) is derived from Uniform Parentage Act Section 706(a). Subsection (j) provides that if, in a record, an individual 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 individual, unless the individual subsequently satisfies the requirements of subsection (f).

Subsection (k): When Posthumously Conceived Gestational Child Treated as in Gestation. Subsection (k) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (1) in utero no later than 36 months after the individual's death or (2) born no later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of all or part of the distribution of the estate.

The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

SECTION 2-121. CHILD BORN TO GESTATIONAL CARRIER.

(a) [Definitions.] In this section:

(1) "Gestational agreement" means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (e).

(2) "Gestational carrier" means a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

(3) "Gestational child" means a child born to a gestational carrier under a gestational agreement.

(4) "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 gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

(b) [Court Order Adjudicating Parentage: Effect.] A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

(c) [Gestational Carrier.] A parent-child relationship between a gestational child and the

child's gestational carrier does not exist unless the gestational carrier is:

(1) designated as a parent of the child in a court order described in subsection (b); or

(2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

(d) [Parent-Child Relationship with Intended Parent or Parents.] In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an intended parent who:

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

(2) died while the gestational carrier was pregnant if:

(A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth;

(B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or

(C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

(e) [Gestational Agreement after Death or Incapacity.] In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by:

(1) a record signed by the individual which considering all the facts and circumstances evidences the individual's intent; or

(2) other facts and circumstances establishing the individual's intent by clear and convincing evidence.

(f) [Presumption: Gestational Agreement after Spouse's Death or Incapacity.] Except as otherwise provided in subsection (g), and unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if:

(1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child;

(2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and

(3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

(g) [Subsection (f) Presumption Inapplicable.] The presumption under subsection (f) does not apply if there is:

(1) a court order under subsection (b); or

(2) a signed record that satisfies subsection (e)(1).

(h) [When Posthumously Conceived Gestational Child Treated as in Gestation.] If, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual's death; or

(2) born not later than 45 months after the individual's death.

(i) [No Effect on Other Law.] This section does not affect law of this state other than this [code] regarding the enforceability or validity of a gestational agreement.

Comment

Subsection (a): Definitions. Subsection (a) defines the following terms:

Gestational agreement. The definition of gestational agreement is based on the Comment to Article 8 of the Uniform Parentage Act, which states that the term "gestational carrier" "applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman who is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents." The Comment also points out that "The [practice in which the woman is both the gestational and genetic mother] has elicited disfavor in the ART community, which has concluded that the gestational carrier's genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement."

Gestational carrier is defined as a woman who is not an intended parent and who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

Gestational child is defined as a child born to a gestational carrier under a gestational agreement.

Intended parent is defined as an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

Other Defined Terms. In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

Child of assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as 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. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic mother is defined as the woman whose egg was fertilized by the sperm of the child's genetic father.

Incapacity is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

Relative is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

Subsection (b): Court Order Adjudicating Parentage: Effect. A court order issued under Section 807 of the Uniform Parentage Act (UPA) would qualify as a court order adjudicating parentage for purposes of subsection (b). UPA Section 807 provides:

UPA Section 807. Parentage under Validated Gestational Agreement.

(a) Upon birth of a child to a gestational carrier, the intended parents shall file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

- (1) confirming that the intended parents are the parents of the child;
- (2) if necessary, ordering that the child be surrendered to the intended parents; and
- (3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational carrier is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational carrier or the appropriate state agency may file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

Subsection (c): Gestational Carrier. Under subsection (c), the only way that a parent-child relationship exists between a gestational child and the child's gestational carrier is if she is (1) designated as a parent of the child in a court order described in subsection (b) or (2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

Subsection (d): Parent-Child Relationship With Intended Parent or Parents. Subsection (d) only applies in the absence of a court order under subsection (b). If there is no such court order, subsection (b) provides that a parent-child relationship exists between a gestational child and an intended parent who functioned as a parent of the child no later than two years after the child's birth. A parent-child also exists between a gestational child and an intended parent if the intended parent died while the gestational carrier was pregnant, but only if (A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth; (B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or (C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

Subsection (e): Gestational Agreement After Death or Incapacity. Subsection (e) only

applies in the absence of a court order under subsection (b). If there is no such court order, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by a record signed by the individual which considering all the facts and circumstances evidences the individual's intent or by other facts and circumstances establishing the individual's intent by clear and convincing evidence.

Subsections (f) and (g): Presumption: Gestational Agreement After Spouse's Death or Incapacity. Subsection (f) and (g) are connected. Subsection (f) provides that unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if (1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child, (2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and (3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

Subsection (g) provides, however, that the presumption under subsection (f) does not apply if there is a court order under subsection (b) or a signed record that satisfies subsection (e)(1).

Subsection (h): When Posthumously Conceived Gestational Child is Treated as in Gestation. Subsection (h) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (1) in utero not later than 36 months after the individual's death or (2) born not later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate.

The 36-month period in subsection (g) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

SECTION 2-122. EQUITABLE ADOPTION. This [subpart] does not affect the doctrine of equitable adoption.

Comment

Subsection (a): Definitions. Subsection (a) defines the following terms:

Gestational agreement. The definition of gestational agreement is based on the Comment to Article 8 of the Uniform Parentage Act, which states that the term "gestational carrier" "applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman who is both the gestational and genetic mother. The key

is that an agreement has been made that the child is to be raised by the intended parents.” The Comment also points out that “The [practice in which the woman is both the gestational and genetic mother] has elicited disfavor in the ART community, which has concluded that the gestational carrier’s genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.”

Gestational carrier is defined as a woman who is not an intended parent and who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child’s genetic mother.

Gestational child is defined as a child born to a gestational carrier under a gestational agreement.

Intended parent is defined as an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

Other Defined Terms. In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

Child of assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as 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. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic mother is defined as the woman whose egg was fertilized by the sperm of the child’s genetic father.

Incapacity is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

Relative is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

Subsection (b): Court Order Adjudicating Parentage: Effect. A court order issued under Section 807 of the Uniform Parentage Act (UPA) would qualify as a court order adjudicating parentage for purposes of subsection (b). UPA Section 807 provides:

UPA Section 807. Parentage under Validated Gestational Agreement.

(a) Upon birth of a child to a gestational carrier, the intended parents shall file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

- (1) confirming that the intended parents are the parents of the child;
- (2) if necessary, ordering that the child be surrendered to the intended parents; and
- (3) directing the [agency maintaining birth records] to issue a birth certificate naming

the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational carrier is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational carrier or the appropriate state agency may file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

Subsection (c): Gestational Carrier. Under subsection (c), the only way that a parent-child relationship exists between a gestational child and the child's gestational carrier is if she is (1) designated as a parent of the child in a court order described in subsection (b) or (2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

Subsection (d): Parent-Child Relationship With Intended Parent or Parents. Subsection (d) only applies in the absence of a court order under subsection (b). If there is no such court order, subsection (b) provides that a parent-child relationship exists between a gestational child and an intended parent who functioned as a parent of the child no later than two years after the child's birth. A parent-child also exists between a gestational child and an intended parent if the intended parent died while the gestational carrier was pregnant, but only if (A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth; (B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or (C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

Subsection (e): Gestational Agreement After Death or Incapacity. Subsection (e) only applies in the absence of a court order under subsection (b). If there is no such court order, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by a record signed by the individual which considering all the facts and circumstances evidences the individual's intent or by other facts and circumstances establishing the individual's intent by clear and convincing evidence.

Subsections (f) and (g): Presumption: Gestational Agreement After Spouse's Death or Incapacity. Subsection (f) and (g) are connected. Subsection (f) provides that unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if (1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child, (2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and (3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

Subsection (g) provides, however, that the presumption under subsection (f) does not apply if there is a court order under subsection (b) or a signed record that satisfies subsection (e)(1).

Subsection (h): When Posthumously Conceived Gestational Child is Treated as in Gestation. Subsection (h) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (1) in utero not later than 36 months after the individual's death or (2) born not later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate.

The 36-month period in subsection (g) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

SECTION 2-702. REQUIREMENT OF SURVIVAL BY 120 HOURS.

(a) [Requirement of Survival by 120 Hours Under Probate Code.] For the purposes of this [code], except as provided in subsection (d), an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is deemed to have predeceased the event.

(b) [Requirement of Survival by 120 Hours under Governing Instrument.] Except as provided in subsection (d), 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 120 hours is deemed to have predeceased the event.

(c) [Co-owners With Right of Survivorship; Requirement of Survival by 120 Hours.] Except as provided in subsection (d), if (i) 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 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours and (ii) 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 120 hours, the property passes in the proportion that one bears to the whole number of co-owners. For the purposes of this subsection, "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.

(d) [Exceptions.] Survival by 120 hours is not required if:

(1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;

(2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly

requires the individual to survive the event by a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;

(3) the imposition of a 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under Section 2-901(a)(1), (b)(1), or (c)(1) or to become invalid under Section 2-901(a)(2), (b)(2), or (c)(2); but survival must be established by clear and convincing evidence; or

(4) the application of a 120-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.

(e) [Protection of Payors and Other Third Parties.]

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument 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 payor or other third party received written notice of a claimed lack of entitlement under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this section.

(2) Written notice of a claimed lack of entitlement under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction 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 payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(f) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) 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.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives 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.

Comment

Scope and Purpose of Revision. This section parallels Section 2-104, which requires an heir to survive the intestate by 120 hours in order to inherit.

The scope of this section is expanded to cover all provisions of a governing instrument and this Code that relate to an individual surviving an event (including the death of another individual). As expanded, this section imposes the 120-hour requirement of survival in the areas covered by the Uniform Simultaneous Death Act. By 1993 technical amendment, an anomalous provision exempting securities registered under Part 3 of Article VI (Uniform TOD Security Registration Act) from the 120-hour survival requirement was eliminated. The exemption reflected a temporary concern attributable to UTODSRA's preparation prior to discussion of inserting a 120-hour survival requirement in the freestanding Uniform Simultaneous Death Act (USDA).

In the case of a multiple-party account such as a joint checking account registered in the name of the decedent and his or her spouse with right of survivorship, the 120-hour requirement of survivorship will not, under the facility-of-payment provision of Section 6-222(1), interfere with the surviving spouse's ability to withdraw funds from the account during the 120-hour period following the decedent's death.

Note that subsection (d)(1) provides that the 120-hour requirement of survival is inapplicable if the governing instrument "contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case." The application of this provision is illustrated by the following example.

Example. G died leaving a will devising her entire estate to her husband, H, adding that "in the event he dies before I do, at the same time that I do, or under circumstances as to make it doubtful who died first," my estate is to go to my brother Melvin. H died about 38 hours after G's death, both having died as a result of injuries sustained in an automobile accident.

Under subsection (b), G's estate passes under the alternative devise to Melvin because H's failure to survive G by 120 hours means that H is deemed to have predeceased G. The language in the governing instrument does not, under subsection (d)(1), nullify the provision that causes H, because of his failure to survive G by 120 hours, to be deemed to have predeceased G. Although the governing instrument does contain language dealing with simultaneous deaths, that language is not operable under the facts of the case because H did not die before G, at the same time as G, or under circumstances as to make it doubtful who died first.

Note that subsection (d)(4) provides that the 120-hour requirement of survival is inapplicable if "the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition." The application of this provision is illustrated by the following example.

Example. Pursuant to a common plan, H and W executed mutual wills with reciprocal provisions. Their intention was that a \$50,000 charitable devise would be made on the death of the survivor. To that end, H's will devised \$50,000 to the charity if W predeceased him. W's will devised \$50,000 to the charity if H predeceased her. Subsequently, H and W were involved in a common accident. W survived H by 48 hours.

Were it not for subsection (d)(4), not only would the charitable devise in W's will be effective, because H in fact predeceased W, but the charitable devise in H's will would also be

effective, because W's failure to survive H by 120 hours would result in her being deemed to have predeceased H. Because this would result in an unintended duplication of the \$50,000 devise, subsection (d)(4) provides that the 120-hour requirement of survival is inapplicable. Thus, only the \$50,000 charitable devise in W's will is effective.

Subsection (d)(4) also renders the 120-hour requirement of survival inapplicable had H and W died in circumstances in which it could not be established by clear and convincing evidence that either survived the other. In such a case, an appropriate result might be to give effect to the common plan by paying half of the intended \$50,000 devise from H's estate and half from W's estate.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. See the Comment to Section 2-804 for a discussion of the ERISA preemption question.

Revision of Uniform Simultaneous Death Act. The freestanding Uniform Simultaneous Death Act (USDA) was revised in 1991 in accordance with the revisions of this section. States that enact Sections 2-104 and 2-702 need not enact the USDA as revised in 1991 and should repeal the original version of the USDA if previously enacted in the state.

Reference. This section is discussed in Halbach & Waggoner, "The UPC's New Survivorship and Antilapse Provisions," 55 Alb. L. Rev. 1091 (1992).

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 140 (Supp. 1992).

SECTION 2-705. CLASS GIFTS CONSTRUED TO ACCORD WITH INTESTATE SUCCESSION; EXCEPTIONS.

(a) [Definitions.] In this section:

- (1) "Adoptee" has the meaning set forth in Section 2-115.
- (2) "Child of assisted reproduction" has the meaning set forth in Section 2-120.
- (3) "Distribution date" means the date when an immediate or postponed class gift takes effect in possession or enjoyment.
- (4) "Functioned as a parent of the adoptee" has the meaning set forth in Section 2-115, substituting "adoptee" for "child" in that definition.
- (5) "Functioned as a parent of the child" has the meaning set forth in Section 2-115.
- (6) "Genetic parent" has the meaning set forth in Section 2-115.
- (7) "Gestational child" has the meaning set forth in Section 2-121.
- (8) "Relative" has the meaning set forth in Section 2-115.

(b) [Terms of Relationship.] A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. For the purpose of determining whether a contrary intention exists under Section 2-701, a provision in a governing instrument that relates to the inclusion or exclusion in a class gift of a child born to parents who are not married to each other

but does not specifically refer to a child of assisted reproduction or a gestational child does not apply to a child of assisted reproduction or a gestational child.

(c) [Relatives by Marriage.] 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:

(1) when the governing instrument was executed, the class was then and foreseeably would be empty; or

(2) the language or circumstances otherwise establish that relatives by marriage were intended to be included.

(d) [Half-Blood Relatives.] Terms of relationship in a governing instrument that 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.

(e) [Transferor Not Genetic Parent.] 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 genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached [18] years of age.

(f) [Transferor Not Adoptive Parent.] 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:

(1) the adoption took place before the adoptee reached [18] years of age;

(2) the adoptive parent was the adoptee's stepparent or foster parent; or

(3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached [18] years of age.

(g) [Class-Closing Rules.] The following rules apply for purposes of the class-closing rules:

(1) A child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

(2) 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 120 hours after birth and was in utero not later than 36 months after the deceased parent's death or born not later than 45 months after the deceased parent's death.

(3) 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.

Comment

This section facilitates a modern construction of gifts that identify the recipient by reference to a relationship to someone; usually these gifts will be class gifts. The rules of construction contained in this section are substantially consistent with the rules of construction contained in the Restatement (Third) of Property: Wills and Other Donative Transfers §§14.5 through 14.9. These sections of the Restatement apply to the treatment for class-gift purposes of an adoptee, a nonmarital child, a child of assisted reproduction, a gestational child, and a relative by marriage.

The rules set forth in this section are rules of construction, which under Section 2-701 are controlling in the absence of a finding of a contrary intention. With two exceptions, Section 2-705

invokes the rules pertaining to intestate succession as rules of construction for interpreting terms of relationship in private instruments.

Subsection (a): Definitions. With one exception, the definitions in subsection (a) rely on definitions contained in intestacy sections. The one exception is the definition of “distribution date,” which is relevant to the class-closing rules contained in subsection (g). *Distribution date* is defined as the date when an immediate or postponed class gift takes effect in possession or enjoyment.

Subsection (b): Terms of Relationship. Subsection (b) provides that a class gift that uses a term of relationship to identify the takers includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of a child of assisted reproduction or a gestational child in a class is subject to the class-closing rules. See *Examples 11 through 15*.

The last sentence of subsection (b) was added by technical amendment in 2010. That sentence is necessary to prevent a provision in a governing instrument that relates to the inclusion or exclusion of a child born to parents who are not married to each other from applying to a child of assisted reproduction or a gestational child, unless the provision specifically refers to such a child. Technically, for example, a posthumously conceived child born to a decedent’s surviving widow could be considered a nonmarital child. See, e.g., *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257, 266-67 (Mass. 2002) (“Because death ends a marriage,... posthumously conceived children are always nonmarital children.”). A provision in a will, trust, or other governing instrument that relates to the inclusion or exclusion of a nonmarital child, or to the inclusion or exclusion of a nonmarital child under specified circumstances, was not likely inserted with a child of assisted reproduction or a gestational child in mind. The last sentence of subsection (b) provides that, unless that type of provision specifically refers to a child of assisted reproduction or a gestational child, such a provision does not state a contrary intention under Section 2-701 to the rule of construction contained in subsection (b).

Subsection (b) also provides that, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are 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 regarding parent-child relationships. The subsection (e) exception relates to situations in which the transferor is not the genetic parent of the child. The subsection (f) exception relates to situations in which the transferor is not the adoptive parent of the adoptee. Consequently, if the transferor *is* the genetic or adoptive parent of the child, neither exception applies, and the class gift or other term of relationship is construed in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of an adoptee or a child born to parents who are not married to each other in a class is subject to the class-closing rules. See *Examples 9 and 10*.

Subsection (c): Relatives by Marriage. Subsection (c) provides that terms of relationship 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 (1) when the governing instrument was executed, the class was then and foreseeably would be empty or (2) the language or circumstances otherwise establish that relatives by marriage were intended to be included. The Restatement (Third) of Property: Wills and Other Donative Transfers §14.9 adopts a similar rule of construction. As recognized in both subsection (c) and the Restatement, there are situations in which the circumstances would tend to include a relative by marriage. As provided in

subsection (g), inclusion of a relative by marriage in a class is subject to the class-closing rules.

One situation in which the circumstances would tend to establish an intent to include a relative by marriage is the situation in which, looking at the facts existing when the governing instrument was executed, the class was then and foreseeably would be empty unless the transferor intended to include relatives by marriage.

Example 1. G's will devised property in trust, directing the trustee to pay the income in equal shares "to G's children who are living on each income payment date and on the death of G's last surviving child, to distribute the trust property to G's issue then living, such issue to take per stirpes, and if no issue of G is then living, to distribute the trust property to the X Charity." When G executed her will, she was past the usual childbearing age, had no children of her own, and was married to a man who had four children by a previous marriage. These children had lived with G and her husband for many years, but G had never adopted them. Under these circumstances, it is reasonable to conclude that when G referred to her "children" in her will she was referring to her stepchildren. Thus her stepchildren should be included in the presumptive meaning of the gift "to G's children" and the issue of her stepchildren should be included in the presumptive meaning of the gift "to G's issue." If G, at the time she executed her will, had children of her own, in the absence of additional facts, G's stepchildren should not be included in the presumptive meaning of the gift to "G's children" or in the gift to "G's issue."

Example 2. G's will devised property in trust, directing the trustee to pay the income to G's wife W for life, and on her death, to distribute the trust property to "my grandchildren." W had children by a prior marriage who were G's stepchildren. G never had any children of his own and he never adopted his stepchildren. It is reasonable to conclude that under these circumstances G meant the children of his stepchildren when his will gave the future interest under the trust to G's "grandchildren."

Example 3. G's will devised property in trust, directing the trustee to pay the income "to my daughter for life and on her death, to distribute the trust property to her children." When G executed his will, his son had died, leaving surviving the son's wife, G's daughter-in-law, and two children. G had no daughter of his own. Under these circumstances, the conclusion is justified that G's daughter-in-law is the "daughter" referred to in G's will.

Another situation in which the circumstances would tend to establish an intent to include a relative by marriage is the case of reciprocal wills, as illustrated in *Example 4*, which is based on *Martin v. Palmer*, 1 S.W.3d 875 (Tex. Ct. App. 1999).

Example 4. G's will devised her entire estate "to my husband if he survives me, but if not, to my nieces and nephews." G's husband H predeceased her. H's will devised his entire estate "to my wife if she survives me, but if not, to my nieces and nephews." Both G and H had nieces and nephews. In these circumstances, "my nieces and nephews" is construed to include G's nieces and nephews by marriage. Were it otherwise, the combined estates of G and H would pass only to the nieces and nephews of the spouse who happened to survive.

Still another situation in which the circumstances would tend to establish an intent to include a relative by marriage is a case in which an ancestor participated in raising a relative by marriage other than a stepchild.

Example 5. G's will devised property in trust, directing the trustee to pay the income in equal shares "to my nieces and nephews living on each income payment date until the death of the last survivor of my nieces and nephews, at which time the trust shall terminate and the trust property

shall be distributed to the X Charity.” G’s wife W was deceased when G executed his will. W had one brother who predeceased her. G and W took the brother’s children, the wife’s nieces and nephews, into their home and raised them. G had one sister who predeceased him, and G and W were close to her children, G’s nieces and nephews. Under these circumstances, the conclusion is justified that the disposition “to my nieces and nephews” includes the children of W’s brother as well as the children of G’s sister.

The language of the disposition may also establish an intent to include relatives by marriage, as illustrated in *Examples 6, 7, and 8*.

Example 6. G’s will devised half of his estate to his wife W and half to “my children.” G had one child by a prior marriage, and W had two children by a prior marriage. G did not adopt his stepchildren. G’s relationship with his stepchildren was close, and he participated in raising them. The use of the plural “children” is a factor indicating that G intended to include his stepchildren in the class gift to his children.

Example 7. G’s will devised the residue of his estate to “my nieces and nephews named herein before.” G’s niece by marriage was referred to in two earlier provisions as “my niece.” The previous reference to her as “my niece” indicates that G intended to include her in the residuary devise.

Example 8. G’s will devised the residue of her estate “in twenty-five (25) separate equal shares, so that there shall be one (1) such share for each of my nieces and nephews who shall survive me, and one (1) such share for each of my nieces and nephews who shall not survive me but who shall have left a child or children surviving me.” G had 22 nieces and nephews by blood or adoption and three nieces and nephews by marriage. The reference to twenty-five nieces and nephews indicates that G intended to include her three nieces and nephews by marriage in the residuary devise.

Subsection (d): Half Blood Relatives. In providing that terms of relationship that 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, subsection (d) is consistent with the rules for intestate succession regarding parent-child relationships. See Section 2-107 and the phrase “or either of them” in Section 2-103(a)(3) and (4). As provided in subsection (g), inclusion of a half blood relative in a class is subject to the class-closing rules.

Subsection (e): Transferor Not Genetic Parent. The general theory of subsection (e) is that a transferor who is not the genetic parent of a child would want the child to be included in a class gift as a child of the genetic parent only if the genetic parent (or one or more of the specified relatives of the child’s genetic parent functioned as a parent of the child before the child reached the age of [18]. As provided in subsection (g), inclusion of a genetic child in a class is subject to the class-closing rules.

Example 9. G’s will created a trust, income to G’s son, A, for life, remainder in corpus to A’s descendants who survive A, by representation. A fathered a child, X; A and X’s mother, D, never married each other, and A never functioned as a parent of the child, nor did any of A’s relatives or spouses or surviving spouses of any of A’s relatives. D later married E; D and E raised X as a member of their household. Because neither A nor any of A’s specified relatives ever functioned as a parent of X, X would not be included as a member of the class of A’s descendants who take the corpus of G’s trust on A’s death.

If, however, A executed a will containing a devise to his children or designated his children

as beneficiary of his life insurance policy, X would be included in the class. Under Section 2-117, X would be A's child for purposes of intestate succession. Subsection (c) is inapplicable because the transferor, A, is the genetic parent.

Subsection (f): Transferor Not Adoptive Parent. The general theory of subsection (f) is that a transferor who is not the adoptive parent of an adoptee would want the child to be included in a class gift as a child of the adoptive parent only if (1) the adoption took place before the adoptee reached the age of [18]; (2) the adoptive parent was the adoptee's stepparent or foster parent; or (3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of [18]. As provided in subsection (g), inclusion of an adoptee in a class is subject to the class-closing rules.

Example 10. G's will created a trust, income to G's daughter, A, for life, remainder in corpus to A's descendants who survive A, by representation. A and A's husband adopted a 47-year old man, X. Because the adoption did not take place before X reached the age of [18], A was not X's stepparent or foster parent, and A did not function as a parent of X before X reached the age of [18]. X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

If, however, A executed a will containing a devise to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class. Under Section 2-118, X would be A's child for purposes of intestate succession. Subsection (d) is inapplicable because the transferor, A, is an adoptive parent.

Subsection (g): Class-Closing Rules. In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must (1) qualify as a class member under subsection (b), (c), (d), (e), or (f) and (2) not be excluded by the class-closing rules. For an exposition of the class-closing rules, see Restatement (Third) of Property: Wills and Other Donative Transfers §15.1. Section 15.1 provides that, "unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution."

Subsection (g)(1): Child in Utero. Subsection (g)(1) codifies the well-accepted rule that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

Subsection (g)(2): Children of Assisted Reproduction and Gestational Children; Class Gift in Which Distribution Date Arises At Deceased Parent's Death. Subsection (g)(2) changes the class-closing rules in one respect. If a child of assisted reproduction (as defined in Section 2-120) or a gestational child (as defined in Section 2-121) is conceived posthumously, and if the distribution date arises at the deceased parent's death, then the child is treated as living on the distribution date if the child lives 120 hours after birth and was either (1) in utero no later than 36 months after the deceased parent's death or (2) born no later than 45 months after the deceased parent's death.

The 36-month period in subsection (g)(2) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence

may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a normal period of pregnancy.

Example 11. G, a member of the armed forces, executed a military will under 10 U.S.C. §1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my wife W and 10 percent of my estate to my children." G also left frozen sperm at a sperm bank in case he should be killed in action. G consented to be treated as the parent of the child within the meaning of Section 2-120(f). G was killed in action. After G's death, W decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (1) in utero within 36 months after G's death or (2) born within 45 months after G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class.

Example 12. G, a member of the armed forces, executed a military will under 10 U.S.C. §1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my husband H and 10 percent of my estate to my issue by representation." G also left frozen embryos in case she should be killed in action. G consented to be the parent of the child within the meaning of Section 2-120(f). G was killed in action. After G's death, H arranged for the embryos to be implanted in the uterus of a gestational carrier. If the child so produced was either (1) in utero within 36 months after G's death or (2) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class.

Example 13. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then to distribute the trust principal to G's children. When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of Section 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (1) in utero within 36 months after G's death or (2) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class under the rule of convenience.

Subsection (g)(2) Inapplicable Unless Child of Assisted Reproduction or Gestational Child is Conceived Posthumously and Distribution Date Arises At Deceased Parent's Death. Subsection (g)(2) only applies if a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date arises at the deceased parent's death. Subsection (g)(2) does not apply if a child of assisted reproduction or a gestational child is not conceived posthumously. It also does not apply if the distribution date arises before or after the deceased parent's death. In cases to which subsection (g)(2) does not apply, the ordinary class-closing rules apply. For purposes of the ordinary class-closing rules, subsection (g)(1) provides that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

This means, for example, that, with respect to a child of assisted reproduction or a gestational child, a class gift in which the distribution date arises after the deceased parent's death is not limited to a child who is born before or in utero at the deceased parent's death or, in the case of posthumous conception, either (1) in utero within 36 months after the deceased parent's death or (2) born within 45 months after the deceased parent's death. The ordinary class-closing rules would only exclude a child of assisted reproduction or a gestational child if the child was not yet born or in utero on the distribution date (or who was then in utero but who failed to live 120 hours after birth).

A case that reached the same result that would be reached under this section is *In re Martin*

B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father's widow around three and five years after his death) were included in class gifts to the deceased father's "issue" or "descendants". The children would be included under this section because (1) the deceased father signed a record that would satisfy Section 2-120(f)(1), (2) the distribution dates arose after the deceased father's death, and (3) the children were living on the distribution dates, thus satisfying subsection (g)(1).

Example 14. G created a revocable inter vivos trust shortly before his death. The trustee was directed to pay the income to G for life, then "to pay the income to my wife, W, for life, then to distribute the trust principal by representation to my descendants who survive W." When G died, G and W had no children. Shortly before G's death and after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of Section 2-120(f). After G's death, W decided to become inseminated with G's frozen sperm so that she could have his child. The child, X, was born five years after G's death. W raised X. Upon W's death many years later, X was a grown adult. X is entitled to receive the trust principal, because a parent-child relationship between G and X existed under Section 2-120(f) and X was living on the distribution date.

Example 15. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then "to pay the income by representation to G's issue from time to time living, and at the death of G's last surviving child, to distribute the trust principal by representation to G descendants who survive G's last surviving child." When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of Section 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (1) in utero within 36 months after G's death or (2) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class-gift of income under the rule of convenience. If G's widow later decides to use his frozen sperm to have another child or children, those children would be included in the class-gift of income (assuming they live 120 hours after birth) even if they were not in utero within 36 months after G's death or born within 45 months after the G's death. The reason is that an income interest in class-gift form is treated as creating separate class gifts in which the distribution date is the time of payment of each subsequent income payment. See Restatement (Third) of Property: Wills and Other Donative Transfers §15.1 cmt. p. Regarding the remainder interest in principal that takes effect in possession on the death of G's last living child, the issue of the posthumously conceived children who are then living would take the trust principal.

Subsection (g)(3). For purposes of the class-closing rules, 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. An individual is "in the process of being adopted" if a legal proceeding to adopt the individual had been filed before the class closed. However, the phrase "in the process of being adopted" is not intended to be limited to the filing of a legal proceeding, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Reference. For the application of this section to children of assisted reproduction and gestational children, see Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30 (2009).

Historical Note. This Comment was revised in 1993, 2008, and 2010.

EXHIBIT F
RELEVANT SECTIONS OF THE UNIFORM PARENTAGE ACT

UNIFORM PARENTAGE ACT

(Last Amended or Revised in 2002)

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR
ST. AUGUSTINE, FLORIDA

JULY 28 – AUGUST 4, 2000

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Seattle, Washington, February 10, 2003

December 2002

SECTION 203. CONSEQUENCES OF ESTABLISHMENT OF PARENTAGE. Unless parental rights are terminated, a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State.

Comment

Source: USCACA (1988) § 10.

This section may seem to state the obvious, but both the statement and the qualifier are necessary because without this explanation a literal reading of §§ 201-203 could lead to erroneous statutory constructions. The basic purpose of the section is to make clear that a mother, as defined in § 201(a), is not a parent once her parental rights have been terminated. Similarly, a man whose paternity has been established by acknowledgment or by court adjudication may subsequently have his parental rights terminated.

The qualifier, “as otherwise provided by other law of this State,” is necessary because other statutes may restrict rights of a parent. For example, UPC (1993) § 2-114(c) precludes a parent of a child (and the parent’s family) from inheriting from the child by intestate succession “unless that natural parent has openly treated the child as his [or hers] and has not refused to support the child.” Similarly, as discussed in the preceding Comment, UPC (1993) § 2-705(b) affects the right of a child to take under a class gift from a person who is not a parent of the child.

ARTICLE 7

CHILD OF ASSISTED REPRODUCTION

Comment

During the last thirty years, medical science has developed a wide array of assisted reproductive technology, often referred to as ART, which have enabled childless individuals and couples to become parents. Thousands of children are born in the United States each year as the result of ART. If a married couple uses their own eggs and sperm to conceive a child born to the wife, the parentage of the child is straightforward. The wife is the mother--by gestation and genetics, the husband is the father--by genetics and presumption. And, insofar as the Uniform Parentage Act is concerned, neither parent fits the definition of a “donor.”

Current state laws and practices are not so straightforward, however. If a woman gives birth to a child conceived using sperm from a man other than her husband, she is the mother and her husband, if any, is the presumed father. However, the man who provided the sperm might assert his biological paternity, or the husband might seek to rebut the martial presumption of paternity by proving through genetic testing that he is not the genetic father. As was the case in UPA (1973), it is necessary for the new Act to clarify definitively the parentage of a child born under these circumstances.

Similarly, assisted reproduction may involve the eggs from a woman other than the mother--perhaps using the intended father’s sperm, perhaps not. In either event, the new Act makes a policy decision to clearly exclude the egg donor from claiming maternity. Theoretically, it is even possible that absent appropriate legislation the mother could attempt to deny maternity based on her lack of genetic relationship.

Finally, many couples employ a common ART procedure that combines sperm and eggs to form a pre-zygote that is then frozen for future use. If the couple later divorces, or one of them dies, absent legislation there are no clear rules for determining the parentage of a child resulting from a pre-zygote implanted after divorce or after the death of the would-be father. Disposition of such pre-zygotes, or even issues of their “ownership,” create not only broad publicity, but also are problems on which courts need guidance.

(Prefatory Note updated December 2002)

SECTION 703. PATERNITY OF CHILD OF ASSISTED REPRODUCTION. A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.

Comment

Source: UPA (1973) § 5; USCACA (1988) §§ 1, 3.

The father-child relationship is created between a man and the resulting child if the man provides sperm for, or consents to, assisted reproduction by a woman with the intent to be the parent of her child, *see* § 704, *infra*. This provision reflects the concern for the best interests of nonmarital as well as marital children of assisted reproduction demonstrated throughout the Act. Given the dramatic increase in the use of ART in the United States during the past decade, it is crucial to clarify the parentage of all of the children born as a result of modern science.

(Comment updated December 2002)

SECTION 704. CONSENT TO ASSISTED REPRODUCTION.

(a) Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.

(b) Failure a man to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own.

Comment

Source: UPA (1973) § 5; UPC (1993) § 2-114(c).

Subsection (a) requires that a man, whether married or unmarried, who intends to be a parent of a child must consent in a record to all forms of assisted reproduction covered by this article. The amendment clarifies that the requirement of consent does not apply to a male or a female donor.

Subsection (b) provides that even if a husband, or an unmarried man who intends to be a parent of the child, did not consent to assisted reproduction, he may nonetheless be found to be the father of a child born through that means if he and the mother openly hold out the child as their own. This principle is taken from the Uniform Probate Code § 2C114(c) (1993), which provides that neither "natural parent" nor kindred may inherit from or through a child "unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child." The "holding out" requirement substitutes evidence of the parties' conduct after the child is born for the requirement of formal consent in a record to prospective assisted reproduction. The "non-support" phrase in § 2C114(c) was not carried forward in subsection (b) (and the term "natural parent" has been replaced by more accurate terminology).

(Comment updated December 2002)

ARTICLE 8
GESTATIONAL AGREEMENT
Comment

The longstanding shortage of adoptable children in this country has led many would-be parents to enlist a gestational mother (previously referred to as a "surrogate mother") to bear a child for them. As contrasted with the assisted reproduction regulated by Article 7, which involves the would-be parent or parents and most commonly one and sometimes two anonymous donors, the

gestational agreement (previously known as a surrogacy agreement) provided in this article is designed to involve at least three parties; the intended mother and father and the woman who agrees to bear a child for them through the use of assisted reproduction (the gestational mother). Additional people may be involved. For example, if the proposed gestational mother is married, her husband, if any, must be included in the agreement to dispense with his presumptive paternity of a child born to his wife. Further, an egg donor or a sperm donor, or both, may be involved, although neither will be joined as a party to the agreement. Thus, by definition, a child born pursuant to a gestational agreement will need to have maternity as well as paternity clarified.

The subject of gestational agreements was last addressed by the National Conference of Commissioners on Uniform State Laws in 1988 with the adoption of the UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA). Because some Commissioners believed that such agreements should be prohibited, while others believed that such agreements should be allowed, but regulated, USCACA offered two alternatives on the subject; either to regulate such activities through a judicial review process or to void such contracts. As might have been predicted, the only two states to enact USCACA selected opposite options; Virginia chose to regulate such agreements, while North Dakota opted to void them.

In the years since the promulgation of USCACA (and virtual de facto rejection of that Act), approximately one-half of the states developed statutory or case law on the issue. Of those, about one-half recognized such agreements, and the other half rejected them. A survey in December, 2000, revealed a wide variety of approaches: eleven states allow gestational agreements by statute or case law; six states void such agreements by statute; eight states do not ban agreements per se, but statutorily ban compensation to the gestational mother, which as a practical matter limits the likelihood of agreement to close relatives; and two states judicially refuse to recognize such agreements. In states rejecting gestational agreements, the legal status of children born pursuant to such an agreement is uncertain. If gestational agreements are voided or criminalized, individuals determined to become parents through this method will seek a friendlier legal forum. This raises a host of legal issues. For example, a couple may return to their home state with a child born as the consequence of a gestational agreement recognized in another state. This presents a full faith and credit question if their home state has a statute declaring gestational agreements to be void or criminal.

Despite the legal uncertainties, thousands of children are born each year pursuant to gestational agreements. One thing is clear; a child born under these circumstances is entitled to have its status clarified. Therefore, NCCUSL once again ventured into this controversial subject, withdrawing USCACA and substituting bracketed Article 8 of the new UPA. The article incorporates many of the USCACA provisions allowing validation and enforcement of gestational agreements, along with some important modifications. The article is bracketed because of a concern that state legislatures may decide that they are still not ready to address gestational agreements, or that they want to treat them differently from what Article 8 provides. States may omit this article without undermining the other provisions of the UPA (2002).

Article 8's replacement of the USCACA terminology, "surrogate mother," by "gestational mother" is important. First, labeling a woman who bears a child a "surrogate" does not comport with the dictionary definition of the term under any construction, to wit: "a person appointed to act in the place of another" or "something serving as a substitute." The term is especially misleading when "surrogate" refers to a woman who supplies both "egg and womb," that is, a woman who is a genetic as well as gestational mother. That combination is now typically avoided by the majority of ART practitioners in order to decrease the possibility that a genetic\gestational mother will be unwilling to relinquish her child to unrelated intended parents. Further, the term "surrogate" has acquired a

negative connotation in American society, which confuses rather than enlightens the discussion.

In contrast, term “gestational mother” is both more accurate and more inclusive. It applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents. The latter practice has elicited disfavor in the ART community, which has concluded that the gestational mother’s genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.

The new UPA treats entering into a gestational agreement as a significant legal act that should be approved by a court, just as an adoption is judicially approved. The procedure established generally follows that of USCACA, but departs from its terms in several important ways. First, nonvalidated gestational agreements are unenforceable (not void), thereby providing a strong incentive for the participants to seek judicial scrutiny. Second, there is no longer a requirement that at least one of the intended parents would be genetically related to the child born of the gestational agreement. Third, individuals who enter into nonvalidated gestational agreements and later refuse to adopt the resulting child may be liable for support of the child.

Although legal recognition of gestational agreements remains controversial, the plain fact is that medical technologies have raced ahead of the law without heed to the views of the general public--or legislators. Courts have recently come to acknowledge this reality when forced to render decisions regarding collaborative reproduction, noting that artificial insemination, gestational carriers, cloning and gene splicing are part of the present, as well as of the future. One court predicted that even if all forms of assisted reproduction were outlawed in a particular state, its courts would still be called upon to decide on the identity of the lawful parents of a child resulting from those procedures undertaken in less restrictive states. This court noted:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all of its permutations) and--as now appears in the not-too-distant future, cloning and even gene splicing--courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who--other than the taxpayers--is obligated to provide maintenance and support for the child. These cases will not go away. Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme. Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.

Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

SECTION 803. HEARING TO VALIDATE GESTATIONAL AGREEMENT.

(a) If the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the of the agreement.

(b) The court may issue an order under subsection (a) only on finding that:

(1) the residence requirements of Section 802 have been satisfied and the parties have

submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];

(2) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of suitability applicable to adoptive parents;

(3) all parties have voluntarily entered into the agreement and understand its terms;

(4) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and

(5) the consideration, if any, paid to the prospective gestational mother is reasonable.

Comment

Source: USCACA § 6(b).

This pre-conception authorization process for a gestational agreement is roughly analogous to prevailing adoption procedures in place in most states. Just as adoption contemplates the transfer of parentage of a child from the birth parents to the adoptive parents, a gestational agreement involves the transfer from the gestational mother to the intended parents. The Act is designed to protect the interests of the child to be born under the gestational agreement as well as the interests of the gestational mother and the intended parents.

In contrast to USCACA (1988) § 1(3), there is no requirement that at least one of the intended parents be genetically related to the child born of a gestational agreement. Similarly, the likelihood that the gestational mother will also be the genetic mother is not directly addressed in the new Act, while USCACA (1988) apparently assumed that such a fact pattern would be typical. Experience with the intractable problems caused by such a combination has dissuaded the majority of fertility laboratories from following that practice. *See In re Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988).

This section seeks to protect the interests of the child in several ways. The major protection of the child is the authorization procedure itself. The Act requires closely supervised gestational arrangements to ensure the security and well being of the child. Once a petition has been filed, subsection (a) permits--but does not require--the court to validate a gestational agreement. If it validates, the court must declare that the intended parents will be the parents of any child born pursuant to, and during the term of, the agreement.

Subsection (b) requires the court to make five separate findings before validating the agreement. Subsection (b)(1) requires the court to ensure that the 90-day residency requirement of § 802 has been satisfied and that it has jurisdiction over the parties;

Under subsection(b)(2), the court will be informed of the results of a home study of the intended parents who must satisfy the suitability standards required of prospective adoptive parents.

The interests of all the parties are protected by subsection (b)(3), which is designed to protect the individuals involved from the possibility of overreaching or fraud. The court must find that all parties consented to the gestational agreement with full knowledge of what they agreed to do, which necessarily includes relinquishing the resulting child to the intended parents who are obligated to accept the child.

The requirement of assurance of health-care expenses until birth of the resulting child imposed by subsection (b)(4) further protects the gestational mother.

Finally, subsection (b)(5) mandates that the court find that compensation of the

gestational mother, if any, is reasonable in amount.

Section 803, spells out detailed requirements for the petition and the findings that must be made before an authorizing order can be issued, but nowhere states the consequences of violations of the rules. Because of the variety of types of violations that could possibly occur, a bright-line rule concerning the effect of such violations is inappropriate. The consequences of a failure to abide by the rules of this section are left to a case-by-case determination. A court should be guided by the Act's intention to permit gestational agreements and the equities of a particular situation. Note that § 806 provides a period for termination of the agreement and vacating of the order. The discovery of a failure to abide by the rules of § 803 would certainly provide an occasion for terminating the agreement. On the other hand, if a failure to abide by the rules of § 803 is discovered by a party during a time when § 806 termination is permissible, failure to seek termination might be an appropriate reason to estop the party from later seeking to overturn or ignore the § 803 order.

(Comment updated December 2002)

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INTERNET RESOURCES

A. Adoption

Adoptive Families Magazine, <http://www.adoptivefamilies.com/>.

Center for Adoption Policy, <http://www.adoptionpolicy.org/>

Center for Adoption Support and Education, <http://adoptionssupport.org/>

Child Welfare Information Gateway, <https://www.childwelfare.gov/>

Internal Revenue Service - Adoption Credit, <http://www.irs.gov/taxtopics/tc607.html>

National Adoption Foundation, <http://fundyouradoption.org/>

National Council for Adoption, <https://www.adoptioncouncil.org/>

U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis>

B. Assisted Reproduction

The American Fertility Association (AFA), <http://www.theafa.org/>

American Society for Reproductive Medicine (ASRM), <http://www.asrm.org/>

Donor Conception Network, <http://www.dcnetwork.org/>

RESOLVE: The National Infertility Association, <http://www.resolve.org/>

C. PARENTING PARTNERSHIPS

Family by Design, <http://www.familybydesign.com/>

ILLINOIS ADDENDUM

A. Posthumously Born Children.¹²⁷

Posthumously born children are treated as if they were born during the decedent's lifetime.

B. Illinois Parentage Act.

Illinois adopted the Uniform Parentage Act, effective January 1, 2007.¹²⁸ It provides, in part, rules for establishing a parent-child relationship, including the following: Rules for acknowledging and denying paternity. Requires the Department of Children and Family Services to establish a registry of paternity, and requires that men who have timely registered be given notice of a proceeding for adoption or for termination of parental rights. Provides rules for the genetic testing of a person to determine parentage. Provides rules for proceedings to adjudicate parentage. Provides rules for determining the parentage of a child of assisted reproduction. Includes in the Uniform Parentage Act certain provisions previously contained in the Illinois Parentage Act of 1984 concerning child support and other matters. Repeals the Illinois Parentage Act and the Illinois Parentage Act of 1984. Amends the Gestational Surrogacy Act; provides that attorneys' certifications that the gestational surrogate and the intended parent or parents entered into a gestational surrogacy contract shall be filed on forms prescribed by the Department of Healthcare and Family Services instead of forms prescribed by the Department of Public Health. Amends other Acts to make conforming changes.

1. Artificial insemination.¹²⁹

A child born to a husband and wife as a result of artificial insemination, under the supervision of a licensed physician and with the consent of the husband, shall be treated as a naturally conceived child of both parents.

2. Presumption of Paternity.¹³⁰

- (a) A man is presumed to be the natural father of a child if:
- (1) he and the child's natural mother are or have been married to each other,

¹²⁷ 755 ILCS 5/2-3 available at <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=075500050HArt%2E+II&ActID=2104&ChapterID=60&SeqStart=3700000&SeqEnd=5000000>.

¹²⁸ See <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4659&GAID=8&DocTypeID=HB&LegID=23045&SessionID=50&SpecSess=&Session=&GA=98> for a list of affected sections.

¹²⁹ 750 ILCS 40/2-3 available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2096&ChapterID=59> and 750 ILCS 45 available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2097&ChapterID=59>.

¹³⁰ 750 ILCS 45/5 available at <http://www.ilga.gov/legislation/ilcs/documents/075000450K5.htm>.

even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage;

(2) after the child's birth, he and the child's natural mother have married each other, even though the marriage is or could be declared invalid, and he is named, with his written consent, as the child's father on the child's birth certificate;

(3) he and the child's natural mother have signed an acknowledgment of paternity in accordance with rules adopted by the Department of Healthcare and Family Services under Section 10-17.7 of the Illinois Public Aid Code; or

(4) he and the child's natural mother have signed an acknowledgment of parentage or, if the natural father is someone other than one presumed to be the father under this Section, an acknowledgment of parentage and denial of paternity in accordance with Section 12 of the Vital Records Act.

C. Gestational Surrogacy Act.¹³¹

The intended mother and father shall be presumed to be the mother and father and parental rights shall vest immediately upon the birth of the child. A gestational surrogate must have already given birth to at least one child. Among other requirements, the intended parents must have contributed at least one of the gametes resulting in the pre-embryo to be carried by the gestational surrogate. A gestational surrogate may be compensated and must agree to surrender custody of the child to the intended parent or parents immediately upon birth of the child, although specific performance is not an available remedy.

D. Adoption Generally.¹³²

In 1997, Illinois amended its laws to extend the statutory presumption in favor of including adopted children as beneficiaries to written instruments created prior to September 1, 1955. As of January 1, 1998, a child adopted after attaining age 18 will be included as a descendant of the adopting parent for purposes of inheritance from collateral or lineal relatives of the adopting parent only if the child resided with the adopting parent before reaching age 18.¹³³

If the adoption takes place when the adoptee is over age 18 and the child never resided with the adopting parent before attaining age of 18 years, the adopted child is a child of the adopting

¹³¹ 750 ILCS 47 available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2613&ChapterID=59>.

¹³² ILCS 5/2-4 available at <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=075500050K2-4>. See also 750 ILCS 50 for the rules applicable to adoptions generally, available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2098&ChapterID=59>.

¹³³ 755 ILCS 5/ 2-4(a, e).

parent but is not a descendant of the adopting parent for the purposes of inheriting from the lineal or collateral heirs of the adopting parent.¹³⁴

Before the 1997 amendment (effective January 1, 1989), the presumption in favor of adopted children applied only to written instruments entered into after September 1, 1955, unless the contrary intent is demonstrated by the terms of the instrument in clear and convincing evidence.¹³⁵

An adopted child and the descendants of the child who is related to a decedent through more than one line of relationship shall be entitled only to the share based on the relationship which entitles the child or descendant to the largest share.¹³⁶

E. Adult Adoption.

Illinois' incest statute makes adult adoptions illegal. 720 ILCS. 5/11-11(2) and 755 ILCS 5/2-4 specifically provide that for trusts executed on or after January 1, 1998, an individual adopted as an adult is not considered a descendant.

F. Legitimacy.¹³⁷

Illinois also looks at legitimacy in terms of whether the parent of an illegitimate child may inherit from that child. Parents of children born out of wedlock in Illinois may inherit from their child, under the laws of intestacy generally, if he or she qualifies as an eligible parent. An "eligible parent" is a parent of the decedent child who, during the decedent's lifetime, acknowledged the decedent as his or her child, established a parental relationship with the decedent, and supported the decedent as the parent's child. Eligible parents in arrears of in excess of one year's child support may not inherit from the decedent without a court order.

¹³⁴ 755 ILCS 5/2-4(a).

¹³⁵ 755 ILCS 5/2-4(e).

¹³⁶ *Id.*

¹³⁷ 755 Ill. Comp Stat. 5/2-2 available at <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=075500050HArt%2E+II&ActID=2104&ChapterID=60&SeqStart=3700000&SeqEnd=5000000>.