

*New Developments in Assisted Reproductive Technologies and Their Effects on Estate Planning*

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*Friday, May 7, 2010 9:15 AM to 10:15 AM*

1. New UPC Sections 2-120 and 2-121 add presumptions of parentage for children conceived after the death of one or both of the intended parents. Are these post mortem conception (PMC) children entitled to inherit from or through the deceased parent?
  - a. UPC 2-120: Child Conceived by Assisted Reproduction Other Than A Child Born to A Gestational Carrier: Requires consent to assisted reproduction with intent to be treated as a parent of the child.
    - i. Consent can be shown by (1) a record signed by the decedent or (2) clear and convincing evidence that the decedent intended to be treated as a parent of a PMC child. Evidence of such consent is presumed if the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceedings were pending.
  - b. UPC 2-121: Child Born To A Gestational Carrier. Requires consent by the individual whose sperm or eggs are used after the individual's death with intent to be treated as a parent of the child.
    - i. Consent can be shown by (1) a record signed by the decedent or (2) clear and convincing evidence of decedent's intent. Evidence of such consent is presumed if the individual deposited sperm or eggs before death at a time when decedent and his/her partner were married with no divorce proceedings pending, and the individual's spouse functioned as a parent of the child within 2 years of the child's birth.
  - c. For both 2-120 and 2-121, the PMC child must be in utero within 36 months after the individual's death, or born not later than 45 months after the individual's death, for the decedent to be treated as a parent.

- d. Note that sperm or eggs must be retrieved before the individual's death in order to benefit from the presumption of intent for 2-121, when a gestational carrier is used. For 2-120, a person married at death might benefit from the presumption even if the material was retrieved after the individual's death.
  - e. Compare Proposed Model Act Governing Assisted Reproduction, ABA Section of Family Law Sec. 702 (2006), and UPA Section 707: Decedent is not a parent unless s/he consented in a record.
2. How would these proposed UPC sections change existing law?
- a. Several states have enacted versions of the 2000 Uniform Parentage Act Section 707, which provides that a deceased spouse is not a parent of a PMC child unless the spouse consented in a record. (Alabama, Colorado,\* New Mexico, Texas, Utah, Washington).
  - b. A few states have adopted a more recent version of UPA Section 707 to refer to an "individual" rather than a "spouse", but still require consent in a record. (Delaware, North Dakota, Wyoming).
  - c. Florida requires the PMC child to be provided for in the decedent's will. Conversely, New York expressly excludes a PMC child from its pretermitted child statute.
  - d. Two states (California and Louisiana) have imposed time limits similar to those in the UPC, in addition to requiring written consent.
  - e. Virginia law: "a child born more than ten months after the death of a parent shall not be recognized as such parent's child" to inherit either in intestacy or by will.
3. Cases on PMC children:

- a. New Jersey, Massachusetts and Arizona have held that the decedent is the parent of the PMC child if certain conditions are met. *In re Estate of Kolacy*, 753 A.2d 1257 (2000); *Woodward v. Commissioner*, 760 N.E. 2d 257 (2002); *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9<sup>th</sup> Cir. 2004).
  - b. New Hampshire, Arkansas, and California have held that a decedent is not the parent of the PMC child. *Eng v. Commissioner*, 930 A.2d 1180 (N.H. 2007); *Finley v. Astrue*, 372 Ark. 103 (2008); *Vernoff v. Astrue*, 568 F.3d 1102 (9<sup>th</sup> Cir. 2009).
  - c. Can the PMC child take *through* the decedent from a grandparent's trust? *In the Matter of Martin B.* 17 Misc. 3d 198, 841 N.Y.S. 2d 207 (2007): trusts created in 1969 for the benefit of the grantor's children and grandchildren. The grantor's son James died in 2001 leaving cryopreserved sperm. Three years after his death, his widow Nancy used the sperm to become pregnant, and gave birth in 2004 to a son James; she underwent the same procedure two years later to have another son, Warren.
  - d. Under UPC 2-120: Would one child (James) be eligible to take, but not the later-born son (Warren)?
4. Four scenarios for the PMC child where the surviving partner wants the decedent to be named the parent of their child, and the decedent is a genetic parent of the child. Assume the PMC child is *in utero* within 36 months of the partner's death.
- a. Easiest case: Surviving partner is female (and birth mother), and the decedent is male (and genetic father). UPC 2-120
    - i. Any signed record to evidence decedent's intent to allow use of gametes after death?
    - ii. If no record, were decedent and the surviving partner married? If not, is there clear and convincing evidence of decedent's intent?
  - b. Surviving partner is female (and birth mother), and decedent is female (and genetic mother). A 3<sup>rd</sup> person must be involved (sperm donor). UPC 2-120. In addition to above questions:
    - i. Is the sperm donor the father of the child? No: not a spouse or the birth mother, no intent to be a parent.

- ii. Will state allow two women (birth mother and deceased genetic mother) to be named as parents?
  - c. Surviving partner is male (genetic father) and decedent is female (genetic mother). A third person must be involved: a gestational carrier. UPC 2-121
    - i. Is gestational carrier (birth mother) the mother of the child? See UPC 2-121(2)(no – she is not the genetic mother absent a court order). Statutes that conclusively presume that the gestational carrier or surrogate is the mother have been declared unconstitutional: *Soos v. Arizona*, 182 Ariz. 470 (1994)(EP); *J.R. v. Utah*, 261 F. Supp. 2d 1268 (2003)(DP and EP). See also *In re Roberto d.B.*, 399 Md. 267 (2007)(EP).
    - ii. For decedent to be declared the mother of the PMC child, we need a record signed by her evidencing her intent, or clear and convincing evidence of her intent.
    - iii. Note additional requirements to get the presumption of intent under 2-121.
  - d. Surviving partner is male and decedent is male (genetic father). Two more people must be involved: an egg donor (who generally would not be a parent, as above for the sperm donor) and a gestational carrier (also not a parent, as above). In addition to the questions in (a) and (c):
    - i. Will state allow two men (genetic father and his partner) to be named on the birth certificate?
    - ii. Surviving partner is intended parent: “an individual who entered into a gestational agreement providing that the individual will be a parent of a child born to the gestational carrier.”
- 5. Can the decedent be named the parent of a PMC child if s/he is not genetically related to the child?
  - a. Any requirement in 2-120 that decedent’s reproductive material be used, or is consent sufficient?
  - b. Compare 2-121(e) which finds a parent-child relationship “with an individual whose sperm or eggs were used after the individual’s death.”