

Materials for ABA Spring Symposia for Professor Kristine S. Knaplund:

10:30 – 11:30 a.m. Friday, April 29, 2011

Born To Be Wild: Assisted Reproduction and Estate Planning

Program Chair and Moderator: Kristine S. Knaplund, Pepperdine School of Law, Malibu, CA

Now that more than 500,000 embryos, and countless sperm and eggs, are stored for future use, estate planners must consider the possibility that their baby boomer clients, or the adult children of their clients, may have a postmortem conception child – a child born years, even decades, after a parent’s death. Our panel will focus on 3 areas in which a postmortem conception child can have a huge impact on the estate plan: clients about to begin assisted reproduction, clients creating a will or trust, where there is a possibility of a postmortem conception child or grandchild, and attorneys for the personal representative of an estate of a client who has frozen sperm, eggs or embryos.

Here is some background information for attendees who are not familiar with the area of assisted reproduction.

What is assisted reproduction?

Assisted reproduction means a child is *not* conceived through sexual intercourse, but rather by a method that involves handling the sperm, the egg, or both, outside the body. The term includes:

- assisted insemination (AI), also called artificial insemination or intrauterine insemination, in which the sperm is inserted into the woman’s cervix by means of a syringe or other device.
- *in vitro* fertilization (IVF) requires collecting the sperm and the ova, and combining them in the laboratory. Once the sperm has fertilized the egg and cell division has occurred, the resulting embryo (or preembryo) is implanted in the woman, or frozen for later use.
- intracytoplasmic sperm injection, developed in the 1990s, involves inserting a single sperm into an egg and then implanting the resulting embryo.

How is the sperm or egg obtained for assisted reproduction?

Gametes (sperm & unfertilized eggs) may be obtained either while the person is alive, while s/he is in a persistent vegetative state, or after a person has died.

To obtain sperm while the man is alive & conscious is easy: no doctor or lab is required. If the man is dead, or in a persistent vegetative state, it is more difficult but possible to obtain viable sperm. The request to obtain sperm from a man who has died is encountered frequently enough that some hospitals have developed protocols to address when such a request should be granted.¹

Obtaining ova for use in assisted reproduction is more difficult than obtaining sperm, and always involves the intervention of a medical professional. The woman is usually given a regimen of hormone drugs to encourage her ovaries to produce more eggs. One way to retrieve the eggs is through ultrasound guided aspiration, in which a thin needle is inserted through the vagina and into the ovaries, and suction is used to obtain the eggs. While it is possible to retrieve ova after a woman has died, to date no such instance has been reported. A recent article in the New England Journal of Medicine considered the ethics of granting a husband's request to keep his wife, who was on life support, alive long enough to retrieve her eggs; the request was ultimately denied.²

Do those requiring assisted reproduction use their own sperm and eggs? Donated sperm or eggs?

Either is possible with assisted reproduction. In some cases, couples use their own gametic material (sperm and eggs) with a technique such as in vitro fertilization, because they have not been successful at achieving pregnancy otherwise. Donated gametes may be used for a variety of reasons: one or both intended parents is infertile, the intended parents are a same sex couple, or the intended parent has no partner, for example.

¹ See, e.g., New York Hospital Guidelines for Consideration of Requests for Post-mortem Sperm Retrieval, available at <http://www.cornellurology.com/uro/cornell/guidelines/shtml>; Lahey Clinic Clinical & Administrative Policy & Procedure Manual, Sperm Retrieval from Dead or Comatose Patients page 93-a, available at http://www.lahey.org/pdf/ethics/pdf_policy/5166.pdf.

² David M. Greer et al, *Case 21-2010: A Request for Retrieval of Oocytes From A 36-Year-Old Woman With Anoxic Brain Injury*, 363 N.Engl. J. Med. 276 (July 15, 2010).

© Professor Kristine S. Knaplund, ABA RPTE Spring Symposia 2011

Can sperm, eggs and embryos be successfully frozen and thawed for later use?

Yes. The ability to freeze (cryopreserve) sperm was the first process to be developed in the 1940s, and came into widespread use in the United States in the 1960s, when astronauts were encouraged to store their sperm in advance of their missions into space.³ Several decades later, embryos (eggs fertilized with sperm and allowed to divide) could be successfully frozen for later use. Fertility clinics all offer to cryopreserve excess embryos.⁴ Freezing unfertilized eggs is now possible but considered experimental by The American Society of Reproductive Medicine and the American College of Obstetrics and Gynecologists.⁵

How widespread is the use of assisted reproduction in the US?

Only statistics regarding assisted reproduction handling eggs or using embryos outside the woman's body are readily available. Because these numbers exclude techniques that only handle sperm (such as assisted insemination), they understate the extent to which all methods of assisted reproduction are used. The main way the federal government obtains information about assisted reproduction is through the reporting of data to the Centers for Disease Control and Prevention (CDC) for clinics that use in vitro fertilization, intracytoplasmic sperm injection, and other methods of assisted reproduction involving eggs or embryos.⁶ The most recent report (2008) contains data from 436 reporting clinics,⁷ and shows that the number of children born with the use of assisted reproduction (excluding assisted insemination) doubled in the past ten years, from 28,851 born in 1998 to 61,426 born in 2008.⁸ By comparison, over 4,000,000 births were recorded by the U.S. Census in 2007.⁹

Are postmortem conception children really being born in the US?

Yes! Courts in Arkansas, Arizona, California, Massachusetts, New Hampshire, New Jersey and New York have all adjudicated cases involving postmortem conception children.¹⁰ The majority

³ W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A.J. 942, 943 (1962).

⁴ The 2008 Assisted Reproduction Report compiled by the Centers for Disease Control and Prevention found that 100% of the reporting clinics offered cryopreservation of embryos as one of their services. See footnote 6.

⁵ Judy Foreman, *Success Rate Elusive on Frozen Eggs*, L.A. Times, Aug. 16, 2010 Part E, pg. 3.

⁶ The Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. 263a-1 et seq., requires the Secretary of Health and Human Services, through the Centers for Disease Control and Prevention, to develop a model program for the certification of embryo laboratories, to be carried out voluntarily by interested states.

⁷ The report states there were 475 clinics operating in 2008 and thus is missing data from 39 clinics, for a compliance rate of over 90%.

⁸ The 2008 Assisted Reproduction Report is available at <http://www.cdc.gov/ART2008.index.htm>.

⁹ Table 78, Live Births, Deaths, Marriages and Divorces: 1960 to 2007, available at http://www.census.gov/compendia/statab/cats/births_deaths_marriages_divorces/births.html.

¹⁰ See Cynthia Fruchtmann's materials for a list of cases and statutes.

of cases involved the child applying for Social Security benefits as a dependent of a deceased wage earner. A postmortem conception child can show eligibility for such benefits, even though s/he was not in fact dependent at the time the wage earner died, if the child is entitled to inherit under the state's intestacy laws. The New York case was brought by trustees asking for instructions as to whether a postmortem conception child was entitled to take as a "grandchild" under a grandparent's trust.¹¹ The Uniform Parentage Act and the Uniform Probate Code have statutes on whether a decedent is a parent of a child that is the result of assisted reproduction after the decedent's death, and thus, whether the child is eligible to inherit from the decedent's estate.¹² A number of states have enacted the Uniform Parentage Act provisions, while two states (Colorado and North Dakota) have enacted the new Uniform Probate Code amendments.

Professor Kris Knaplund is Professor of Law at Pepperdine University School of Law in Malibu, California, where she teaches Bioethics, Wills and Trusts, Advanced Wills and Trusts, and Property. She is Co-Chair of the ABA Committee on Bioethics, and a member of the ABA RPTE Continuing Legal Education Committee. She is an Academic Fellow in the American College of Trust and Estate Counsel. For further reading, Professor Knaplund's recent articles on assisted reproduction and postmortem conception include:

The New Uniform Probate Code's Surprising Gender Inequities, Duke Journal of Gender Law & Policy Spring 2011

Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century, 43 ABA Real Property, Trust and Estate Law Journal 393 (Fall 2008).

Equal Protection, Postmortem Conception, and Intestacy, 53 Kansas Law Review 627 (April 2005).

Postmortem Conception and A Father's Last Will, 46 Arizona Law Review 91 (Spring 2004).

All of Professor Knaplund's articles are available at

http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=543388

¹¹ *In Re Martin B.*, 841 N.Y.S. 2d 207 (2008).

¹² Uniform Parentage Act Section 707; Uniform Probate Code Sections 2-120 and 2-121.

© Professor Kristine S. Knaplund, ABA RPTE Spring Symposia 2011

Born To Be Wild: Assisted Reproduction and Estate Planning

**Teresa C. Baird
Fairfield and Woods, P.C.**

ABA Spring Symposia

April 29, 2011

I. The Technology & Its Impact

A. In the Past Half Century, Advances in Artificial Reproductive Technologies (ART) Provides New and Diverse Opportunities to Create Children

1. Intrauterine insemination (also know as artificial or assisted insemination) has been used in the US since the 1950's.
2. In vitro fertilization (IVF) involves the fertilization of a human egg outside a woman's body and the subsequent transfer of the fertilized egg to a uterus.
3. Ability to freeze embryos from IVF began in the 1980's (usually stored from two to five years but use of embryos frozen for up to 12 years has resulted in successful pregnancies).
4. Intracytoplasmic sperm injection (ICSI) – single sperm can be injected into an egg to achieve fertilization developed in the 1990's (treatment for severe male factor problems).
5. Today – technology to freeze unfertilized eggs and ovarian tissue.

B. Reasons for Cryopreserving Gametes:

1. In vitro fertilization for couples having difficulty conceiving;
2. Existing or anticipated medical problems;
3. Healthy women cryopreserve their eggs before the decline in fertility that results from the natural aging process;
4. Soldiers assigned to combat zones;
5. Dangerous professions (i.e. firefighter, police officer); and
6. Same sex marriages.

C. Ability to Conceive with a Decedent's Gametic Material Became Possible with Two Biological Advances

1. Ability to Freeze and Thaw Gametes.

- a. One sperm bank reported a successful pregnancy and birth of twins using sperm cryopreserved for almost 20 years.
 - b. Technology for freezing and thawing eggs is not as advanced, but is improving.
2. Ability to Retrieve Gametes Postmortem.
 - a. Technology has existed to retrieve sperm from men who are dead, brain dead, or in a persistent vegetative state since at least 1980.
 - b. Science soon may allow for postmortem retrieval of a woman's eggs or ovaries.

II. Evaluation of the Law - Estates and Trusts Law Has Struggled to Keep Up With the Advances in Reproductive Technology

A. Introduction

1. Family law and family courts have been at the forefront of evolving alongside advances in reproductive technology.
2. Because estates and trusts law has not developed as quickly as family law, family law has provided guidance in determining parent-child relationships for the laws of succession.

B. Uniform Parentage Act (UPA)

1. 2000 version - Colorado, Utah, and Washington (UPA § 707)
2. Colorado – COLO. REV. STAT. § 19-4-106(8)

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 the child.

3. Alabama has a section similar to the 2000 version except for an additional requirement that the record be signed by the consenting spouse and maintained by the licensed assisting physician. ALA. CODE § 26-17-707:

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.

4. Texas has a section similar to the 2000 version except requiring the record be kept by a licensed physician. TEX. STAT. & CODE § 160.707:

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 kept by a licensed physician* that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

5. 2002 version – Delaware, North Dakota, Wyoming, New Mexico (uses term “person” instead of “individual”) (UPA § 707)

If an individual who consented in record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

C. Other Statutory Approaches under Family Law

1. Louisiana - (Parent and Child Code) LA. REV. STAT. § 9:391.1(A) provides:

Any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, *including the capacity to inherit from the decedent*, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, *within three years* of the death of the decedent.

2. Florida – (Domestic Relations Chapter) FLA. STAT. ANN. § 742.17(4) provides:

A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or pre-embryos to a woman’s body shall not be eligible for a claim against the decedent’s estate unless the child has been provided for by the decedent’s will.

3. Virginia – (Domestic Relations) VA. CODE ANN. § 20-158(B) provides:

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 ten-month period immediately preceding the birth, either party died.

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.

D. California Approach

California not only requires the decedent's consent to postmortem use of gametes but also specifies a timetable within which the gametes must be used to produce a child - CAL. PROB. CODE § 249.5(b).

For purposes of property rights distributed upon death, a posthumously conceived child is deemed born during the lifetime of decedent, if such child or his or her representative proves by clear and convincing evidence:

- a. Decedent specifies in writing that his or her genetic material may be used for posthumous conception that is signed and dated by the decedent which designates the person to control the use of the genetic material;
- b. Person designated to control the genetic material provides written notice to the personal representative or trustee within four months of the decedent's death;
- c. The child was in utero using the decedent's genetic material and was in utero within two years of decedent's death.

E. Judicial Determinations – SSA Benefits

1. Judicial decisions involving posthumous conception in the context of the Social Security Act (SSA) benefits have also provided guidance as the determinations have usually been based upon the ability of the child to be treated as the heir under state's intestate statutes.
2. Under the SSA, a person can only receive survivor's benefits if he or she is a dependent child of the deceased insured wage earner. Often the status of whether a child is "dependent" is based upon whether the individual is legally entitled to inherit under his or her state's intestacy statute.
3. Relevant Case Law
 - a. *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000)
 - (i) Husband diagnosed with leukemia and harvested his sperm because he was worried the chemotherapy treatments would prevent him from having children. Eighteen months after husband's death, his widow gave birth to twin girls as a result of IVF and applied for Social Security dependent benefits.
 - (ii) Upon denial of benefits from an administrative law judge, widow filed action in Superior Court of New Jersey.

- (iii) The court held the posthumously conceived children qualified for Social Security benefits because they qualified as heirs under New Jersey's intestacy statutes.
 - (iv) The Court reasoned the general legislative intent when enacting intestacy statutes, including the after-born heirs statute, was to give preference to children inheriting from and through their parents.
 - (v) The court was also persuaded by the fact that there was evidence that the decedent wanted children.
 - (vi) Set forth that a genetic child of a parent be the heir of such parent unless such determination would "unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates."
- b. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002)
- (i) This case involved similar facts as Estate of Kolacy.
 - (ii) After widow unsuccessfully appealed to the Appeals Council of the SSA, she filed an appeal with the United States District Court for the District of Massachusetts.
 - (iii) The District Court certified issue of whether posthumously conceived children had rights to inherit under the intestacy system to the Massachusetts Supreme Court.
 - (iv) The Supreme Court discussed three state interests: 1) state's interest to promote best interests of the child, 2) state's interest to prevent fraud, and 3) state's interest in protecting reproductive rights.
 - (v) After balancing the competing interest, the Court held a posthumously conceived child could be an heir under the intestacy statute under specified circumstances (i.e. parent/child must be genetically related and deceased parent affirmatively consented to posthumous conception).
 - (vi) Court indicated time limits might preclude the child from being an heir but did not set time limits – in this case the child was born 2 years after decedent's death.
- c. *Gillett-Netting v. Barnhart*, 231 F.Supp.2d 961 (D. Ariz. 2002), rev'd, 371 F.3d 593 (9th Cir. 2004)
- (i) Court did not have to reach intestacy question because there were other ways to show child was legitimate under SSA.

- (ii) Court held that the fact child was genetically related to decedent who was married to the widow was sufficient.
- d. *Khabbaz v. Comm’r Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007)
- (i) Supreme Court of New Hampshire distinguished New Hampshire intestate statute from that in Massachusetts.
 - (ii) Court held word “surviving” meant child must be conceived prior to decedent’s death to be heir.
 - (iii) A posthumously conceived child could not “survive” a decedent because he or she was not in existence at time of decedent’s death.
- e. *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008)
- (i) Widow used a frozen embryo, created while husband was living, to conceive a child via in vitro fertilization after his death.
 - (ii) Arkansas intestacy statute provides that descendants of a person who dies intestate will inherit if they are conceived before his or her death but born thereafter.
 - (iii) Widow argued child was “conceived” before husband’s death.
 - (iv) Arkansas Supreme Court held the intestacy statute enacted in 1969 when in vitro fertilization was not available so legislature could not have intended to create intestacy rights in posthumously conceived children.

F. Judicial Determinations – Inheritance Through Donor

1. Restatement (Third) of Property: Wills and Other Donative Transfers

For a child conceived by assisted reproduction, the child is treated as the child of a person who consented to function as the child’s parent and did so function or intended so to function but was prevented from doing so by an intervening event such as death or incapacity.

2. The Third Restatement’s Approach was approved in *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Surr. Ct. 2007).

- a. A recent New York County Surrogate Court decision addressed whether posthumously conceived children were included in the definitions of “issue” and “descendants” in the decedent’s trust agreements.

- b. Martin, the grantor, executed seven trust agreements—one of which was governed by New York law and the rest by the law of the District of Columbia—providing for distributions to his issue or descendants. Prior to Martin’s death on July 9, 2001, his son James died from Hodgkin’s lymphoma. In anticipation of his impending death, James cryopreserved his sperm for later use by his wife. James’s wife used the cryopreserved sperm and gave birth to two children in 2004 and 2006.
- c. Because Martin’s trusts did not address posthumously conceived children, the trustees brought an action to determine if they were authorized to distribute principal to James’s posthumously conceived children.
- d. The court noted neither New York nor the District of Columbia had adopted the UPA or any similar statute addressing posthumous conception with respect to inheritance rights. Therefore, the court relied on the Third Restatement.
- e. The court held “where a governing instrument is silent, a child born of the new biotechnology with the consent of [his or her] parent [is] entitled to the same rights ‘for all purposes as those of a natural child.’”
- f. Because Martin’s instruments did not address posthumously conceived children but provided that “upon the death of the grantor’s wife, the trust fund would benefit his sons and their families equally,” the court applied a “sympathetic reading” of the trust agreements and held that Martin intended to include “all members of his bloodline” to receive their share.

III. Recent Amendments to the Uniform Probate Code (UPC)

A. 2008 Amendments to the Uniform Probate Code (UPC)

- 1. Until recently, UPC § 2-108 did not refer to posthumously conceived heirs:

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.
- 2. In 2004 Professor Ronald Chester suggested changes to UPC § 2-108 (which were ultimately rejected) to address posthumously conceived children whereby the putative parent must provide consent in record to include such child for intestate purposes.
- 3. Drafters chose to leave UPC § 2-108 as is, but added a new section to address posthumously conceived children. UPC §§ 2-104, 2-114-122, 2-705
- 4. UPC 2-120 deals with children of assisted reproduction where the mother is not a surrogate while UPC 2-121 deals with a surrogate mom.

5. Colorado and North Dakota have adopted the amended UPC rules relating to intestate succession. COLO. REV. STAT. §§ 15-11-115-121 & 705 (with an effective date of July 1, 2010) and N.D. CENT. CODE §§ 30.1-04-04, 30.1-04-09, 30.1-04-14-20, 30.1-09.1-05 (with an effective date of August 1, 2009). New Mexico introduced the amended UPC rules in 2011 under SB 146.

B. How a Parent-Child Relationship is Established under UPC

1. UPC § 2-120(f): Parent-child relationship with another. Except as otherwise provided in subsections (g), (i), and (j) of this section, and unless a parent-child relationship is established under subsection (d) or (e) of this section, *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.
2. UPC § 2-120 (h): Presumption--Birth Mother is Married or Surviving Spouse. For the purpose of subsection (f)(2), the following rules apply:
 - a. 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).
 - b. 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)(A) or (B).

3. UPC § 2-121: Child Born to Gestational Carrier- provides similar provision for a child born to gestational carrier

- a. Generally requires consent to be established by a record signed by the decedent or clear and convincing evidence
- b. Presumption – Consent is presumed if:
 - (1) Prior to death, decedent deposited sperm or egg that were to be used to conceive the child;
 - (2) At the time the sperm or eggs were deposited, decedent was married and no divorce proceeding was pending; and
 - (3) Decedent’s surviving spouse functioned as parent of the child no later than 2 years after birth.

C. What is a PCC’s Right to Inherit?

1. UPC § 2-120(k): Right to Inherit. If a parent-child relationship is established under the UPC, a posthumously conceived child can receive a share of intestate estate if the child is:

- a. In utero not later than 36 months after the decedent’s death; or
- b. Born not later than 45 months after the decedent’s death.

D. Class Gifts and PCC

1. UPC § 2-705: Class Gifts Construed to Accord with Intestate Succession

a. UPC § 2-705(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 . . .their respective descendants if appropriate to the class, *in accordance with the rules for intestate succession regarding parent-child relationships.*

b. UPC § 2-705(e) – Inheritance through 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 the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of the relative of the genetic parent functioned as a parent of the child before the child reached 18 years of age.

c. UPC § 2-705(g) - Class Closing Rules:

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.

E. UPC Amendments – Rules of Construction

1. UPC § 2-701 imposes rules of construction on governing instruments in existence prior to the effective date unless there is a clear indication of contrary intent. (*See also* ND CENT. CODE § 30.1-09.1-01.)
2. Colorado – New rules apply to governing instrument executed, republished, or reaffirmed on or after July 1, 2010. COLO. REV. STAT. § 15-11-701.

IV. Observations & Planning Ideas

A. Conflict between UPA and UPC

1. In statutes which have adopted both the UPA and UPC, it is unclear how the statutes will work together if the UPC remains in effect.
2. Different consent requirements:
 - a. UPC assumes consent if birth parent and decedent were married; UPA still requires consent in a record;
 - b. The consent required by the UPC is only the general consent to parent a child using assisted reproduction; UPA could be construed to require more specific consent to parent a child after death.
3. UPA does not have a time limitation. If a child is born 4 years after the decedent died and the decedent had consented in writing to posthumous conception (as outlined under the UPA), is the decedent still the father in light of the time limit under UPC (child must be in utero within 3 years, or born within 5 months, for decedent to be considered the parent)?
4. Comment to UPA § 203: Parent-child relationship established under the UPA does not exist if contradicted by another law of the jurisdiction. Professors Kurtz and Waggoner (who wrote the UPC Amendments) take the position that, using the comment, the UPC Amendments would trump the UPA. (This section has been adopted by Delaware, North Dakota, New Mexico, Utah, Washington, and Wyoming).

B. Shortfalls of UPC Amendments

1. Consent – Only need general consent to be treated *as the parent*, which can easily be satisfied by the execution of a provider contract. The UPC does

not require specific consent that the decedent wanted a PCC to be treated as an heir or beneficiary.

2. Notice – The UPC does not require notice to the personal representative or trustee of the existence of preserved genetic materials (Colorado requires such notice under COLO. REV. STAT. § 15-12-705 (*See also* CO’s statutory form Information of Appointment) and if the personal representative has not received such notice, cannot be surcharged for distributions made that do not take into account PCC under COLO. REV. STAT. § 15-12-703). Fiduciaries should do due diligence prior to making a distribution to descendants of the decedent prior to 45 months after decedent’s death.

C. Planning for New Clients

1. Specific discussions with clients to determine their intent, particularly in situations in which the client has frozen genetic material or if the estate plan involves dynasty trusts to avoid an *In Re Martin B* situation. Consider including questions in a client questionnaire regarding whether the client has frozen eggs, sperm, or embryos.

- a. Example of questions contained in client questionnaire to address frozen genetic material:

Do you have any frozen eggs, sperm, or embryos? Yes ___ No ___

If you have any frozen eggs, sperm or embryos, please provide the name of the facility in custody: _____.

2. Review provider contracts to make sure any statements and elections are consistent with client’s wishes and estate planning documents. In a state that has adopted the UPC Amendments, remember the UPC only requires general consent to be treated as a parent to establish inheritance rights.
3. Provide for the inheritance rights of PCC in estate planning documents.
 - a. Rules of construction in UPC are default rules and should not be relied upon. Recognize the preference in the UPC for PCC born to a surviving spouse. If client is not married to his or her partner, or if there is no current partner or spouse, the planner needs to be especially careful in providing for the possibility of a PCC.
 - b. Clients could move to a different jurisdiction that has not adopted the same rules.
 - c. UPC states may adopt UPC Amendments in the future which apply to trusts and wills in existence prior to the effective date.
 - d. Avoid conflict between client’s intent and any other current state laws (i.e. the UPA, other family law statutes, and case law addressing Social Security benefits) or future (unknown) statutes.

e. Sample Trust Provisions:

- (1) Client does not want PCC included as beneficiaries – avoid presumption for married couples under UPC § 2-120(h).
 - (a) Define “children” as those born within 10 months of the client’s death.
 - (b) For future beneficiaries, limit child’s descendants to those born within 10 months of the child’s death.
 - (c) Define “children” or a class of persons to include: “any posthumously conceived child shall not be considered the child or descendant of such father or mother.”

- (2) Client wishes to include all of a descendant’s PCC as beneficiaries – avoids exception regarding unmarried descendants under UPC § 2-705(e).

- (a) Descendants: [. . .] A posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant’s ancestors.
- (b) Client wants formal consent by descendant for inclusion of the descendant’s PCC:

Descendants: [. . .] On the written declaration of any descendant of me and my husband and subject to any restrictions contained in such written declaration, a posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant’s ancestors.

- (3) General Provision.

Children: All references to “my children” in this trust shall refer only to any child born to or adopted by my husband and me after the date of this trust agreement. *“Any child born” to my husband and me shall include a posthumously conceived child by me by means of assisted reproduction whereby I provided the egg and my husband provided the sperm, as long as (1) such child is born during my husband’s lifetime and (2) my husband has acted as such child’s legal guardian unless he was unable to do so as a result of his death or disability. On the written declaration*

of any descendant of me and my husband and subject to any restrictions contained in such written declaration, a posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant's ancestors.

- f. Consider other possible restrictions.
 - (1) Consider including a time limit by which the PCC must be born.
 - (a) Sample trust provision to decrease 3-year time limit under the UPC § 2-120(k) default rule:

Descendants: [. . .] Notwithstanding the foregoing provisions, a posthumously conceived child shall only include a child: (1) in utero not later than 12 months after the parent's death; or (2) born not later than 22 months after the parent's death.
 - (2) Would the client want the PCC to be treated as his or hers if the surviving spouse remarries prior to conception? What if the new wife carries the PCC to birth?
 - (3) Consider including a time limit by which the trustee or personal representative must be notified of frozen genetic material and the possibility of PCC.

D. Planning for Existing Trusts

1. UPC § 2-701 imposes the rules of construction on trusts in existence prior to the effective date unless there is a clear indication of a contrary intent. (*See also* North Dakota, N.D. CENT. CODE § 30.1-09.1-05)
2. In Colorado, COLO. REV. STAT. § 15-11-701 imposes the rules of construction regarding class gifts on trusts executed, republished, or reaffirmed *on or after July 1, 2010* unless there is a clear indication of a contrary intent.
3. Default rule does not apply if the settlor is not the genetic parent, and the genetic parent is not married to the birth parent upon the genetic parent's death (unless a relative of the genetic parent acts as a parent of the child).
 - a. Does the existence of a power of appointment make the power holder the "transferor" for purposes of this provision? Would it matter whether or not the power was actually exercised?
4. Planners and professional trustees should contact the settlors of existing trust to discuss their desires regarding PCC of beneficiaries. Under the

UPC, even if the trust is irrevocable, a statement of the settlor's desires should override the default rules in the statute. In Colorado or states which have not adopted the UPC Amendments, such a statement would provide evidence of the settlor's intent.

V. Postmortem Retrieval of Gametes and Embryos

A. Law

1. *Stephen v. Comm'r Soc. Sec.*, 386 F.Supp.2d 1257 (M.D. Fla. 2005)
 - a. Husband died in November of 1997 of a heart attack and the following day his widow extracted sperm from the decedent's body and cryopreserved it.
 - b. In June of 2001, the widow gave birth to a child conceived by in vitro fertilization of the cryopreserved sperm.
 - c. The widow filed for benefits under the SSA for her child.
 - d. Court noted that under Florida law, a posthumously conceived child is not eligible for a claim against the decedent's estate unless the child is provided for under the decedent's will.
 - e. The Court held the child was not dependent upon the decedent at the time of his death (because he was not even born until 4 years later) and therefore was not entitled to SSA benefits.
 - f. The Court also noted that because the decedent was domiciled in Florida at the time of his death, Florida intestacy law applied. Because the decedent did not have a will, the child had no claim against the estate and therefore was not a child for SSA benefits purposes.
2. A soldier's widow, Kynesha Dhanoolal, succeeded in having sperm taken from his body and frozen four days after he was slain in Iraq. Sergeant Dhanoolal had often talked of having children with his wife. A federal judge in Columbus, GA granted her request for a temporary restraining order preventing the military from embalming Sergeant Dhanoolal until someone extracted and froze samples of his sperm in hopes of reproducing using artificial insemination. However, fertility experts said the procedure would likely not work as recovery of viable sperm appears relatively uncommon after 24 hours post-mortem unless the body has been cooled. See http://www.usatoday.com/news/nation/2008-04-07-2254969189_x.htm
3. Legality and Ethical Implications of Postmortem retrieval of gametes and embryos is contested.
 - a. Because the surviving spouse or next-of-kin has the right to consent to or deny permission to perform an autopsy or organ procurement procedure, some argue that the surviving spouse or

- next-of-kin should have the right to consent to post-mortem sperm procurement.
- b. Others argue that such procedure should not be performed without prior written consent or evidence of such consent.
4. American Bar Association's Section of Family Law has approved a Proposed Model Act Governing Assisted Reproduction to address post-mortem sperm procurement.
 - a. Each person and/or entity that collects gametes or embryos from cryopreserved tissue, or from deceased or incompetent persons, shall first obtain a written consent executed prior to death or incompetency by the person from whom the gametes or embryos are to be collected. In the event of an emergency where, in the opinion of the treating physician, loss of viability would occur as a result of delay, and where there is genuine question as to the existence of a written permission, an exception is permissible.
 - b. If gametes or embryos are collected pursuant to paragraph [a] of this Section, transfer of gametes or of an embryo is expressly prohibited unless approved by a court of law. Absence of a writing as described in Paragraph [a] authorizing use of such gametes or embryos, except in an emergency situation, shall constitute a presumption of non-consent.
 - c. Any person or entity not acting in accordance with Paragraph [a] may be subject to civil and/or criminal liability as provided by law.
 5. The New York State Task Force on Life and Law issued a report in 1998 setting forth numerous recommendations regarding post-mortem sperm procurement.
 - a. Gametes should generally not be retrieved without informed consent. New York should enact legislation prohibiting the retrieval of gametes from deceased persons or living individuals incapable of providing informed consent, unless the individual consented to the retrieval of gametes under the particular circumstances, in writing, when able to do so, or the person seeking to retrieve the gametes establishes extraordinary circumstances in a judicial proceeding.
 6. In 1994, a panel of experts at New York Hospital developed a set of guidelines addressing post-mortem sperm procurement.
 - a. Post-mortem sperm retrieval should be authorized only if the wife of the deceased individual provides evidence that the deceased husband would have consented to such procurement.

- b. Examples: if he was undergoing fertility treatment, was actively attempting conception, or had expressed a plan to attempt conception in the immediate future.
 - c. The widow should be the only individual for whom such sperm should be used for conception.
- 7. The issue of post-mortem procurement of gametes or embryos has not been addressed in Colorado.

B. Planning Ideas

- 1. Despite the uncertainty of post-mortem procurement, estate planners may wish to discuss issue with clients - - particularly male clients who do not have any current children.
- 2. Query – Would an executed anatomical gifts provision be a sufficient statement of intent?
- 3. Client wishes regarding post-mortem sperm procurement should be documented.
 - a. Individual should execute a document reflecting such intent.
 - b. Such a provision may be included in medical power of attorney or with anatomical gifts provision.
- 4. In either case – planner should advise client that it is unclear whether a hospital or medical facility will adhere to provision in light of absence of clear authority.
- 5. If advances allow for postmortem retrieval of a woman’s eggs or ovaries, estate planner should address same issues with female clients.

Born to Be Wild: Assisted
Reproduction and Estate
Planning

Presented by: Teresa C. Baird

Defining Children/Descendants to Address
Posthumously Conceived Children (PCC)

■ Address PCC in definition of
children/descendants in trust/will.

- Clients with frozen genetic material (client questionnaire)
- Clients with dynasty trust – *In re Martin B*
- Possibility of conflict between client's intent and current state law (i.e. Uniform Parentage Act, case law addressing Social Security benefits, other statutes) or future (unknown) statutes
- Avoid rules of intestacy under Uniform Probate Code (UPC)

Uniform Probate Code

■ State Adoptions

Alaska	Massachusetts	North Dakota
Arizona	Michigan	Oregon
Arkansas	Minnesota	South Carolina
Colorado	Montana	South Dakota
Hawaii	Nebraska	Utah
Idaho	New Jersey	Vermont
Maine	New Mexico	

2008 UPC Amendments

- Drafters chose to add a new section to the UPC to address PCC.
- Bill Tracking
 - Adopted by Colorado and North Dakota
 - New Mexico – Introduced in 2011

Rules of Construction – UPC § 2-701

- Under the UPC, new rules apply to governing instruments in existence prior to effective date.
- In Colorado, new rules apply only to governing instruments executed, reaffirmed, or republished on or after July 1, 2010.

Default UPC Rules Versus Client's Intent – UPC § 2-705

- Under the UPC, a class gift under a trust/will follows the intestate succession rules.

Parent-Child Relationship Must Exist for PCC to Inherit – UPC § 2-120(f)

- A parent-child relationship is established if an individual (other than birth mother):
- Consents to assisted reproduction by the birth mother; and
- Intends to be the child's other parent.

How is Consent Established?

- Signed record (before or after PCC's birth) evidencing the individual's consent.
- If no signed record:
 - Functioned as parent of PCC within 2 years of birth; or
 - Clear and convincing evidence of intent to be treated as a parent of PCC.

An Important Presumption – UPC § 2-120(h)

- If no divorce is pending at death between a married couple, a parent-child relationship is presumed between the deceased spouse and PCC.
- May need to negate this presumption through drafting.

Client Does Not Want PCC Included as Beneficiaries

- Define “children” as those born within 10 months of the client’s death.
- For future beneficiaries, limit child’s descendants to those born within 10 months of the child’s death.
- Define “children” or a class of persons to include: “any posthumously conceived child shall not be considered the child or descendant of such father or mother.”

PCC’s Right to Inherit Under Intestate Rules – UPC § 2-120(k)

- If a parent-child relationship is established under the UPC, a PCC can receive a share of intestate estate if the child is:
 - In utero not later than 36 months after the decedent’s death; or
 - Born not later than 45 months after the decedent’s death.

Include Time Limit in Trust/Will

- Increase or decrease default 3-year time limit in trust/will in accordance with client’s intent.
- Descendants: [. . .] Notwithstanding the foregoing provisions, a posthumously conceived child shall only include a child: (1) in utero not later than 12 months after the parent’s death; or (2) born not later than 22 months after the parent’s death.

Important Exception – Inheritance Through a Genetic Parent – UPC § 2-705(e)

- A PCC will not inherit “through” a genetic parent unless parents were married at the time of death.

Example

- Father creates trust for son for son’s lifetime, then to son’s descendants.
- Son is diagnosed with cancer, and deposits sperm prior to treatment; son dies.

Example

- **Case 1**
 - Son was married at the time. Surviving spouse uses sperm to conceive a child one year after death; child qualifies under trust.
- **Case 2**
 - Son was not married at the time, but allowed his long time girlfriend to have sperm. Girlfriend uses sperm to conceive a child one year after death; child does not qualify under trust.

Include All of Descendant's PCC

- Descendants: [. . .] A posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant's ancestors.
- Avoids exclusion of PCC of unmarried descendants.

Include Descendant's PCC Only With Written Declaration

- Descendants: [. . .] On the written declaration of any descendant of me and my husband and subject to any restrictions contained in such written declaration, a posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant's ancestors.
- Excludes PCC where decedent-parent did not formally consent.

Sample Trust Provision

- Children: All references to "my children" in this trust shall refer only to any child born to or adopted by my husband and me after the date of this trust agreement. "Any child born" to my husband and me shall include a posthumously conceived child by me by means of assisted reproduction whereby I provided the egg and my husband provided the sperm, as long as (1) such child is born during my husband's lifetime and (2) my husband has acted as such child's parent unless he was unable to do so as a result of his death or disability. On the written declaration of any descendant of me and my husband and subject to any restrictions contained in such written declaration, a posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant's ancestors.

Other Possible Restrictions

- Consider including a time limit by which the trustee or personal representative must be notified of frozen genetic material and the possibility of a PCC.
- Would the client want the PCC to be treated as his or hers if the surviving spouse remarries prior to conception? What if the new wife carries the PCC to birth?

Planning for Existing Trust

- In states that have adopted the 2008 UPC Amendments, default rules may apply to existing trusts unless there is a clear indication of a contrary intent.
- In either case, contact settlors of existing trust to document their desires regarding PCC to prevent application of rules of intestacy or conflict with future (unknown) statute.

FAIRFIELD AND WOODS P.C.

THANK YOU!

Presented by :
Teresa C. Baird
tbaird@fwlaw.com
303-894-4455

DYING TO BE BORN: POSTHUMOUS REPRODUCTION AND ART

Cynthia E. Fruchtman
The Law Offices of Cynthia E. Fruchtman
2530 Wilshire Boulevard, Suite 310
Santa Monica, California 90403
Ph: (310) 829-0678
Fax: (310) 829-5923
Cell: (310) 387-8791
e-m: Cynthia@fruchtmanlaw.com
www.fruchtmanlaw.com

I. INTRODUCTION

Wills and Estates lawyers should know that Assisted Reproductive Technology (ART) has advanced to allow for a multitude of choices concerning conception: from artificial insemination to surrogate parenting after the death of both biological parents through extraction of eggs and sperm from the deceased for procreative purposes. Nevertheless, there is still sufficient societal stigma attached to infertility that some Clients may intentionally conceal their use of ART. Others may not realize the relevance of stored sperm or ova or embryos in their family or estate planning or divorces. Whether or not Clients volunteer the information, they should be asked about their use of ART. Their wishes concerning disposition of cryopreserved gametes and embryos and posthumous reproduction should be documented.

II. DEFINITION

Posthumous reproduction can mean many things. The focus here is on posthumous reproduction in the context of ART:

A. Gametes (sperm or ova) of a deceased individual, collected while alive (with or without competence) or after death (“posthumous gamete retrieval”), or of a fetus, are used to conceive a child; or

B. Embryos created prior to death are implanted, gestated and delivered after the death of a parent.

III. SCENARIOS

The following scenarios are examples only and should not by any means be considered as exhaustive of the reasons or ways that people use ART. In each of these scenarios and whenever anyone decides to engage in ART, BEFORE gametes leave the body or an embryo is created, the lawyer should fully explore and document the Client’s wishes and directions with respect to rights and responsibilities regarding his or her genetic material.

A. A bereaved family member may attempt to cope with the tragic incompetence or death of a loved one by harvesting the loved one's gametes for procreative purposes. Current possibilities include harvesting eggs from aborted females who were never born.

B. A couple may choose to save or store some gametes from a partner who may have gotten sick, such as with cancer, and stored the gametes in case treatment causes sterility. That partner may die from the sickness or unexpectedly, perhaps in an accident, or the couple may divorce. Either way, those gametes might still be used to conceive a child after the parent's death.

C. A soldier about to deploy to a war zone may choose to store his or her gametes in case of an injury that causes sterility or death.

D. Gametes or embryos preserved for infertility treatment may remain unused, such that custody and control become issues in divorce or upon death.

IV. HISTORY

The first posthumous sperm retrieval was reported in 1980.

A report in 1997 showed that between 1980 and 1995, 40 centers reported about 82 requests for post mortem sperm retrieval.

The first living child born from a dead father was the case of Diane Blood in the UK. In 1997, a woman requested sperm retrieval from her dead husband, and got permission from a British Court to export the sperm to Belgium and do the insemination resulting in the birth of a male infant.

It was reported in 2006 that a Russian woman tried to use her dead son's frozen sperm to fertilize a donor egg and used a surrogate mother to give birth to the child, but Russian officials said: "this child has no legal mother and father, so does not officially exist!"

V. ISSUES TO BE DOCUMENTED

A. Parentage/inheritance

1. In *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002) children born two years after their father's death could be the legal heirs of their deceased parents. The Court provided a three-factor test to determine whether a posthumous child can qualify as the legal heir of a deceased parent. The surviving parent (or legal representative of the child) must satisfy three requirements: (1) prove a genetic relationship with

the decedent; (2) demonstrate the decedent "affirmatively consented" to posthumous conception; and (3) demonstrate that the decedent consented "to the support of any resulting child."

2. In *Eng v. Comm'r of Soc. Sec.*, 930 A.2d 1180 (N.H. 2007) a dying man banked his sperm so that his wife could conceive a child through artificial insemination and executed a consent form indicating that the sperm was for his wife's use, specifying in writing that he desired and intended to be legally recognized as the father of any resulting child. After his death, his widow became pregnant using the sperm, and then applied for social security survivor's benefit for her child. The court held that a posthumously conceived child was not a surviving child eligible to inherit from her father under New Hampshire intestate law regardless of the intent or preparation of the father, so benefits were denied. Likewise, *Finley v. Astrue*, 372 Ark. 103 (2008).

3. In *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir. 2009), the Court explained that the Social Security Administration excludes only those posthumously-conceived children who do not meet the statutory requirements under State law. Although the posthumously conceived child in that case could not inherit in intestacy under California state law, California has since enacted a statute requiring written consent from the decedent and establishing time limits for inheritance by a posthumously conceived child. Cal. Prob. Code Section 249.5(a) (2010).

B. Property/divorce

1. In *Parpalaix c. CECOS*, T.G.I. Creteil, Aug. 1 1984, Gaz. Du Pal. 1984, 2, pan. jurisp., 560, the French Tribunaux de grand instance awarded the sperm of a man who got cancer at age twenty-four, deposited the sperm before undergoing treatment, and got married two days before he died but left no instructions as to how the sperm should be disposed of if he died, to his widow, believing that it was his intent to have her bear his child.

2. In *Hecht v. Sup Ct.*, (1993) 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275, a man by contract and will expressly donated and bequeathed vials of his frozen sperm to his girlfriend before he committed suicide. His adult children by a former marriage sought to enjoin the girlfriend from receiving the vials. The Court awarded the frozen sperm to the girlfriend because the sperm was not subject to the property division with the former wife, and the dead man had clearly expressed his intent to give the sperm to his girlfriend.

3. In *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), the first embryo disposition case, a divorcing couple had stored embryos for fertility

treatment. The Court pronounced the following three step analysis: first, apply the preferences of the progenitors; if those cannot be determined, the party wishing to avoid procreation prevails if the other party has a reasonable possibility of achieving parenthood by other means; if no other reasonable alternatives exist, then the embryos should be used to achieve pregnancy unless the party seeking control of the embryos intends to donate them to someone else.

C. Military benefits - military survivor benefits often mirror Social Security benefits and include them to some extent. Eligibility criteria should encompass children conceived where a service member has voluntarily surrendered a specimen prior to death and *has clearly indicated the intended disposition of such specimen in the event of the service member's death or incapacity*.

1. Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, Army Law., Nov. 1999, at 1;

2. Major Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military*, Army Law. May 2008, at 1.

D. Sensitivity – religion, privacy, autonomy, psychology

From ESHRE Task Force on Ethics and Law 11: Posthumous assisted reproduction) Human Reproduction Vol.21, No.12 pp. 3050–3053, 2006
doi:10.1093/humrep/del287 Advance Access publication August 21, 2006:

There is no consensus among the different religions on posthumous reproduction. Roman Catholics will reject this application because it separates human reproduction from sexual intercourse and implies insemination of a single woman. Islam also rejects this procedure because it takes place after the end of the marital term. Jewish law, on the contrary, permits posthumous procreation.

The principle of respect for autonomy means generally that we have to respect people's decisions. However, this does not imply unconditional acceptance of the patient's wishes. Two limitations are relevant for the moral evaluation. First, real respect for autonomy implies the creation of conditions that promote well-considered decisions reflecting the person's value structure. Second, the prospective parents should take into account the effect of their wishes on the future child.

VI. STATUTES

A. Six states have adopted the 2000 version of the Uniform Parentage Act Section 707, which provides: 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 the child.

- Code of Ala. § 26-17-707 (2010) (also requiring spouse to sign the record, and requiring record to be maintained by a licensed assisting physician);
- Colo. Rev. Stat. § 19-4-106(8) (2009);
- New Mex. Stat. Ann. § 40-11A-707 (2009);
- Tex. Fam. Code Ann. § 160.707 (2010) (also requiring that the record be kept by a licensed physician);
- Utah Code Ann. § 78-45g-707 (2009);
- Wash. Rev. Code Ann. § 26.26.730 (2010).

B. Three states have adopted a more recent version of UPA Section 707, which applies to any individual who consents in writing to post mortem conception, rather than to a "spouse."

- Del. Code Ann. Tit. 13, § 8-707 (2010);
- N.D. Cent. Code § 14-20-65 (2010);
- Wyo. Stat. Ann. § 14-2-907 (2010)

C. Note: two states (Colorado and North Dakota) have adopted the new amendments to the Uniform Probate Code 2-120 and 2-121, which do not require written consent for posthumous use of gametes, but instead find three ways to get consent (writing, clear or convincing evidence, or a presumption of consent in certain circumstances for a married decedent). These two states have also adopted the Uniform Parentage Act, which requires a writing under all circumstances, thereby creating a conflict in their laws.

D. Two states require written consent and also impose a timetable within which the sperm or eggs must be used to conceive a child.

- Cal. Prob. Code § 249.5(a) (2010);
- LA. Rev. Stat. Ann. § 9:391.1(A) (2010)

E. Fla. Stat. Sec. 742.17(4) provides "[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or pre-embryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." Further, this law provides that a commissioning couple

“shall” enter into a written agreement stating what happens to the frozen embryos in the event of divorce, death or unforeseen circumstances.

F. N.Y. Est. Powers & Trusts Law § 5-3.2(b) (2010) provides that, if a will does not provide for additional children, a child conceived after a parent dies has no rights to a portion of the estate.

G. VA Code Ann. § 20-164 (2010) states that any child born more than ten months after the death of a parent is not recognized as the child of that parent and thus cannot inherit in intestacy or by will.

VII. SAMPLE LANGUAGE

A. FOR GAMETE DONATION CONTRACTS

1. Known egg donor related to Intended Mother:

DEATH, SEPARATION OR DIVORCE OF INTENDED PARENTS. In the event the Intended Mother and Intended Father become legally separated or divorced, Intended Mother and Intended Father shall nevertheless jointly have sole legal and physical custody of any embryos, unless otherwise determined by decree of court. In the event of the death or incapacity of the Intended Father, the embryos shall be deemed to be the property of the Intended Mother ONLY. In the event of the death or incapacity of the Intended Mother, the embryos shall be destroyed. In the event of the death or incapacity of both Intended Mother and Intended Father, the guardian named in the Intended Mother's and Intended Father's testamentary documents shall have the power to decide the disposition of the embryos, in accordance with the terms of this Agreement. If both Intended Mother and Intended Father should die after execution of this Agreement, but prior to retrieval of Egg Donor's eggs, then this Agreement shall terminate. If Intended Mother or Intended Father should die after execution of this Agreement, but not both, prior to retrieval of Egg Donor's eggs, then this Agreement may be terminated at the option of the surviving Intended Parent. In the event that this Agreement terminates pursuant to this paragraph after Egg Donor has already started injectable medication and Physician determines that a retrieval is medically necessary for the health and safety of Egg Donor, then any and all eggs and/or embryos resulting from the conduct described herein shall belong to Intended Parents (or their estate). If Intended Mother or Intended Father should both die after execution of this Agreement any unfertilized egg(s)/ova(um) shall revert to Egg Donor's possession/custody.

2. Known sperm donor:

Pursuant to this Agreement, Intended Parent shall have complete custody and control of embryos created from the sperm donated to her, including but not limited to the ability to make all decisions regarding disposition of embryos, transfer to a surrogate's body, termination of embryos, abortion, or donation to another person. If Intended Mother should die after execution of this Agreement, prior to relinquishment of donated sperm, this Agreement shall be cancelled. If Intended Mother should die after completion of the fertilization procedure, Donor agrees that relinquishment of custody of the child, as well as any embryos formed from the sperm and any unused sperm, shall be made to the guardian appointed by Intended Mother pursuant to this Agreement.

B. FOR SURROGACY CONTRACTS

DEATH OR SEPARATION OF INTENDED PARENTS. In the event of the death of either of the Intended Parents prior to the birth of the child, all of the rights and obligations of Gestational Carrier shall be of equal force and effect notwithstanding such event. Any child born pursuant to this Agreement shall be placed in the custody of the surviving Intended Parent. Moreover, the surviving Intended Parent shall go forth under the terms of this Agreement and hereby agrees to effectuate all the terms contained herein. In the event of the death of both Intended Parents prior to the birth of the child, all of the obligations of the Gestational Carrier shall be of equal force and effect notwithstanding such event. Said deaths shall not alter any terms of this Agreement, nor shall it in any way effect the responsibilities of the parties to effectuate the terms of this Agreement. The Intended Parents' estates shall go forth under the terms of this Agreement and agree to effectuate all the terms and contained herein. The child shall be placed in the custody of _____, the guardians hereby nominated by the Intended Parents, and the Intended Parents shall have arranged for the support, care and custody of the child by said guardians.

In the event of a separation of Intended Parents before the child is born, Intended Parents agree that, in the absence of a written agreement or court order otherwise, the Intended Father shall have primary custody of the child at the time of birth. Irrespective of which Intended Parent shall have primary custody, both Intended Parents hereby agree to go forth under the terms of this Agreement and agree to effectuate all the terms contained herein.

In no event shall the Gestational Carrier have any obligation to provide any care for any child born pursuant to this Agreement. In no event shall any child born pursuant to this Agreement possess rights of inheritance from any party other than the genetic family lineage of the Intended Parents.

C. FOR THOSE USING IVF

DEATH, SEPARATION OR DIVORCE OF INTENDED PARENTS

1. Intended Parents recognize that, should either of them decide s/he does not want to procreate prior to the implantation of any of The Embryos, that decision will nullify any right of either Intended Parents to use the Embryos for that purpose. No Intended Parent will receive custody of the Embryos for procreation purposes over the objection of the other Intended Parent.

2. Whether or not the Intended Mother and Intended Father get married, if they do so and then become legally separated or divorced, or if they do not get married and then they end their committed relationship, Intended Mother shall have sole legal and physical custody of any embryos, unless otherwise determined by decree of court, and Intended Mother alone may exercise any or all of the options listed in paragraph 5(b), above.

3. If either of the Intended Parents becomes disabled or diseased, the Embryos may be used as determined by the Intended Parents jointly. Further, if one Intended Parent loses capacity to make health care decisions on his or her own behalf, the Intended Parent with capacity is empowered to make all decisions concerning the disposition of the Embryos.

4. In the event of the disappearance after all reasonable attempts to locate him for a period of at least six (6) months or death or incapacity of the Intended Father, the embryos shall be deemed to be the property of the Intended Mother ONLY. In the event of the disappearance after all reasonable attempts to locate her for a period of at least two (2) years or death or incapacity of the Intended Mother, the embryos shall be the property of the Intended Father ONLY.

5. In the event of the death or incapacity of both Intended Mother and Intended Father, _____ shall have the power to decide the disposition of the embryos, in accordance with the terms of this Agreement.

6. In the event of the death or incapacity of either Intended Mother or Intended Father, Intended Parents each specifically consent to the use of the genetic material for the survivor to have a Child who might be conceived and born after the death of the other intended parent and that the Child shall be deemed to have been born in the lifetime of the deceased parent. If the surviving Intended Parent chooses to have a Child using the Embryos, that Child shall be deemed to have been born in the lifetime of the deceased Intended Parent even if the Child was in utero more than two years of decedent's death, notwithstanding any law to the contrary. To the fullest extent possible, each Intended Parent clearly and unequivocally consents not only to posthumous reproduction but also to the support of any resulting Child born pursuant to this Agreement.

7. If Intended Parents are married or are in a committed relationship but cannot agree as to the disposition of the Embryos, a court is authorized to decide the disposition of the Embryos, except that, if no court action is initiated within two (2) years of said disagreement, the Embryos will be donated for medical research or training for all purposes other than the birth of a Child.

8. If both Intended Parents die without testamentary documents or if both Intended Parents die and their testamentary documents substantially conflict either with each other or with this Agreement, a court is authorized to decide the disposition of the Embryos, except that, if no court action is initiated within two (2) years of said death, the Embryos will be donated for medical research or training for all purposes other than the birth of a Child.

VIII. CONCLUSION

ASRM's ethics statement about posthumous reproduction states that a spouse's request for the posthumous removal of sperm "without the prior consent or known wishes of the deceased spouse need not be honored" and, since these requests pose judgmental questions, they should be considered individually in light of circumstances and relevant state law. The Ethics Committee of the American Society for Reproductive Medicine, Posthumous Reproduction, 82 FERT. & STER. SUPP. 1, S262, Sept. 2004.

Ethics and advisability aside, the law that governs the entitlements and inheritance rights of children conceived from frozen gametes or from embryos after the deaths of their parents, as well as the rights of those parents to have those children, is evolving. Wills and Estates lawyers should be aware of the laws that govern posthumous reproduction in the states in which they practice and bring that awareness to the matters on which they consult.

VIII. ADDITIONAL READING

Knaplund, Kristine S., *The New Uniform Probate Code's Surprising Gender Inequities* (2010) *Duke Journal of Gender Law & Policy*, 2011

Samani, Reza Omani et al., *Posthumous Assisted Reproduction from Islamic Perspective*, *International Journal of Fertility and Sterility*. Vol 2, No 2, Aug-Sep 2008, Pages: 96-100.

Zafran, Ruth, *Dying To Be A Father: Legal Paternity In Cases Of Posthumous Conception*, (2008) *8 Hous. J. Health L. & Pol'y* 47–102.