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Inheritance Rights for Children of Assisted Reproductive Technologies

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Introduction

- In 2008, the Uniform Probate Code was amended to modernize its provisions to take into account today's blended families. The Amendments address many topics, such as when a child can inherit from a step-parent. It also addressed several novel questions of law that were not previously addressed in the UPC. The questions are centered around the inheritance rights of children born from Assisted Reproductive Technology, or ART. The use of ART is more common than you might think, necessitating that new laws be enacted to help courts and families in dealing with and interpreting the parent/child relationship in a host of different scenarios.
- "Roughly 10 to 15% of all adults experience some form of infertility."
  - (Debora L. Spar, The Baby Business 31 (2006)).
- CDC estimates:
  - the number of ART procedures and the number of infants conceived through ART procedures has more than doubled since 1996. (CDC ART Surveillance 2006).
  - 1% of US infants born in 2006 were conceived through ART. Id.
- Impetus for new laws: rapidly changing American family demands modernizing the law to accommodate these increasingly common family choices.

Background to UPC §§ 2-120, 2-121

- When a child is born using ART, the child may have genetic material from one or both intended parents, and the child may have been carried in the womb of the intended mother. On the other hand, the child may have genetic material from two unrelated or unknown parties, be carried in the womb of yet another party, and raised by the intended parents. The UPC makes clear who the child's parents are for intestacy purposes in each of these scenarios. The UPC does this by enacting two new Code Sections: §§ 2-120 and 2-121. Essentially, § 2-120 covers all situations where the intended parent carried the child in her womb. § 2-121 covers the situation where a surrogate carried the child in her womb. However, if after birth the child is adopted by the intended parents, neither of these two new sections apply. If the child is adopted, the adoption provisions of the UPC apply.
- Generally intended to be consistent with provisions of the Uniform Parentage Act (UPA) (2000)
  - UPA Article 7 Child of Assisted Reproduction adopted in 7 states (and UPA Article 8 Gestational Agreement in 2 states) as follows:
    - Alabama §§ 26-17-701 to 26-17-707
    - Delaware §§ 8-701 to 8-707
    - North Dakota §§ 14-20-59 to 14-20-65
    - Texas Family Code §§ 160.701 to 160.707 (and Article 8 adopted §§ 160.751 to 160.763)
    - Utah §§ 78B-15-701 through 78B-15-707 (and Article 8 §§ 78B-15-801 to 78B-15-809)
    - Washington §§ 26.26.700 to 26.26.740
    - Wyoming §§ 14-2-901 to 14-2-907
- Addresses inheritance rights of children of "Assisted Reproduction"

- "Assisted Reproduction (AR):" method of causing pregnancy other than sexual intercourse. (UPC § 2-115) (from UPA § 102)
    - Current methods include: artificial insemination, donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.
- UPC § 2-120: the birth mother is the intended parent (whether or not she is the genetic parent)
- UPC § 2-121: the birth mother is not the intended parent
- These 2008 UPC Amendments have been adopted in 2 states:
    - Colorado §§ 15-11-120 to 15-11-121
    - North Dakota §§ 30.1-04-19 to 30.1-04-20
- Generally, if a parent-child relationship exists under either section then they are treated as a parent and child for purposes of intestate succession.

UPC § 2-120
Child Conceived by Assisted Reproduction other than Child Born to Gestational Carrier

A Who has a parent-child relationship with the child of AR for purposes of intestacy?

- Third Party Donor.
    - Adopts UPA § 702 theory: "donors are eliminated from the parental equation"
    - A parent-child relationship does not exist, even though Third Party Donor has a genetic relationship with the child (UPC § 2-120(b))
        - "Third-party donor": produces eggs or sperm used for AR (whether or not for consideration). (UPC § 2-120(a)(3) from (UPA § 102(8)))
            - Does not include:
                - Husband who provides sperm or wife who provides eggs, that are used for AR by the wife
                - The Birth Mother of a child of AR; or
                - An individual who has a parent-child relationship with the child.
    - Reasoning: No intent to be the parent.
- Birth Mother.
    - UPC § 2-120(c) Consistent with UPA § 201: you're the mother if you give birth (unless Gestational Agreement).
    - A parent-child relationship exists
        - "Birth mother:" woman, other than a Gestational Carrier, who gives birth to a child of AR. Not necessarily the genetic mother.
    - Reasoning: No proof of Intent necessary because Birth Mother made the decision to undergo the procedure with the intent to become pregnant and to give birth to the child.
- Parents Whose Consent is Presumed
    - Husband of the Birth Mother whose Sperm was used during his Lifetime by his Wife for AR. (UPC § 2-120(d))
        - A parent-child relationship exists
            - Reasoning: Presumed Husband consented
                - Ex. Artificial Insemination Husband
                - (Consistent with UPA § 703 prior to 2002 amendment)

        - Note: does not apply to posthumous conception
        - Exceptions (both from UPA § 706(b))
            - (i) Divorce before Placement of eggs, sperm, or embryos (unless the former spouse consented in a record re: AR post divorce).
            - (j) Withdrawal of Consent before Placement of eggs, sperm, or embryos in a Record (unless later satisfies the parent-child Relationship test).
    - Spouse of Birth Mother (when Spouse's sperm was not used or when Spouse's sperm was use after death of Spouse) (and no divorce pending). (UPC § 2-120(h)(1),(2))
        - Presumption: parent-child relationship exists with Birth Mother's spouse (unless there is clear and convincing evidence that spouse did not intend to be the parent and did not function as a parent of the child)
    - Birth Certificate. (UPC § 2-120(e))
        - Presumption: parent-child relationship exists with that individual (who is not Birth Mother).
        - Note: could apply to a Same-Sex couple (not using Gestational Carrier) if state law permits a woman who is not the Birth Mother to be listed on the child's birth certificate. (Comments to UPC § 2-120)
            - If not, the woman who is not the Birth Mother could still become the parent by (i) signed record showing consent, (ii) by satisfying the function as a parent test, or by (iii) adoption
- Parent-Child Relationship with Another (Someone Other than Birth Mother). (UPC § 2-120(f))
    - This person's genetic material not necessarily used.
    - Adopts theory of UPA that both married and unmarried couples are entitled to use AR to become parents. (See UPA § 201 Comment)
    - parent-child relationship exists if the individual (other than the Birth Mother) consented with the intent to be treated as the other parent of the child.
    - Consent is established:
        - (1) Signed record (evidencing consent under all the facts and circumstances, whether before or after the child's birth) (consistent with UPA §§ 703, 704);
            - Note: does not have to expressly state that the individual intends to be treated as parent. Ex. In re Martin B (841 NYS.2d 207 (Sur. Ct. 2007)): deceased father had signed forms authorizing the repro lab to release specimens to named spouse, certifying he was married to named spouse and the stored specimens would be used for future inseminations with wife. Sufficient.
            - Exception: Individual who never functioned as a parent of the child who signed a record more than two years after the birth of the child OR a relative of that individual who is not also a relative of the Birth Mother cannot inherit from or through the child.
        - (2) Or if no Signed record, look to Actions:
            - Functioned as a parent of the child by the time child was two; or

        - Intended to function as a parent of the child (but was prevented by death, incapacity, or other circumstances); or
        - Intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.
  - Also same exceptions (above): Divorce/ Withdrawal of consent before Placement of eggs, sperm, or embryos §2-120(i) and (j)
  - "Functioned as a parent of the child:" (UPC § 2-115(4)) 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.
    - Note: not the UPA § 704 definition, which requires (i) sharing household with child during first two years + (ii) holding child out as own, because of:
      - (i) armed service persons, incarcerated persons, hospitalized persons etc.
      - and (ii) does not seem to be sufficient
    - Taken from Restatement (Third) of Property

B. Given a parent-child relationship, can the child inherit from the parent?

- Note on Posthumous Placement of Genetic Material:
  - Cases with married men with leukemia who have frozen sperm to have baby with wife, but die before procedure is successful.
  - Competing policies: balancing decedent's intent with closing class of intestate beneficiaries.
    - Will the child be treated as "in gestation" at the parent's death so as to inherit from the parent? Yes (UPC § 2-120(k)) if:
      - in utero not later than 36 months after death; or
      - not born later than 45 months after death.
    - Reasoning (Comments to UPC § 2-120):
      - grieving time
      - Under UPC § 3-1006, unknown heirs surfacing within three years permitted to inherit
    - Even if the child is not "in gestation" for purposes of inheriting from the parent, the child could still be a child of the parent for purposes of inheriting from the parent's relatives via intestacy and class gifts.

UPC § 2-121
Child Born to Gestational Carrier

- Situation where the Gestational Carrier is not the Intended Parent(s)
- Only takes effect if the Intended Parents have not formally adopted the child
- Gestational Carrier (GC). (UPC 2-121(a)(2))
  - Gives birth to a child under a "Gestational Agreement" (agreement for AR in which a woman agrees to carry a child to birth for intended parent(s)).

    - The GC does not have a parent-child relationship with the child (UPC § 2-121(c)) unless:
        - court order; or
        - genetic mother and no parent-child relationship with an individual other than her
    - Note on Gestational Agreement:
        - Definition in UPC 2-121(a)(1) based on the Comment to Article 8 of the UPA. However, the UPA makes a distinction between agreements that have been enforced by courts and those that are not. For purposes of intestacy, if an agreement has been honored, the child should inherit from the intended parent even if the agreement was not enforceable under the laws of the state.
- Intended Parent(s) ("IP(s)"). (UPC 2-121(a)(4))
    - Gestational Agreement provided they would be the parents. They don't necessarily have a genetic relationship to the child.
    - parent-child relationship exists (UPC § 2-121(d)) if:
        - Functioned as parent(s) by the time the child was two years of age; or
        - Died while GC pregnant, and:
            - The surviving IP (there were 2) functioned as a parent by the time the child was two; or
            - Both IPs died while GC pregnant, but a relative of either IP or relative's spouse functioned as a parent by the time the child was two; or
            - Only 1 IP, and his/her relative or spouse of a relative functioned as a parent by the time the child was two.
        - (Unless court order to the contrary).
- Court Order. Conclusively establishes parent-child relationship (UPC § 2-121(b))
- Gestational Agreement after Death or Incapacity (without court order)
    - Posthumous child situation
    - Presumption (UPC § 2-121(f)) that a Deceased/Incapacitated Spouse intended to be the parent if:
        - before death/incapacity the individual deposited the sperm or eggs that were used to conceive the child; and
        - while the individual was married (no divorce pending); and
        - the individual's spouse or surviving spouse functioned as a parent of the child by the time the child was two.
        - Unless there is:
            - Clear and convincing evidence decedent did not intend to be the parent; or
            - Court order deciding parents of child born to gestational carrier; or
            - Signed record.
    - Otherwise, parent-child relationship exists with Individual whose sperms/eggs used after death/incapacity(UPC § 2-121(e)) if:
        - Intent to be treated as the parent of the child, shown by:
            - Signed record; or

    - Other clear and convincing evidence.
  - Same "in gestation" rule (above): child will inherit from the parent (UPC § 2-21(h)) if:
    - in utero not later than 36 months after death; or
    - not born later than 45 months after death.

UPC § 2-705
Class Gifts Construed to Accord with Intestate Succession, Exceptions

- Generally, a class gift that uses a term of relationship to identify the takers (ie "issue") includes a child of AR and a Gestational child and their descendants (if appropriate to the class) as takers if a parent-child relationship was established. (UPC § 2-705(b))
- However, inclusion in class is subject to the Class Closing Rules (UPC §2-705(g)(2)):
  - If a child of AR or a Gestational child is conceived posthumously, and if the distribution arises at the 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:
    - (i) in utero no later than 36 months after parent's death, or
    - (ii) not born later than 45 months after parent's death.
  - Same reasoning as above.
  - Ex. 13 G's mother's will created a testamentary trust: income to G for life, then principal to G's children. When G's mother died, G was married w/o children. When diagnosed w/ leukemia, G froze sperm and consented to be parent (2-120(f)). After G's death, G's widow was inseminated.
    - If child satisfies (i) or (ii) above w/in G's death, then child included in class under the Rule of Convenience.
  - Note: UPC § 2-705(g)(2) only applies if child of AR or gestational child is conceived posthumously and the distribution date arises at the deceased parent's death.
    - Otherwise, the ordinary class closing rules apply
  - When Transferor is not the genetic parent (example doc is grandmother's trust) then genetic parent is not the parent for this purpose unless functioned as parent before the child reaches 18 (or persons's spouse of relative did)

UPC § 2-118(c)
Child of Assisted Reproduction or Gestational Child in Process of Being Adopted.

- Situation where parent-child relationship established b/w child of AR under § 2-120 or Gestational child under § 2-121 with a parent, and that child is in the process of being adopted by parent's spouse when that spouse dies, then child treated as adopted by the deceased spouse (if parent survives the deceased spouse by 120 hours).