AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY, TRUST, AND ESTATE LAW

New Developments in Assisted Reproductive Technology and Their Effects on Estate Planning

Twenty-first Spring Symposia
May 6-7, 2010
Philadelphia, Pennsylvania

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Introduction

In 2006, the American Bar Association House of Delegates ratified the Model Act Governing Assisted Reproductive Technology (ART) unanimously. As stated in the prefatory note to that Act:

> Since the birth of the first *in vitro* fertilization baby in 1978, extraordinary advances in reproductive medicine have made biological parenthood possible for people with infertility, certain other medical conditions, for individuals who risk passing on inheritable diseases or genetic abnormalities, or for individuals who are effectively infertile due to social rather than medical reasons. Such advances have also been applied to extend reproductive potential by treating post-menopausal women. These advances use technology to enable individuals to have children when for personal reasons they cannot or choose not to do so by means of sexual intercourse. These advances have also been used to retrieve gametes from dead or incapacitated individuals, or to manipulate differentiated cells to produce the equivalent or near-equivalent of a human embryo, capable of implantation in the uterus and gestation to term birth.
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> The rise of these new technologies and therapeutic modalities, including the use of third parties, to assist in creation or gestation of an embryo has created a host of novel legal issues. The resolution of these issues has caused confusion and contradictions in the application of a body of existing statutory and common law.

As is evident from the varied and inconsistent decisions in the cases dealing with both parentage (*In re Baby M*, 537 A.2d 1227 (N.J. 1988) to *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)) and posthumous reproduction (*Estate of Kolacy*, (753 A.2d 1257 (N.J. 2000), *Woodward v. Commissioner of Social Security*, (760 N.E.2d 257 (Mass. 2002) and their progeny), legislative guidance would be helpful. That it would be appreciated by the courts is evident from the following dicta:

> We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some over-all legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.

In re Marriage of Buzzanca, 72 Cal.Rptr. 280 (Cal.App. 1998).

The 2008 Amendments to the Uniform Probate Code promulgated by the Uniform Commissioners on Uniform State Laws are such a legislative response intended to address the complex issues raised by ART in the area of intestate succession. Such rules are both desirable and welcomed. Unfortunately, they cannot exist in a vacuum in any particular jurisdiction. The effect and propriety of these

amendments as drafted depends on numerous other statutes and policies in the particular state considering adopting them.

Discussion

The UPC amendments relating to ART and posthumous reproduction were intended to dovetail with the parental presumptions and judicial preapproval provisions of sections 7 and 8 of the Uniform Parentage Act as amended in 2002. If a jurisdiction has passed the 2002 UPA, the UPC amendments were intended to fit well. However, there are at least two other relevant legislative climates that may review and consider the UPC amendments, and each creates different issues for consideration.

Illinois, for example, has not passed the judicial preapproval model for validating surrogacy arrangements as contained in the UPA. It has created an administrative model for surrogacy that results in the intended parents being placed on the resulting child's birth certificate without court hearing or order. 750 ILCS 47/1-70 (2005). Therefore, references in the UPC that state parentage is established for intestate succession purposes by court order are inapposite. (e.g. - UPC Sec. 2-121(b) and (g)(1).) Nevertheless, Illinois has at least established a clear legislative policy supporting ART and surrogacy, so the concepts proposed by the UPC do follow the state's general legislative intent. Such housekeeping details will vary from state to state.

Minnesota, on the other hand, has adopted neither the 2002 UPA not any laws affirming surrogacy, same-sex unions, or ART in general (other than the 1979 UPA provision regarding parentage of sperm donors). Considering the UPC amendments in such an atmosphere creates an entirely different discussion on many more policy levels. In order to shed light on how the UPC is discussed and viewed in such a climate, I offer the following content from the memorandum of a Minnesota subcommittee that was charged with reviewing and making recommendations on Sections 2-120 and 2-121 of the proposed amendments.

Minnesota's Consideration and Perspective

Our subcommittee was charged with reviewing the most recently proposed amendments to the Uniform Probate Code (UPC) by the Uniform Law Commission (ULC) that address the parent-child relationship in the context of intestate succession.

Initial comments concerning scope and application: The intestacy statutes apply specifically to intestacy, and, clearly, if a decedent dies without a Will, the subject provisions would be applied to determine his heirs through the parent-child relationship as newly defined. Any decedent who has capacity can execute a Will and define with specificity who should take as beneficiaries of his estate, thereby avoiding the application of these default rules. However, it is to be noted that, through the application

of other provisions of the Code, these provisions also apply to class gifts, and other construction questions, so that they also apply to "governing instruments" that reference or rely on intestacy rules, using phrases such as "heirs-at-law" or "descendants" or "issue" without more definition.

Under section 8-101, the provisions of the amended UPC, including the subject provisions, apply to "governing instruments executed by decedents dying" after their effective date, and to "any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code," and "any rule of construction or presumption provided in this Code applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent."

Thus, these provisions have a potentially very broad application to existing documents, whether revocable or irrevocable, as well as to future documents. They may apply to documents that don't belong to the affected parent or child but belong, instead, to more distant relatives who may provide for their "descendants" or "heirs at law." With the use of the phrase "inherit from or through" it appears this result is intended by the ULC. For example, a donor could provide for distribution under an irrevocable trust (arguably, a "governing instrument") to his "descendants" and, without a specific definition contained in that instrument, these intestacy provisions would determine the parent-child relationship that that donor's child has to his or her own descendants, thereby including or excluding those descendants in the donor's disposition scheme.

Therefore, given that potentially broad application, we feel it is important that we be both thoughtful and conservative. Our view is that these provisions should only encompass relationships that could be anticipated by decedents and makers of governing instruments or would otherwise be strongly supported by public policy considerations. Nonetheless, we do believe that our current laws should be brought up-to-date with some of the technology that is more and more commonly affecting how children are conceived and born in today's world. Our comments are designed to balance these factors.

As a general comment on this part of the amended UPC, we discussed the concept of same sex couples as parents and determined that legislating in the inheritance context for rights that don't yet exist elsewhere was premature. For example, because Minnesota does not recognize a same sex partner as a legal relationship, we chose to use the term "husband" and not "partner."

New Definitions to be added to general defnitions under UPC. Originally, as proposed, section 2-115 and section 2-120 (now 2-119) contained definitions relevant to Part 2 but the committee felt that all definitions should appear in the general definitions section of the UPC at the beginning. Our comments on the notable definitions are as follows:

- “Adoptee” here does not limit adoption to minors, but also includes adults who are adopted in accordance with Minnesota law. The committee felt that this is consistent and acceptable.

- “Assisted reproduction” is self explanatory and sufficient, we thought.

- “Birth mother” is defined as a woman who bears a child, other than pursuant to a gestational agreement. We altered the language to delete references to a surrogacy provision and add “including” rather than a new sentence.

- “Child of assisted reproduction” we modified to exclude gestational agreement situations.

- “Functioned as a parent of the child” was a term we grappled with, recognizing that it may call into question a parent’s parenting behavior as a fact issue, however, in most situations throughout the statute, the requirement of clear and convincing evidence would likely prevent frivolous claims based on a parent’s parenting style.

- “Genetic parent” (and, respectively, “genetic father” and “genetic mother”) means the person who provided the sperm or egg to create the child. Because we are recommending the addition of provisions governing assisted reproduction, it is necessary to define the genetic parent, as opposed to an adoptive parent or parent determined by the rules governing assisted reproduction, discussed below. The provision states that a person determined to be a father under our existing paternity code is treated as a genetic father for purposes of the new intestacy provisions.

- “Gestational agreement” is a term we use only when excluding surrogacy arrangements from the purview of the provisions we are recommending. We altered this definition to delete the phrase “an enforceable or unenforceable” and also the last phrase “or an individual described in subsection (e),” which allows gestational agreements to be entered into on behalf of a deceased intended parent. As discussed below, we determined that since Minnesota law does not have a settled body of law (or a settled practice) that recognizes the validity of and requirements for gestational agreements, we agreed that an intestacy provision validating those practices was premature at this time.

- “Gestational carrier” and “gestational child” we deleted because we wanted to minimize references to these terms. Where current Minnesota law does not recognize these terms o these relationships, we felt we should eliminate any unnecessary references to those concepts.

- “Intended parent” is another term used in the surrogacy context and we have included that definition here only for purposes of excluding those arrangements from our accepted provisions. We modified the language of this definition to say “including a

person who has a genetic relationship with the child" rather than a full new sentence saying "the term is not limited to" the genetic parent.

- The term "relative" means grandparent or lineal descendant of a grandparent.

- "Third party donor" includes a man who donates sperm or a woman who donates eggs.

We thought this provision was generally acceptable.

Other than the foregoing modifications, we accepted these definitions, and found them to be adequate and we support their inclusion in any final legislation.

Section 2-119 governs the right of adoptees and their genetic parents to inherit from one another.

Subsection (a) states the general rule that, except as provided in situations described in Subsections (b) through (e), a parent-child relationship does not exist between any adoptee and the adoptee's genetic parents. These provisions are generally designed, as stated in the ULC's comments to this Section, to recognize that a familial relationship between the adopted child and non-custodial genetic parents is unlikely to exist, except in certain circumstances that the statute excepts. In those excepted circumstances, it is assumed a familial relationship with the genetic parent still exists, thereby warranting retention of a right to inherit from and through that parent. We think their provision is appropriate.

Subsection (b) as proposed by the ULC would recognize the parent-child relationship between a genetic parent and his/her spouse who adopts the child, and maintain the right of the child to inherit from the other non-custodial genetic parent.

We felt that Subsection (b)'s exception went too far, because it would allow the child to inherit from and through a genetic parent whose parental rights were likely terminated when the child was adopted by someone else. We didn't feel this would be the expected result for that genetic parent, certainly if that genetic parent was living at the time of the adoption. Rather, we felt that genetic parent would not consider the child to be his or her child and would not expect that that child would inherit from or through him or her.

Therefore, our committee recommends that Subsection (b) only be included with modifications. A reasonable modification might be similar to the Oregon statute on this topic. That statute maintains the parent-child relationship for purposes of the child inheriting from or through the genetic parent, despite adoption by a spouse of the other genetic parent, but only if the noncustodial genetic parent is deceased at the time of the child's adoption. We have included in our re-draft of that subsection the modified version.

Subsection (c) continues to recognize a parent-child relationship and the child's right to inherit from and through both genetic parents, despite adoption of a child by a relative of a genetic parent or the spouse or a relative of a genetic parent. The ULC rationale was that there would likely remain a familial relationship, and we agreed with that position.

Subsection (d) continues to recognize a child's right to inherit from and through both of his or her genetic parents where the child is adopted by someone else after the death of both genetic parents.

Again, the ULC rationale was that there would likely remain a familial relationship, and we agreed with that position.

Subsection (e) is designed to put a child conceived by assisted reproduction on the same footing as a genetic child.

Because our committee does not endorse enactment of gestational carrier provisions, we have modified this subsection from the version proposed to include only the assisted reproduction provisions we have endorsed. See below discussion.

Section 524.2-119 addresses assisted reproduction and extends the clarity of the law that currently exists. Currently, under the Uniform Parentage Act (UPA) adopted by Minnesota, it is clear that a third party donor of sperm is not considered a parent, however it is not clear that a third party donor of an egg is not a parent. That law has not caught up with technology as it currently exists and as is commonly used to conceive and bear children. The UPA contains various presumptions about paternity. It is notable that our UPA is not the current version adopted and suggested by the ULC.

We discussed at some length the concept that it is possible that there could develop inconsistencies between the UPA and the UPC's treatment of this subject, and we determined it was preferable for the UPC to specifically address these issues, rather than simply defer to the UPA. The UPA has different implications in a different context than the UPC, so we felt separate treatment was warranted. We also discussed that our attempts to include provisions dealing with assisted reproduction will likely be modified over time to react to changing technology as well as developing common law in the years that follow.

Original Subsection (a) set forth definitions for this section, but we think those should be moved to the general definitions section of our statute, discussed above.

New Subsection (a) states and existing law that a third party donor, whether of sperm or eggs, is not a parent. This section seemed reasonable and consistent with what would be expected.

Subsection (b) states that a parent-child relationship exists between the child of assisted reproduction and the birth mother.

Subsection (c) states that a husband of a birth mother is a parent if he provided the sperm during his lifetime.

This section seemed reasonable and consistent with what would be expected.

Subsection (d) contains a presumption that the persons listed on a birth certificate are the parents of a child of assisted reproduction.

This section provides a helpful presumption that will, in most cases, yield the expected results about who the parents of the child are intended to be.

Subsection (e) provides that a parent-child relationship is presumed to exist between a child of assisted reproduction and an individual other than the birth mother who consented to be the other parent of the child. That consent is shown by the existence of a signed record that shows consent, or in the absence of a signed record, by that person functioning as a parent or intending to so function (but being precluded from actually functioning as a parent by death, incapacity, etc.).

The committee believed this provision was acceptable as modified. We changed it to provide that this was a presumption which, in most cases, would apply but could be rebutted with sufficient evidence. We also changed it to provide that the person consenting would be treated as “the other parent” rather than “a parent” to prevent the possibility that there could be more than 2 parents of a child. This is a departure from the ULC’s proposed treatment in which a child might have multiple parents all of whom functioned as a parent of the child and/or signed consents and, therefore, would be presumed to be parents. We also deleted provisions relating to posthumously conceived children because we do not endorse including posthumously conceived children at this point, as discussed below.

Subsection (f) states that a record of consent that is signed more than 2 years after the child’s birth is not effective to create inheritance rights in the parent or his relatives unless that person also functioned as a parent. This prevents someone from signing a consent just to inherit from a child.

We agreed with this provision.

Subsection (g) states the additional presumptions that the husband of the birth mother is presumed to be a parent, even if he is deceased before the child is born, in the absence of clear and convincing evidence otherwise.

We deleted the references to posthumously conceived children as we have not adopted that provision, but we otherwise agreed with this provision.

Subsection (h) states that if a married couple is divorced, the husband is not a parent unless he consented in a record or there is clear and convincing evidence of his consent that the child conceived after divorce would be his child.

We agreed with this provision, but added the clear and convincing evidence standard for consent not shown in a record.

Subsection (i) provides that if consent is withdrawn, no parent-child relationship exists for children conceived thereafter.

We agreed with this provision but added the clear and convincing evidence standard for consent not shown in a record.

Former Subsection (j) as proposed by the ULC would have allowed posthumously conceived children to inherit if they were conceived within 36 months or born within 45 months after the parent's death. We do not endorse adopting this type of posthumous conception provision at this time. The committee had considerable debate about possible appropriate timeframes. We identified issues concerning: determining heirship or devisees for purposes of probate proceedings or distributions, and estate tax implications for filing returns and determining the effects of deductions, allocations of GST exemption, and so forth. For these reasons, we felt the suggested timeframes, and even the concept, posed too many unanswered questions and difficulties. We also felt that there would usually be more of a tenuous relationship between a child born to a deceased father's spouse 3 or 4 years after that father's death and the rest of the father's family whose wealth could possibly pass to that child under these provisions, if enacted. Rather, families could affirmatively provide for these posthumously conceived children to solve that problem, in the circumstances where that would be desirable for those families. For other families where that relationship would be more tenuous, which we thought would be the norm, we didn't think this presumption was appropriate. For those reasons, we do not believe these provisions should be adopted.

Section 2-121 proposed by the Commissioners provided for recognition of surrogacy arrangements and the "intended parents" of children conceived in those arrangements. Minnesota law does not have a well-settled common law or statutory scheme that validates or regulates surrogacy arrangements. Rather, this area of law is only slowly developing. As a result, we felt it was premature to legislate inheritance rights based on these types of currently undefined arrangements. We felt that individuals who are currently engaging in conception through those means could address the inheritance rights of those children specifically in their estate plans. In addition, there exist other more traditional means by which those parent-child relationships could be determined. For example, our definition of birth mother would exclude a surrogate as being a parent, and the intended parents could adopt the child, thereby clearly severing the relationship with the surrogate. Given these factors, we did not believe adopting the surrogacy provisions would be appropriate at this time. At some point in the near future, it is possible that surrogacy agreements may be enforced and given clear validity under the common law of Minnesota. If so, this presumption might be overcome by a showing of the existence of a valid gestational agreement so that the intended parents, not the genetic parents, would be determined to be the parents. Until then, the presumption would control in most instances. We changed the statutory references to delete the

surrogacy provisions we do not endorse adopting at this time. See below discussion. We are aware that at some time in the future, perhaps not too long into the future, surrogacy arrangements will become more common and more well-defined. At that point, we could envision adding a surrogacy provision that delineates inheritance rights based on the way those arrangements are structured, such as by written agreement, or by functioning as a parent, but until then, we would not recommend that the Probate and Trust Section advocate legislation that attempts to order and define those arrangements and their effect on inheritance.

Conclusion

The present diverse legislative landscape regarding ART and same sex unions creates an impossible environment in which to propose one statute that will work equally well in all jurisdictions. The UPC amendments are intended to be passed in concert with the 2002 UPA, and, if this is done, may constitute an adequate legislative response to ART issues in intestacy as they currently exist. Unfortunately, various difficulties arises when the amendments are considered by the numerous jurisdictions that have not passed the 2002 UPA as reflected by the comments in the committee memorandum cited above.