
HOW ART AFFECTS OUR ESTATES & TRUSTS PRACTICE

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Advancements in assisted reproduction technology (ART) make it possible for children to be conceived and born following the death of a parent. While the technology has been around for several years, the laws recognizing the rights of posthumously conceived children have been slow to develop. The Supreme Court's opinion in the case of *Astrue v. Capato*, 132 S.Ct. 2021, 566 U.S. ____ (2012), which held that state intestacy laws determine whether a posthumously conceived child is entitled to the predeceased parent's social security benefits, sparked state legislative action. In 2012 and 2013, Maryland passed legislation that expands the definition of "child" to include posthumously conceived children under certain circumstances. The 2013 legislation also provides for the distribution and receipt of a decedent's property without liability to an unknown posthumously conceived child provided certain filing requirements are met. The state's legislative response to posthumous conception issues should cause us each to consider the following in his or her practice: (1) How do Maryland's new laws impact any of my pending probate and trust matters? (2) When and how should I modify the drafting of my Wills and Trusts? (3) What other counsel should I be providing to my clients in this area?

Section 1-205 of the Estates and Trusts Article of the Maryland Code is a rule of construction applied to the meaning of the word "child" when it is not otherwise clearly defined in a will or a trust. The term "child" includes a legitimate child, an adopted child and an illegitimate child to the extent provided for in Estates and Trusts Sections 1-206, 1-207 and 1-208. Effective October 1, 2012, Section 1-205 expanded the definition of "child" to include a child conceived from the genetic material of a person after the death of the person if two different consents from the decedent are obtained. First, the decedent must have consented in a written record to the use of his or her genetic material for purposes of posthumous conception in accordance with the requirements of Section 20-111 of the Health General Article. This first consent is required to be in writing and signed by the decedent, or by some other person in the presence of the decedent at the decedent's direction, but no other formalities are required. Second, the decedent must have consented to be the parent of the posthumously conceived child (PCC). There is no requirement that this second consent be signed, just that there be some written record that establishes the decedent's intent.

Estates and Trusts Section 3-107, located in the intestacy

provisions of the Code, specifically addresses inheritance rights for a decedent's after-born children. Effective October 1, 2012 a PCC of the decedent is included as an heir of the decedent, subject to the same two consent requirements set forth in 1-205, and further provided that the PCC is born within two years after the death of the decedent.

The 2012 law raised concerns about the distribution of estates and trusts in a timely fashion because Section 1-205, which construes the meaning of the word "child" unless a will or trust clearly provides otherwise, imposed no time period in which a PCC must be born in order to qualify as a "child" of the decedent. Further, because there was no requirement to notify persons responsible for administering and distributing the decedent's property of the possibility of a PCC, there was no way such persons could be sure that a PCC would not materialize in the future. As a result, distribution of a decedent's estate and the payment of decedent's death benefits to beneficiaries would likely be delayed while fiduciaries, insurance companies, IRA custodians and plan administrators identified the individuals or class of beneficiaries entitled to be paid. As written, the 2012 law was also unclear as to whether its terms applied retroactively to trusts already in existence on October 1, 2012.

The 2013 law (House Bill 857), effective June 1, 2013 addressed the above concerns by doing the following:

- (1) Bringing parity between Sections 1-205 and 3-107 by requiring PCCs to be born within 2 years of the decedent's death in testate estates.
- (2) Establishing that a PCC will be recognized as a child of the decedent with respect to trusts only if the trust was created by the decedent and became irrevocable on or after October 1, 2012.
- (3) Requiring that the two written consents be filed with the Register of Wills within 6 months of the decedent's death and that the birth record of the PCC be filed within 2 years and 60 days after the decedent's death. (For a decedent who died between October 1, 2012 and May 30, 2013, the consents are to be filed by December 1, 2013.) The filings are to be made at the Register of Wills Office for the County in which the decedent's probate estate is filed, and if there is no probate estate filed, then in the

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County in which the decedent died domiciled. If these filings are not timely made, a person holding property that passes by reason of the decedent's death may distribute that property, and the transferee may receive the property, without liability for a claim by any unknown PCC.

(4) Clarifying that the law applies only to a child of a decedent who dies on or after October 1, 2012.

What changes do these new laws bring with respect to estate administrations pending in our offices and to trusts of which we or our clients serve as trustee?

For estates of decedent's dying before October 1, 2012, nothing has changed. A PCC is not considered to be a child of the decedent, unless the decedent's will expressly provides for the PCC. However, even if the PCC's parent expressly provided for the PCC in the parent's will, for inheritance tax purposes, the PCC will not be exempt. (See ALLAN J. GIBBER, ESQ., GIBBER ON ESTATE ADMINISTRATION, §10.5 (Supp. 2008), which points out that a child born to a woman who is artificially inseminated with her husband's sperm after his death is not exempt from inheritance tax because the child was not conceived during the marriage.)

As to trusts that were irrevocable on or before October 1, 2012, the terms of the trust will govern what, if any, PCCs are included as beneficiaries. Traditional rules of construction will apply. Depending on how a trust is written, the law that governs the identity of the trust beneficiaries could be the law that exists on any one of the following dates: the date the trust was created; the date of the grantor's death; the distribution date of the trust; or the date of some other event established in the trust document. In an interesting case from the Surrogate's Court of New York, *In re Martin B*, 841 N.Y.S.2d 207 (2007), the decedent's irrevocable trust provided for distributions to be made "among the grantor's issue." At the time of Martin B's death, he had two children who survived him. His son later died and Martin B's daughter-in-law gave birth to a PCC using the son's stored genetic material. The trustee filed a declaratory judgment action to determine whether the PCC was included in the class of beneficiaries to whom distributions were to be made. The court found that New York's pretermitted heir statute applied only to probate estates and to the children of the decedent, not to a beneficiary of a third-party trust. Nevertheless, the court held that, because the PCC was born with the consent of the predeceased son, the PCC was entitled to the same rights under Martin B's trust as the child would have been if naturally born. This was the court's ruling even though the trust agreement was silent on the issue

of posthumously conceived beneficiaries and the grantor's intent on the issue was completely unknown. Given the date when the trust was created by Martin B, it is unlikely that he had ever contemplated the possibility of a posthumously conceived grandchild.

As to estates and revocable trusts with decedent's dying on or after October 1, 2012, the new laws provide another good reason why no distributions to the beneficiaries should be made from the estate in the first six months following the decedent's death. Just as it is necessary to wait for all claims to be filed against an estate, the new law similarly imposes a six-month "claim period" for a person intending to use the decedent's genetic material to notify the personal representative by filing the requisite consent forms with the Register of Wills' Office. If these consents are filed, the Personal Representative is on notice of the potential birth of a PCC and should not distribute the estate until after the due date for filing a PCC's birth record, i.e., 2 years and 60 days following the decedent's death. If there are no filings made within the 6-month time period, the trustee or personal representative may proceed to distribute the estate even if the will or trust agreement expressly provides for a period longer than 2 years for the PCC to be born, so long as the personal representative or trustee has no knowledge of a PCC. In cases where the consents are filed, but the birth record is not, or in cases in which the personal representative or trustee has knowledge or other information indicating the possibility of a PCC, the personal representative or trustee would be wise to seek a court order prior to distributing the estate. Accordingly, it will be necessary to ask your personal representative or trustee as to whether they have any knowledge of a PCC and, when in doubt, file the petition.

As there is little formality required for the written records to be filed with the Register of Wills, and no genetic proof linking the PCC to the decedent is required to be filed, there will no doubt be some litigation that ensues with allegations of fraudulent consents and records having been made or disputing the paternity of a PCC. Therefore, if given an opportunity to assist a client who consents to the use of his or her genetic material after death, advise him or her to have the consent records witnessed and notarized. Moreover, if representing a surviving spouse, partner or significant other of a decedent who has consented to the use of his or her genetic material for posthumous conception, advise your client to make timely filing of the consents and birth record with the Register of Wills.

Note that some uncertainty still exists as to the status of

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children born from the posthumous use of cryogenetically preserved embryos created during the decedent's lifetime. Depending on whether "conception," for purposes of Estates and Trusts Sections 1-205 and 3-107, is deemed to occur upon the fertilization of an egg or only upon implantation of the fertilized egg in the woman's uterus, a different result occurs upon application of the law. If conception is deemed to occur upon the union of the egg and sperm, then Maryland's PCC laws do not apply to such children because conception took place prior to decedent's death. A child born posthumously from the frozen embryo of a married couple would be the legitimate child of both the husband and the wife. In the case in which the embryo was formed by an unmarried couple, the child would be the child of the mother and would be the child of the father only if legitimized under Estates and Trusts Section 1-208. Currently, there is no time limitation imposed by law as to when such a child must be born. If, however, the law deems conception to occur only upon implantation of the fertilized egg, or upon gestation of the fertilized egg, then Maryland's PCC laws would apply.

Drafting for the inclusion or exclusion of children or heirs born as the result of ART must now be discussed with our clients to ascertain their wishes. Not all clients will want to include children born in non-traditional ways or into non-traditional families. We need to know if the client has stored genetic material and, if so, whether the client intends to be the parent of a PCC. This information is very personal and clients may not readily volunteered it. Therefore, it will be incumbent on the lawyer to draw this information from the client and determine the client's thoughts and wishes as it relates to providing for children who are born as a result of reproductive technology. Unless we know whether a client or her family is undergoing ART procedures and we discuss their intentions with respect to providing for children born as a result of ART, our clients may make wrong assumptions about whether such beneficiaries are included in their estate plan. For example, a client who has an adult daughter undergoing fertility treatment or ART procedures and who wants to leave a specific bequest of \$10,000 to each of her grandchildren would need to include a provision in her Will that defines the term "grandchild" to include posthumously conceived grandchildren if she wanted daughter's children, posthumously conceived after the client's death, to be included in the gift. To avoid keeping the client's estate open indefinitely, it would be best to recognize only grandchildren that were in gestation within a stated amount of months following the client's death and born within ten months thereafter. Absent such a provision in the client's will, under Maryland law a grandchild conceived by the client's daughter following client's death would not be includ-

ed. This is because the after-born child statute of Maryland law, Estates and Trusts Section 3-107, extends inheritance rights only to children born of the decedent, and not to after-born grandchildren or other relatives. However, if the client's will said, "I leave my residuary estate to my daughter, if she is living, and if she is not living then to her issue, per stirpes," a grandchild who was posthumously conceived after the client's daughter's death, but prior to the client's own death, would inherit just as any other issue of the pre-deceased child.

To keep things simple for a client who wishes to exclude all PCCs, a client's will could be drafted to say, "A child born more than ten months following my death shall not be considered as a child or descendant of mine." If the client wishes also to exclude children born from embryos, the document could say, "the term 'child,' when used in my Will shall not include any child placed in gestation following my death."

If a client wishes to include PCCs or limit the class of PCCs, the will or trust could state that, in order for a child or child's issue to be considered a beneficiary of the decedent, the descendant must be born within a stated amount of time following the death of the decedent or within a stated amount of time following the death of such child's or issue's parent.

For sprinkling trusts in which distributions are permitted to be made among a class of beneficiaries (such as the case of *In re Martin B*), it is not necessary to place time limits on when the beneficiaries must be born, because they automatically become part of the class of permitted distributees whenever they are born. However, drafting becomes more difficult when the client wants to divide an estate or trust into separate shares upon some other triggering event *and* wants to include PCCs. The document should require that a beneficiary for whom a separate share is created must be in gestation within a certain time. Bruce Stone, an attorney in Coral Gables, Florida, has produced detailed trust language for separate trusts that include PCCs. His materials were distributed at the 47th Annual Heckerling Institute on Estate Planning in January and were re-printed with his permission as part of the materials presented at the Estates and Trust Law Section session at MSBA's annual meeting this past June. It is worth looking at Mr. Stone's draft language for these complex trusts.

Aside from drafting, there are other ART-related issues we should discuss with our clients. If the client has stored genetic material, the agreement governing its storage should

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