

The Origin of Life: Who is a Descendant?  
Opening a Can of Wombs  
Inherited Rights of Children Conceived After The Death of a Parent

Dallas Bar Association  
Probate, Trusts & Estates Section  
March 22, 2010

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- I. Definition of “Descendants” in Light of Modern Reproductive Techniques. In a modern society in which advances have been made in reproductive medicine such as sperm donors (artificial insemination), egg donors, in vitro fertilization, and surrogate mothers, the definition of a “descendant,” particularly in a multi-generational irrevocable trust, has become increasingly more problematic.
- A. Who is the owner of unfertilized sperm, unfertilized eggs, or cryopreserved embryos? Are a decedent’s harvested but unfertilized sperm or eggs property? If unfertilized sperm or eggs are property, and not the subject of a special bequest, does such sperm or eggs pass as a part of the decedent’s residuary estate? What if a decedent’s residuary estate passes to one or more trusts? Is it the responsibility of an Executor during the administration of an estate to preserve and protect a decedent’s unfertilized sperm or eggs?
1. Hecht v. Super. Ct., 16 Cal.App.4th 836, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993). Kane, in his Will, bequeathed his cryopreserved sperm to his mistress, Deborah Hecht. Following Kane’s suicide, Kane’s adult children sought to cause the sperm to be destroyed over the objections of Hecht who sought to conceive a child. The court ruled in favor of Hecht and held that
    - (a) Kane’s cryopreserved sperm was a property right that passed as a part of his estate, and
    - (b) public policy did not prohibit posthumous artificial insemination or prohibit a single unmarried woman from becoming pregnant with cryopreserved sperm.
  2. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992). *Davis v. Davis* involved the legal status of cryopreserved embryos in a divorce, where husband wanted to cause them to be destroyed and wife wanted to donate them to a childless couple. The court held that neither party “had a true property interest in the embryos.” The court created a hierarchy of considerations for purposes of determining the fate of the cryopreserved embryos.

3. AZ v. BZ, 725 N.E.2d 1051 (Mass. 2000). Husband and wife entered into a contract that permitted the wife to use the couple's cryopreserved embryos to bear children. Upon divorce ex-husband obtained an injunction prohibiting ex-wife from using or donating the cryopreserved embryos. The court disregarded the contract but nonetheless adopted a policy barring forced parenthood.
  4. Divorce.
    - (a) §160.702 of the Texas Family Code, parallels §702 of the Uniform Parentage Act, and provides that a donor (whether sperm or egg) *is not* a parent of a child conceived by means of assisted reproduction.
    - (b) §160.703 of the Texas Family Code, parallels §703 of the Uniform Parentage Act, and provides that if a husband provides sperm for or consents to assisted reproduction by his wife, then he *is* the father of the resulting child. Commentary to UPA Section 703 indicates that only the husband can file an action denying paternity through lack of consent. Such an action cannot be brought by the administrator or executor of his estate.
    - (c) §160.7031 of the Texas Family Code is entitled "Unmarried Man's Paternity of Child of Assisted Reproduction." §160.7031 provides that "If an unmarried man, with the intent to be the father of a resulting child, provides sperm to a licensed physician and consents to the use of that sperm for assisted reproduction by an unmarried woman, he *is* the father of a resulting child."
    - (d) See also ABA Proposed Model Act Governing Assisted Reproduction, Art. 5, §501(4)(c) entitled "Parental Rights & Obligations Under Embryo Agreements."
  5. In the Interest of Olivia Grace McGill, Texas Lawyer, April 19, 1999. Prior to their divorce, husband and wife created an embryo which was cryogenically preserved. Ex-wife had the embryo implanted and claimed her ex-husband was not the father inasmuch as the divorce nullified his parental rights. The court disagreed with the mother and granted paternity rights to the biological father, citing the interests of the father.
- B. Suggested Imperfect Definitions of Children in a Will or Trust. Must a child be born prior to the decedent's death in order to inherit? If not, when must such child be born? In the absence of language in a Will to the contrary, Section 42 of the Texas Probate Code entitled "Inheritance Rights of Children" defines who is a child of the biological or adopted mother and who is a child of the biological father. Section 42(b) of the Texas Probate Code cross references Section 160.201 of the Texas Family Code for purposes of defining paternal inheritance. However, there is no analogous definition of a "child" in Section 111.004 of the Texas Trust Code.
1. The term "children" could include biological children, adopted children and posthumous children, but *not* assisted reproductive children.
  2. Alternatively, the term "children" could include biological children, adopted children and posthumous children, *as well as* assisted reproductive children.

Subject to a definition, children conceived as a result of assisted reproductive technology would be considered a child of:

- (a) the biological mother or the birth mother, unless she is serving as a surrogate birth mother. This definition therefore excludes the child of a surrogate birth mother as the surrogate birth mother's child. Instead, the child of a surrogate birth mother will be treated as a descendant of the person (the "intended parent") for whom the birth mother served as a surrogate.
- (b) the biological father if:
  - (i) the child was born when the man was alive;
  - (ii) the man consented to such assisted reproductive technology;
  - (iii) in case of artificial insemination only the man's sperm was used (i.e., was not mixed with another man's sperm either (a) to assist in reproduction or (b) in the case of a gay couple seeking to have a child together); or
  - (iv) the man is alive when the child is born and the man claims the child as his own; or
  - (v) the man is not alive when the child is born but the child is born within two (2) years following the father's death AND the mother has not remarried within such period.

3. Adopted Children. The definition of an adopted child could exclude a child adopted after a specified age, such as age six (6) or fourteen (14). Alternatively, the term "children" could go further and exclude an adopted descendant if such person is adopted (i) after the Grantor's death AND (ii) is older than the oldest other beneficiary of the trust who was a member of the class of beneficiaries at the Grantor's death.

4. Posthumous Children. What if a child is born posthumously within the normal gestational period following death? Alternatively, what if a child is born posthumously many years after a parent's death as a result of assisted reproductive techniques, such as a frozen and/or donated sperm or egg, or even a frozen embryo?

- (a) Texas Family Code 160.707 addresses Posthumous Children: If a spouse dies before the placement of the eggs, sperm, or embryo then such child **will not** be considered a child **unless** the deceased spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after the spouse's death the deceased spouse would be a parent of the child.
- (b) Alternatively, a decedent's Will or Trust could simply define an eligible posthumous child as one born within one (1) year following the death of the parent.
- (c) *Matter of Fabbri*, 2 NY 2d 236. *Matter of Martin B.*, NYLJ. August 6, 2007. In this case the court held that whether a posthumous child is a trust beneficiary must be determined based upon the Grantor's intent as gleaned from the trust agreement.

- (d) See <http://www.cnn.com/2007/US/03/20/oppenheim/btsc/index.html> reporting on Brian Smith, who was born as a consequence of in vitro fertilization approximately two years after his father, Brian Smith, died in Iraq.
  - (e) <http://www.statesman.com/news/content/news/stories/local/04/08/0408evans.html> reporting on a case decided before Travis County Judge Guy Herman. In this case, Judge Herman ordered the body of Nikolas Colton Evans, a 21 year old assault victim, to be maintained, at the request of his mother, Marissa Evans, in order to collect his sperm post-mortem, and thus enable Nikolas' mother to have a grandchild through a surrogate mother.
- C. Rule Against Perpetuities. Posthumously born children are disregarded for purposes of the Rule Against Perpetuities.
- D. Uniform Parentage Act. The Uniform Parentage Act has been adopted by Texas and establishes the ability of the husband of the sperm receiver to be deemed the father of the resulting child. Moreover, once the sperm donee's husband is established as the father of the child, then the biological father's ties are severed.
- E. Laws of Intestacy.
- 1. In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. 2000). Mother brought action seeking declaration that her twin daughters were the intestate heirs of her late husband. The Court held that: (1) action was justiciable in state court even if adjunct to federal claims, and (2) twins conceived by in vitro fertilization and born nearly 18 months after their father's death qualified as father's legal heirs under state intestate law. In this case, the Social Security Administration's Appeals Council refused to accept the judge's decisions in part because it was not a final ruling by the state's highest court.
  - 2. *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008). The Arkansas Supreme Court held that a child created as an embryo during his parents' marriage but implanted in his mother's womb after his father's death could not inherit from his father under the state's intestacy law. The court held that the intestacy statute requires that a child must have been conceived before the decedent's death in order to inherit as a posthumous descendent. While declining to define the term "conceived," the court found that the drafters of the statute did not intend to permit a child created through in vitro fertilization, and implanted after the father's death, to inherit under intestate succession.
- F. Social Security.
- 1. *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257 (Mass. 2002). Mother sought social security benefits on behalf of her twins who were born two years after the death of their father. The mother's claim was denied by the Social Security Administration.

The Massachusetts Supreme Court placed three threshold conditions on children's right to inheritance pursuant to Massachusetts intestacy statutes: (i) a proven genetic relationship; (ii) affirmative consent of the decedent to conception; and (iii) consent to support the resulting child.

2. *In Gillett-Netting v. Barnhart*, the court held that because Arizona law did not treat a child conceived posthumously as an heir under its state intestacy statute, Social Security survivor benefits were properly denied because at the time of decedent's death, the posthumous child failed to meet the Social Security definition of a dependant child. 231F. Supp. 2d 961 (D. Ariz. 2002). The decision was reversed and remanded by the 9th Circuit in 2004, holding that posthumously conceived children were considered "children" within the definition of the Social Security Act, and that children were presumed dependent for purposes of entitlement to insurance benefits, since their status as children is examined under applicable state law. *Gillett-Netting v. Barnhart*, 371 F. 3d 593 (9th Cir. (Ariz.) June 9, 2004).
3. *Vernoff v. Astrue*, 2009 U.S. App. LEXIS 13046 (9th Cir. 2009). Widow had semen extracted from her late husband's body and, three years after his death, conceived his child. Late husband had not consented or indicated a desire to have a child postmortem. Widow filed an unsuccessful claim for child survivor benefits with the Social Security Administration. The 9th Circuit affirmed the denial of benefits, holding that under California law the child was not a "dependant" for the purposes of the Social Security Act. Under California law, the deceased was not presumed to be the parent of the child, nor was the child entitled to inherit from the deceased under intestacy laws. The court also denied the widow's claim that excluding some posthumously-conceived children from Social Security child survivor benefits violated the Equal Protection Clause.

## II. Descendants.

- A. Wills. *In re Estate of Tyner*, 292 S.W. 3d 179 (Tex. App.-Tyler 2009, no pet.). In this matter the Testator had three children one of whom was adopted. Testator's Will defined the term "children" to include only his two biological children and defined the term "descendants" to include his two biological children and their descendants, but also provided that the term "descendants" included adopted descendants. Testator's adopted child predeceased him, but was survived by a child who filed suit. Though the court concluded these definitions were ambiguous, the court also concluded that the biological child of the Testator's predeceased adopted child was not an eligible beneficiary.
- B. Trusts.

1. *Charles Paschall, Jr. v. Bank of America, N.A.*, 260 S.W. 3d 707 (Tex. App.-Dallas 2008). In this case Judge DeShazo was asked to decide whether the children of Charles Paschall, Jr. were his “descendants” and therefore eligible to receive income and principal distributions from a trust created on October 17, 1975 by Sue Bain Groves and entitled the Sue Bain Groves Revocable and Amendable Trust Agreement. Upon the death of Ms. Groves on February 21, 1977, the trustee was directed to “immediately divide the trust estate into equal shares and it is directed to set aside one of such shares for the benefit of each of Settlor’s grandchildren then living, and one of such shares for the benefit of the living descendants of any of Settlor’s grandchildren then dead.” Charles Paschall, Jr. was one of Sue Bain Groves’ three grandchildren, and prior to his divorce fathered three children. Item (B) of the trust agreement was entitled “Distribution of Income and Principal” and Item (B)(2) directed the trustee “at any time” to make discretionary distributions from each separate trust “to or for the benefit of such grandchild, or the descendants of a grandchild, for whom such trust is held...” Item C of the trust further provided that upon the death of all of Settlor’s grandchildren the trusts “shall continue in existence with the income thereof to be thereafter distributed at regular intervals to Dallas Baptist University.” Charles Paschall, Jr. sought to prevent the trustee from making income and/or principal distributions to his children claiming that his children were not his “descendants” because he was alive. The trust agreement did not define the term “descendants.” Nonetheless, Judge DeShazo and the appellate court concluded that Mr. Paschall’s children were eligible beneficiaries of the separate trust held for him during his lifetime.
2. *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. New York County 2007). A New York surrogates court held that a class disposition to a grantor’s “issue” or “descendants” included children of the grantor’s son who were conceived after the son’s death but before the disposition became effective. The court suggested that EPTL 6.5-7(a) and EPTL 2-1.3, which provide that posthumous children are entitled to share in gifts made to children or issue, could be read literally to include posthumously-conceived children. Looking at the intent of the grantor, the court found that though the trust instruments were silent on the issue of posthumously conceived children, a reading of those instruments warranted the conclusion that the grantor intended all members of his bloodline to receive their share. The court also pointed out a need for legislation to resolve issues of this nature raised by advances in biotechnology.

### III. Testamentary Powers of Appointment.

- A. Multi-generational trusts. In a multi-generational trust, often times referred to as a generation skipping transfer tax exempt trust, or a dynasty trust, a beneficiary may be given the power to appoint the trust's assets at his or her subsequent death. In order to prevent the assets of the trust from being a part of a beneficiary's gross estate for federal estate tax purposes a beneficiary's power of appointment is often times restricted to a group of persons consisting of the Settlor's or the Testator's "descendants". Sections 2041 and 2514 of the Internal Revenue Code address the estate and gift tax consequences of powers of appointment. Should the term "descendants" be defined? What if a multi-generational trust does not grant a beneficiary a special or limited power of appointment and simply provides that upon a beneficiary's death there is a "pot trust" for such beneficiary's descendants? Alternatively, what if a multi-generational trust does not grant a beneficiary a special or limited power of appointment and simply requires that the remaining assets of such child's trust be subdivided into separate trusts for such child's descendants?
- B. Who is a descendant - Modern Families. In "modern" families it is now possible for two women or two men to enter into a committed relationship and decide to have a child.
1. What if two men of different races are in a committed relationship and seek to have a child? Assume both men volunteer to be sperm donors and their sperm is mixed and then used to fertilize an egg which is later inserted in a surrogate mother. Assume further one of the men, who is a beneficiary of an irrevocable multi-generational trust, is caucasian, but his partner is not, and a child is born who does not have caucasian features. Is such child an eligible "descendant?" Would it make a difference if the non-caucasian child's birth certificate names both men as the child's parents? Must the caucasian trust beneficiary "adopt" his child in order to permit the child to become an eligible successor trust beneficiary?
  2. Would it make a difference if two women in a committed relationship have a child and one of the women is the birth mother? Would the resulting child be a "descendant" only of the birth mother? Would the child be a "descendant" of the non-birth mother if the sperm donor is not identified on the child's birth certificate and if the non-birth mother is identified on the child's birth certificate as a parent?
  3. What if a husband and wife have a child, but are divorced, the wife later remarries, and the biological father, who is the beneficiary of a multi-generational trust allows his child to be adopted by wife's second husband? If a biological father gives up his parental rights, and permits his child to be adopted, will such adopted child cease to be an eligible beneficiary of a multi-generational trust? What if the multi-generational trust is for the primary benefit of the father but also defines the father's children as eligible secondary beneficiaries?
  4. In a multi-generational trust should a child and such child's children be defined as eligible beneficiaries in order to promote flexibility and tax

efficiency or should the definition of an eligible beneficiary be restricted solely to one member of a generation?

IV. One Possible Definition: Descendants. All references in this Agreement to a “descendant” or “descendants” of any person relate only to one or more of that person’s lawful lineal descendants in all degrees, whether (i) natural born, (ii) born as a consequence of assisted reproductive technology, or (iii) adopted through court proceedings prior to the age of fourteen (14) years. A child in gestation who is born alive shall be considered a descendant in being throughout the period of gestation. The foregoing notwithstanding, a child born as a consequence of assisted reproductive technology shall be considered a child of:

- (a) the biological mother, unless she is serving as a mere egg donor.
- (b) the birth mother, unless she is serving as a surrogate birth mother.
- (c) the biological father if:
  - (i) the man is alive when the child is born and consented to such assisted reproductive technology, other than as a mere sperm donor, and either
    - (1) in case of artificial insemination only the man’s sperm was used; or
    - (2) the man claims the child as his own.
  - (ii) the man is not alive when the child is born but
    - (1) the child is born within two (2) years following the father’s death,
    - (2) the man was legally married at the time of his death to the woman who is either (1) the biological mother of the child or (2) in the case where a surrogate birth mother is utilized, the intended mother of the child; and
    - (3) such woman has not married or remarried within such two (2) year period.
- (d) a man who is not the biological father of such child but consented to assisted reproduction by his wife.

- (e) the intended parents if such intended parents (i) entered into a gestational agreement, (ii) such agreement has been validated in accordance with Texas law, or in accordance with the law of the state of residence of either the intended parents or the prospective gestational mother, (iii) notice of such child's birth is duly reported to the court of applicable jurisdiction within the time period required by applicable state law, if any, and (iv) the intended parents are thereafter confirmed as such child's parents by such court, as required by applicable state law, if any.

I want to express my gratitude to Joshua S. Rubenstein, at Katten, Muchin & Rosemann, LLP for his presentation at the 44<sup>th</sup> Heckerling Institute on Estate Planning (2010) entitled "Planning for Life After Death: Laws of Succession vs. the New Biology."

**TEXAS FAMILY CODE ANN. § 160.702 : Texas Statutes - Section 160.702:  
PARENTAL STATUS OF DONOR**

A donor is not a parent of a child conceived by means of assisted reproduction.

Added by Acts 2001, 77th Leg., ch. 821, Sec. 1.01, eff. June 14, 2001.

**TEXAS FAMILY CODE ANN. § 160.703 : Texas Statutes - Section 160.703: HUSBAND'S  
PATERNITY OF CHILD OF ASSISTED REPRODUCTION**

If a husband provides sperm for or consents to assisted reproduction by his wife as provided by Section 160.704, he is the father of a resulting child.

Added by Acts 2001, 77th Leg., ch. 821, Sec. 1.01, eff. June 14, 2001.

**TEXAS FAMILY CODE ANN. § 160.7031: Texas Statutes - Section 160.7031: UNMARRIED  
MAN'S PATERNITY OF CHILD OF ASSISTED REPRODUCTION**

(a) If an unmarried man, with the intent to be the father of a resulting child, provides sperm to a licensed physician and consents to the use of that sperm for assisted reproduction by an unmarried woman, he is the father of a resulting child.

(b) Consent by an unmarried man who intends to be the father of a resulting child in accordance with this section must be in a record signed by the man and the unmarried woman and kept by a licensed physician.

Added by Acts 2007, 80th Leg.

**TEX FA. CODE ANN. § 160.754 : Texas Statutes - Section 160.754: GESTATIONAL  
AGREEMENT AUTHORIZED**

(a) A prospective gestational mother, her husband if she is married, each donor, and each intended parent may enter into a written agreement providing that:

- (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;
- (2) the prospective gestational mother, her husband if she is married, and each donor other than the intended parents, if applicable, relinquish all parental rights and duties with respect to a child conceived through assisted reproduction;
- (3) the intended parents will be the parents of the child; and

(4) the gestational mother and each intended parent agree to exchange throughout the period covered by the agreement all relevant information regarding the health of the gestational mother and each intended parent.

(b) The intended parents must be married to each other. Each intended parent must be a party to the gestational agreement.

(c) The gestational agreement must require that the eggs used in the assisted reproduction procedure be retrieved from an intended parent or a donor. The gestational mother's eggs may not be used in the assisted reproduction procedure.

(d) The gestational agreement must state that the physician who will perform the assisted reproduction procedure as provided by the agreement has informed the parties to the agreement of:

(1) the rate of successful conceptions and births attributable to the procedure, including the most recent published outcome statistics of the procedure at the facility at which it will be performed;

(2) the potential for and risks associated with the implantation of multiple embryos and consequent multiple births resulting from the procedure;

(3) the nature of and expenses related to the procedure;

(4) the health risks associated with, as applicable, fertility drugs used in the procedure, egg retrieval procedures, and egg or embryo transfer procedures; and

(5) reasonably foreseeable psychological effects resulting from the procedure.

(e) The parties to a gestational agreement must enter into the agreement before the 14th day preceding the date the transfer of eggs, sperm, or embryos to the gestational mother occurs for the purpose of conception or implantation.

(f) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

(g) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo.

**TEX FA. CODE ANN. § 160.755 : Texas Statutes - Section 160.755: PETITION TO VALIDATE GESTATIONAL AGREEMENT**

(a) The intended parents and the prospective gestational mother under a gestational agreement may commence a proceeding to validate the agreement.

(b) A person may maintain a proceeding to validate a gestational agreement only if:

(1) the prospective gestational mother or the intended parents have resided in this state for the 90 days preceding the date the proceeding is commenced;

(2) the prospective gestational mother's husband, if she is married, is joined as a party to the proceeding; and

(3) a copy of the gestational agreement is attached to the petition.

Added by Acts 2003, 78th Leg., ch. 457, Sec. 2, eff. Sept. 1, 2003.

**TEX FA. CODE ANN. § 160.756 : Texas Statutes - Section 160.756: HEARING TO VALIDATE GESTATIONAL AGREEMENT**

(a) A gestational agreement must be validated as provided by this section.

(b) The court may validate a gestational agreement as provided by Subsection (c) only if the court finds that:

(1) the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this chapter;

(2) the medical evidence provided shows that the intended mother is unable to carry a pregnancy to term and give birth to the child or is unable to carry the pregnancy to term and give birth to the child without unreasonable risk to her physical or mental health or to the health of the unborn child;

(3) unless waived by the court, an agency or other person has conducted a home study of the intended parents and has determined that the intended parents meet the standards of fitness applicable to adoptive parents;

(4) each party to the agreement has voluntarily entered into and understands the terms of the agreement;

(5) the prospective gestational mother has had at least one previous pregnancy and delivery and carrying another pregnancy to term and giving birth to another child would not pose an unreasonable risk to the child's health or the physical or mental health of the prospective gestational mother; and

(6) the parties have adequately provided for which party is responsible for all reasonable health care expenses associated with the pregnancy, including providing for who is responsible for those expenses if the agreement is terminated.

(c) If the court finds that the requirements of Subsection (b) are satisfied, the court may render an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born under the agreement.

(d) The court may validate the gestational agreement at the court's discretion. The court's determination of whether to validate the agreement is subject to review only for abuse of discretion.

Added by Acts 2003, 78th Leg., ch. 457, Sec. 2, eff. Sept. 1, 2003.

**TEX FA. CODE ANN. § 160.760 : Texas Statutes - Section 160.760: PARENTAGE UNDER VALIDATED GESTATIONAL AGREEMENT**

(a) On the birth of a child to a gestational mother under a validated gestational agreement, the intended parents shall file a notice of the birth with the court not later than the 300th day after the date assisted reproduction occurred.

(b) After receiving notice of the birth, the court shall render an order that:

(1) confirms that the intended parents are the child's parents;

(2) requires the gestational mother to surrender the child to the intended parents, if necessary; and

(3) requires the bureau of vital statistics to issue a birth certificate naming the intended parents as the child's parents.

(c) If a person alleges that a child born to a gestational mother did not result from assisted reproduction, the court shall order that scientifically accepted parentage testing be conducted to determine the child's parentage.

(d) If the intended parents fail to file the notice required by Subsection (a), the gestational mother or an appropriate state agency may file the notice required by that subsection. On a showing that an order validating the gestational agreement was rendered in accordance with Section 160.756, the court shall order that the intended parents are the child's parents and are financially responsible for the child.

Added by Acts 2003, 78th Leg., ch. 457, Sec. 2, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. Sec. 22, eff. June 18, 2005.