

Changing Definitions of Children for Intestacy Purposes

Susan N. Gary
University of Oregon School of Law

Annual Meeting of the Association of American Law Schools
Assisted Reproduction, Parentage and Inheritance in the 21st Century
January 7, 2004

Joint Editorial Board for Uniform Trust and Estate Acts
Project to Revise Two Sections of the Uniform Probate Code

Section 2-108, Afterborn Heirs

Issue: The current statute does not address whether a posthumously conceived child is an heir of the child's deceased parent.

Three Cases – Three Sets of Twins

In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). The court found general legislative intent that children should inherit from their parents. A child genetically related to a parent should be an heir of the parent unless such a determination would “unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.”

Woodward v. Commissioner of Social Security, 760 N.E. 2d 257 (Mass. 2002). A child can be considered the child of the deceased parent if the child establishes his or her genetic relationship and if the deceased parent had consented to the posthumous conception and support of any resulting child. Time limits could preclude a claim.

Gillett-Netting v. Barnhart, 231 F.Supp. 2d 961 (D. Ariz. 2002), rev'd 371 F.3d 593 (9th Cir. 2004). The district court interpreted the inheritance statute to mean that a child had to be in gestation at the death of the parent. The Ninth Circuit reversed, but did not address the question of whether Arizona's inheritance statute includes posthumously conceived children. The court ruled that status as an intestate heir was not a necessary determination for entitlement to survivor's benefits under the Social Security Act.

Statutory Approaches

Uniform Parentage Act (2000, last amended in 2002), § 706. Treats a person who has provided genetic material but dies before the placement of the eggs, sperm, or embryos as a parent, only if the person consented in writing to be treated as a parent if the assisted reproduction occurred after the person's death. Adopted in Delaware, Texas, Washington, and Wyoming. Colorado has adopted similar language. Other states are considering the UPA.

Louisiana. La. Rev. Stat. Ann. § 9.391.1.

Requires written consent. Child must be born within three years of the parent's death. Does not clearly require that consent specify posthumous use, but does refer to use by the decedent's "surviving spouse."

Florida. Fla. Stat. Ann. § 742.17.

A child conceived posthumously can inherit from a deceased parent only if the parent provided for the child in the parent's will.

Georgia. Ga. Code Ann. § 53-2-1.

A child must be "conceived prior to the decedent's death" in order to be an heir.

North Dakota. N.D. Cent. Code § 14-18-04.

A person who provides genetic material but dies before the conception of a child using that material will not be considered the child's parent.

California. 2003 CA A.B. 1910 (signed by the Governor on September 24, 2004).

A posthumously conceived child will be child of the deceased parent for purposes of the distribution of property of that decedent if (1) the decedent left written consent to posthumous conception, signed by the decedent and at least one witness; (2) the genetic material was used by the spouse or registered domestic partner of the decedent or by someone named by the decedent in the written consent; (3) written notice that genetic material is available for posthumous conception was provided within four months following the decedent's death to a person with the power to control the distribution of property; and (4) the child was in utero within two years of the decedent's death. The act specifically precludes cloned children from qualifying as heirs.

JEB Revisions – Three Requirements

1. The parent and child are genetically related.
2. The parent consented to the use of his or her genetic material to create a child.
3. Conception occurred within a specified time after the parent's death.

Proof of Consent

Written or not

Consent to conception or consent specifically to posthumous conception

Time Limit

Difficult decision for surviving spouse

Conception may take time

Need for certainty

Drafting

“any child born to or adopted by me, before or after my death”

Drafting issues for the potential parent and for strangers to the conception

Section 2-114, Parent and Child Relationship

Issues: Reproductive technologies have changed the determination of relationships “by blood” and changes in adoption practices are changing relationships between children and birth parents who release parental rights. The current UPC blocks intestacy rights between a birth mother and her child when the mother's committed parent (the child's second parent) adopts the child.

Genetic relationships

Assisted conception raises issues as to who is the “natural” parent.

Should the intestacy statute defer to determinations under state family law or create its own rules?

Adoptive relationships

Current UPC: an adopted child inherits solely through the adoptive family, with an exception for stepparent adoptions. Following a stepparent adoption, the child will continue to inherit from and through the parent who gave up parental rights. This provision will remain.

The stepparent exception cuts off inheritance rights in second-parent adoption situations. Adoption by the second parent should not cut off rights to inherit

between the other legal parent and the child. This provision will be revised to provide that both parents will continue to be treated as parents for intestacy purposes.

Should intestacy rules reflect the differences in adoptions (e.g., “open” adoptions)? This may be too difficult for the UPC to address.

Functional relationships

Revisions to the UPC will not include a functional definition in the definition of the parent and child relationship. If a state court makes a determination of parentage based on a functional relationship, does that determination mean that the person is related for intestacy purposes?