

ART, ADOPTION AND ESTATE PLANNING

presented by
Rachael K. Pirner
Triplett, Woolf & Garretson, LLC
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Adoption: any age?

- ❑ Benefits of adult adoption?
- ❑ Risk is that it could expose the trust to mischief when adult adoptions are sued to manipulate the class of “descendants”

Adoption: any age?

Olive Watson (heiress to IBM fortune) adopted her lesbian partner (Ann Spado) when they were both in their mid-40s

- Later had a falling out
- When Watson's mother died, Spado claimed inheritance interest in trust for grandchildren
- Trustees responding by having the adoption annulled

Adoption: any age?

Doris Duke adopted her companion Chandi Gail Heffner when she was 35 (and Duke was in her mid-70s)

- The two had a falling out, and Duke left bulk of estate to charity
- Heffner brought claim against the estate
- Settled for \$65M (\$5M from Duke's estate and \$60M from trust created by Duke's father (James Buchanan Duke, founder of American Tobacco Co))

- Limit on adoption – 18 years
- Spouse of birth mother / IP
 - Presumption does not equate to parentage

Confirmatory adoptions and importance for estate planning and inheritance law

Examples:

- A child born through ART where the non-birthing parent was genetically related to the child but was forced to legally adopt the child
 - Prohibition on adoption?

Confirmatory adoptions and importance for estate planning and inheritance law

Examples:

- A grandparent who "takes in" a grandchild and raises the grandchild as a child without any legal documentation of the custodial arrangement
 - Holding out and de facto parentage (available after death??)
 - Without more, would not be recognized as a "child" for most legal purposes in most states
 - Mere "acts" of parentage insufficient to establish inheritance right

Confirmatory adoptions and importance for estate planning and inheritance law

Examples:

- An adult child who adopts her romantic partner in an effort to have the partner includible in a class of beneficiaries for inheritance purposes
 - States vary
 - 1984 NY case, *Matter of Adoption of Robert Paul P.*, where man attempted to adopt his male partner; held that adult adoption will not be permitted because presence of a sexual relationship was so incompatible with parent-child relationship

Confirmatory adoptions and importance for estate planning and inheritance law

Examples:

- A child conceived five years after the death of the biological father and intended parent using sperm that the father had donated to his wife, the other intended parent, before his death.
 - Applicable time period? (statute or testamentary documents)
 - If no time limit applies, concern over open class?

Confirmatory adoptions and importance for estate planning and inheritance law

Examples:

- sperm donor, who has several biological children with whom he shares no relationship
 - “Formal” donation under medical supervision would sever parental relationship
 - “Friendly” donation could result in 3-parent family, child support, etc.
 - Fuzzy lines where relationship with donor formed years later

Confirmatory adoptions and importance for estate planning and inheritance law

Examples:

- A sperm donor, who later meets one of his biological children and forms a paternal relationship with the child

Time limit on use of decedent's gametes

- ❑ For young widow (or widower), is 36 months enough time to grieve and bear children?
- ❑ Does it mean that fiduciaries MUST wait 36/45 months before making distributions?
- ❑ Alternate approach is to provide that intent of gamete contributor controls, so posthumously conceived could be recognized later in time or not at all.

Necessity to review all relevant documents - orders, clinic forms, etc.

- All gamete/embryo disposition forms should be reviewed
- Special concern for clients with older stored material (as older forms are typically problematic)
- Consider, e.g., that in 2017 a baby was born from 24-year old embryo (mother, who was 25, was only 1-year old when the embryo was fertilized) Alternate approach is to provide that intent of gamete contributor controls, so posthumously conceived could be recognized later in time or not at all.
- What do you think the fertility clinic storage forms looked like a quarter century ago when IVF was a fairly new technology?

Necessity to review all relevant documents - orders, clinic forms, etc.

- But modern forms can have issues too:
 - Co-maternity forms where one partner is treated as "donor" and mistakenly gives up parental rights Does it mean that fiduciaries MUST wait 36/45 months before making distributions?
 - Recently reviewed form provides for disposition of the material in the following events:
 - (i) simultaneous death of both patients,
 - (ii) death of either patient,

Modern Form Issues Continued

- (iii) separation, dissolution or divorce of the patients, and
- (iv) separation, dissolution or divorce of the patients, and
- But what about disposition at the second death?? Totally unclear.

Financial Powers of Attorney, Health Care Proxy and Wills

- Provisions for Health Care Proxy
 - For GC:
 - Require life support until birth (not merely authorize?)
 - Give IP right to medical decision-making for child
 - Necessary to address abortion?
 - For IP:
 - Add provisions for minor children in case IP is incapacitated at or after birth of child

Financial Powers of Attorney, Health Care Proxy and Wills

- Provisions for Financial Power of Attorney
 - For GC:
 - Enforcement / amendment of surrogacy agreement terms
 - For IP:
 - Enforcement/amendment of surrogacy agreement terms
 - Payment of surrogacy obligations
 - Parental powers over minors

Financial Powers of Attorney, Health Care Proxy and Wills

- Provisions for Wills
 - For GC:
 - Enforcement / amendment of surrogacy agreement terms
 - Special attention to definition of “children” and “descendants”

Financial Powers of Attorney, Health Care Proxy and Wills

- Provisions for Wills
 - For IP:
 - Enforcement/amendment of surrogacy agreement terms
 - Payment of surrogacy obligations
 - Include guardianship provisions for minor children

Financial Powers of Attorney, Health Care Proxy and Wills

- For IP:
 - Special attention to definition of “children” and “descendants”
 - Special attention to OTHER documents (e.g., estate plan of IP's parent) to determine whether child will be recognized
 - If not, consider amending (if parent alive)
 - Or can IP exercise POA in favor of class including child?

Life Insurance & Beneficiary Designations for Gestational Carriers

Disposition of Embryos & Gametes

- During life:
 - Storage Agreements | Wills (see above)
 - Generally a valid contract executed by the parties that provides for disposition of the material in various circumstances will be respected
 - 2016 Connecticut case, *Mate v. Mate*, held that storage facility agreement was merely a "check the box" questionnaire rather than a carefully considered and drafted understanding," and so did not control disposition

Disposition of Embryos & Gametes

- Pre-nups and Post-nups
 - Possible to address these issues in advance? Probably (especially with respect to gametes)
 - Caution with respect to storage facility agreements, which could contain terms (even boilerplate) contrary to marital agreement
 - Precedent for invalidating agreements between the parties where the result - would be to force parentage on one of the parties

Disposition of Embryos & Gametes

- After death?
 - Scenario?
 - ❑ Storage facility agreement is missing or suffers from fatal defect
 - ❑ Storage facility agreement is vague/ does not cover situation (see above re: disposition at second death)
 - ❑ Expression of intent in storage agreement and expression of intent in estate plan are inconsistent
 - ❑ Surviving spouse or other family member makes a claim

Disposition of Embryos & Gametes

- Limited statutory guidance (though seeing increases in legislative attempts to address this);

Highlight 1:

- Florida: written agreement is required and its terms control
 - In the absence of an agreement, (i) the person who provided the gametes controls their disposition; and (ii) the intended parents jointly decide the disposition of their embryos.
 - If one member of the couple dies, the surviving member makes all decisions about the embryo's disposition
 - But no guidance on disposition or decision-making authority at second death

Disposition of Embryos & Gametes

Highlight 2:

□ Louisiana: By statute, an in vitro fertilized human ovum is considered to be a juridical person that cannot be owned by its intended parents, and to whom the intended parents and physicians owe a high duty of care.

- As a result of this language, and for fear of medical malpractice claims, very few IVF clinics are located in Louisiana.
- The state's unique approach to human embryos might be a strategic opportunity for some intended parents; we saw this play out in the Sofia Vergara/ Nick Loeb embryo controversy that unfolded over the last several years.

Limited case law (to the extent litigation is brought, it is largely sealed/settled)

- ❑ To my knowledge, one known published case on disposition of frozen embryos at death: *In re Desta* (TX 20_)
- ❑ Couple lived in Dallas, Texas where they owned and operated restaurant; one evening a disgruntled customer followed couple home and shot them to death on front porch

Limited case law (to the extent litigation is brought, it is largely sealed/settled)

- ❑ Couple had 2-year old son and 11 frozen embryos at time of death
- ❑ Left no Wills; although contract with fertility clinic contemplated divorce, it did not make provisions for the death of both parents
- ❑ Texas court ruled that embryos were property (or at least quasi-property) that had ownership interests subject to probate and were therefore part of the probate estate; the magistrate further ruled that the embryos were to be stored until 2-year old son reached age 18, at which time he would acquire rights to their disposition.

What if there was no disposition and no applicable statutory or court precedent?

- Intent: basic tenant of any fiduciary, and the primary consideration for courts considering these sorts of reproductive issues
 - Written expression of intent (even if less than valid contract)?
 - Other credible expression of intent?

What if there was no disposition and no applicable statutory or court precedent?

- Duty of Prudence: administer the estate as a prudent person
 - Marshall and value estate assets -. are embryos assets? With values?
 - Protect and preserve estate property -. maintain storage costs? For how long? Or authorize destruction?

What if there was no disposition and no applicable statutory or court precedent?

- Duty of Loyalty: administer property in interests of beneficiaries
 - Are embryos property, or potential beneficiaries?
 - May depend on the laws of the state...state where embryos are located?
State where decedent died?

What if there was no disposition and no applicable statutory or court precedent?

- Duty of Impartiality: balancing of diverse interests of BFs
 - Again, state law may determine whether embryos are property or persons
 - If unclear, could fiduciary consent to disposition of embryos for reproductive purposes if it resulted in expanding the class of beneficiaries?