

**Fundamentals of Trusts and Estates
Third Edition**

**2011 Transfer Tax and Intestacy
Supplement**

by

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Insert a new section 1.03 -

§ 1.03 Federal Wealth Transfer Taxes

This section pursues a modest, but important, goal: to introduce you to the federal system for taxing transfers of wealth. With a basic understanding of what the system is about, you will be better able to follow cases involving estate plans constructed for tax reasons. Additionally, research and advanced course work should be easier. Most importantly, however, you should be able to identify situations which call for more expertise than you have acquired. Then you will know it is time to learn more or to send your client elsewhere.

Not surprisingly, the current system developed over time. Although Congress had imposed various inheritance-related taxes for short periods in the 18th and 19th centuries, it turned to an estate tax in 1916, and we have had one since then. The gift tax followed, with some fits and starts, as a backup to the estate tax and the income tax. The estate and gift taxes operated separately from 1932 until 1976, when they were unified into one system which taxes cumulative lifetime transfers and an individual's estate at death. Major reforms in 1981 moved the tax burden off of the middle class, by raising effective exemption levels and allowing an unlimited marital deduction. Those reforms, however, left intact some loopholes benefiting the very rich who set up dynastic trusts. In 1986, Congress added a permanent separate generation-skipping transfer (GST) tax, which seeks to impose a wealth transfer tax once each generation, but with a generous exemption level so that practically the GST tax falls on only our wealthiest families.

Shifting directions in 2001, Congress started phasing out the system until there were no estate and GST taxes for decedents dying in 2010. The gift tax remained, but at lower rates. In an interesting political game, the 2001 legislation would have reinstated much of the system in 2011, but at levels that would have applied before the 2001 amendments. After much delay and haggling, Congress in late 2010 made some changes,¹ but basically kicked the can down the road for two years. For 2011 and 2012, the estate and GST taxes were re-instated, but with increased exemption levels, and the gift tax exemption was increased to \$5 million. Much like before, unless a new Congress acts, which undoubtedly it will, 2013 will see a return most of the pre-2001 rules.

The transfer taxes interface with the federal income tax at a number of points. For our purpose here, the most important concept is “basis,” which sets the starting value of capital assets to determine the extent of a gain or a loss on the sale of the assets. For example, if you buy 100 shares of stock for \$1,000 and sell them for \$1,500, your basis will be \$1,000 and your gain will be the amount your sale price exceeds the basis (here, \$500). See [IRC § 1001\(a\)](#).² Similarly, if you sell for less than your basis, your loss will be measured from the basis.

¹ For 2010, the estate tax system was retroactively reimposed, but with a \$5 million exemption and a top rate of 35% (down from 45% in 2009). GSTs in 2010 continued to be tax free, but under a slightly different formulation.

² Technically, gain and loss are determined by comparing the amount realized from the sale with the adjusted basis for the property. See [IRC § 1011\(a\)](#). Amount realized is generally the sales price less related selling expenses, such as commissions. See [IRC § 1011\(b\)](#). Adjusted basis is generally the cost of

When gratuitous transfers — at death or during life — are involved, the basis of the property is determined by special rules. The basis of property received on the death of someone is either the property’s fair market value as of the date of death or the value six months later, depending upon which value the personal representative selects. See [IRC § 1014](#).

Consider again the stock you purchased for \$1,000. As we have seen, if you sell it for \$1,500, your gain is \$500. On the other hand, if you keep the stock and die when its value is \$1,500, its basis will jump to \$1,500. If the beneficiary of the stock sells it for \$1,500, no taxable gain will occur since the sales price and the basis are the same amount. When there is a lifetime gift, the basis depends on whether the donee disposes of the property at a gain or a loss. If the donee transfers for a gain, the donee’s basis for determining gain becomes whatever the donor’s basis was. If the donee transfers for a loss, the donee’s basis is the lesser of the donor’s basis or the fair market value at the time of the gift. See [IRC § 1015](#). Estate planners need to keep in mind not only the estate and gift tax rules we discuss, but also the income tax consequences donees will face.³

A. A Unified System

The gift and estate tax system works rather like a large beaker, with a scale printed on the side. Each time we make a taxable transfer, we pour a little water into the beaker. Later additions are assessed at a higher rate, and we start paying taxes once we fill past the threshold Congress has set. Until then we use bits and pieces of our “unified credit” to offset tax we would otherwise owe. See [IRC §§ 2001 \(c\), 2010, 2505](#). Our transfers are technically taxable transfers, but we use the credit instead of actually paying tax. The amount passing tax free is usually known as an “exemption”, an “exemption equivalent” or “the applicable exclusion amount.”

In late 2010, Congress set the exemption amount for both estate and gift taxation at \$ 5 million for 2011 and 2012.⁴ If Congress does not act, the exemption will drop to \$1 million in 2013. The top rate will be 35% in 2011 and 2012, but would (again, unless Congress acts) jump back to 55% in 2013.

The GST exemption mirrors the estate tax exemption amount in 2011 and 2012 and the rate of GST tax equals the highest marginal estate tax rate, which is 35% in 2011 and 2012. Again, these baseline figures will change in 2013 depending on what action Congress takes.

To see how the unified credit works, imagine Marc, who has incurred no prior transfer tax liability. Because his son, Ben, needs a down payment for his first house, in 2011 Marc gives Ben \$33,000, \$13,000 of which is exempt from taxation under an annual exclusion designed to reduce the gift tax consequences of lifetime transfers. The other \$20,000 is subject

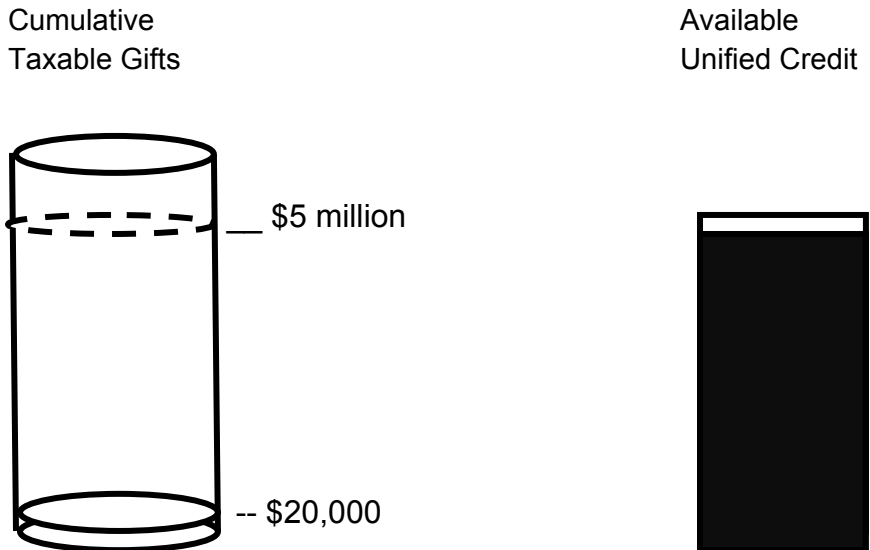
the property, although in some cases later events may cause the basis to be adjusted upward or downward. See [IRC §§ 1011](#) and 1016.

³ For decedents dying in 2010, the personal representative can elect out of the estate tax system, but the price to pay for the election is that the aggregate basis for property acquired from the decedent will be the decedent’s adjusted basis, with a possible increase of \$1.3 million and an additional \$3 million increase for property passing to the surviving spouse in a qualifying way.

⁴ In 2012, the exemption may be increased based on an inflation adjustment.

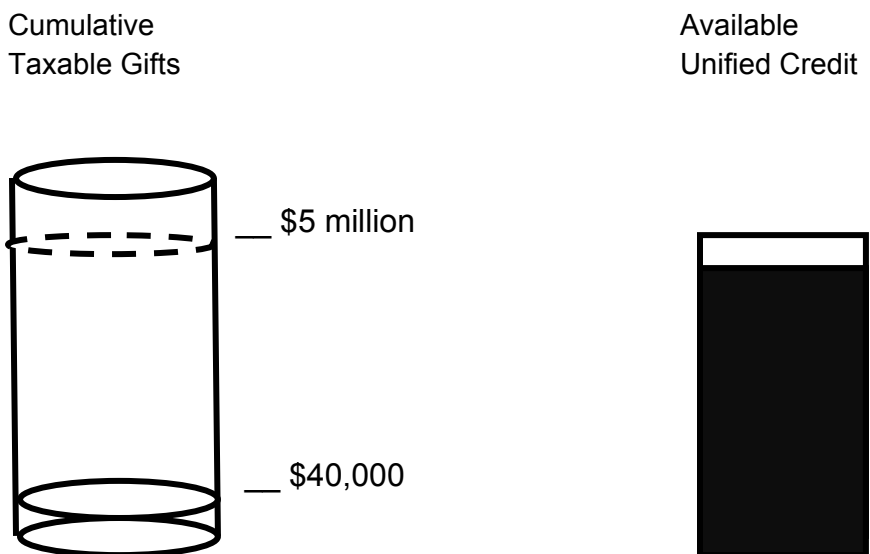
to gift tax. See [IRC § 2501](#). Rather than actually paying any tax, however, Marc uses up a small piece of his unified credit. Figure 1-2 below illustrates Marc's situation after making the gift.

Figure 1-2 Marc's First Gift



Suppose further that in 2012, Ben's house is damaged in a storm, so Marc gives him another \$33,000 for repairs. Again, and assuming no inflation adjustment for gifts in 2012, the annual exclusion shelters \$13,000 and the other \$20,000 is subject to tax. This second gift is taxed at a higher rate, however, because it comes on top of Marc's earlier gift. To achieve that result as an accounting matter, we add in the prior gift for the purpose of figuring the tax on the new gift. Marc is not taxed twice on the first gift. The earlier gift only serves to push the second gift into a higher bracket. Marc still uses his unified credit and pays no tax. See Figure 1-3.

Figure 1-2 Marc's Second Gift



Other taxable gifts will be treated the same way. Suppose that Marc dies in 2012 having given away \$500,000 in taxable gifts. Now the value of his taxable estate will be added in just like the gifts. If the taxable estate is \$4,500,000 or less, the rest of his unified credit can cover the tax.⁵ If the taxable estate pushes his lifetime-plus-death total over \$5 million, his estate will be able to use the rest of his available credit to offset some of the tax, but will be liable for the rest.

Rather than using up their unified credits in smaller bites throughout their lifetimes, some wealthy taxpayers elect to make lump sum gifts which would use the entire unified credit. By moving the assets out of their estates, they save both income tax on the income the property would generate and estate tax on any value the property would gain between the time of the gift and the donor's death.

With the basic framework in mind, we now turn to identifying taxable gifts and estates.

B. The Gift Tax

The Internal Revenue Code imposes a tax on any “transfer of property by gift,” while also excluding many gifts of up to \$13,000, as that amount is indexed for inflation. See [IRC §§ 2502 \(a\)\(1\), 2503\(b\)](#). This section first addresses what constitutes a gift, and then turns to the annual exclusion.

Deciding whether something is a “gift” for gift tax purposes often involves questions of valuation and of whether a transfer is complete. Some gifts are obvious. If Monica hands \$50 to her son, Doug, and tells him “happy birthday,” she has made a gift. Some are more subtle. Suppose Monica sells Doug her car for \$2,000. If the car is worth \$2,000, there is no gift, but if the car is worth \$5,000, Monica has made a \$3,000 gift. Valuation determines both whether there is a gift and how much the gift is.

Sometimes donors will give away property, but hold onto some strings. Then the question is whether the strings are strong enough to mean there was no completed gift. Only if the donor has parted with all “dominion and control” is there a gift. See [Treas. Reg. § 25.2511-2](#). For example, if Monica creates a trust for Doug, but retains a power to revoke, she has not made a gift.

To avoid the record keeping which would follow if all gifts, including birthday presents, were taxable, Congress created the annual exclusion, indexed in \$1,000 increments for inflation. In 2011, the exclusion was \$13,000. [IRC § 2503 \(b\)](#). Because it allows each donor to make substantial annual gifts to each donee, however, the exclusion is large enough to encourage wealthy taxpayers to reduce their estates by making lifetime gifts. The annual exclusion applies only to unrestricted rights to the use, possession, or enjoyment of property or its income. [Treas. Reg. § 25.2503-3\(b\)](#). Thus, a donor cannot apply the exclusion to income interests given in trusts if the trustee has discretion to allocate income among various beneficiaries. Similarly, the exclusion does not cover future interests. Many taxpayers, however, want to use the annual exclusion, but restrict gifts to minors until they reach majority. In response, the Code allows the annual exclusion for future gifts to minors in some

⁵ Although no federal estate tax will be payable if the combined lifetime transfers and the taxable estate is \$5 million or less, state death taxes may be payable in about 20 states which set the exemption level much lower. For example, New York has only a \$1 million exemption for estate tax purposes.

circumstances. See [IRC § 2503 \(c\)](#). See also *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968). Also, taxpayers who directly pay college tuition or medical expenses for someone else can take advantage of separate gift tax exclusions. See [IRC § 2503\(e\)](#).

QUESTION

Alicia, like most people, gives her family birthday presents. In June, Alicia gave her daughter, Elizabeth, a nice blouse. As part of year-end tax planning, Alicia wrote Elizabeth a check for \$13,000. Should Alicia's lawyer ignore the incidental gifts and tell her she need not file a gift tax return because the annual exclusion covers her \$13,000 check?

C. The Estate Tax

The federal estate tax resembles a fishing net. It snares a large number of different assets, but its holes allow some assets to escape in some situations. The basic approach is to include assets in a "gross estate," and allow some deductions to produce a "taxable estate." Much like the way later gifts are stacked on top of earlier gifts to assess gift tax, the taxable estate is added to lifetime gifts to determine estate tax liability. Again, the unified credit may cover all or part of that liability. This section first introduces the gross estate, then discusses the marital deduction, and closes with a look at how couples can use the marital deduction and unified credit together to shelter larger estates.

1. The Gross Estate

The gross estate is an accounting concept which attributes to a decedent property in the decedent's probate estate as well as non-probate property that benefits the decedent. When we say an asset is "in the gross estate," we do *not* mean that the asset itself becomes subject to the jurisdiction of a court. Rather, we are including its *value* in a computation to determine estate tax liability. See Figure 1-4.

Figure 1-4 The Gross Estate A Decedent's Wealth

Probate Property
In Decedent's Name

Non-Probate Property*
Life Insurance
Joint Property
Retirement Benefits
Property in Lifetime Trusts
P. O. D. Accounts

*This list is illustrative, not complete.

One of the most important points to get across to clients is that avoiding probate does not, of itself, mean avoiding federal estate taxes. A few basic provisions bring in most of the

assets of typical families: separately-held property, joint property,⁶ life insurance, and retirement benefits. [IRC §§ 2033](#) , 2039, 2040, 2042. Because of the political uncertainty about how Congress will set the exemption levels, many people — especially those with lots of life insurance or generous retirement benefits — may learn to their surprise that they could benefit from tax planning.

The estate tax, of course, also covers other forms of wealth. In particular, the Internal Revenue Code captures for the gross estate the value of lifetime transfers in which taxpayers retain beneficial interests. The gross estate will include the value of property in which the decedent kept: a life estate, a reversionary interest worth more than 5% of the value of the property which can only be enjoyed by surviving the decedent, or various powers to control the property. [IRC §§ 2036](#) , 2037, 2038. These provisions have generated a great deal of litigation, as taxpayers seek to retain benefits without suffering tax consequences. In general, the courts have looked at the substance, rather than the form, of the arrangements under question. Finally, the gross estate includes property subject to a general power of appointment. A power of appointment gives one person the authority to transfer someone else's property.⁷ A general power is one exercisable in favor of the person holding the power (the donee), the donee's creditors, the donee's estate, or creditors of the donee's estate. [IRC § 2041](#) (b)(2)(A).

In terms of taxing property a decedent has earned or received outright, the Internal Revenue Code casts a broad net. On the other hand, it is much more generous toward property received with strings attached. Gift recipients can receive a good deal of power over property, short of absolute ownership, without subjecting that property to tax in their own estates. For example, suppose Jennie creates a trust naming Sheila as trustee and giving her typical management powers. Jennie can also give Sheila, as beneficiary, a right to the trust's income, and a power to appoint the remainder to anyone except herself, her creditors, her estate or creditors of her estate. Sheila has something very close to complete ownership, yet the value of the trust will not be included in her gross estate.

⁶ When a married couple holds joint property, half its value is in the gross estate of the first to die. [IRC § 2040](#) (b). The value of an unmarried joint tenant's share will be based on the percentage the decedent contributed to the purchase. [IRC § 2040](#)(a). At the death of the last surviving joint tenant, all of the property will be included in that person's gross estate. [IRC § 2033](#).

⁷ See pages 541-553.

2. The Marital Deduction

Once the value of the gross estate is established, various deductions apply, reducing the gross estate to the “taxable estate.” For our purposes, the most important deduction is the one for transfers to surviving spouses.⁸ Although the details can get quite complex, the basic principle of the marital deduction is straightforward: the law treats married couples as units, not individuals. It allows each spouse to give unlimited amounts of property to the other without

A Portable Exemption

Until 2010, the unified credit (and its effective exemption amount) was personal to each taxpayer, so if a taxpayer died without using all of the credit, that benefit was simply lost. For example, one spouse might leave the entire estate to the other. On the death of the first, the marital deduction would cover everything, and there would be no need to use any of the credit. When the survivor died, only the survivor’s own credit was available. Complicated estate plans were developed to subject to tax enough of the estate of the first-to-die spouse, so that spouse’s credit was not wasted. (You may still see references to such “credit shelter” trusts.)

Now a decedent’s personal representative can elect that the surviving spouse be allowed to take into account the deceased spouse’s unused exclusion amount. [IRC § 2010\(c\)](#). For example, if the deceased spouse died in 2012 with a taxable estate of \$1 million and had made no taxable gifts, the unused exclusion amount would be \$4 million. If the executor so elected, the surviving spouse’s exemption amount would be augmented by \$4 million.

The combination of larger exemptions and their portability will likely mean rethinking many estate plans which were structured around maximizing the unified credit and the marital deduction at the expense of others, e.g., children of a prior or current marriage.

incurring transfer taxes, so long as the property will be exposed to tax if and when it leaves the marital unit. A similar deduction is available for the gift tax, but this discussion will cover only the estate tax deduction. *Compare* [IRC § 2523](#) (gift tax) with [IRC § 2056](#) (estate tax).

The easiest way to be sure a transfer qualifies for the marital deduction is for the decedent spouse to give the property outright to the surviving spouse. In many situations, however, such an approach may be undesirable. The surviving spouse may need the management a trust provides, or the decedent spouse may want to be sure children from an earlier marriage get a share after the survivor’s death. By carefully following the Internal Revenue Code’s rules, drafters can create trusts to qualify for the marital deduction while not actually passing more than a life estate to the spouse. In each case, the tradeoff is that the property then will be in the survivor’s gross estate.

Deciding how best to structure an estate plan utilizing the marital deduction requires lawyers and clients to consider a wide range of variables. In addition, marital deduction planning often places the lawyer in a difficult position, because the spouses’ interests, or desires, may be different. In particular, spouses who expect to survive their mates may object to a plan that leaves them with less than complete ownership. In that connection, consider the following.

⁸ Deductions are also allowed, most noteworthy for qualifying contributions to charities, for administration and funeral expenses and debts of the decedent.

Lawrence J. Fox & Susan R. Martyn
Red Flags: A Lawyer's Handbook on Legal Ethics (ALI-ABA 2d Ed. 2010)

► §7.23(b) Handling Confidentiality In Joint Client Representations

*Used with permission

Every joint representation requires attention to the issue of client confidentiality. Your written waiver should include the clients' choice of confidentiality provisions. They can elect to have you disclose or not disclose to the other whatever either tells you in confidence. With respect to the attorney-client privilege, you must warn your clients that it attaches between commonly represented parties against opposing parties, but does not attach if litigation arises between these clients, including that initiated by a counterclaim.

If you do not include a confidentiality provision in your conflicts waiver, and one joint client tells you some material fact in confidence, your duty of confidentiality to that client will directly collide with your duty to keep the other client informed about material aspects of the matter. Your duties to one client now put you in a position of direct adversity to the other, and unless they have instructed you what to do in advance, you now must withdraw from the representation of both. Of course, withdrawal does not end the issue about disclosure. Here, absent a prior agreement between the parties, courts generally look to their own confidentiality exceptions to determine whether you may (or must) disclose.

NOTE

Careful preparation saved some headaches for the law firm in *A v. B*, [726 A.2d 924](#) (N.J. 1999). The firm had drafted wills for both a husband and a wife giving property to each other, with alternative gifts to the spouse's issue. Before the wills were executed, the firm — but not the wife — learned that the husband had a non-marital child who could qualify to take from the wife's estate. Because at the time of the representation the couple had agreed that information from one spouse could be shared with the other, the firm could disclose the existence of the non-marital child to the wife.

PROBLEM

Jenny, age 50, and Richard, age 60, are a married couple in need of tax planning. How do you decide whether you can represent them both and what steps would you take if you did?

D. The Generation-Skipping Transfer Tax

To plug some holes which the gift and estate tax system had left open, Congress in 1986 enacted the generation-skipping transfer (GST) tax. [IRC Chap. 13](#). The GST tax applies in addition to gift and estate taxes, but was designed with those taxes in mind. The rules

surrounding the tax, and lawyer's strategies for coping with those rules, are very complex. The purpose of this section is not to summarize those rules but, rather, to help you understand why they developed.

The overall goal is to tax wealth once in each generation. To accomplish this, the GST tax system taxes transfers to a "skip person," someone two or more generations below the transferor's generation. [IRC § 2613](#) (a). To help visualize these transfers, consider gifts from Genevieve to her daughter Peggy, and to Peggy's son, Troy. From Genevieve's perspective, Troy is a skip person. Transfers to a skip person might happen any of three ways. There could be a "taxable termination," like a trust from Genevieve which ends at Peggy's death, with distribution to Troy. There could be a "taxable distribution," like Peggy's exercise as trustee of a power to invade for Troy's benefit the principal of a trust Genevieve established. Finally, to prevent direct avoidance of the rules aimed at trusts, there could be a "direct skip," like an outright gift from Genevieve to Troy. See [IRC §§ 2611-2613](#). The GST exemption is the same as the estate tax exemption, For example, if in 2011 Genevieve put \$10 million in trust for Peggy (her child) for life, remainder to Troy (grandchild), Genevieve could allocate all of her \$5 million exemption to the trust. When the GST became due at Peggy's death, half of the trust would be exempt. Notice that if the trust grew to \$30 million before Peggy's death, \$15 million would now be exempt. Taxable transfers exceeding the GST exemption limits generate tax liability at the federal estate tax's highest rate. [IRC § 2602](#).

PROBLEMS

1. Harry and Wilma were married, and Harry died recently. At Harry's death, the following items of value were located:

Harry's separate property (probate estate):	\$10,000,000
Life insurance on Harry's life payable to Wilma (Harry owned):	100,000
A power to appoint (only among his children) the principal of a trust created by his mother; value of trust:	200,000

(a) What is the size of Harry's gross estate?

(b) Assume Harry's will gave all of his probate estate to Wilma. Assuming no debts or administrative expenses, what is Harry's taxable estate?

2. Assume at Wilma's later death the value of the property which passed to her is the same as it was at Harry's death and that she died with no other property and no expenses. Upon what amount will Wilma have to pay estate taxes?

3. For exercises requiring the preparation of an estate tax return, see Roger W. Andersen & Karen Boxx, *Skills & Values: Trusts and Estates*, Ch. 16 (2009).

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John R Price, *In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning*, 62 *U. Miami L. Rev.* 735(2008).

[Replace pages 60-bottom of 69 with the following]

B. Descendants

1. Non-marital Children⁹

Children of unmarried women long suffered discrimination because of the decisions their parents made. Now their status alone does not prejudice their position in the intestate hierarchy, but a continuing challenge remains. Without unduly burdening claimants, we do need to be confident that there really is a paternal-child relationship between a particular man and his putative child.

Browne Lewis

Children of Men: Balancing the Inheritance Rights of Marital and Non-marital Children

39 *U. Tol. L. Rev.* 1-2, 6, 18 (2007) *Used with permission

Children born out of wedlock were once the exception to the rule. They were called bastards and their rights were largely ignored. Today, however, having children out of wedlock has become commonplace in the United States. . . . In America, at least one out of every three babies born is a non-marital child. . . .

...

Beginning in 1968, several cases involving the legal rights of non-marital children came before the U.S. Supreme Court ...involv[ing] a wide range of legal issues, including ... probate.... The decisions ...broadly extended the legal relationship between parents and their

⁹ Consider the following excerpt:

At the outset the court wishes to express criticism of the use of the word "illegitimate" as applied to children. Not only is this term, when used in connection with children, repugnant to this court but its use in any local law, ordinance or resolution or in any public or judicial proceeding or in any process, notice, order, decree, judgment, record, public document or paper, is a violation of law (*see* General Construction Law, § 59). Despite this fact Judges, legal writers and others continuously use that term when writing about children born out of wedlock. In this decision wherever the words "non-marital child or children" are used the references apply to the prohibited phrase "illegitimate child or children."
In re Estate of Leventritt, 400 N.Y.S.2d 298, 299 (Sup. Ct. 1977).

non-marital children[,]... changed the legal landscape for non-marital children[,] and influenced the enactment of state intestacy statutes. ...

...

...[I]n order for a state inheritance statute to survive a constitutional attack, it must provide non-marital children with the opportunity to inherit from their fathers. The Supreme Court has given states substantial leeway in probate matters; nevertheless, any statutory scheme that expressly or implicitly prevents non-marital children from establishing a father-child relationship for inheritance purposes would likely be invalidated. However, states are not required to permit non-marital children to have the exact same inheritance rights as marital children. ...Therefore, the key is to provide equal opportunity, not strict equality.

...

... [S]tate legislatures must avoid extremes--total exclusion and total inclusion. Total exclusion is not fair to non-marital children because it punishes them for actions taken by their parents. On the other hand, total inclusion is not fair to the fathers or their marital children because it permits persons to file unchallenged claims against the estates of deceased men. ... [S]tatutes in most states give non-marital children the opportunity to inherit from their fathers as long as they take the steps necessary to prove paternity.

...[T]he statutory requirements range from simple to complex. ...

Aside from special situations, the UPC defers to the state's family law provisions for establishing paternity. In contrast, New York's intestacy provisions, like that of many states, address paternity generally.

UNIFORM PROBATE CODE

Section 2-117. No Distinction Based on Marital Status. Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.

Comment

Scope. This section, adopted in 2008, provides the general rule that a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status. Exceptions to this general rule are contained in Sections 2-114 (Parent Barred from Inheriting in Certain Circumstances), 2-119 (Adoptee and Adoptee's Genetic Parents), 2-120 (Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier), and 2-121 (Child Born to Gestational Carrier).

N.Y. Est. Powers & Trusts Law § 4-1.2

Inheritance by non-marital children

(a) For the purposes of this article:

(1) A non-marital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if:

(A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and father of the child have executed an acknowledgment of paternity pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or;

(B) the father of the child has signed an instrument acknowledging paternity, provided that ... [various requirements are met.]

(C) paternity has been established by clear and convincing evidence, which may include, but is not limited to: (i) evidence derived from a genetic marker test, or (ii) evidence that the father openly and notoriously acknowledged the child as his own; however nothing in this section regarding genetic marker tests shall be construed to expand or limit the current application of subdivision four of section forty-two hundred ten of the public health law.

New York's reference to DNA evidence is relatively unusual. However, as science becomes more sophisticated, proof-of-paternity problems get easier, and it becomes increasingly harder to justify disproportionate burdens placed on non-marital children. Meanwhile, the law has resisted change. See, e.g., *Phillips v. Ledford*, 590 S.E.2d 280 (N.C. 2004) (because statutory elements not met, daughter was unable to inherit despite DNA and other evidence of relationship.); *Tuan Anh Nguen v. INS*, 533 U.S. 53 (2001) (upholding extensive paternity proof requirements).

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Kate Schuler, *The Liberalization of Posthumous Paternity Testing — Expanding the Rights of Illegitimate Children*, 17 Quinnipiac Prob. L.J. 150 (2003).

2. Adopted Persons

Because adoption creates new relationships with new families, it also creates a series of problems regarding inheritance rights.¹⁰ The first step in examining adoption situations is to identify the various parties. The adoptee, of course, is the central character. On one side, we might have the adoptee's genetic parents¹¹ and their families. On the other side, we might find the adoptive parents and their families. Inheritance questions can flow in many directions: If the adoptee dies, can either side inherit? If parents on either side die, can the adoptee inherit? What about more distant relatives? Can the adoptee inherit from them or vice-versa? Should special rules apply when the adoptive parent is married to a genetic parent? What if they are unmarried partners?

Typically, adopted children can inherit from their adoptive parents, although the statutes vary in their specifics. More difficult is the question of whether adopted children can inherit from the genetic parents. Some statutes sever the adopted child's relationship with the genetic family in most situations. When statutes do not address the question, however, many courts allow such inheritance.

Another question is what happens if the child's adoptive or genetic grandparents (or other relatives) die. The answer is less certain. Some statutes allow the adopted child to inherit from the ancestors and collaterals of adoptive parents, but when statutes do not address the question, the courts are divided. On the other hand, courts tend to allow the adopted child to inherit from ancestors and collaterals of genetic parents to the same degree that they allow inheritance from the genetic parents themselves.

Similar problems occur when the adopted child dies. In the absence of express statutory language, often the genetic parents, but not the adoptive parents, can inherit from the child. The equitable doctrine of abandonment, however, may bar the genetic parents.

¹⁰ This section considers the impact of adoption in the context of intestate inheritance. A related problem arises in the context of interpreting documents, as when a will gives property to "children." See page 516.

¹¹ The term "natural parents" is commonly used to designate the biological parents of an adopted person. This book avoids the term because it carries the connotation that the adoptive parents are somehow "unnatural." "Birth," "genetic," or "biological" are terms carrying no such baggage.

A number of states follow the UPC's solution to these problems and, in most situations, simply remove the child from the families of the genetic parents and drop it into the adoptive parents' families for all purposes. UPC §§ 2-118,1-119(a)4.. That approach has the advantages of clarity and of giving the child a "fresh start" in a new family.

On the other hand, many adoptions occur *within* a family. For example, when a remarriage follows a death or divorce the new spouse may adopt a child of remaining parent. The UPC's solution to stepparent adoptions is to place the child in the adoptive-stepparent's family, but then to distinguish between the genetic parents. The full parent-child relationship is maintained with the spouse of the adopting stepparent; each can inherit from the other. The relationship with the non-custodial genetic parent's family, however, runs only to the benefit of the child. The child can inherit from members of the non-custodial side of the birth family, but they cannot inherit from her. UPC § 2-119(b). If the adoption is by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, the UPC provides that the relationships to the genetic parents continue, but again only to the benefit of the child. UPC §2-119(c).

Adoption also raises some unusual problems. For example, suppose Aunt Minnie has three nephews who would inherit equally. Because Jay lives nearby and has helped her, Minnie might try to adopt Jay so he could take everything as her child. Courts disagree about whether to recognize such adoptions.

Applying the theory of "equitable adoption," also known as "virtual adoption," courts sometimes treat a child as adopted, even in the absence of formal adoption proceedings. *Compare Matter of Heirs of Hodge*, 470 So. 2d 740 (Fla. App. 1985) (child treated as adopted when raised by others since age 3 and given their name), *with O'Neal v. Wilkes*, 439 S.E.2d 490 (Ga. 1994) (after shuffling among relatives, girl eventually raised by non-relatives, but not entitled to protection as "adopted" because aunt who last took care of her had no authority to enter into adoption contract). Courts have been wary of allowing the "adoptive parents" or their heirs to inherit from the unadopted child on such a theory.

Sometimes an adoption occurs in one state, and the intestate decedent lives in another. If the two states treat the rights of adopted children differently, a conflict of laws problem arises. The decedent's state may want to enforce its own law in the inheritance situation, even though the law of the place of adoption controls the child's status for most purposes. *See, e.g., Warren v. Foster*, 450 So. 2d 786 (Miss. 1984) (refusal by Mississippi court to follow Tennessee statute cutting off adoption from birth parent).

UNIFORM PROBATE CODE

SECTION 2-115. Definitions. In this [subpart]:

- (1) "Adoptee" means an individual who is adopted.
- (2) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse.

(3) “Divorce” includes an annulment, dissolution, and declaration of invalidity of a marriage.

(4) “Functioned as a parent of the child” means behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household.

(5) “Genetic father” means the man whose sperm fertilized the egg of a child’s genetic mother. If the father-child relationship is established under the presumption of paternity under [insert applicable state law], the term means only the man for whom that relationship is established.

(6) “Genetic mother” means the woman whose egg was fertilized by the sperm of a child’s genetic father.

(7) “Genetic parent” means a child’s genetic father or genetic mother.

(8) “Incapacity” means the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

(9) “Relative” means a grandparent or a descendant of a grandparent.

Section 2-118. Adoptee and Adoptee’s Adoptive Parent or Parents.

(a) **[Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents.]** A parent-child relationship exists between an adoptee and the adoptee’s adoptive parent or parents.

Section 2-119. Adoptee and Adoptee’s Genetic Parents.

(a) **[Parent-Child Relationship Between Adoptee and Genetic Parents.]** Except as otherwise provided in subsections (b) through (e), a parent-child relationship does not exist between an adoptee and the adoptee’s genetic parents.

(b) **[Stepchild Adopted by Stepparent.]** A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

(1) the genetic parent whose spouse adopted the individual; and

(2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(c) **[Individual Adopted by Relative of Genetic Parent.]** A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

(d) **[Individual Adopted after Death of Both Genetic Parents.]** A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic parent.

(e) **[Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted.]** If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents under Section 2-120 or between a gestational child and a

parent or parents under Section 2-121, the child is adopted by another or others, the child's parent or parents under Section 2-120 or 2-121 are treated as the child's genetic parent or parents for the purpose of this section.

QUESTIONS AND NOTE

1. Should it matter if the adopted "child" was an adult at the time of the adoption? See *Tinney v. Tinney*, 799 A.2d 235 (R.I. 2002) (no).

2. "Kate Hudson is the biological daughter of Goldie Hawn and Bill Hudson. Goldie and Bill divorced when Kate was young, and Kate was raised by Goldie and Kurt Russell, Goldie's longtime partner. If Kurt, a step-partner, had adopted Kate, and thereafter Bill died intestate, would/should Kate still be entitled to inherit from and through Bill?" Peter Wendel, *Inheritance Rights and the Step-partner Adoption Paradigm: Shades of the Discrimination against Illegitimate Children*, 34 *Hofstra L. Rev.* 351 (2005).

3. Peggy's daughter, Roxanne, has battled drug addiction, joblessness, and jail time. As a consequence, Peggy had been raising Roxanne's son Jason for most of his life. Peggy died recently while caring for Jason because Roxanne is back in prison. Should Jason (now 10) be able to inherit from his grandmother?

4. Should a child who could not satisfy the rules governing inheritance by non-marital children, but lived with both parents, be able to inherit under an "equitable legitimization" theory, roughly similar to the "equitable adoption" theory?

5. Peggy's daughter, Roxanne, has battled drug addiction, joblessness, and jail time. As a consequence, Peggy had been raising Roxanne's son Jason for most of his life. Peggy died recently while caring for Jason because Roxanne is back in prison. Should Jason (now 10) be able to inherit from his grandmother?

6. In Chapter 9 we examine how courts interpret documents when beneficiaries have been adopted.

PROBLEMS

1. Bob was born to Doug and Wanda, who later divorced. Wanda then married Alphonse, who adopted Bob with Doug's consent.

(a) When Doug dies, does Bob inherit from him under the law of your state? Under the UPC?

(b) Would Doug inherit from Bob?

(c) Same results if Doug and Wanda had adopted Bob?

(d) Same results if Wanda and Alphonse cohabited without marriage?

(e) Same results if instead of marrying Alphonse, Wanda formed a domestic

partnership (or civil union) with Marjorie, who adopted Bob?

2. Bob was born to Doug and Wanda. Then Doug died and Wanda married Alphonse, who adopted Bob. When Doug's father dies, would Bob inherit from him under the law of your state? Under the UPC?

3. After Sam's mother died, his mother's sister adopted him. Later, Sam's maternal grandfather died intestate. Would Sam inherit anything from his grandfather under the law of your state? Under the UPC?

Selected References

Jason C. Beekman, *Same-sex Second-parent Adoption and Intestacy law: Applying the Sharon S. Model of "Simultaneous" Adoption to Parent-child Provisions of the Uniform Probate Code*, 96 Cornell L. Rev. 139 (2010).

Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 Wake Forest L. Rev. 223 (2008).

Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*. 48 Ariz. L. Rev. 1 (2006).

Carissa R Trast, *You Can't Choose Your Parents: Why Children Raised by Same-sex Couples Are Entitled to Inheritance Rights from Both Their Parents*, 35 Hofstra L. Rev. 857 (2006).

Peter Wendel, *Inheritance Rights and the Step-partner Adoption Paradigm: Shades of the Discrimination against Illegitimate Children*. 34 Hofstra L. Rev. 351 (2005).

Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg into a Round Hole*. 43 Creighton L. Rev. 815 (2010).

3. Children of Assisted Reproduction

As often happens, the law lags behind science and technology. Consider the following case.

**FINLEY V. COMMISSIONER, SOCIAL SECURITY
ADMINISTRATION**

270 S.W.3d 849 (Ark., 2008)

PAUL E. DANIELSON, Associate Justice. This case involves a question of law certified to this court by the United States District Court for the Eastern District of Arkansas The question certified is the following:

Does a child, who was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after the death of his father, inherit from the father under Arkansas intestacy law as a surviving child?

We conclude that the answer to this question is no.

According to the District Court's order, the certified question arises from an appeal by Amy Finley, from the final decision of the Commissioner of the Social Security Administration, Michael Astrue (the Commissioner), which denied her claim for "child's insurance benefits" under 42 U.S.C. § 402(d). The District Court's order reflects the following facts. On October 6, 1990, Ms. Finley and Wade W. Finley, Jr., were married. During the course of the marriage, the Finleys pursued fertility treatments at the University of Arkansas for Medical Sciences (UAMS), and, ultimately, participated in UAMS's In Vitro Fertilization and Embryo Transfer (IVF/ET) Program.¹² In June of 2001, doctors produced ten embryos using Ms. Finley's eggs and Mr. Finley's sperm. Two of the embryos were implanted into Ms. Finley's uterus and four embryos were frozen for preservation. Ms. Finley later suffered a miscarriage of both of the implanted embryos.

¹² In vitro fertilization is described as follows:

After the woman has taken injectable ovulation-inducing medications ..., multiple oocytes are retrieved from the woman's ovaries by a minor surgical procedure. The oocytes are placed in a petri dish with her male partner's sperm (in vitro) and placed in an incubator for fertilization to occur. The embryos are allowed to grow for a period of three to five days before they are placed back into the woman's uterus.

17-289 Attorneys' Textbook of Medicine P.289.65 (3d ed. 2007).

It differs entirely from artificial insemination:

Intrauterine insemination, also known as artificial insemination, refers to the placement of sperm into the uterine cavity. Intrauterine insemination may be performed at the time of ovulation in the woman's normal menstrual cycle, or with the use of medications that induce ovulation. In most cases, the female partner takes fertility medications in advance of the procedure. The man must produce sperm at the time the woman is ovulating; the sperm (after undergoing certain "washing" procedures) are then inserted into the woman's uterine cavity through a long, thin catheter.

17-289 Attorney's Textbook of Medicine P.289.81 (3d ed. 2007).

On July 19, 2001, Mr. Finley died intestate while domiciled here in Arkansas. A little less than one year later, on June 26, 2002, Ms. Finley had two of the previously frozen embryos thawed and transferred into her uterus, resulting in a single pregnancy. On February 14, 2003, prior to the child's birth, the Lonoke County Circuit Court entered an order providing that upon the baby's delivery... [the child's birth certificate would show Wade Finley, Jr., as the father and that determination would be binding for all lawful purposes].

The child was born on March 4, 2003, and on April 11, 2003, Ms. Finley filed a claim for mother's insurance benefits and the child's claim for child's insurance benefits, based on the earnings record of Mr. Finley. ,, [Denied claims and various appeals led to the district court certifying the question to this court.] The claims were denied at the initial and reconsideration levels; however, an Administrative Law Judge (ALJ) issued a decision on June 16, 2006, awarding both mother's and child's insurance benefits.

... Ms. Finley argues that her child was "conceived" at the time her egg was fertilized by the father's sperm. She contends that there is no statutory prohibition in Arkansas preventing a natural child who was conceived by in vitro fertilization from inheriting from his father. She avers that the General Assembly was aware of in vitro fertilization procedures in light of the fact that it mandated all accident and health insurance companies include in vitro fertilization as a covered expense in Ark. Code Ann. § 23-85-137(a) (Repl. 2004) and was aware of assisted reproductive technologies by its reference to artificial insemination in Ark. Code Ann. § 28-9-209(c) (Repl. 2004). She urges that based upon the medical definitions of "conception," the child born of the Finleys' union was not posthumously conceived and that as a matter of public policy, all children's rights should be protected, including their rights to property and inheritance.

The Commissioner responds that Arkansas intestacy law does not provide inheritance rights from a biological father to a child who was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after the death of the father. He argues that the Finleys' child was neither born nor conceived during the Finleys' marriage, which ended upon Mr. Finley's death. The Commissioner maintains that the logical interpretation of the term "conception" or "conceived," as used in Arkansas's intestacy provisions, is to mean the onset of pregnancy, or the successful implantation of an embryo in the womb. He asserts that the General Assembly has not amended the intestate succession statutes to expand the definition of conception to include the creation of embryos during the in vitro fertilization process. ... He further points out that the General Assembly, and not the courts, determines public policy. Finally, the Commissioner submits, given the fact that inheritance laws require finality, it is unlikely that the legislature defined the term "conception" to include a medical procedure that could result in a biological birth many years after the father's death. Ms. Finley replies that the General Assembly has been well aware of assisted reproduction for a number of years and, had it chosen to do so, it could have enacted legislation to prevent such an inheritance.

...[T]he District Court's certification order ... provides that "[u]nder the Social Security Act, a child is entitled to child's insurance benefits if he is the child of an individual who dies while insured, if the child was dependent upon the insured at the time of the insured's death.... In

determining whether a claimant is the "child" of a deceased insured, the Commissioner is instructed to "apply such law as would be applied in determining the devolution of intestate personal property ... by the courts of the State in which [the insured] was domiciled at the time of his death[.]" 42 U.S.C. § 416(h)(2)(A)....”

During the administrative proceedings in this case, Plaintiff claimed that there were no Arkansas statutes specifically addressing the inheritance rights of a child conceived through in vitro fertilization, but that, pursuant to Ark. Code Ann. § 28-9-209(c), W.F. was "conceived" as a "zygote" prior to his father's death, while his parents were married. Thus, she argued that W.F. had inheritance rights under that statute. The Commissioner acknowledged the lack of a "clear definition" of "conception" under Arkansas state law, but looked to "the generally accepted definition of the term in the medical community" and concluded that "conception" occurred when "the embryo was implanted in [Plaintiff's] uterus after the wage earner died." ...

...

...In order to inherit as a posthumous heir under Arkansas law, the child must not only have been born after the decedent's death, but must also have been conceived before the decedent's death:

(a) Posthumous descendants of the intestate *conceived before his or her death* but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.

Ark. Code Ann. § 28-9-210(a) (Repl. 2004) (emphasis added). In order to answer the question certified to this court, we must, then, determine whether a child, created as an embryo through in vitro fertilization during the child's parents' marriage, but implanted into the child's mother's womb after the death of the child's father, was "conceived before" the decedent's death.

...

It is clear from the statute that in order to inherit through intestate succession as a posthumous descendant, the child must have been conceived before the decedent's death. However, the statutory scheme fails to define the term "conceived." While we could define that term, we find there is no need to do so, as we can definitively say that the General Assembly, in enacting Act 303 of 1969, § 12, now codified at Ark. Code Ann. § 28-9-210, did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death, to inherit under intestate succession. Not only does the instant statute fail to specifically address such a scenario, but it was enacted in 1969, which was well before the technology of in vitro fertilization was developed.....

While the parties would have us define the term "conceive," we decline to do so in the instant case. Our role is not to create the law, but to interpret the law and to give effect to the legislature's intent. ...In vitro fertilization and other methods of assisted reproduction are new technologies that have created new legal issues not addressed by already-existing law. ...Were we to define the term "conceive," we would be making a determination that would implicate many public policy concerns, including, but certainly not limited to, the finality of estates. That is not our role. The determination of public policy lies almost exclusively with the legislature, and we will not interfere with that determination in the absence of palpable errors. ...With this is

mind, we strongly encourage the General Assembly to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve.

For the foregoing reasons, we answer the certified question in the negative.

NOTE AND QUESTION

1. As of this writing, the Arkansas legislature has not embraced the court’s suggestion. For commentary on this case, see *Casenote, Statutory Misconception: The Arkansas Supreme Court’s Method in Finley v. Astrue Sets New Precedent for Uncertainty*, 63 Ark. L. Rev. 419 (2010).

2. How well do you think the UPC provisions below balance the competing interests of the child, each of the parents, donors, gestational carriers, the child’s siblings, and the need to resolve inheritance questions in a timely fashion?

UNIFORM PROBATE CODE

SECTION 2-115. Definitions.

In this [subpart]:

...

(2) “Assisted reproduction” means a method of causing pregnancy other than sexual intercourse.

...

(4) “Functioned as a parent of the child” means behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household.

(5) “Genetic father” means the man whose sperm fertilized the egg of a child’s genetic mother. If the father-child relationship is established under the presumption of paternity under [insert applicable state law], the term means only the man for whom that relationship is established.

(6) “Genetic mother” means the woman whose egg was fertilized by the sperm of a child’s genetic father.

(7) “Genetic parent” means a child’s genetic father or genetic mother.

(8) “Incapacity” means the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

...

Section 2-120. Child Conceived by Assisted Reproduction Other Than Child Born to Gestational Carrier.

(a) [Definitions.] In this section:

(1) “Birth mother” means a woman, other than a gestational carrier under Section 2-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child’s genetic mother.

(2) “Child of assisted reproduction” means a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

(3) “Third-party donor” means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(A) a husband who provides sperm, or a wife who provides eggs, that are used for assisted reproduction by the wife;

(B) the birth mother of a child of assisted reproduction; or

(C) an individual who has been determined under subsection (e) or (f) to have a parent-child relationship with a child of assisted reproduction.

(b) **[Third-Party Donor.]** A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

(c) **[Parent-Child Relationship with Birth Mother.]** A parent-child relationship exists between a child of assisted reproduction and the child’s birth mother.

(d) **[Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime by His Wife for Assisted Reproduction.]** Except as otherwise provided in subsections (i) and (j), a parent-child relationship exists between a child of assisted reproduction and the husband of the child’s birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

(e) **[Birth Certificate: Presumptive Effect.]** A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that individual.

(f) **[Parent-Child Relationship with Another.]** Except as otherwise provided in subsections (g), (i), and (j), and unless a parent-child relationship is established under subsection (d) or (e), a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(1) before or after the child’s birth, signed a record that, considering all the facts and circumstances, evidences the individual’s consent; or

(2) in the absence of a signed record under paragraph (1):

(A) functioned as a parent of the child no later than two years after the child’s birth;

(B) intended to function as a parent of the child no later than two years after the child’s birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.

(g) [Record Signed More than Two Years after the Birth of the Child: Effect.]

For the purpose of subsection (f)(1), neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached [18] years of age.

(h) [Presumption: Birth Mother Is Married or Surviving Spouse.] For the purpose of subsection (f)(2), the following rules apply:

(1) If the birth mother is married and no divorce proceeding is pending, in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B).

(2) If the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

(i) [Divorce Before Placement of Eggs, Sperm, or Embryos.] If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

(j) [Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos.] If, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies subsection (f).

(k) [When Posthumously Conceived Child Treated as in Gestation.] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

- (1) in utero not later than 36 months after the individual's death; or
- (2) born not later than 45 months after the individual's death.

Section 2-121. Child Born to Gestational Carrier.

(a) [Definitions.] In this section:

(1) "Gestational agreement" means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (e).

(2) “Gestational carrier” means a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child’s genetic mother.

(3) “Gestational child” means a child born to a gestational carrier under a gestational agreement.

(4) “Intended parent” means an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

(b) [Court Order Adjudicating Parentage: Effect.] A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

(c) [Gestational Carrier.] A parent-child relationship between a gestational child and the child’s gestational carrier does not exist unless the gestational carrier is:

(1) designated as a parent of the child in a court order described in subsection (b); or

(2) the child’s genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

(d) [Parent-Child Relationship with Intended Parent or Parents.] In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an intended parent who:

(1) functioned as a parent of the child no later than two years after the child’s birth; or

(2) died while the gestational carrier was pregnant if:

(A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child’s birth;

(B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child’s birth; or

(C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child’s birth.

(h) [When Posthumously Conceived Gestational Child Treated as in Gestation.]

If, under this section, an individual is a parent of a gestational child who is conceived after the individual’s death, the child is treated as in gestation at the individual’s death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual’s death; or

(2) born not later than 45 months after the individual’s death.

(i) **[No Effect on Other Law.]** This section does not affect law of this state other than this [code] regarding the enforceability or validity of a gestational agreement.

QUESTION

Would the result in *Finley* have been different if Arkansas had been using the UPC approach?

PROBLEM

Phyliscia was born to Mariel, who had been impregnated with the sperm of a third-party donor. Six months after Phyliscia's birth, Phyliscia met Leslie and within a year they were sharing housing and child care for Mariel. This arrangement continued until Leslie was killed in a car accident ten years later. Last month Leslie's father died intestate. In a UPC jurisdiction, what evidence would you gather to establish Mariel's right to inherit from Leslie's father?

Selected References:

Amanda Horner, *I Consented to do What?: Posthumous Children and the Consent to Parent After-death*, 33 S. Ill. U. L.J. 157 (2008).

Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 Real Prop. Tr. & Est. L.J. 393 (2008).

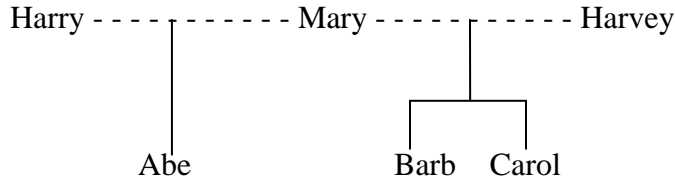
Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 Geo. Mason L. Rev. 403 (2009).

Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally-Based Approach to Parent-Child Property Succession*, 62 SMU L. Rev. 367, 392 (2009).

Morgan Kirkland Wood, *It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 Ga. L. Rev. 873, 902 (2010).

C. Half Bloods

Two people are in a half-blood relationship when they have one common ancestor. Consider the following family:



Mary and Harry had Abe. After a death or divorce, Mary and Harvey had Barb and Carol. As to Carol, Abe is a half-brother and Barb is a whole-blooded sister.

Most states allow half-blood and full-blood relatives to inherit equally. *See, e.g.*, UPC § 2-107. Some statutes, however, do not. E.g., [Fla. Stat. § 732.105](#) (half blood get half the share of whole bloods).

As the next section describes, traditionally there must be some blood relationship between the decedent and the heir (e.g., Abe would not inherit from Harvey).

Selected Reference

Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family*, 58 SMU L. Rev. 137-94 (2005).

One's stepchildren are the children of one's spouse. Until recently, stepchildren and other relatives by affinity have had no inheritance rights. The UPC and a few states allow stepchildren to take if there are no surviving blood relatives, as a last alternative to the property escheating to the state.¹³ In the right circumstances, a stepchild might be able to use the "equitable adoption" theory to qualify as an "adopted" child.

¹³ As amended in 2008, UPC 2-103(b) provides for stepchildren as follows:

[If the decedent was not survived by any close relatives], but the decedent has:

- (1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to the spouse's descendants by representation or
- (2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.

QUESTION

Blended families may come from many sources: divorce and remarriage, death and remarriage (especially among older people), and shifting non-marital relationships. Should intestate statutes recognize and intergenerational, non-blood relationships? If so, which ones and how?

[Return to 3d edition text at the bottom of page 69, starting with “Identifying Next of Kin“]