since the Supreme Court decided the Capato case, there has been considerable concern about the inheritance rights of children conceived after the death of a parent and born more than nine months after the parent’s death. That case validated the Social Security Administration policy of tying survivor benefits to the intestacy law of the state of the insured parent’s residence. The effect is double or nothing: Either the child inherits from the deceased parent and collects Social Security benefits or gets neither—depending on state law. The Capato children lost out because Florida law excluded them because their father did not provide for them in his will.

Currently, 25 state legislatures have addressed the problem. Of these, 20 granted rights to posthumously conceived (PC) children under various circumstances, and five ruled them out (see Exhibit 1). A major problem is that the other 25 states and the District of Columbia have no relevant statute, although two have applicable case law (see Exhibit 1). Hence the woman intent on producing a PC child should be concerned about her late husband’s last residence.

Key questions
Few of the laws dealing with PC children explicitly govern transfer by a document such as a will, trust instrument, or beneficiary designation. Those who assist estate owners in these matters need to determine their clients’ intention with respect to defining descendants and the like. Those who administer estates and distribute death benefits need guidance as to the rightful beneficiaries. That may involve having answers to these questions:
- Is consent of the deceased required and must it specifically cover postmortem conception? (The contract with the fertility clinic may manifest consent.)
- Is there a time limit for the gamete transfer or birth?
- Must there be a genetic tie to the deceased?
- Does the deceased have to be married to the birth mother?
- May a surrogate be used?
- Must notice be given to those with property being transferred?
- Is there liability for failure to include a PC child in a distribution?

Defining “descendants” and the like for estate planning purposes has always been critical. Adopted adults and non-marital children used to be the principal concerns. Then came assisted reproductive technology, and the problem became exceedingly complex.

Legislative catch-up
A child born after the death of a parent generally takes from a
deceased parent’s estate the same share as a child in being at the decedent’s death. Until about three decades ago, children born after a parent’s death had to have been conceived during that parent’s lifetime. But in the late 1970s artificial reproductive technology was invented, and postmortem conception became a reality.

Most of the laws regarding the inheritance rights of posthumous children are ambiguous because medical advances have extended the time that can elapse between a parent’s death and the birth of a child. As the result of the “new biology,” sperm, eggs, and embryos may be preserved in a frozen state well past the lives of their donors. Posthumous conception was unimaginable when the relevant laws were established. PC children are certainly posthumous and more common than generally thought in that sperm and egg donors who may not be intended parents may be long gone when their gametes are transferred. PC children may also fall in the category of children born after a will is signed.

Strictly speaking, “conceived” is not all-inclusive when describing PC children because an egg can be fertilized in a laboratory and the resulting pre-embryo implanted in a woman. Actually, a PC child can result when gametes or fertilized embryos are implanted or transferred after the death of the gamete donor.

Ohio was the first state with a law in this area, and it prohibited PC children from inheriting from a deceased biological parent. Virginia followed suit shortly after Capato, allowing no inheritance rights unless the parents were married and the child is born within ten months (unlikely posthumously conceived). Minnesota banned them in 2010, and Missouri banned them as to children other than those of the intestate.

The Illinois legislature recently amended the Illinois Probate Code by adding 14 words to existing § 2-3: “A posthumous child of a decedent shall receive the same share of an estate as if the child had been born in the decedent’s lifetime; provided that such posthumous child shall have been in utero at the decedent’s death.” Without the italicized language, arguably a child whenever born after the death of a parent is entitled to a share of that parent’s estate. The original bill allowed a child conceived at any time after the parent’s death to be regarded as the deceased parent’s child, a provision based on the Uniform Parentage Act. But it was amended to reverse the result out of concern for the prompt settlement of estates. Like the comparable law of most other states, it probably does not affect trusts, life insurance, or retirement benefits.

EXHIBIT 1
States With Legislation or Case Law Addressing Inheritance Rights of Children Conceived After Death

The following states have granted rights to posthumously conceived children:
1. Alabama.
2. Arkansas.
3. California.
6. Delaware.
7. Iowa.
8. Louisiana.
10. Maryland.
12. New Mexico.
15. North Dakota.
17. Texas.
18. Utah.
20. Wyoming.

Legislation in these states specifically deny inheritance rights to posthumously conceived children:
1. Florida.
2. Illinois.
4. Ohio.
5. Virginia.

States with case law that grants inheritance rights to posthumously conceived children:
1. Massachusetts.
2. New Jersey.

3 Fla. Stat. § 742.17(4).
4 UPC §§ 2-104(a)(2) and 2-705(g)(1).
6 Va. Code Ann. § 20-158B.
7 M.S.A. § 524.2-120 subd. 10.
9 755 ILC S 5/2-3, effective 1/1/16 (emphasis added).
10 See note 13 infra.
In contrast with the five states mentioned above, 16 states have granted inheritance rights to PC children under some circumstances. Two Uniform Acts have done so as well. There is a range of time limits related to the concern for efficient administration of estates and trusts. One-, two-, and three-year allowances are frequent, but some states impose no time limit. One proposal is that the class should close only when distribution or division is required.11

A 2008 amendment to the Uniform Probate Code extends the inclusion of PC children:

2-705(g) [Class-Closing Rules.] The following rules apply for purposes of the class-closing rules: (1) A child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth. (2) If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent’s death, the child is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent’s death or born not later than 45 months after the deceased parent’s death.

Only Colorado and North Dakota have adopted this amendment.12

Uniform Parentage Act. The Uniform Parentage Act has been adopted at least in part by 22 states but only ten of them have adopted the 2002 version that includes section 707:

Parental Status of Deceased Individual. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Note the following fine points:
- The donor may be male or female.
- Consent in a record (writing?) is necessary.
- The deceased is a spouse, presumably married to the mother (surrogate?).
- There is no time limit for the “placement” of eggs, sperm, or embryos after death.
- The consent must include assisted reproduction after death.

Some of the adopting states have deleted the reference to “spouse.” A comment to the section states: “This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material leads to the deceased being determined to be a parent. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.”13

Sampling of state laws. California has a comprehensive law on the subject. California Probate Code § 249.5 provides that for purposes of determining rights to property upon the death of a decedent, a child conceived and born after the decedent’s death is deemed to have been born in the lifetime of the decedent if the representative proves by clear and convincing evidence that:
- The decedent consented in writing to having his or her genetic material used for the posthumous conception of a child of the decedent.
- A person is designated to control the use of the material.
- Notice is given within four months after the person’s death certificate is issued or a court determines the date of death to a person who controls distribution of the decedent’s property or death benefits.
- The child was in utero within two years of the death.

Protection is provided for persons who distribute property without knowledge of the existence of genetic material before receipt of notice.14

New York enacted a similar provision to California in November 2014 in EPTL § 4-1.3. To inherit from the genetic parent in intestacy or under a will or trust:
- The genetic parent must consent in writing not more than seven years before his or her death to the use of his or her genetic material for posthumous conception and authorize a person to make decisions about the use of the material.
- Within seven months of the issuance of letters, the authorized person must give notice of the existence of the material to the personal representative of the estate and record the consent with the Surrogate’s Court.
- Finally, the genetic child must be in utero within 24 months of the genetic parent’s death or

11 See note 19 infra.
12 CRS § 15-11-120; 120-19-4-106(8); ND Cert Code § 14-20-65; 10-04-19(11).
14 California Probate Code § 249.6-7.
15 Szafranski v. Dunston, 2015 IL App (1st) 122975.
16 IRS Reg. 1.401(a)(9)-4, Q&A-4.
A reasonable compromise is needed between protection for PC offspring and avoidance of unduly extended administration of estates and trusts.

Related issues

A related question is who has the right to use the gametes. A number of cases involved a divorce but several revolved around harvesting and using a decedent’s gametes. The most recent case awarded the pre-embryos to a woman against the wishes of her former partner, the sperm donor.15

As to retirement benefits, the IRS specifies that a “designated beneficiary” who can “stretch” benefits over an extended period must be a “beneficiary” (presumably born) at the employee’s death.16

Only one reported case dealt with PC grandchildren in connection with a trust. In In re Martin B.,17 the New York Surrogate decided that children born three and five years after the death of their father by means of his frozen sperm were in the class of beneficiaries of a trust. The court found no support in New York statutes except that the laws on posthumous children, read literally, would include those posthumously conceived. It conceded that the grantor could not have imagined in 1969 that his son would have children conceived posthumously. Nonetheless, the court concluded that the children were his “issue,” relying on the Restatement (Third of Property § 14.8 that includes children of assisted reproduction whose parent was prevented by death to function as a parent. The court also pointed out the need for legislation in this area.

Many trusts remain outstanding whose creators did not contemplate PC children. Gifts to descendants or issue when distribution or division is specified will continue to puzzle courts. As to existing wills and trusts, the New York approach of prospective application to documents of which the genetic parent is not the creator makes sense. Clarification may be needed that the child must be in utero when a division or distribution is required. Otherwise trustees and executors may be saddled with a dilemma as to the identity of the beneficiaries.

Planning considerations

Estate planners need to deal with the new biology both as to assisted reproduction generally and as to children by posthumous conception. It may be difficult to convince many clients to deal with the subject, and drafting to cover the consequences of assisted repro-
duction is daunting, especially if offspring conceived after the death of a genetic parent are to be included. (One approach is simply to incorporate the law of a state such as California or New York or invoke the Restatement of Property, the Uniform Probate Code, or the Uniform Parentage Act.)

A few states have legislated rules of construction when the testator fails to provide for a child born after the testator’s death. While Iowa bans inheritance by a PC child in an intestate situation, since 2011 it allows it by will (not trust or other transfer document), provided a genetic parent-child relationship between the child and the testator is established, the testator authorized the surviving spouse to use the genetic material after the donor’s death, and the child is born within two years of the death of the testator.18

The Restatement (Third) of Property § 14.8 makes it a matter of consent with intent to be treated as the other parent established by a signed document or, as to PC children, if that intent is established by “clear and convincing evidence.”

Several commentators have provided suggested language for new instruments. Some examples are:

“A child born more than [ten months] [two years] [three years] after the death of a person will not be considered a child of that person.”

“A child born more than ten months after the death of a person will be considered the child of the person only if (1) the child is born no later than [three] years after the death of the person; (2) the person’s genetic material was used to create the child; and (3) the person consented [in writing] to the use of the genetic material to create a child [after the person’s death].” 19

“The term ‘descendant’ shall include a descendant of mine born as the result of the transfer of gametes of a deceased descendant of mine, provided the infant is born or in utero before determination of those who would take property outright or for whom it would be placed in trust under this instrument.”

Conclusion
It would be extremely helpful if every state would clarify its law concerning the succession consequences of births involving assisted reproduction, including posthumous conception. Ideally, a uniform definition of legal parenthood would apply, rather than having benefits depend on the birth place of the infant. At least litigation should not be required to determine the result. But uniformity is unlikely given the differing positions of the states that have already legislated the matter. Estates and trusts need to be administered in a reasonable duration, but an infant who lacks two living parents at birth and the surviving parent deserve a break. It is not the child’s fault that he or she was born in the wrong state. Laws generally do not discriminate against adopted and non-marital children.

A reasonable compromise is needed between protection for PC offspring and avoidance of unduly extended administration of estates and trusts. Long-lasting trusts with a single fund for descendants could tolerate keeping the class open for an extended period.

Estate planners are now obliged to deal with the question of PC children in the documents that they prepare and also should be prepared to advise fiduciaries and custodians how to deal with the possibility of an expanded class of beneficiaries as a result of artificial reproductive techniques. ■

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18 Iowa Code § 633.267.