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The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies

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Editor's Synopsis: Recent years' advances in assisted reproduction technology have enabled the conception of children in ways in addition to the traditional way. The Uniform Probate Code was amended last year to address the status of children born from assisted reproductive technologies for intestacy and class-gift purposes. This article discusses the relevant UPC provisions and offers several hypothetical cases to show how they operate. The article concludes expressing the hope that states will consider the new UPC approach.

Introduction

Class-gift and intestacy rights of children of assisted reproduction pose relatively new and complex questions in the law. These questions are destined to become increasingly important as the use of assisted reproduction technologies increases. The judges in several recent decisions have implored their state legislatures to address the inheritance rights of children of assisted reproduction.¹ In *Woodward v. Commissioner of Social Security*,² Chief Justice Marshall of the Massachusetts Supreme Judicial Court stated: "The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehen-

sive response reflecting the considered will of the people."³ Chief Justice Marshall's statement was quoted with approval in the New Hampshire case of *Khabbaz v. Commissioner, Social Security Administration*.⁴ Concurring separately, Chief Justice Broderick stated: "I write separately to respectfully urge the legislature to examine, within the context of the state's intestacy statute, the confluence of new, ever-expanding birth technologies and the seemingly arcane language and presumptions attendant to the settlement of decedents' estates. I believe that with time and further technological advances, this confluence will engulf more and more of our state's families and the children produced as a consequence of such advances."⁵ In the New York case of *In re Martin B.*,⁶ Surrogate Renee Roth stated: "As can be seen from all of the above, there is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology."⁷ Similarly, in *Finley v. Astrue*,⁸ Justice Danielson of the Supreme Court of Arkansas stated: "[W]e 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."⁹

As amended by the Uniform Law Commission (ULC) this past summer, the Uniform Probate Code (UPC or Code) now addresses the status of children of assisted reproduction for purposes of intestacy and class gifts.¹⁰

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¹ Judges in non-inheritance contexts have expressed the same view. In a child custody case, for example, Justice Dooley of the Supreme Court of Vermont stated: "[W]e face the problem here of a family created by artificial insemination, and the Legislature has not dealt directly with new reproductive technologies.... We express, as many other courts have, a preference for legislative action.... Again, we stress that the difficulty in interpretation in this context arises because the Legislature has not addressed assisted reproductive technologies." *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 968-70 (Vt. 2006).

² *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257 (Mass. 2002).

³ *Id.* at 272.

⁴ *Khabbaz v. Commissioner, Social Security Administration*, 930 A.2d 1180, 1186 (N.H. 2007).

⁵ *Id.* at 1187.

⁶ *In re Martin B.*, 841 N.Y.S.2d 207 (Surr. Ct. 2007).

⁷ *Id.* at 212.

⁸ *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008).

⁹ *Id.* at 855.

¹⁰ The Uniform Parentage Act (2000, amended 2002) (UPA) also addresses children of assisted reproduction. Although the main focus of the UPA is on non-inheritance issues, UPA § 707 addresses the parental status of a decedent in a manner that in some respects is inconsistent with the UPC. UPA § 203, however, provides that a parent-child relationship established under the UPA does not apply if contradicted by another law of the jurisdiction. The Comment to UPA § 203 specifically mentions the UPC as another law. Consequently, if any state enacts both statutes, the UPC would take precedence to the extent that the two are in conflict regarding intestacy and class gifts.

The ULC took this step on the recommendation of the Joint Editorial Board for Uniform Trust and Estate Acts¹¹ and a Special Drafting Committee to Amend the UPC.¹² As amended, the UPC is now closely aligned with the new Restatement of Property on these issues.¹³ The new UPC provisions constitute a self-contained set of provisions that can be enacted separately and not only as part of the UPC as a whole.

Assisted reproduction is defined in the Code as any method of causing pregnancy other than sexual intercourse.¹⁴ These methods currently include intrauterine insemination (previously and sometimes currently called artificial insemination), donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

The woman who becomes pregnant by one of these technologies may do so because she intends to be the child's mother. If she intends to be the child's mother, she may be married to a man or a woman (under the law of Connecticut, Iowa, Maine, Massachusetts, New Hampshire, or Vermont), or she may be in a civil union or domestic partnership with another woman (under the law of California, Hawaii, Maryland, New Jersey, Oregon, Washington, or the District of Columbia),¹⁵ or she may be unmarried with or without a partner of the same or opposite sex. Alternatively, the woman who becomes pregnant may be a surrogate who has agreed to bear the child for a married or unmarried couple of the same or opposite sex or for an unpartnered man or woman.¹⁶ To further complicate matters, the sperm that fertilizes the egg may be the sperm of a man who intends to be the child's father or the sperm of a third-party donor who has no such intention and probably was compensated for making the donation. The egg

that is fertilized may be the egg of a woman who intends to be the child's mother or the egg of a third-party donor who has no such intention and probably was compensated for making the donation. The possible combinations are legion.

Class Gifts: UPC § 2-705

For ACTEC Fellows, the most important aspect of the new biology is how children of assisted reproduction are treated for class-gift purposes. Are such children included as class members in the case, for example, of an income or a remainder interest to a trust beneficiary's "children" or "descendants," and, if so, under what circumstances are they included? A related question is how such children are treated for purposes of intestacy. Although ACTEC Fellows do not often deal directly with intestate estates, the treatment of children of assisted reproduction under the intestacy laws is a matter of social importance and, under the UPC, governs how such children are treated for purposes of a class gift. UPC § 2-705 provides that a class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction and his or her respective descendants, if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships.

It bears emphasizing that UPC § 2-705 establishes a rule of construction regarding class gifts, not a mandatory rule.¹⁷ A rule of construction is a default rule that applies in the absence of a contrary intention.¹⁸ Consequently, drafting attorneys have every opportunity to alter a rule of construction in order to give effect to a client's individual preferences.¹⁹

¹¹ In addition to the authors, ACTEC Fellows on the Joint Editorial Board are Jackson Bruce, David English, Mary Louise Fellows, Thomas Gallanis, Edward Halbach, Susan House, Joseph Kartiganer, John Langbein, Carlyn McCaffrey, Judith McCue, Malcolm Moore, Bruce Stone, and Raymond Young.

¹² In addition to the authors, ACTEC Fellows on the Special Drafting Committee are Turney Berry and David English.

¹³ Officially, the RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS. On the RESTATEMENT'S treatment of class gifts, see Lawrence W. Waggoner, *Class Gifts under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 993 (2007).

¹⁴ See UPC § 2-115(2).

¹⁵ For a listing of such states, see www.ncsl.org/programs/cyf/samesex.htm (last visited Jun. 16, 2009).

¹⁶ Interestingly, both the New York Times Sunday Magazine and Newsweek have recently featured front cover articles on surrogacy. See Alex Kuczynski, *Her Body, My Baby*, http://www.nytimes.com/2008/11/30/magazine/30Surrogate.html?_r=1&scp=1&sq=her%20body,%20my%20baby&st=cse (last visited Nov. 30,

2008); Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, April 7, 2008, at 45.

¹⁷ See UPC § 2-701.

¹⁸ See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003).

¹⁹ Technically, and unfortunately, a posthumously conceived child born to a decedent's surviving widow could be considered a nonmarital child. See, e.g., *Woodward v. Commissioner of Social Security*, *supra* note 2, at 266-67 ("Because death ends a marriage, ... posthumously conceived children are always nonmarital children."). Nevertheless, a provision in a will, trust, or other governing instrument that relates to the inclusion or exclusion of a nonmarital child, or to the inclusion or exclusion of a nonmarital child under specific circumstances, would not have been inserted with a child of assisted reproduction in mind. Consequently, such a provision ought to be treated as inapplicable to a child of assisted reproduction. When published in hard-bound volume, the RESTATEMENT (THIRD) OF PROPERTY § 14.8 cmt. m will so provide. To remove any doubt about the matter under the UPC, an amendment to § 2-705 saying so explicitly may be forthcoming.

Intestacy: UPC §§ 2-120 and 2-121

The Code deals with intestacy rights, and by incorporation, class-gift rights, in two sections. Section 2-120 deals with children of assisted reproduction where the birth mother is not a surrogate. Section 2-121 deals with such children where the woman who became pregnant by assisted reproduction is a surrogate.²⁰

The UPC uses the term “parent-child relationship” to indicate the existence of intestacy rights. If either § 2-120 or § 2-121 provides that a parent-child relationship exists or is established, the effect is that the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession and class gifts.²¹ The Code does not require the parent to adopt the child in order for a parent-child relationship to be recognized under these sections.

Non-Surrogacy

Non-Surrogacy Birth Mother Automatically Has Parent-Child Relationship With Child of Assisted Reproduction

In the non-surrogacy situation, the birth mother is a woman who has voluntarily become pregnant by means of assisted reproduction technology. It therefore seems appropriate to conclude that her purpose was to have *her* child, and the Code does so. Regardless of whether she is the child’s genetic mother (i.e., whether or not the egg that was fertilized was her egg or the egg of a third-party donor), her action in undergoing the procedure automatically establishes a parent-child relationship between her and the child.²² Consequently, in the case of an intestacy, the child inherits from or through the birth mother and the birth mother inherits from or through the child. If the birth mother or someone else creates a will, trust, or other

arrangement that contains a class gift in favor of the birth mother’s “children” or “descendants,” the child is presumptively a class member.

The question in the non-surrogacy cases is whether someone else also has a parent-child relationship with the resulting child. Under the Code, a third-party donor never has such a relationship.²³ A third-party donor is someone who, for compensation or not, provides sperm or eggs for assisted reproduction. Not counted as a third-party donor, however, is (1) a spouse whose sperm or egg is used for assisted reproduction by the wife; (2) the birth mother; (3) an individual who is identified on the child’s birth certificate as the other parent of the child; or (4) an individual who consented to assisted reproduction by the birth mother with intent to be treated as the child’s other parent.²⁴

Rick and Donna, Husband and Wife

Consider the case of Rick and Donna, a husband and wife in their late thirties who want children or another child but have had difficulty conceiving by sexual intercourse. Before taking the step of adopting a child, they try to conceive by artificial insemination (or some other procedure), using Rick’s sperm for that purpose. The procedure is successful. Donna becomes pregnant and gives birth to a child who grows up with the couple in the same household. In such a case, Rick and Donna are the genetic parents of the child,²⁵ and Rick undoubtedly would be identified as the father on the child’s birth certificate.²⁶ Under the Code, Rick is the child’s father, i.e., he has a parent-child relationship with the child.²⁷ In many such cases, the child will never be told and will never have reason to question how he or she was conceived. In any event, in the case of an intestacy, the child inherits from or through Rick as well as from and through Donna (the birth mother) and Rick as well as Donna inherits from or through the

²⁰ The Code uses the term “gestational carrier” for a surrogate and uses the term “gestational child” for a child born to a surrogate. See UPC § 2-121(a).

²¹ See UPC § 2-116.

²² See UPC § 2-120(c). This position is consistent with § 201(a) of the Uniform Parentage Act (2002). If, subsequent to the child’s birth, the birth mother gives the child up for adoption and the child is adopted, a parent-child relationship is established between the child and the child’s adoptive parent or parents (see UPC § 2-118(a)) and the parent-child relationship with the birth mother is usually severed (see UPC §§ 2-119(a); -119(e)).

²³ See UPC § 2-120(b).

²⁴ See UPC § 2-120(a)(3).

²⁵ Even so, there are two exceptions to the establishment of a parent-child relationship: if, before insemination, (1) Rick and

Donna were divorced; or (2) Rick, in a record, withdrew consent to the use of his sperm for that purpose. See UPC § 2-120(i), (j).

²⁶ Under UPC § 2-120(e), the father’s name on the birth certificate presumptively establishes a parent-child relationship between him and the child. Generally, state law controls whose name can be inserted on a birth certificate as the child’s father. It is common for such laws to provide that the child’s father is the mother’s husband absent a paternity order showing another to be the father. See, e.g., FLA. STAT. ANN. § 382.013(2)(a); IOWA CODE § 144.13((2); MICH. COMP. L. ANN. § 333.2824(1), (6). States usually have procedures whereby the named father can set aside a presumption of paternity arising by his name being listed on the birth certificate. See TEX. FAM. CODE ANN. § 160.204(b).

²⁷ See UPC § 2-120(d).

child. If Rick or someone else creates a will, trust, or other arrangement that contains a class gift in favor of Rick's "children" or "descendants," the child is presumptively a class member.

Suppose that Donna's assisted-reproduction pregnancy came about using the sperm of a third-party donor or, alternatively, using the egg of a third-party donor, or using the sperm and egg of third-party donors. As the birth mother, Donna has a parent-child relationship with the child. Rick also has a parent-child relationship with the child if Rick's name appears on the birth certificate as the child's father²⁸ or, absent that, if he consented to the procedure with the intent to be treated as the child's other parent.²⁹ Ideally, Rick's consent to be treated as the child's other parent will be evidenced by a writing or other record.³⁰ In the absence of such a record, his consent can be evidenced by his behavior toward the child, i.e., that he functioned as the child's parent³¹ within two years of the child's birth or intended to function as the parent but was prevented from doing so by death, incapacity, or other circumstances.³² Because Rick and Donna were married, the Code creates a strong but rebuttable presumption that he satisfied one or the other of the preceding requirements.³³

Sam and Mary, Unmarried Partners

Suppose that Sam and Mary are unmarried partners. If Mary has a child as a result of an assisted reproduction technology, she has a parent-child relationship with the child because she is the birth mother. Since she and Sam are not married, Sam is not presumed to be the child's other parent, even if his sperm was used to create the child. His parentage, however, could be established if he consented to have his name listed on the child's birth certificate.³⁴ Absent that, he would also have a parent-child relationship with the child if he "consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child."³⁵

Ann and Sara, Unmarried Partners

Suppose that Ann and Sara are unmarried partners. If Sara has a child by an assisted reproductive technology, she is the birth mother and has a parent-child relationship with the child. It would also be possible for Ann to have a parent-child relationship with the child. If Ann is not listed as the other parent on the child's birth certificate, the parent-

²⁸ See *supra* note 26.

²⁹ See UPC § 2-120(f). Under Michigan law, a "child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife." MICH. COMP. L. ANN. § 333.2824(6).

³⁰ UPC § 2-120(f)(1) provides that consent with intent to be treated as the other parent of the child can be established by a signed record that, "considering all the facts and circumstances, evidences the individual's intent." The statute is phrased this way because fertility clinic consent forms typically do not directly state that the individual giving consent does so with intent to be treated as the child's parent. For example, the University of Michigan Center for Reproductive Medicine's consent form relative to in-vitro fertilization and transfer of embryos states that "the control and direction for the disposition of these zygotes/embryos rests with [insert name of spouse or partner] and [insert name of other spouse or partner] for transfer into the woman's uterus in one or more future cycles for the purpose of establishing a normal pregnancy." The form further provides: "In the event of the death of one partner, the control and direction of the disposition of tissues will remain with the surviving partner noted in this contract." (Copy of consent form on file with the authors.) Considering all the facts and circumstances, this form (and others like it) evidences the intent to be treated as the other parent of any resulting child. *Accord*, In re Martin B., 841 N.Y.S.2d 207 (Surr. Ct. 2007), where the court held that a similar consent form satisfied the intent requirement.

By Legislative Note, the UPC encourages enacting states to require genetic depositories to provide a consent form that would

directly state that the individual giving consent does so with intent to be treated as the child's parent.

³¹ The phrase "functioned as a parent of the child" means "behaving toward a child in a manner consistent with being the child's parent and performing the 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." UPC § 2-115(4).

³² *Id.* An example in which death would prevent a parent from functioning as a parent would be if Rick were a soldier who was deployed to a war zone after Donna became pregnant but was killed in action before the child was born.

³³ See UPC § 2-120(h)(1).

³⁴ Federal law provides that an unmarried man can be listed as the child's father on a birth certificate only if there is a voluntary acknowledgment of paternity by both the mother and father or paternity is adjudicated by a court or an administrative agency of competent jurisdiction. See 42 U.S.C. § 666(a)(5)(D)(i). Michigan law implements this federal provision by providing: "If the child's mother was not married at the time of conception or birth, the name of the father shall not be entered on the certificate of birth without the written consent of the mother and without the completion, and filing with the state registrar, of an acknowledgment of parentage by the mother and the individual to be named as the father." MICH. COMP. L. ANN. § 333.2824(2).

³⁵ See UPC § 2-120(f). For discussion of how consent is manifested, see *supra* notes 30-32 and accompanying text.

child relationship between Ann and the child could be established if Ann consented to Sara's assisted reproduction with the intent to be treated as the child's other parent. Her consent could be evidenced by a writing or, absent a writing, if she functioned as the child's parent within two years of the child's birth.³⁶

Betty, an Unpartnered Woman

Suppose that Betty is an unpartnered woman who desires to have a child by assisted reproduction using the sperm of a third-party sperm donor or the egg of a third-party egg donor. For inheritance and class-gift purposes, Betty would be the child's only parent.

Posthumous Conception

The principal question in the case of posthumous conception is whether the decedent has a parent-child relationship with the child so that the child is treated as the decedent's child for purposes of intestacy or class gifts. If, in the above cases, Donna, Mary, or Sara became pregnant after the death of Rick, Sam, or Ann, a parent-child relationship clearly exists between Donna, Mary, or Sara and the resulting child.³⁷ The question is whether the decedent, Rick, Sam, or Ann, also has a parent-child relationship with the child. The answer is yes if Rick, Sam, or Ann consented to be treated as the child's other parent. Ideally, Rick's, Sam's, or Ann's consent to be treated as the child's other parent will be evidenced by a writing or other record. In the absence of such a record, his or her consent can be shown by evidence that he or she intended

to function as the child's other parent but was prevented from doing so by his or her death³⁸ or intended to be treated as the child's other parent in the case of posthumous conception if that intent is established by clear and convincing evidence.³⁹ Because Rick and Donna were married to each other, there is a strong but rebuttable presumption that Rick did so intend,⁴⁰ but there is no such presumption regarding Sam or Ann.

Surrogacy

Surrogate Nancy

Surrogacy is another option for Rick and Donna, Sam and Mary, Ann and Sara, and Betty in the previous examples. It is also an option for Bill and Jim, who are unmarried partners, or for Hank, an unpartnered male. Let's say that they, she, or he enters into a surrogacy agreement with Nancy, obligating Nancy to get pregnant by assisted reproduction and then turn over the child upon or shortly after birth to them, her, or him as the intended parents or parent.

As surrogate, Nancy never intended to have, and under the Code does not have, a parent-child relationship with the child.⁴¹ The intent of the agreement was that the intended parents or parent would raise the child as their, her, or his own. Merely entering into a surrogacy agreement does not, by itself, establish a parent-child relationship between the intended parents or parent and child, however. The parent-child relationship could be established by a court order designating the intended parents or parent as the parents or parent of the child⁴² or, absent a court order, evidence that the intended parents or parent carried out their, her, or his obligation by func-

³⁶ In a child-custody case, the Supreme Court of Vermont applied a similar analysis. Lisa was the birth mother and Janet was Lisa's civil-union partner. The court held that Janet was also a parent of the child, saying: "Many factors are present here that support a conclusion that Janet is a parent, including, first and foremost, that Janet and Lisa were in a valid legal union at the time of the child's birth. The other factors include the following. It was the expectation and intent of both Lisa and Janet that Janet would be [the child]'s parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as [the child]'s parent during the time they resided together, and Lisa identified Janet as a parent of [the child] in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave [the child] with only one parent. The sperm donor was anonymous and is making no claim to be [the child]'s parent.... This is not a close case.... Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue

in a closer case. We do note that, in accordance with the common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage." *Miller-Jenkins v. Miller-Jenkins*, *supra* note 1, at 970-71.

³⁷ See *supra* note 22.

³⁸ See UPC § 2-120(f)(2)(B).

³⁹ See UPC § 2-120(f)(2)(C).

⁴⁰ See UPC § 2-120(h)(2).

⁴¹ The Code does recognize two exceptions to this rule, neither of which is likely to arise. One is a case in which a court order designates Nancy as a parent of the child. The other is a case in which Nancy is the child's genetic mother *and* no one else has a parent-child relationship with the child under the Code. See UPC § 2-121(c). The practice in which the surrogate is both the gestational and genetic mother is disfavored in the Assisted Reproduction Technology community, because the surrogate's genetic link to the child too often creates additional emotional and psychological problems in enforcing a surrogacy agreement. See the Comment to UPC § 2-121.

⁴² See UPC § 2-121(b).

tioning as the child's parents or parent⁴³ no later than two years after the child's birth.⁴⁴ If either of these requirements is satisfied, the intended parents or parent have a parent-child relationship with the child.

Perhaps the most important feature of the Code is that the enforceability or legality of the surrogacy agreement is irrelevant to the existence of a parent-child relationship.⁴⁵ Voluntary performance of an illegal or unenforceable contract still produces a child who is entitled to be treated as someone's child. Because the Code only deals with intestacy and class gifts, the question cannot arise under the Code unless a child is actually born. The only question is who has a parent-child relationship with the child. Disregarding the enforceability or legality of the surrogacy agreement has the added advantage of avoiding conflict of laws questions that might otherwise arise because of the mobility of society. For example, a child might be born as a result of a surrogacy agreement that was valid under the law applicable when the contract was entered into but the intended parents or parent moved and later died in a state in which surrogacy contracts are illegal (or vice versa). It would be cruel indeed for the law to hold that a child who grew up in the household of the intended parents or parent is not a child of the intended parents or parent simply because the surrogacy contract was illegal—and the Code does not do so.

Posthumous Conception

Suppose that Nancy becomes pregnant under a surrogacy agreement that was entered into by a decedent's surviving spouse or partner. Can the decedent ever have a parent-child relationship with the child so that the child is treated as the decedent's child for purposes of intestacy or class gifts? Under the Code, the answer is yes under very limited circumstances. Suppose that

Rick died survived by Donna or that Donna died survived by Rick. Or that Sam died survived by Mary or that Mary died survived by Sam. Or that Ann died survived by Sara or that Sara died survived by Ann. Or that Bill died survived by Jim or that Jim died survived by Bill. If there is a court order naming the decedent as a parent of the child, that ends the matter. The court order controls.⁴⁶ In the absence of a court order, the decedent might still be treated as the child's parent, but the first requirement is that the child must have a genetic connection to the decedent, i.e., the decedent's sperm or egg must be the source of the surrogate's pregnancy. In addition, the decedent must have intended to be treated as a parent of the child. Ideally, the decedent's intent will be expressed in a record signed by the decedent which, considering all the facts and circumstances, evidences the decedent's intent.⁴⁷ In the absence of such a record, the decedent's intent can be shown by other facts and circumstances establishing the decedent's intent, but that intent must be shown by evidence that is both clear and convincing.⁴⁸

In the case of Rick and Donna, there is another provision that might apply in the absence of a court order or a signed record indicating the decedent's intent. If, before death, a married decedent deposited the sperm or eggs that were used to conceive the child, the decedent is deemed to have intended to be treated as the parent of the child as long as the decedent's surviving spouse functioned as a parent of the child no later than two years after the child's birth.⁴⁹

Class-Closing Rules

In order to take under a class gift, it is not enough that the child qualifies as a class member. The child must also qualify under the class-closing rules, i.e., the child must be in being or be treated as in being on or

⁴³ For the meaning of the phrase "functioned as a parent of the child," see *supra* note 31.

⁴⁴ See UPC § 2-121(d). The Code also anticipates the possibility that an intended parent will die while the surrogate is pregnant, making it impossible for the deceased intended parent to function as a parent of the child. In such a case, the deceased intended parent has a parent-child relationship with the child if (1) 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; (2) 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 (3) 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.

⁴⁵ See UPC § 2-121(a)(1). Surrogacy agreements are illegal in some states. See, e.g., MICH. COMP. L. ANN. § 722.855, which provides: "A surrogate parentage contract is void and unenforceable as contrary to public policy." The UPC does not seek to overturn or interfere with such laws. The Code specifically provides that the Code "does not affect law of this state...regarding the enforceability or validity of a [surrogacy] agreement." UPC § 2-121(i). The Code only seeks to deal with parentage for purposes of intestacy and class gifts when a child is born as a result of a surrogacy agreement.

⁴⁶ See UPC § 2-121(b).

⁴⁷ See UPC § 2-121(e)(1).

⁴⁸ See UPC § 2-121(e)(2).

⁴⁹ See UPC § 2-121(f), (g).

before the distribution date.⁵⁰ In cases in which the distribution date is the deceased parent's death, the Code deviates from the ordinary class-closing rules by treating a child conceived posthumously by assisted reproduction as in being at the decedent's death if the child was in utero within thirty-six months or born within forty-five months after the decedent's death.⁵¹ This period is intended to strike a balance between two interests—the interest in the final settlement of trusts and estates within a reasonable time and the humane interest in allowing the surviving spouse or domestic partner time to grieve before making a decision whether to go forward with an assisted-reproduction procedure,⁵² taking account of the fact that the first attempt to become pregnant and carry the child to term is not always successful.⁵³ To illustrate, take the case of Rick and Donna. Let's say that Rick was diagnosed with leukemia and was told that he would have to undergo chemotherapy. Because the chemotherapy would substantially decrease his sperm count, he first deposited sperm in a fertility clinic. When he did so, he signed a record that, considering all the facts and circumstances, expressed an intent to be treated as a parent of the child should Donna use the sperm to get pregnant. Unfortunately, Rick died several months later. His widow Donna decided to use his frozen sperm to have his child. Suppose that, several years before Rick's death, Rick's mother passed away, leaving a will that created a testamentary trust. The terms of the trust directed the trustee to pay the income to Rick for life, then to distribute the trust principal by representation to Rick's descendants who survive Rick. Donna became pregnant and gave birth to X

forty-two months after Rick's death. Because X was born within forty-five months after Rick's death, X is included in the class gift to Rick's descendants created in his mother's trust.

In cases in which the distribution date arises after the deceased parent's death, no deviation from the ordinary class-closing rules is necessary. A child conceived posthumously by assisted reproduction is in being on the date when the child is in utero, just as is any other child.⁵⁴ To illustrate, take the case of Sam and Mary. Like Rick in the above case, Sam was diagnosed with leukemia and was told that he would have to undergo chemotherapy. Because the chemotherapy would substantially decrease his sperm count, he first deposited sperm in a fertility clinic. When he did so, he signed a record that, considering all the facts and circumstances, expressed an intent to be treated as a parent of the child should Mary use the sperm to get pregnant. Unfortunately, Sam died several months later. Suppose that before Sam's death, he created a revocable inter vivos trust, directing the trustee to pay the income to Sam for life, then "to pay the income to my partner, Mary, for life, then to distribute the trust principal by representation to my descendants who survive Mary." A year or so after Sam died, Mary decided to become inseminated with Sam's frozen sperm so that she could have his child. She became pregnant but unfortunately had a miscarriage. A second try was successful and she gave birth to X four years after Sam's death. Mary raised X. Upon Mary's death many years later, X was a grown adult. Because X was living on the distribution date (Mary's death), X is a class member and is therefore entitled to receive the trust principal.⁵⁵

⁵⁰ For an exposition of the class-closing rules, see RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 15.1. Section 15.1 provides that, "unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution."

⁵¹ See UPC § 2-705(g)(2). The same time limit applies for purposes of intestacy. See UPC § 2-120(k); § 2-121(h). If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

⁵² On the grieving process and the different stages of grief, see ELIZABETH KUBLER-ROSS, ON DEATH AND DYING (1969); Maciejewski, Zhang, Block & Prigerson, *An Empirical Examination of the Stage Theory of Grief*, 297 JAMA 716 (2007).

⁵³ The 36-month period also coincides with UPC § 3-1006,

under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. Another provision of the Code gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of all or part of the distribution of the estate. See UPC § 3-703. The Comment to this section is scheduled to be amended to refer explicitly to posthumous conception. Comparable authority is likely to be given trustees by a future amendment to the Uniform Trust Code. Compare CAL. PROB. CODE § 249.6.

⁵⁴ See UPC § 2-705 Comment.

⁵⁵ A case that reached the same result that would be reached under the Code is *In re Martin B.*, 841 N.Y.S.2d 207 (Surr. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father's widow around three and five years after his death) were included in class gifts to the deceased father's "issue" or "descendants." The children would also be included under the Code because the deceased father signed a record that evidenced his intent to be treated as the child's father, the distribution dates arose after the deceased father's death, and the children were living on the distribution dates.

Conclusion

As amended, the Uniform Probate Code now represents a comprehensive statutory approach to the class-gift and inheritance rights of children born as the result of assisted reproduction. The Commission-

ers have heard the pleas of the numerous jurists who have urged a legislative solution to this vexing problem. We hope that these new provisions will be considered by bar groups and state legislatures, all of whom in time will have to address this increasingly important topic.