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Subject: Martin M. Shenkman, Jonathan G. Blattmachr, Sandra D. Glazier, Kim Kamin & Thomas A. Tietz: Defining Descendants - Who Inherits Under Your Client's Wills and Trusts?

"Who a client names as their beneficiaries is fundamental to carrying out their dispositive wishes. How their estate planning instruments define, or in the absence of a definition, the state default rule, terms such as 'child,' "descendant,' and 'issue,' is critical to assure that the individuals a client wants included are included as beneficiaries, and those whom they don't want included are not. How modern medical reproductive techniques, social mores, adoption, nonmarital children, and other considerations are addressed in planning are complex and evolving considerations. This newsletter will in explore some issues inherent this planning and the possible implications for your client's estate planning."

In their commentary, **Martin M. Shenkman**, **Jonathan G. Blattmachr**, **Sandra D. Glazier**, **Kim Kamin** and **Thomas A. Tietz** explore the issues inherent in how a client's estate planning instruments address important terms such as child, descendant and issue. Click this link to access their commentary: Defining Descendants

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Defining Descendants: Who Inherits Under Your Client's Wills and Trusts?*

By: Martin M. Shenkman, Jonathan G. Blattmachr, Sandra D. Glazier, Kim Kamin, and Thomas A. Tietz

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* These materials relate to the presentation by Sandra D. Glazier, Kim Kamin and Martin M. Shenkman with Susan R. Lipp moderating, *Trusts & Estates Magazine Advisory Board Panel: Defining Descendants: Practical and Sometimes Surprising Considerations for Practitioners,* 49th Annual Notre Dame Tax & Estate Planning Institute (September 21, 2023).

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Introduction

Who a client names as their beneficiaries is fundamental to carrying out their dispositive wishes. How their estate planning instruments define, or in the absence of a definition, the state default rule, terms such as "child," "descendant," and "issue," is critical to assure that the individuals a client wants included are included as beneficiaries, and those whom they don't want included are not. How modern medical reproductive techniques, social mores, adoption, nonmarital children, and other considerations are addressed in planning are complex and evolving considerations. This article will explore some issues inherent in this planning and the possible implications for your client's estate planning.

Who Are a Client's "Descendants"?

Quite simply as the word suggests, a descendant is a person who descends from a particular ancestor. To "descend" means to extend or fall downward. Therefore, a descendant is a relative who is in one or more generations below the client, such as a child, grandchild, great-grandchild, etc.

Modern medicine has developed certain reproductive technologies, such as the utilization of in vitro fertilization technology which enables a child to be conceived outside of a womb. But Assisted Reproductive Technology ("ART"), as it exists today, can raise issues as to how "descendant" may be defined.[1] ART has advanced significantly in recent decades. What will the future hold? What new issues will have to be addressed to define descendants as new technologies unfold? Professionals may wish to consider drafting the definition of descendants carefully, with flexibility built into the definition, as it is impossible to predict what advancements there may be in the future.

Another factor that complicates the determination of who a descendant might be has been the evolution of the American family. The stereotypical American family for a long period of time was assumed by the estate planning field to consist of a male husband and a female wife, who married young, remained

[1] Kim Kamin, Esq., "Estate Planning for Modern Families," Tax Management Estate, Gifts, and Trusts Journal. Vol. 44, No. 1, Jan. 10, 2019.

married and together had 2-3 children the old-fashioned way.[2] But over time the composition of the family unit has evolved to the point that in today's environment there is no dominant form of family unit. The proportion of blended families (that is, where the household includes at least one descendant other than of both adult members of the household) has grown significantly. Fewer couples are getting married. Estimates are that 40% of children are born to women outside of marriage, *i.e.*, either single women or women cohabiting with an unmarried partner.[3] Same-sex marriage has been legalized and has become more common, although it is unclear what course the country may chart in the future regarding the law governing same sex marriage.[4] Each of these changes has had a profound impact on determining who will be treated as "children" and "descendants," and how those terms may need to be defined so that your client's estate plan reflects their wishes.

Finally, it cannot be overlooked how genetic testing like 23andMe, Ancestry.Com, MyHeritage DNA, and other such services have revolutionized the process of determining one's parentage. Clients and their family members are experiencing often startling revelations regarding their ancestry. Depending on how trusts are drafted, these revelations if shared with a trustee or other fiduciary, can upend the presumptions that have been made about who is and isn't a descendant.

So, the importance of defining "descendants" to many estate plans has grown more complex and important and will likely become even more complex and important in the future.

Why Determining "Descendants" Is So Important to Estate Planning

While it may seem obvious why determining the identity of a client's descendants can impact who inherits under their estate plan, it is nonetheless helpful to address this fundamental point. Many wills, trusts, beneficiary designations and other instruments, instead of designating a specific person to inherit, name a class of people such as the client's "children," "issue," or "descendants." Accordingly, how the term used is defined in such instruments (or, if silent, under state law) will determine who will inherit from the client.

A typical clause for distribution of assets from a trust might state: "*The Grantor directs the Trustee to set aside and divide the Grantor's Residuary Trust Fund into per stirpital shares for the Grantor's descendants who survive the Grantor, each such share so set aside for a descendant to be distributed to the Trustee of a Descendant's Separate Trust to be held as a separate trust...*" Therefore, who would qualify as a "descendant" under a provision like that is key.

Considerations of How "Descendant" Is Defined

Ordinarily clients will tell us who they want to consider as their own children in their instruments. It gets more complicated when we discuss with them their more remote descendants. Who counts as your client's grandchild? If the client's daughter is married and is the genetic mother, birth mother, and

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[2] In 1965, the average number of children per family was 2.44. In 2022, that average was 1.94. *See* https://www.statista.com/statistics/718084/average-number-of-own-children-per-family/ (last accessed on Nov. 5, 2023).

[3] *See* https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels (last accessed on Nov. 5, 2023).

[4] While the case *Obergefell v. Hodges*, 576 U.S. 644 (2015) legalized same-sex marriage, will it be overturned? *See* Carly Nairn, " Will SCOTUS Overturn Obergefell?," Feb. 13, 2023, https://www.superlawyers.com/articles/online-features/will-scotus-overturn-obergefell/ (last accessed on Nov. 5, 2023).

intended parent, then there should be no question that the child should be considered the client's grandchild. However, discussing points beyond this basic fact may become uncomfortable for clients and thus difficult. The following are several questions and points that may be raised with clients for their consideration. How they respond to the questions may provide the professional with insight on how to craft a definition of descendants for the client.

Should it matter if the client's embryo was fertilized by donor sperm and then implanted? In that case would the baby be considered the child of the client's spouse if it were not his sperm that fertilized the embryo? What if the clients use a donor egg, but the husband's sperm? Is the client carrying the embryo to term in the context of marriage even though she did not contribute genetic material to the baby sufficient to establish parenthood and attendant rights? Is it anyone's business? How would an attorney or future trustee even know?

If a client donated sperm to fertilize the egg of a person to whom they were not married, is that baby their child? What if client used their sperm to fertilize an egg of a person to whom they were married, but they divorced before the baby was born? Consider a situation where clients donated sperm and that sperm was frozen. The widow, after the client's death, used that frozen sperm to fertilize one of her[5] eggs after the client's death. Is that baby the deceased husband's child? Might it matter how long after death the fertilization occurred? Some trust documents or state law may provide that the baby may have to be in gestation on the donor's death, others might provide a specified time period following the client's death during which the baby would be considered a descendant of deceased donor. Rights may also be affected by what documentation was signed with the company storing the genetic material, or what the donor's will and trusts provided.

Consider clients who may have donated their egg or sperm to a third party who used that genetic material, and either their genetic material or that of another donor, to have a baby. Is that resulting child intended to be the donor/client's descendant? For a donor to a regulated sperm or egg storage facility, the answers may be quite clear in the donation contract that they have no parental rights. But what about more informal donations such as to help friends or family members to have a child?

Regardless of whether clients contributed genetic material to the child, if they treated the child openly as their child, should that affect the legal status of that individual as being the client's descendant? What if clients provided the trustee of a trust they created with an affidavit stating that that individual should be treated for all purposes as the client's child? Would that change the result? How might the applicable legal document and applicable state law affect the import of such an affidavit? What if the instrument states that a child of one of the parties (who was adopted by the other) shall be treated as our child, but the parties subsequently divorce?

For clients that adopted a child prior to that child attaining age 18, will that adopted individual be treated as the client's descendant? That may depend on the terms of the trust or other governing legal document and applicable state law.

A legal parent can always agree to voluntarily terminate their parental rights if the child is being adopted out. What if a court terminates a client's parental rights involuntarily? In most states, courts can grant

[5] In this article, the authors have sought to primary use gender neutral language but have used certain traditional gendered terms such as mother with accompanying "she" and related pronouns.

petitions to terminate parental rights for egregious wrongdoing such as neglect, sexual or other serious abuse, or attempted murder.[6] If that legal relationship of parent/child is terminated, *e.g.*, for child neglect, that child may not be treated as a child of that parent or may be treated as a child of the parent for purposes of inheriting from that parent but the parent will not be treated as an heir at law of the child.

Example: Grandma created a dynastic trust. Grandson neglected his children, was incarcerated, and eventually the court terminated his parental rights as to his natural minor children who had been placed in foster care and whose foster parents petitioned to adopt them. The trustee of the trust desired to take certain actions with respect to the trust, which would require that all beneficiaries sign off or that someone on their behalf sign off. Are the grandson's children still deemed beneficiaries of the trust? Do they have to sign off on the trust action? Since they are minors, will a court have to appoint a guardian for these minor children to act on their behalf since their father cannot do so legally in any event? The answers may depend on when the rights of these children were vested in the trust under the terms of the trust and state law. If the children had vested rights as beneficiaries before the grandson's parental rights were terminated, then they are beneficiaries, and a guardianship would have to be established so that they could be represented in the contemplated trust action.

A distinction should be made between the right of the adopted child to inherit from their biological parents and all other legal rights and obligations such as that for a child whose parental rights were terminated, as discussed in the preceding paragraph. For example, in New Jersey, when an adoption is granted by the court, it does not alter the child's ability to inherit from their biological parent's intestate estate.[7] Depending on state law, unless the biological parent specifically disinherits the child that was adopted by someone else, that child may still potentially inherit from them.

Providing clarity on these points in a will or trust may avoid resorting to the application of state law to resolve an ambiguity and assure the result the client wants. Also, expressly dealing with the details of who is a descendant may avoid a future change in the law creating a result the client may not have expected or desired.

Given the myriad of nuances implicated in all these points, trusts and other legal documents might consider including express language to hold fiduciaries, such as executors and trustees, harmless for any good faith determination of who is, or is not, a descendant.

Example: A client's grandfather created a trust that benefits the client and their descendants. Whether or not an individual is considered the client's child could have profound implications on the client's financial well-being, especially if the trust involved was quite large (*e.g.*, funds for the client's children could be distributed from the trust rather than be a financial burden for the client, etc.). Depending on the facts involved, there might be steps the client can take to support or even assure that the child involved is in fact to be treated as the client's child or descendant under that trust. For example, the creative use of powers of appointment that may be provided under a trust instrument may help a client achieve the goal of leaving funds to who they consider their descendants, even if the trust instrument does not include those individuals in the written definition. It may be feasible if the client's child does not qualify as a "child"

[6] *See* https://www.childwelfare.gov/pubpdfs/groundtermin.pdf (last accessed on Nov. 5, 2023).

[7] Pursuant to NJ Rev Stat § 2A:22-3 (2022) subparagraph a, "*…The right of the person adopted, and of such persons as legally represent him on his death, to take and inherit intestate personal and real property from his natural parents and their kindred shall not be altered by the adoption…*"

as defined in the instrument that the client may formally adopt the person to assure their qualification as a beneficiary. Including a provision that permits adoption beyond the age of majority may be helpful in achieving just such an outcome.

Simple Definition of Descendant

Here is a simple definition of "descendant" from a trust document. This article will evaluate the points raised, and some of the potential shortcomings of this simple definition.

"*References in this Trust Agreement to a person's "children," "grandchildren," and other "descendants" shall refer respectively to that person's children, grandchildren, and descendants, whenever born, as determined according to applicable governing law, except to the extent modified herein*."[8]

This definition is simple, but the reality is that many clients do not want to consider the implications and nuances of what modern families might comprise, or how modern medical technology can affect who might, or might not, be defined as a descendant. So, many wills and trusts do not get much deeper than the above definition. Many wills may not provide a definition of these terms at all, relying instead on state law. But as families and medicine continue to evolve, the complications that can ensue from determining who is a "descendant" under a particular will or trust has grown and will likely continue to do so.

Detailed Definition of Descendant

The discussions above, and the many questions raised, suggest that a more detailed definition of descendant might be useful. But the questions that are raised by modern medicine and the evolving concept of what a "family" might be, are not all answered by even the expanded definition below. As the definition of family continues to evolve, and medical technology moves forward, questions and uncertainties will undoubtedly arise beyond those addressed in this longer definition. Comments and questions will be raised for the practitioner to consider and discuss with their clients to illustrate some of the limitations.

The simple definition discussed above is a nice broad definition that could be sufficient if the client is willing to just rely on governing law. As with many definitions in estate planning documents, what local law provides will be critical. State laws differ on many points and those differences will continue while many states courts grapple with new medical concepts and evolving social norms. Also, consider that not merely state statutes but court cases interpreting those statutes will be relevant. This issue could become even more complicated if contained in a will that may be governed or interpreted under the law of the state where the testator resided at the time of death (which may have differed from what would have been provided by the laws of the state where the will was executed). Merely relying on statutes may require a complex analysis in certain situations. In addition, the political climate in states may cause significant differences in the definitions of descendants from state to state. Clients may move to a state that has laws with different definitions of descendants without understanding the implications to their planning.

"A biological child shall not be treated as a child or descendant of any biological parent of the child or as a descendant of the ancestors of such biological parent if the child has been surrendered for adoption

[8] The authors acknowledge and thank Interactive Legal Systems ("ILS") for providing the sample clauses used in this article. Information on ILS can be viewed on their website, https://interactivelegal.com/.

with the consent of such biological parent and the child's adoptive parent substitutes for the consenting parent under applicable state law."

This provision addresses when a child is adopted-out of the family. If the biological parent gives the child up for adoption, that child may potentially lose their rights as an intestate heir or as a legatee or beneficiary under the biological parent's estate plan. But state law will have an impact, as discussed above. It is possible that without an express statement in the document to the contrary, a client whose parental rights for one of their children was terminated, and the child was later adopted by another person, that child may still be considered an heir of the client whose rights were terminated (as well as the stepparent who adopted them). However, the client typically cannot inherit under intestate law from the child if their rights as a parent were terminated.

"A biological child born out of wedlock shall not be treated as a child of their biological parent who is a descendant of the Grantor, or as a descendant of such parent's ancestors unless and until the child's biological parents marry one another before the child attains eighteen (18) years of age."

This provision addresses nonmarital children. Note that statutes and trust instruments may use terms in describing nonmarital children that may be offensive like "illegitimate" or antiquated like "out of wedlock," such as in the sample above. Nonmarital children are incredibly common occurrences, but the idea can still sometimes elicit strong emotions depending on the client's beliefs. Historically the law did not even consider nonmarital children to be issue or descendants for inheritance purposes. However, starting in the 1970s several U.S. Supreme Court decisions found that defining a descendant purely on marital status violated the Equal Protection Clause of the 14th amendment.[9]

However, this can still be affected by state law as certain states may require additional steps for a nonmarital child to be considered a beneficiary.[10] The sample language above, which shows intent by the decedent to disinherit a nonmarital child, would achieve that goal. However, this provision may be the opposite of what a client wishes to have happened. This highlights the important point that these types of provisions are vital to read in any document. Practitioners may wish to encourage the client to review all definitions in the document so that the client can confirm that no matter what is written, it conforms with the client's wishes. [11]

Also, consider the statistics. As discussed above, there are estimates that 40% of births in the U.S. are to unmarried women (and in some states it is higher than 50%).[12] That is a high percentage. With an increasing number of trusts being created as long-term dynastic trusts, the probability that a future

[9]For additional discussion, *see* "Planning Considerations for the Post-Nuclear Family," by Bobbi J. Bierhals and Kim Kamin, published in *Trusts & Estates*, pp. 17-24, Aug. 2016.

[10] Florida Courts, for example, have determined that state law requires direct and unequivocal acknowledgement of a nonmarital child by the parent. *See* "Establishing Paternity for a Child Born Out of Wedlock," by Benjamin Sunshine, https://www.wealthmanagement.com/estate-planning/establishing-paternity-child-born-out-wedlock, Oct. 26, 2021 (last accessed Nov. 5, 2023).

[11] For example, Peter Bing, who established an irrevocable trust in 1980, used the term "grandchildren" as his beneficiaries. But when his son died with at least two nonmarital children who wanted to claim under the trust, he had to clarify to the trustees that it was not his intention to include the two children who had never been recognized by his son during his lifetime. https://nypost.com/2021/07/03/liz-hurleys-son-damian-cut-out-of-familys-multi-million-dollar-trust/ (last accessed Nov. 7, 2023).

[12] *See* https://www.statista.com/statistics/276025/us-percentage-of-births-to-unmarried-women/ and https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm (both last accessed Nov. 5, 2023).

descendant will have nonmarital children may be significant. But the reality is that many clients creating wills and trusts are uncomfortable discussing this possibility. Might the approach provided in this sample provision disinherit a client's daughter's child because the father of the child refuses to get married? Is that fair to the child? Regardless of "fairness," the client will need to consider whether that is the result they would want. It is also increasingly common for parents to intentionally be "single parents by choice." Is forcing an individual to enter into temporary marriages with random friends or acquaintances before their children are born simply to ensure the children can inherit under the instruments really what the client wants?

"Adoptions and marriages that are recognized under this Trust Agreement shall not affect prior distributions or other interests that have previously vested in possession, but they shall enable a person to receive distributions from or remainder or other interests in a trust still in existence. The descendants of a person who is treated as a child or descendant under this Article shall also be treated as descendants of such person's ancestors. The descendants of a person who is treated as not being a child or descendant under this Article shall also be treated as not being descendants of such person's ancestors.

The term "child" or "descendant" (and any plural form thereof) in this Trust Agreement shall include any biological child or descendant of the Grantor (who has not been adopted by a person who is not a descendant of the Grantor unless the adoptive parent is married to a descendant of the Grantor or unless the adoptive parent was married to a descendant of the Grantor who died prior to the adoption) whose conception has resulted from the use of a gamete (or zygote consisting of a gamete) of a deceased descendant of the Grantor and gamete (or zygote consisting of a gamete) of the Grantor's deceased descendant's surviving spouse and that posthumously conceived descendant has been born or is in utero by the time of the determination of the descendants who would take property outright or for whom it would be placed into separate trusts for descendants of the Grantor under this Trust Agreement; provided, however, that proof that such posthumously conceived person is the biological child or descendant of the Grantor shall be established by DNA or equally reliable testing**."**

This provision includes that adoption of a person who would otherwise be a "descendant" may cut off that person's rights under the client's estate. It also includes that a biological descendant would include a child resulting from the use of ART, even if that child was born posthumously. The term "gamete" above would mean ova or egg cells in the case of a female, and sperm in the case of a male. If a client's descendant froze their gametes and a child was conceived using that genetic material and genetic material of their surviving spouse, and if the child was born before a determination was made as to who a descendant was under the client's will or trust, that child would inherit. But if, for example, the client's daughter's egg was fertilized after her death by donor sperm, *i.e.*, from someone not married to her, then the resulting child may not inherit.

Assisted Reproductive Technologies ("ART")

ART techniques are modern medical procedures typically used to treat low fertility or infertile couples, but they are also widely used in other situations. Approximately 1-2% of babies born in the U.S. each year are

estimated to result from ART.[13] ART includes various treatments that are described below.[14]

Modern reproductive technologies have had a tremendous impact on many seeking to have children. These developments have also created new complications and issues for estate planning. This may be just the beginning. How might future medical developments further transform this new and already complex field? How will future reproductive technologies impact the determination of who is a descendant and will inherit under which documents? The philosophical, moral, and religious implications of these techniques are also significant but beyond the scope of this article.

From an estate planning perspective, under what circumstances should children born of these techniques be considered "descendants" of which persons? Is a person donating genetic material to facilitate the birth a parent under the law? Or does a surrogate who carried the fertilized egg for the clients have parental rights? The answer is complex and will depend on the intent of those involved, contractual agreements that may have been signed, state law, the terms of wills and trusts, and perhaps other factors.

ART Techniques, Terminology and Concepts

The techniques, and some of the additional terminology of ART include the following:

- *Artificial insemination* may be used, for example, by a single mother by choice, by a couple struggling with fertility and in same-sex partnerships. Semen could be obtained from a member of the couple, from a donation by a friend or family member, or from a sperm bank. Questions that may arise from these procedures include: What parental rights, if any, does a sperm donor who is not an intended parent have? The corollary to that is what rights will that child have to inherit, if any, from the donor? Another issue that arises is if the insemination is completed after the sperm donor died (and how long after), how might that affect the child's rights to inherit?
- *In-vitro fertilization ("IVF")* is another procedure used where insemination occurs in a petri dish and then the resulting zygote(s) or pre-embryos are implanted or frozen for future use. There are lots of options for whose gametes might be used to create the zygote. They may belong to both of the intended parents or be provided by a known or anonymous donor. In addition to the issues noted for artificial insemination, with IVF what parental rights the egg donor may have may be a question. There are also questions to consider regarding the control and ownership of the zygotes and embryos

[13] *See* Centers for Disease Control and Prevention 2021 data at https://www.cdc.gov/art/artdata/index.html; *see also* https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbers# (both last accessed on Nov. 5, 2023). Worldwide, over 9 million infants are estimated to have been born utilizing ART since 1978 according to the National Center for Biotechnology Information. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8907601/ (last accessed on Nov. 5, 2023). The percentage of Americans who report undergoing fertility treatment (or knowing someone who has) varies markedly by education and income. About 43% of those with a bachelor's degree report having had some exposure to fertility treatment – either through their own experience or that of someone they know – and the share rises to 56% among respondents with a postgraduate degree. https://www.pewresearch.org/short-reads/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/ (last accessed on Nov. 5, 2023).

[14] For additional information on various ART techniques, *see* "Assisted Reproductive Technology (ART) Techniques," by Meaghan Jain; Manvinder Singh, posted Nation Library of Medicine, Nation Center for Biotechnology Information database, last updated Nov. 28, 2022 https://www.ncbi.nlm.nih.gov/books/NBK576409/ (last accessed on Nov. 5, 2023).

when cryopreserved for later use. Are zygotes property of their donors?[15] What rights the child may have to inherit from the egg donor is the corollary to that.

- *Surrogacy* is an arrangement in which a person other than an intended mother carries the child to term and gives birth to the child. There are two types of surrogates. In a "gestational surrogacy" the surrogate's own egg is fertilized with sperm, such that the surrogate is the biological mother of the resulting child. Conversely, the surrogate in a "gestational carrier" arrangement has no genetic relationship with the child and carries to term an in-vitro fertilized embryo produced with the genetic material that is from one or both of the intended parents or that they have obtained elsewhere.[16] The carrier may or may not have any familial relationship with the intended parents. What parental rights might a gestational carrier have to the child, if any? The corollary to that is what rights, if any, does the child have to the gestational carrier? The questions of what parental rights a gestational surrogate may have to the child, and what rights, if any, the child may have to a gestational surrogate may be more nettlesome than for a mere gestational carrier since it is the surrogate's own gamete that resulted in the baby. Another point to consider is that surrogacy may include compensation. This nuance can add additional complications, as certain states have legal hurdles, or outright ban the practice of compensated surrogacy. Practitioners may wish to ask the client how the surrogacy was completed, and review state law to determine the effect on parentage.[17]
- *Gametes* (as defined earlier in this article) are reproductive cells that only contain half of the genetic material required. When fertilization occurs, male and female gametes join creating a zygote. Donors may donate gametes, sperm, or egg, to a bank or directly to a person seeking to have a child. The legal arrangement and documentation of that process may affect the parental rights of the donor, and of the resulting child to that donor, if any.

Use of the above techniques has created three concepts in determining the rights of the donor of genetic material and of the child. In any situation these may occur individually or in some combination:

1. Genetic parentage resulting from the contribution of gametes, either egg or sperm, to the birth of a child.
2. Gestational parentage resulting from the carrying of the child through birth.
3. Functional parentage resulting from the caring for and raising of the child by an intended parent who coordinated the use of ART to have a child.

Uniform Parentage Act ("UPA")

The UPA endeavors to provide a uniform legal framework for determining paternity of minor children. This may affect children born to married couples or unmarried couples. The UPA may permit more than two people to

[15] The Michigan Court in *Markiewicz v. Markiewicz* found a Zygote to be marital property subject to equitable distribution. Other states may have different standards. For additional discussion on this point, *see* "Karungi v. Ejalu: Zygote, Embryo, Fetus, Oh My!," by Sandra D. Glazier, Esq., Leimberg Information Services Estate Planning Newsletter No. 2902 (Aug. 30, 2021) and "Markiewicz v. Markiewicz: Zygotes Revisited – Property or Something Else," by Sandra D. Glazier, Esq., Leimberg Information Services Estate Planning Newsletter No. 2954 (Apr. 20, 2022).

[16] From Kim Kamin, *A Potpourri of Estate Planning Considerations for Modern Families*, Montana Tax Institute Nov. 13, 2023, pp. 18-19.

[17] For discussion regarding compensated surrogacy and the legality of the practice in different states, *see* https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (last accessed on Nov. 5, 2023).

be legally recognized as parents of a particular child. If a man donates sperm that is used in the birth of a child, whether that man would have rights as a parent will depend on the intent he had to be a parent or not at the time of the donation.

The UPA has been revised several times since it was first introduced. The most recent revision of the UPA was completed in 2017. However, only seven states have enacted the recent version of the UPA, and many jurisdictions continue to reflect previous iterations of the UPA.[18] The UPA revisions created in 1973 and 2002 were drafted with gender-specific terms and many concerns of same-sex couples were not addressed in the language of those versions of the uniform statutes.[19] Some jurisdictions that enacted the UPA made varying changes to the standard provisions of the act. Thus, state laws still differ considerably on these matters and practitioners may wish to discuss with the client the state law that may apply (*e.g.*, is it the state where the clients currently reside? Could it be the state where the child was conceived? What if the clients moved to a different state during pregnancy, is it the state where the child was born? Etc.) and then analyze what the laws of the applicable state provide.

Posthumous Conception

Traditional or historic posthumous conception may have been simple compared to modern scenarios.

Example: A married couple conceived a child before the death of the husband. Husband then died and thereafter the child was born. Since the child was conceived during the marriage and the husband was aware (or presumed to be aware) of his wife's pregnancy during his lifetime, the child born after his death would be deemed his child for inheritance purposes. A similar scenario would occur if the mother were, for example, in a car accident in which she did not survive, and the fetus was rescued.

The advances in ART have permitted conception to occur after the individual donating genetic tissue has died, hence the term "posthumous" conception. This can occur under several circumstances and raises a variety of legal issues. Consider the following examples.

Example: A male is diagnosed with cancer and before treatments begin, he freezes sperm for future use with his wife in the event that the cancer treatments render him sterile. He later dies and following his death his wife uses the frozen sperm to fertilize an egg and carry a baby as they had both wished.

Example: A male dies, or is incapacitated, and his sperm are harvested without him having given consent during his lifetime or when he had legal capacity to do so. Following his death his wife uses the frozen sperm to fertilize an egg and carry a baby as she indicated that they had both wished.

Example: A male is injured and rendered legally incompetent. He is the scion of a wealthy family and the beneficiary of a very large trust. The trust provides that on his death the assets of the trust will pass to his

[18] The seven states that have enacted the 2017 revision of the UPA are California, Colorado (substantially similar), Connecticut, Maine, Rhode Island, Vermont, and Washington. A listing of states that have enacted different versions of the UPA can be viewed at https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f#LegBillTrackingAnchor (last accessed on Nov. 5, 2023).

[19] *See* "The New Uniform Parentage Act of 2017," by Jamie D. Pedersen, Apr. 1, 2018, https://www.americanbar.org/groups/family_law/publications/family-advocate/2018/spring/4spring2018-pedersen/#:~:text=For%20example%2C%20section%20703%20of,Hodges%2C%20135%20S (last accessed on Nov. 5, 2023).

issue, and if no issue to charity. His wife has his sperm harvested without him having given consent when he had legal capacity to do so. Prior to his death his spouse uses the frozen sperm to fertilize an egg and carry a baby for the sole purpose of creating a descendant who can benefit from the large trust fund above. The spouse's hope is that this will enable them to indirectly benefit through the child being born.

Example: A male has frozen his sperm. He then dies and leaves to his wife all of his property in the estate (which under the governing law of the state would include the frozen sperm). Assume five years later his spouse learns that any descendants of her late husband would be beneficiaries of a large trust fund. At that time, she decides to undergo IVF to have his sperm fertilize an egg and carry a baby for the sole purpose of creating a descendant who can benefit from the large trust fund above. Her hope is that this will enable her to indirectly benefit through the child being born.[20]

These examples raise many issues. Is it appropriate or even legal to harvest genetic material if someone has not consented? What is required to support "consent" to such actions? How long after death might the genetic material of someone whose consent wasn't specifically provided be used? What are the legal implications to whether the resulting child should be deemed a descendant of the person contributing genetic material while alive?

Similar examples could be created for the harvesting of genetic material from a female for transplant after fertilization into a gestational surrogate.

What Might Estate Planning Documents Address?

Should wills and trusts address whether a child born from genetic material be considered a valid descendant? Should they address, or differentiate, whether the person donating the genetic material consented in writing to the use of their genetic material in a particular manner? Should there be a time limit that the child should be in gestation before death? Should there be a time limit that the child should be in gestation or born within some maximum number of months or years following death? If so, how long? How will such provisions, if addressed, be affected by the terms of agreements with the donor bank holding the genetic materials? Should there be a requirement that a person function as a parent to be treated as a parent of a child?[21]

Should health care proxies and medical powers of attorney expressly forbid, permit or perhaps encourage, depending on the client's wishes, an agent to have genetic material harvested and frozen? Should health related documents authorize an agent to expressly execute an agreement with a cryopreservation firm? Should the agent under the financial power of attorney be authorized, or perhaps directed, to pay for such services as selected as a result of the health care agent's decision?

In addition to traditional estate planning documents (such as in a power of attorney, health proxy, will and trust), documents such as contractual documents with a surrogate, storage facility, etc., it may be

[20] Additional points to consider regarding inheritance for a posthumously conceived child, such as social security benefits for children of the decedent, are discussed in "Family Law and Estate Law - Reproductive Technology - Use of Artificial Reproductive Technologies After the Death of a Parent," by Lisa Medford, University of Arkansas at Little Rock Law Review, Vol. 33, Issue 1, Article 5, 2010.

[21] For additional discussion regarding concerns on drafting provisions addressing conception after death, *see* "Children of Assisted Reproduction," by Kristine S. Knaplund, University of Michigan Journal of Law Reform, Vol. 45, 2012. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1019&context=mjlr (last accessed on Nov. 5, 2023).

important to define who will be treated as a child beyond what is necessary for determining inheritance rights for that child. The contracts entered with a surrogate should clearly indicate whether the surrogate has any parental rights and whether the child will have any inheritance rights from the surrogate (understanding that state law may not respect such agreements). Agreements with storage facilities should indicate who has the right to determine the use and disposition of genetic material. For example, should the spouse of the donor have that right? Will there be limits?

Children who are Nonmarital

Historically, a nonmarital child might not have inherited from either parent. Now, however, a nonmarital child who is the client's biological child may be presumed under state law to be a descendant who can inherit, unless the will or trust expresses a clear intent otherwise.[22] DNA testing might be used to confirm or establish parentage. The father may expressly in writing acknowledge that the child should be treated as his. Some state laws base inheritance rights on whether the purported father functioned as a parent to the child. There could be considerable differences in what that phrase may mean. This all could be uncertain and could trigger litigation to determine the consequences based on the facts and circumstances. Therefore, if feasible, it is preferable for the client to address the matter with specificity in their will and trusts or even more so, adopt the child if there is uncertainty and that is an option.

Consider the following sample clauses as an alternative for addressing nonmarital children:[23]

Marital Presumptions:

Children Born During Marriage. A person born to an individual who was married at any time during the ten months prior to the person's birth shall be treated as the child of an individual who gave birth to the child and that individual's spouse (the "parents"), except the individual shall not be treated as a child of an individual if such individual (i) proves that they did not contribute to that child's DNA and (ii) states in their will or in a signed instrument delivered to the trustee during that individual's life that the child shall not be treated as their child.

Nonmarital Child Alternative 1: Requires Affirmative Consent by Non-Birth Parent

Nonmarital Children. A person born to an individual who was not married at any time during the ten months prior to the person's birth shall be treated as the child of (A) an individual who gave birth to the child (other than an individual who was contractually serving as a surrogate), and (B) another individual from whom the child inherited one-half of their DNA, but only if that individual (i) at any time marries the individual who gave birth to the child, (ii) properly files an acknowledgment of paternity with the appropriate state record's office, or (iii) states in their will or in a signed instrument delivered to the trustee during his life that the child shall be treated as their child.

Nonmarital Child Alternative 2: Functioned as a Parent

[22] For example, NJ Rev Stat § 3A:2A-41(b) (2022) states, "*If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person… In cases not covered by subsection a., a person is the child of its natural parents regardless of their marital status…*"

[23] Sample language utilized with permission from Wendy Goffe and Kim Kamin, *The Tools & Techniques of Estate Planning for Modern Families*, Leimberg Library (4th ed. Forthcoming 2024).

Nonmarital Children. A person born to an individual who was not married at any time during the ten months prior to the person's birth shall be treated as the child of (A) the individual who gave birth to the child, and (B) any other individual from whom the child inherited one-half of their DNA if the individual functioned as a parent of the child unless the individual states in their will or in a signed instrument delivered to the trustee during their life that the child shall not be treated as their child. An individual's payment of support for a child, without more, shall not be sufficient to consider that individual as functioning as the child's parent pursuant to this subparagraph. The independent trustee's determination of whether an individual has functioned as a parent of the child shall be binding and conclusive, absent bad faith.

Children Who Are Adopted

State law may now treat an adopted child no differently than a biological child for inheritance purposes.[24] However, older trust documents may either expressly exclude an adopted child or be subject to the former so-called "stranger-to-the-adoption rule" which limited children to inherit only from a parent who has legally adopted them and not from any ancestors or collateral relatives.[25]

Issues relating to adoption can also be particularly thorny when a client or their descendant wants to adopt a stepchild, foster-child, or another child with whom they have formed an emotional parent-child relationship. A minor child can be adopted only when both living biological or legal parents have provided explicit consent which generally requires that one parent: (i) has their parental rights terminated by agreement or by a court, or (ii) is deceased. Some states and the UPC have established special intestacy rules for children adopted by the spouse of one of the genetic parents. While a stepparent can adopt a child only once the other parent's rights have been terminated, either voluntarily or involuntarily, these special rules preserve the ability of the child to inherit from the biological family. Under this exception, the child may inherit from the adopting stepparent and the stepparent's family, as well as from both genetic parents and their families. Perhaps a step-parent wants to adopt a child, but a basis for terminating the natural parent's rights can't be established. As a drafting tip, perhaps clients might be encouraged to expand limitations in the definition of descendants in their documents to include that a child may be adopted past the age of 18 until at least age 21, or better yet 25 since it can take time for an adoption to be initiated and finalized.[26]

Moreover, courts are still divided on whether they are willing to allow inheritance from a non-parent relative based on adult adoption.[27] Under Illinois law, for example, a person adopted after reaching age 18, who never resided with the adoptive parent before attaining the age of 18 years, is not considered a descendant of the adoptive parent for purposes of inheriting from ancestors or relatives of the adoptive parent.[28]

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[24] *See e.g.*, NY Est Pow & Trusts L § 2-1.3 (2022), which in paragraph a(1) states "*(a) Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributes (or by any term of like import) of the creator or of another, includes: (1) Adopted children and their issue in their adoptive relationship...*"

[25] *See* Kim Kamin, *A Potpourri of Estate Planning Considerations for Modern Families*, Montana Tax Institute Nov. 13, 2023, p.15.

[26] See Kim Kamin, *A Potpourri of Estate Planning Considerations for Modern Families*, Montana Tax Institute Nov. 13, 2023, p.16.

[27] *See* Susan Gary *et al*., *Contemporary Trusts and Estates*, ch. 2 (3d ed. 2016).

[28] *See* Probate Act of 1975, 755 Ill. Comp. Stat. 5/2-4(a).

Restricting or Enlarging the Scope of Who May be a Descendant

Wills and trusts, instead of designating a specific person to inherit, may name a group or class of people such as the client's "children," "issue," or "descendants." How the term is defined will determine who might inherit from the client's estate when they die. There are situations where a client may choose to deliberately restrict, or conversely, increase the breadth of the definition of the group who might be included in the definitions. For example, a client may wish to limit their largess to those who remain members of a particular faith. Another category that raises potential definitional concerns are children of a person or a couple who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary or otherwise ("LGBTQ+").

A suggestion of this article, which will be explored in different contexts below, is that for some clients, creating a new role to include in the client's documents, such as a "special trust protector" holding a limited or special power of appointment to determine who should be included or removed from the definition of "issue" or "descendant" in the governing legal documents may be worth considering. There remains uncertainty in many situations from religious beliefs to lifestyle choices that could affect the determination of who should be treated as an heir or beneficiary. Those uncertainties are compounded by advances in medical technology that have created issues that would have been viewed as science fiction only a few decades ago. No doubt medical technology will continue to advance and new issues and concepts will arise in future decades. All of this is further complicated by the evolving composition of the American family.

Can Clients Limit Their Descendants to Only Members of a Particular Faith?

What issues might arise if clients wish to define "descendants" as comprised only of members of a particular faith? It can be a difficult task for practitioners to interpret and apply religious heir restrictions, especially for a client of faith with which the practitioner is not familiar. Can the client legally impose this type of restriction? If they could legally impose such a restriction, how would the client wish to define what a particular faith is? Many faiths have different levels of observance and different sects within them. How would the client define what it means to be a member of that particular faith? What can objectively be done to prove that someone is, or is not, a member of a particular faith? Who would be charged with making such a decision? If the client prefers that a religious body rather than a secular court make the decision, can practitioners include language in documents mandating that be done? If that might be akin to a mandatory arbitration of the issue, would that be valid? For example, in some states the parties affected must agree to mandatory arbitration for it to be enforceable. Finally, are you, as a practitioner, comfortable drafting documents that include restrictions of this nature, or would it be more appropriate to refer the client to someone who might be more knowledgeable about effectively implement the client's desires? These are issues the practitioner and client might need to grapple with when the client's religious beliefs are a significant factor in their life.

Legal Issues Associated with Restricting Bequests to Members of a Particular Faith

Does restricting the definition for descendants to individuals who are members of a particular faith, or who marry only within a specified faith, violate the constitutional rights of someone who is thereby excluded? Or instead, is this the client's prerogative to distribute their wealth how they choose to? Clauses limiting included heirs to members of a particular faith may raise questions as to the constitutionality of such a clause. Potential heirs excluded under such provisions have argued that a religious restriction on marriage, for example, violates constitutional safeguards under the Fourteenth Amendment to the Constitution that protects the right to marry.

Courts have held clauses that determine if potential beneficiaries qualify for distributions based on religious criteria enforceable if the potential beneficiaries have no vested interest in the assets.[29] Another Court upheld the provisions of a will that conditioned the bequests to the testator's sons upon their marrying women of a particular faith. In that case the Court held that such clauses did not offend the Constitution of the state of Ohio or of the United States.[30] The courts' opinions in such cases are narrowly tailored to the specific facts, since individuals are generally allowed to disinherit an heir in most jurisdictions (with the exception of a spousal elective share or a community property interest), but even a disinherited child may, under some circumstances, still retain a right to receive a family allowance or exempt personal property. The reasoning of the Courts that have upheld such restrictions have found that such restrictions are not a restriction on the Constitutional right of an heir to marry, but rather on the right of testators to bequeath property as they wish. Those Courts have viewed the right to receive property by will as a creature of the law, and not a natural right or one guaranteed or protected by the Constitution.[31]

These issues can be quite nuanced. Would a restriction on marriage into a particular faith be viewed only as a partial restraint upon marriage? If the condition were that the beneficiary does not marry anyone, the restraint would be general or total and might be held to be contrary to public policy and void. Some courts have held clauses that limit inheritance based on the religion of an individual to be void against public policy. As a result, some commentators have recommended avoiding a religious based reason for the disinheritance clause, if possible, to minimize the likelihood of courts interpreting the clause finding it to be void as against public policy. Even if a religious restriction is likely to be found to be enforceable, might the risk of a challenge, a potentially public lawsuit, etc. convince some clients to try a different approach? For a client that expresses the desire to implement religious restrictions on the definition of descendants, the practitioner might consider having a comprehensive discussion of the potential implications and provide the client with materials that discusses the risks and concerns of including those restrictions in their planning.

Emotional Implications of Such Restrictions on the Family

Apart from the legal issues, what about the emotional implications of such a clause? Does such a provision give the child, grandchild, or other heir the equivalent of a "kick in the pants on the way out the door?" In other words, if the client's true wish is that the descendants or other heirs remain faithful to a particular religion, the harshness of a disinheritance may serve to only assure that the disinherited person never

[29] *Feinberg v. Feinberg* (*In re Estate of Feinberg*), 235 III. 2d 256 (2009).

[30] *Shapira v. Union Nat'l Bank 39 Ohio Misc. 28 De Silva 90-D.C. Colombo 2,187* (1974).

[31] The court in *Shapira* stated, *"Basically, the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by either the Ohio or the United States constitution."*

returns to the faith. The pain and hurt of the disinheritance may end up solidifying what may have only been an exploration of different faith options. What might this type of disinheritance do to the family relationships among the person affected and other family members? Will the disinherited child be able to sustain a relationship with the children who are not disinherited? Will any or all those affected view the benefactor's action in a negative light? Might that adversely influence the observance of those who might have otherwise remained faithful to the religion?

Creating a Religious Purpose Trust

An alternative approach practitioners might consider is for the client to create a single trust for all heirs/beneficiaries and mandate that the funds in that trust be used for the costs of obtaining a religious education, attending religious summer camps, taking relevant religious studies, religious institutional membership, religious travel, etc. In other words, this trust could use its assets as a carrot to encourage religious observance that the settlor desired for their heirs. But this approach may only partially address the question. Should the remainder of the estate be used for all the heirs regardless of religious affiliation? Is the remainder of the estate put into a separate trust for each heir or one single trust? How are those funds to be divided? What are the costs of creating and administering an additional trust? Who will be named trustee of the religious trust? Will that person face pressure and perhaps even harassment by the heirs that have moved away from the particular religious path? Would it be helpful if the religious purpose trust provisions were part of separate share trusts as opposed to a pot trust benefiting all beneficiaries?

Islamic Estate Planning May Raise Unique Issues on Determination of Heirs

The discussion above addressed the determination of who is a descendant with consideration to religious provisions generally. The following discussion will review specific implications to how a dispositive plan compliant with Islamic law may involve determination of who is a descendant.

The Sharia laws of inheritance are somewhat like an intestacy statute. One-third of the decedent's estate may be distributed as the decedent wishes. But the remaining shares of the estate must be distributed as mandated under Islamic law. That law is derived generally from the Quran, Chapter 4 verses 11-12.[32] The inheritance regime under Islamic law creates several potential issues. The residuary inheritance shares (*i.e.*, after the one-third discretionary share above) is restricted to Muslim heirs. This might raise a question as to the constitutionality of such a clause. It also raises the difficult task of interpreting and applying such a restriction, as discussed above.

Assuming that such a bequest is not challenged, or if challenged that the court upholds the dispositive plan, there may remain the need to determine who is in fact Muslim to be able to inherit. Who should make that determination? If there is a disagreement as to the status of a potential heir, a secular court may not have the knowledge to handle such a matter, and what happens if there are competing expert opinions?

Another consideration is that Sharia law prescribes specified shares of the estate to be distributed to certain heirs. What happens if those shares will change depending on which heirs are alive at the moment of the decedent's death? So, while a will for a Muslim testator may specify that the dispositive provisions

[32] Cf. Numbers 27: 1-11 of the King James version of the Bible. Some, who strictly follow the Bible, use revocable trusts to avoid the requirements of inheritance set forth in Numbers.

shall adhere to Sharia law, the will may specify who those heirs will be at the date of execution. But those heirs may change before the testator dies because of changes in the composition of the heirs alive at the moment of death. Thus, to implement a Sharia compliant dispositive scheme, the plan may need to be interpreted and cemented upon a decedent's death to determine who exactly is entitled to inherit and in what fractions under Sharia law.

Planning Considerations for a Sharia Compliant Estate Plan

It might be helpful for the trust to delineate who the grantor's living Muslim heirs are at the time of creation and include a mechanism for determining the final shares on the date of death in the event that:

- One or more of such individuals aren't alive.
- Additional Muslim heirs are born to the grantor after the execution of the dispositive instrument.
- There's a dispute relating to the eligibility of an heir to inherit (*e.g.*, that heir is no longer Muslim).

It may be feasible to limit the involvement of secular courts in these religious issues by using a pour-over will and a funded revocable trust that will serve as the primary dispositive document. A further step may be possible to bolster the proper application of Sharia law by requiring issues be resolved by appropriate experts in Islamic law, rather than by a secular court. A special appointment might be made under the revocable trust of a person, perhaps referred to as a "Sharia Trust Protector," who, in a non-fiduciary capacity, may be empowered to make the decisions relevant to the application of Sharia law. This person might be an expert in Sharia law, such as an independent, unrelated, Muslim attorney, Imam, or a panel of such experts. The reason for the suggestion that such a role be crafted (if state law permits) to be in a non-fiduciary capacity, is that may serve to eliminate any fiduciary obligation such person might be deemed to have with respect to the heirs as specified in the instrument at the time of execution. If there is uncertainty as to how the estate should be divided among Sharia heirs at death, it may be more efficient and less prone to issues that might arise if persons not steeped in Sharia law are empowered to make the determinations. This determination can negatively impact or eliminate a potential beneficiary's inheritance share. Therefore, granting the Sharia Trust Protector a limited power of appointment over estate assets to appoint them in conformity with Sharia law, in a non-fiduciary capacity, may avoid issues as to fiduciary duties owed to any named beneficiaries.

LGBTQ+ Considerations May Affect Who is Deemed a Descendant

If your client or any member of the client's family is LGBTQ+, the law and conventional drafting may not adequately address the unique considerations that can arise as to who should be considered a descendant. There are estimates that indicate 37% of LGBTQ+ couples in America are currently caring for a child. There are approximately three million LGBTQ+ Americans that have had a child and as many as six million American children and adults that have an LGBTQ+ parent.[33] Thus, it may warrant special steps to carry out a client's intended wishes as to who should be considered their "descendants." For example, how might a beneficiary be defined to assure that desired heirs are in fact included, and are not inadvertently disinherited? What if a particular heir is designated by name, but thereafter undergoes a name and/or gender change? Could that result in that heir unintentionally being excluded?

As discussed in more detail above, children could be adopted or born through surrogacy. This could result in neither the client, nor the client's spouse, being biologically related to the child. For example, two

[33] *See* additional information and statistics at https://williamsinstitute.law.ucla.edu/publications/lgbt-parenting-us/ (last accessed on Nov. 5, 2023).

women are married, and one bears a child using donor sperm. The other spouse contributed no genetic material to the child, so her parentage may be an issue in terms of defining that child as her descendant (depending on state law).[34]

While an "equitable-parent doctrine" may be recognized by some states, such that a non-biological parent might be able to assert rights as a parent in custody and parenting time proceedings, that may not suffice to protect the client's estate planning goals. Further, that legal doctrine might be limited to those who were living as a married couple but who could not marry because of legal restrictions at that time.[35]

Additional Issues and Concerns Affect the Determination of Who Is a Child

Specifically naming a child in the client's will and stating that the named child is to be treated as the client's child may or may not resolve the issue of the child inheriting assets from the client. There is always the potential problem that if the will is not revised to reflect the new child or relationship, the intended beneficiary could be omitted. What if the will or trust is held invalid in a challenge?

Another concern for LGBTQ+ clients is how divorce affects their estate planning if documents are not updated before their death. A case in Michigan, *In re of Grablick*,[36] addressed the effect on a stepchild when her stepfather, who had not adopted her, died. The stepchild's mother married stepfather in the 1990s. Stepchild was treated as the daughter of stepfather in estate planning documents created in 2005. Mother and stepfather divorced in 2019 and stepfather died several months later, without updating documents. Stepchild sued to assert her right as a child of the stepfather due to wording in the 2005 documents. The court determined under Michigan law that relatives of a divorced spouse, unless those relatives are also biologically related to the decedent, are considered as pre-deceasing the decedent, effectively disinheriting them.[37] While this case did not involve an LGBTQ+ couple, the decision could affect them. Consider the example of the two married women above, where one spouse has no biological relation to their child. If they were to divorce, and the non-biologically related spouse did not update her estate planning documents, it is possible that she would inadvertently disinherit her own child.

Taxes may present another issue. For example, for a couple who resides in a state with an inheritance tax, if the child is not deemed a child under state law, any bequests to that child, even if preserved by an express provision, may be subject to state inheritance tax. Had the child qualified as a child under state

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[34] New Jersey, for example, defines "child" in NJ Rev Stat § 3B:1-1 (2022) as "'Child' means any individual, *including a natural or adopted child*, entitled to take by intestate succession from the parent whose relationship is involved and excludes any individual who is only a stepchild, a resource family child, a grandchild or any more remote descendant… [*emphasis added*]." Therefore, a same-sex spouse with no biological relation to the child, unless that spouse has formally adopted the child under NJ law, they may not be considered that spouse's child for purposes of the statutory definition.

[35] For example, Michigan Supreme Court recently found "A person seeking custody who demonstrates by a preponderance of the evidence that the parties would have married before the child's conception or birth but for Michigan's unconstitutional marriage ban is entitled to make their case for equitable parenthood to seek custody." *Pueblo v. Haas*, Docket No. 164046, Decided July 24, 2023. https://www.courts.michigan.gov/4a1846/siteassets/case-documents/opinions-orders/msc-term-opinions-(manually-curated)/22-23/pueblo-op.pdf (last accessed on Nov. 5, 2023).

[36] *Banaszak v. Grablick (In re Tr. of Grablick*), Nos. 353951, 353955, 2021 Mich. App. LEXIS 7032 (Ct. App. Dec. 16, 2021).

[37] For a more detailed analysis of the case, *see* "In re Joseph & Sally Grablick Trust: An Ounce of Prevention is Worth a Pound of Cure," by Sandra D. Glazier, Esq., Leimberg Information Services Estate Planning Newsletter No. 2931 (Jan. 10, 2022).

law they may have been a beneficiary not subject to inheritance tax. But if they do not qualify, they may be subject to the highest inheritance tax rates.

Guardianship of a minor child may also be considered when planning for LGBTQ+ clients. It is only due to the United States Supreme Court decision in *Pavan V. Smith*[38] decided in 2017 that states are required to include a non-biologically related spouse on a birth certificate for a child born during a same-sex marriage. Before that decision, state law could prevent a non-biological parent from being listed on a birth certificate. For same-sex couples that had children before 2017, the children's birth certificates may not include both spouses, which could potentially affect parental status. Consider the example of the two married women above. If the spouse with the biological connection to the child is disabled and unable to care for their child, does the spouse who is not legally considered the child's parent have a basis for being the child's guardian? If the child's legal grandparents (*e.g*., the parents of the biological mother of the child) were to assert guardianship over the child, would the court respect the parenthood of the spouse without a biological connection to the child? These issues are dependent on state law, and practitioners may wish to be cognizant of these concerns when representing LGBTQ+ clients.

One simple suggestion for defining descendants that addresses the issues discussed so far with ART, Nonmarital Children, Adoption, and LGBTQ+ considerations in defining descendants is to add language to the definition of descendant that clarifies that a fiduciary can rely on a birth certificate to determine parentage. A parent must affirmatively consent to be identified on a birth certificate since it requires their signature. That said, there could be fraud or a situation where a presumed parent who initially agrees to be on the birth certificate later learns they were not the baby's biological parent and wants to not be treated as the parent for legal purposes.

Sample language to consider:

"A parent listed on an individual's most recent official birth certificate shall be the presumed parent of the individual without further inquiry. Such presumption can be rebuttable only by such identified parent." OR "A trustee may rely on a properly authenticated birth certificate as proof of parentage without any duty to seek further inquiry or evidence."

Adoption Sometimes Provides a Solution

The question of whether a particular individual is treated as a client's child may be resolved if that individual could be and is legally adopted. But it will still require that an adopted child fall within the definition of "child" under the governing will or trust. In some cases, it may not be feasible for legal or other reasons for the child to be legally adopted. The discrimination and other challenges that the LGBTQ+ individual may have in adopting a child may also be an impediment to this step.

In some instances, state law might provide a simpler solution in the form of a confirmatory adoption proceeding.[39] That may require less cost and steps than a general adoption proceeding. Since that process might suffice to corroborate the parentage of the spouse who did not contribute genetic material and did not bear the child, taking such action may be advisable and may assist in obtaining the desired inheritance and avoidance of an undesired inheritance tax.

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[38] *Pavan v. Smith,* 137 S.Ct. 2075 (2017).

[39] For example, New Jersey law S3528/A5396 was enacted on January 13, 2020, which provided a streamlined confirmatory adoption process for couples where one spouse does not have a biological connection to the child. https://www.billtrack50.com/BillDetail/1094459.

Should The Trustee Be Given the Power to Add Beneficiaries?

Given the risks, uncertainties and challenges that may face clients and their fiduciaries in determining descendants, practitioners may consider implementing further steps in the client's documents to endeavor to address these issues. One approach might be to grant authority to a trustee (or specifically an independent trustee) to add to the class of children or beneficiaries anyone with whom the individual may have had a parent-child or similar relationship even though, technically, not a biological or legal child of the testator.

While that approach could work, it would present some significant issues. The individual acting as a trustee has a fiduciary duty to the beneficiaries named in the instrument. If the trustee adds an additional person that they believe the settlor or testator viewed as a "child" to the class of beneficiaries, they may be argued to have violated their fiduciary duty and duty of loyalty to the named beneficiaries. That argument may foment litigation even if it was expressly provided in the instrument that a trustee who exercises such authority shall not be deemed to have violated any fiduciary duty. Put another way, if the trustee "in their sole discretion" was merely tasked with determining who is and isn't a descendant as defined under the instrument that would be different than empowering them to add or remove beneficiaries. That is already the job of the trustee, and certainly from time to time a trustee is confronted a biological descendant who emerges after learning their true parentage (*e.g.*, because of a DNA test). As discussed earlier, one might also consider whether providing an individual with the right to enlarge the class of persons considered to be descendants) through the non-fiduciary exercise of a power of appointment might provide a viable solution.

Might a Name or Gender Change Disinherit an Intended Descendant?

Another category of issues may arise with beneficiaries if a named beneficiary changes their name or gender. Might a name or gender change inadvertently result in that individual being omitted as a beneficiary? For example, consider a beneficiary who changes their name from "John Doe" to "Jane Doe." Will a client's bequest of "My gold Rolex to John Doe" now lapse because there is no John Doe? What if the client's oldest son has gender confirmation surgery and transitions to female. What will the impact be if the client had a bequest that was phrased as: "I bequeath my diamond cufflinks to my oldest son." Will this lapse or would another child claim the diamond cufflinks? Practitioners may want to consider how they can help testators avoid ambiguity and family strife in these situations.

The simplest and clearest solution to the above issues is to endeavor to draft to contemplate these potential changes. Consider the following provision, *"My gold Rolex to John Doe. [list other tangible property and specific bequests]. I recognize in making these bequests that should any beneficiary indicated above change their name that the bequest is intended to continue to such person."* Will that suffice for a name change? It would seem so. Would that suffice through a gender transition? It would also seem so, even without specifying it. For a client that is aware that a named beneficiary may transition the practitioner could include language that is even more specific*: "…I recognize in making these bequests that should any beneficiary indicated change their name, or gender, that the bequest is intended to continue to such person."*

The above bequest can be phrased differently if the client wishes. For example, "*I bequeath my diamond cufflinks to my oldest child assigned male at birth,* i.e.*, my cisgender son*." However, this provision could be problematic. If the client's oldest son transitions, will that child still inherit the intended property? The bequest may be vague on that point. The preceding bequest might assure that the oldest child who was born male and remains male at the time of the testator's death might inherit the diamond cufflinks. But is

that the client's intent? Might clients prefer to have the child named inherit the diamond cufflinks regardless of a later name or gender transition? For a client that wants to make certain gender specific gifts, the practitioner may consider having a discussion exploring the intent of the gift with the testator. The practitioner may also want to discuss with the client the preparation of a letter of instruction, in which the client can discuss their desires and reasoning for providing certain property to beneficiaries, providing context for their designated recipients.[40]

The solutions illustrated above are fraught with practical issues:

1. Clients almost universally delay amending and restating documents, and their intended bequest could be challenged, misdirected or lapse because of an old document not addressing these circumstances.
2. What if the client's child has not communicated these personal matters to the client?
3. If the language used is vague, the language itself may create an interpretive issue.
4. If the child transitions and is uncomfortable with the use of their former name (dead name) will the mere bequest in the will create discomfort or worse? In such cases, using a pour over will that does not list family members, which pours into a revocable trust that contains the dispositive provisions, may be preferable. While the will may be a public record document when filed for probate, if there is no litigation or other event that requires a filing or disclosure of the revocable trust, the trust may remain private. This may be a better default approach for many clients.

Might Clients Wish the Opposite?

The above discussion presumes that the client wished to continue to benefit a particular beneficiary despite that beneficiary transitioning. But for some clients, that may not be their actual feelings in this regard. Consider a client with a devout religious background, who would choose instead to intentionally disinherit a child that transitions. If that is the case, it would be helpful for the governing legal documents to be clear in what is intended, as clarity of intent may help to avoid litigation over the dispositive plan. Specificity in drafting is also important to avoid claims of discrimination of a class that may violate public policy.[41]

[40] For additional discussion regarding letters of instruction, *see* "Letter Of Instruction: Roadmap To Take This Important Estate Planning Step," by Martin Shenkman, posted on Forbes.com June 18, 2023 https://www.forbes.com/sites/martinshenkman/2023/06/18/letter-of-instruction-roadmap-to-take-this-important-estate-planning-step/?sh=4050d338408b (last accessed on Nov. 5, 2023).

[41] *See, e.g.*, *Todd v. Hilliard Lyons Tr. Co.,* 633 S.W.3d 342, 348 (Ky. Ct. App. 2021) in which the Appellate Court nullified a trust provision excluding "any person adopted by another person, the issue of any person adopted by another person, or the ancestors of any persons so adopted by another person" on public policy grounds. The Court acknowledged that a person has a right to disinherit otherwise legal descendants; however, to exclude all persons who are adopted (and their descendants and ancestors) in this way was not only against public policy, but also impractical to enforce.

Consider Naming a Special Trust Protector to Address Issues with Defining Descendants

Rather than relying on the sole discretion of the trustee which potentially puts the trustee in a difficult position as a fiduciary, there is another approach that might warrant consideration for clients who does, or might in the future, face these considerations. The main dispositive document, *e.g.*, a revocable trust or irrevocable trust, could permit a Trust Protector or Special Trust Protector to address the types of issues noted above in this article. If not being given to a Trust Protector with broader powers, the role could be given a name such as "Descendants Trust Protector" or some other name. This position may be a type of trust protector empowered to address the issues described earlier. In that way, if sufficient powers are provided to this individual, they could make the decisions without the need for court involvement and the negative publicity, cost and animosity that might trigger. In many situations, the concerns may not be known at the time the document is drafted, and it may be prudent to add provisions allowing flexibility in managing and addressing issues that may arise in the future.

Who might be named in this role of Special Trust Protector? Perhaps a family friend understanding of the issues involved and who has a relationship with the individuals who may be affected could be named. For practitioners that are comfortable taking on such a role, as they drafted the documents and are intimately familiar with the client's wishes, the practitioner could consider being named. If the attorney or the firm is nominated, it could be helpful to address potential conflict of interest issues that this may implicate.

This power would be analogous, in some respects, to the power given to an individual in a hybrid-domestic asset protection trust to appoint additional beneficiaries (although the uncertainties of adding the settlor in a hybrid DAPT are not relevant to this application of the concept).

Another power that the testator might consider giving to the Special Trust Protector is a power to direct distributions to beneficiaries for medical expenses (including transition expenses), adoption, family planning and other costs that a trustee may not believe are covered under the terms of the governing instrument if it is limited to an ascertainable standard.

The Special Trust Protector Should Serve in a Non-Fiduciary Capacity

The person or entity serving in this capacity as Special Trust Protector should be designated in the legal document as serving in a non-fiduciary capacity. The rationale for a non-fiduciary capacity is that the Special Trust Protector may have to add a beneficiary to the plan (*e.g.*, an individual considered to be a child by a family member who did not meet the formal legal requirements as an heir or "descendant" under the governing instruments; a non-adopted child who's clearly an intended beneficiary, etc.), or salvage a situation where a person who was perhaps intended to be a beneficiary but who lost that status because of a name change or transition under the terms of the governing documents or state law. If the Special Trust Protector is designated as serving (or required by state law to serve) in a fiduciary capacity those actions may violate the Special Trust Protector's fiduciary duties, duty of loyalty due other beneficiaries, etc. Whether that can be done will depend on state law. If the state where the trust is administered mandates that a trust protector serves only in a fiduciary capacity, then it may be worthwhile to discuss with the client creating the trust in a different jurisdiction. That may be feasible, but practitioners should consider discussing the implications and costs with the client, as establishing a trust in a different jurisdiction might require or at least suggest that a co-trustee in that jurisdiction be named and an account may be worth setting up for the trust in that jurisdiction, etc.

It may not be possible, under the law of some jurisdictions, to name a Special Trust Director to act in a non-fiduciary capacity. The Special Trust Protector may be considered a trust director within the meaning of the Uniform Directed Trust Act or an individual with the power to direct the trustee under former Section 808 of the Uniform Trust Code. If the governing jurisdiction has adopted a version of one or both of those acts, the applicable statutory law may provide that the Special Trust Director, if considered a trust director, acts in a fiduciary capacity. In some jurisdictions, a statutory default to fiduciary status may be imposed. Some jurisdictions may permit such a default to be overridden by the terms of the governing instrument. In any case, it's important to know a governing jurisdiction's applicable law on this subject and to understand that provisions that are deemed to be administrative (as opposed to substantive) may ultimately be governed by the jurisdiction where a trust is administered as opposed to where the settlor resided. If there remains uncertainty as to whether the Special Trust Protector can serve in a non-fiduciary capacity, consider incorporating a pour-over provision to an irrevocable trust sitused in a jurisdiction that permits a trust director to serve in a non-fiduciary capacity and have that instrument contain the primary dispositive provisions. That trust may be nominally funded during the settlor's lifetime, so that if the settlor changes their mind, the instrument containing the pour over provision might be changed to a different instrument with different dispositive provisions.

Including A Special Trust Director or Protector in Estate Planning Documents

As explained in the introduction, the questions of who is to be included as an heir or beneficiary are complicated, evolving and can raise considerable uncertainties. Medicine and scientific knowledge continue to evolve. The overlay of changing family structure and religious beliefs based on very different values may all have an impact. While practitioners might be able to draft provisions in documents to address these concerns, the practical reality is that it is likely impossible for a practitioner to contemplate all the future changes in society, medicine, values and more. For some clients, consideration of a special trust protector charged with making these decisions when uncertainty arises from the provisions crafted to carry out the client's wishes (and provide a framework for the trust protector) may be helpful. Since this is a novel concept, practitioners should proceed with caution and carefully consider how broad the powers granted to this person might be. Practitioners may also wish to communicate with the client the uncertainty under the law for this planning, and how any powers provided in documents are not supported by case law and may be determined by courts later to be invalid.

Sample Clause

The following is sample language for practitioners to consider in implementing a Special Trust Director provision.

Appointment of Special Trust Director to Clarify Heirs and Beneficiaries

The person, and any successors, appointed hereunder, shall be referred to as the "Special Trust Director."

The initial Special Trust Director shall be *Name, who resides at *Address OR the Law firm of *Name of Firm and its successors and assigns (and such firm may designate a partner to act specifically on behalf of such firm in this capacity).

If the initial Special Trust Director is unable or unwilling to serve, then the first person of the following who is able and willing to serve, shall so serve:

***Name, *Address.**
***Name, *Address.**

If no person of the forgoing is able and willing to serve then the Trustee and eldest beneficiary [or other named persons], shall have the authority to designate a successor Special Trust Director. The designation of a successor Special Trust Director shall be determined by unanimous agreement of such persons.

The Special Trust Director shall have the following powers [These need to be modified and revised to address clients concerns and issues that might be anticipated]:

1. **The power to clarify or modify who is deemed to be a child born of a particular marriage for purposes of establishing a beneficiary hereunder.**
2. **The power to interpret when an individual born using Assisted Reproductive Technologies is or is not to be deemed a child of a person who is subsumed under the definition of "child," "issue" or "descendant" under this Trust Agreement.**
3. **The power to lengthen or shorten the period of time following a death that person posthumously conceived using the genetic material from a deceased individual may be subsumed under the definition of "child," "issue" or "descendant" under this Trust Agreement.**
4. **The power to clarify or confirm the religious status of any person named in this Trust Agreement, if same is relevant to the dispositive plan contained in this instrument.**
5. **The power to clarify or correct the name of any person named in this Trust Agreement, whether due to name change or other reason. This power shall include the clarification or correction of any name for any beneficiary or other person named in an instrument, including powerholders, fiduciaries, and persons designated to act in non-fiduciary capacities.**
6. **The power to correct or otherwise change any references to gender in this Trust Agreement to avoid any beneficiary from being excluded or otherwise having a beneficial interest changed. This power shall include the power to correct or otherwise change any references to gender for any powerholders, fiduciaries, and persons designated to act in non-fiduciary capacities, if necessary or advisable in the Special Trust Director's discretion, to avoid having such person prevented from so serving.**
7. **The power to create a separate instrument confirming the current name or gender of any beneficiary, fiduciary or powerholder hereunder for the above purposes.**
8. **The Special Trust Director shall have the authority to direct the Trustee to decant this Trust into a new Trust with administrative changes deemed necessary by the Special Trust Director to carry out the settlor's wishes considering current circumstances, with the use of only the names the Special Trust Director indicates and expressly excluding any names of such persons as specified. [Note that the preceding sentence is very broad and only should be used with caution, and perhaps must be modified to reflect the clients concerns in particular areas].**
9. **The power to direct the Trustee to make a distribution to or for any beneficiary or potential beneficiary for any of the following:**
    a. **Adoption proceedings even if the result of same is to add the adopted person as a beneficiary hereunder. [Note this provision may be limited to adoptions before the proposed adoptee reaches a certain age. The use of the age of 18 may be too restrictive as adoption is intended for a person who could not be adopted before majority because a parent's rights could not be terminated. In those instances, the settlor might prefer using before the adoptee has attained the age of 22.]**

b. For religious conversion proceedings even if the result of same is to add the person who underwent conversion as a beneficiary hereunder.

c. Medical and related expenses including, but not limited to, mental or physical care, gender confirmation surgery, related procedures, cosmetic or reconstructive surgery, counseling, medications, and family planning, including, by way of example, fertility treatments, adoption, and surrogacy costs and related legal fees and travel costs.

10. The power to direct, in a signed, acknowledged instrument, that a specifically identified person, other than the Special Trust Director, the Special Trust Director's estate, a creditor of the Special Trust Director or of the Special Trust Director's estate, or any person related or subordinate to the Special Trust Director within the meaning of Code Sec. 672(c), shall be included in the definition of "descendants" for purposes of this Trust Agreement. Any such direction shall apply prospectively, beginning on the date such signed, acknowledged instrument is delivered to the Trustee. [This is a very broad power and should be carefully evaluated].

11. To the extent not prohibited by applicable law, the Special Trust Director shall not be treated as acting under a fiduciary duty, shall not be required to exercise the powers granted to the Special Trust Director hereunder, and shall have no duty to monitor the actions of any Trustee acting hereunder. However, the Special Trust Director must act in good faith and in accordance with the intent of the [settlor/testator] expressed herein.

The Special Trust Director may:

1. **Engage the services of consultants, attorneys, and advisors to advise or assist in the performance of the Special Trust Director's duties and may act on the recommendations of the persons or entities employed, with or without independent investigation.**
2. **Reasonably compensate an individual or entity employed to assist or advise the Special Trust Director, regardless of any other relationship existing between the individual or entity and the Special Trust Director.**
3. **Direct the trustee to pay the usual compensation for services contracted under this section out of trust income or principal as the Special Trust Director deems advisable. The Special Trust Director may direct payment of compensation to an individual or entity employed to assist or advise the Special Trust Director without diminishing the compensation to which the Special Trust Director is entitled under this instrument. A Special Trust Director who is a partner, stockholder, officer, director, or corporate affiliate in any entity employed to assist or advise the Special Trust Director may nonetheless receive the Special Trust Director's share of the compensation paid to the entity.**

The Special Trust Director must be either (i) a citizen of the United States then residing (and having a bona fide tax base and residence) in the United States, or (ii) a corporation which is created or organized under the laws of the United States or under the laws of any state of the United States or the District of Columbia and which is qualified as a domestic corporation under the Code. Notwithstanding anything to the contrary in this Trust instrument, the Special Trust Director shall not be (i) the Settlor or Settlor's spouse; (ii) any then acting trustee; (iii) any current or contingent beneficiary of a trust under this instrument; or (iv) anyone subordinate or related to the Settlor or any beneficiary within the meaning of Code Section 672(c).

Anticipated Hiatus in Appointment

Because it is contemplated that the need for a Special Trust Director's input may not be ongoing in nature or apply to all periods during which a Trust is administered under this instrument, a Special Trust Director may resign (creating a hiatus in its responsibilities) and subsequently be requested to again act as a Special Trust Director later in the administration of a Trust created under this instrument. Therefore, during such hiatus and/or following the Special Trust Director's resignation, the provisions of this Article with regard to the Special Trust Director's responsibilities and liabilities shall continue in force only to the extent applicable.

The Special Trust Director shall be compensated as follows [add here].

Conclusion

As the above discussion and sample clauses illustrate, the interplay of modern medical technology and determining who will be considered a descendant to inherit under a client's will or trusts is incredibly complex and there is a myriad of uncertainties. Further, those complexities and uncertainties will only grow as medical science advances. Practitioners will need to consider how they wish to approach these discussions with a client. In how much detail will a client be comfortable addressing these considerations? What costs will having these complex discussions with a client add to completing their estate plan? Will a client be willing to accept the additional cost the detailed discussions and thoughtful drafting will require? What might be done with existing trusts that have not addressed the circumstances that might arise? While this is a challenging area that is consistently evolving, practitioners who successfully navigate these issues will provide the client with a thoughtful, tailored estate plan that may have a better chance of achieving their client's goals.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

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