Discussion thaws on rights of frozen embryos to inherit

By: David J. Correira and Eric D. Correira May 11, 2017

More than 30 years ago, the issue of inheritance and survivor rights of frozen embryos first gained international attention when California couple Mario and Elsa Rios died in a plane crash in Chile, with frozen embryos being held in a fertilization clinic in Australia.

The embryos were created in 1981 and were unused at the time of death in 1984, when Mario's son from another marriage, Michael Rios, then in his mid-30s, stood to inherit the couple's $1 million estate. Eggs from Elsa Rios were fertilized with the sperm of an anonymous donor.

At that time, the Rios case stirred discussion about the right of frozen embryos to inherit.

More recently, media reports of a dispute between Sofia Vergara and former boyfriend Nick Loeb resurrected the discussion. In 2013, Vergara and her then-fiancé went to a fertilization clinic in California and entered into an agreement that the embryos would come to term only with the consent of each party; however, the agreement did not address a breakup or dissolution of a subsequent marriage.

A suit dismissed in California was refiled in Louisiana by Loeb on behalf of the embryos under a state law governing embryos: LA-RS 9 Sections 121-133. The law is controversial with pro-choice and right-to-life groups because it confers personhood on frozen embryos as well as inheritance rights at the time of a "live birth."

In the Vergara-Loeb case, if the embryos are "born," they stand to inherit from a trust created for Vergara's children.

In addition to inheritance rights, other issues surface related to survivor rights for frozen embryos such as those which exist under federal law.

On May 21, 2012, the U.S. Supreme Court in *Astrue v. Capato* answered whether a child conceived and born after a biological parent's death is entitled to receive Social Security survivors' benefits.

In answering the question, the court was required to consider a law first passed in 1939, and the advancements of modern science and medicine. The court determined that the answer was based on state law, specifically state intestacy law, and that under Florida law, which was the governing law for purposes of intestacy, the children were not entitled to inherit from their father and thus were not entitled to receive Social Security survivors' benefits.

The case also serves as a reminder of the importance of having a precisely worded estate plan that is reviewed frequently to ensure it is as up-to-date as possible.

Karen and Robert Capato were married in 1999 and lived in Florida. Less than three years later, Robert died from esophageal cancer. Prior to his death, Robert underwent chemotherapy treatments, which his doctors had warned could make him sterile. Before his treatments began, Robert went to a sperm bank and had his sperm frozen for use at a later time.

Amazingly, while undergoing chemotherapy, Robert and Karen conceived a child, but did not wish for the child to grow up without a brother or sister. Before Karen could conceive again, Robert died. Karen later used Robert's sperm for an invitro fertilization, which resulted in the birth of twins some 18 months after Robert's death, in New Jersey, where Karen had moved while pregnant.

Karen applied for Social Security survivors' benefits for the twins, which the Social Security Administration denied. She appealed to the U.S. District Court of New Jersey, which sided with the Social Security Administration. Karen then appealed to the 3rd U.S. Circuit Court of Appeals, where she was successful.

The commissioner of the Social Security Administration, Michael J. Astrue, appealed the 3rd Circuit ruling to the Supreme Court. The question before the court was: How is the term "child" defined under the Social Security Act for purposes of administering Social Security survivors' benefits.

Karen argued that "child" was defined by one part of the Social Security Act, stating that "the term 'child' means the child or legally adopted child of an individual," so long as that individual satisfies certain conditions.

The Social Security Administration contended that the proper definition of "child" could be found elsewhere in the act, where the determination of "whether an applicant is a child or parent of [an] insured individual for purposes of [Social Security survivors' benefits], the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State]."

The court sided with the commissioner, who had found that, at the time of his death, Robert was a domiciliary of Florida and thus the intestacy law of Florida applied to determine whether Robert and Karen's twins were "children" for purposes of Social Security survivors' benefits.

The court's reasoning focused on two points. First, while the commissioner's interpretation may not be the only reasonable interpretation of "child" for purposes of the act, it is at least a permissible construction entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*

And second, while Karen was correct that "child" is defined as she had argued under Section 416(e), the commissioner's argument was based on Section 416(h), which requires reference to state intestacy law to determine child status not just for Section 416(h), but for all purposes of the subchapter dealing with survivors' benefits, including Section 416(e), which Karen's argument rested upon.

It is worth noting that Robert Capato's last will and testament had been recently updated prior to his death, as it provided for both his wife, Karen, and the child conceived and born while Robert was still alive.

> *As technological advances continue, and as the use of those advances become more and more a part of everyday life, attorneys will need to continue to review documents to ensure that they are current with the circumstances in their clients' lives and with changes in the law.*

The will did not provide for — and in fact did not even mention — the possibility of children being conceived after his death. That is where Karen ran into a problem: Florida law provides that children conceived after a parent's death cannot inherit from the parent, unless they are referred to in the parent's will. See "Children Not Entitled to Dead Father's Benefits, Justices Rule," Adam Liptak, New York Times, May 21, 2012.

This is not to say that in all cases children conceived and born after a biological parent's death are not entitled to receive Social Security survivors' benefits; rather, the takeaway from the Supreme Court is that the determination as to whether a child conceived and born after a biological parent's death is considered a "child" for purposes of receiving Social Security survivors' benefits is a matter of state law. Thus, the outcome in this case may very well have been different if Robert was domiciled in another state at the time of his death.

For instance, in 2002 the Supreme Judicial Court was required to determine what the inheritance rights of a child conceived and born after a biological parent's death are under Massachusetts law.

The SJC in *Woodward v. Commissioner of Social Security* determined that, under Massachusetts law, a child conceived and born after a biological parent's death could inherit only after it was established that a genetic relationship existed between the child and the deceased parent, and that the deceased parent affirmatively

consented both to the posthumous conception and support of any resulting child. *Woodward*, 435 Mass. 536, 537-38 (2002).

Thus, under the Supreme Court's ruling in *Astrue*, a child conceived and born after a biological parent's death would be able to apply for and receive Social Security survivors' benefits under Massachusetts law, so long as he could establish the two elements required by the SJC in *Woodward*.

From an estate planning perspective, both *Woodward* and *Astrue* reinforce the necessity of having an estate plan that is as up-to-date as possible. Under the Florida law in question in *Astrue*, had Robert Capato provided in his will for any children not yet conceived or born, his twins born after his death would have been entitled to Social Security survivors' benefits.

The same rule applies in Massachusetts, for if a deceased parent specifically states in his will that he intends to care for any children conceived and born after his death, the courts would certainly accept that as proof that the deceased parent both consented to the posthumous conception and intended to provide support for any children resulting therefrom.

There are still many states, including Rhode Island, where this issue has not yet been litigated, and the law remains unclear. While Rhode Island, like all states, has intestacy laws regarding who is entitled to inherit from whom in the absence of a last will and testament, the courts of the state have not yet been asked to determine how the law applies to children conceived and born after a biological parent's death.

Specifically, the relevant Rhode Island law states that if a parent omits to provide in his will for any child born after the execution of the will, regardless of whether the child is born while the parent is alive or after the parent's death, the child is entitled to inherit that share of the parent's estate that the child would have been entitled to inherit had the parent died intestate. See R.I.G.L. §33-6-24.

What is not clear in that statute is whether the child must be conceived or at least conceptualized, as is the case in both Florida and Massachusetts, before the parent's death.

In an unreported case believed to be of first impression in Rhode Island (Newport Superior Court No. 12-C269 and Newport Probate Court No. 11-18), the surviving partner, infant and frozen embryos sued the estate of a decedent in order to assert a number of rights, including the potential that the embryos might have an interest in the estate. While the case, *In Re: Estate of Glassie,* is sealed and a settlement is subject to confidentiality agreements, of note is that the two judges in the parallel cases appointed guardians ad litem to represent the potential inheritance rights of the frozen embryos.

Estate planning is not a stagnant area of the law. As technological advances continue, and as the use of those advances become more and more a part of everyday life, attorneys will need to continue to review documents to ensure that they are current with the circumstances in their clients' lives and with changes in the law.

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