POST-MORTEM / SPERM-DONOR ADOPTED-IN / ADOPTED-OUT PRETERMITTED / OMITTED

AND RELATED ISSUES AFFECTING THE INHERITANCE RIGHTS OF CHILDREN

JUNE 9, 2010

ROBERT I. AUFSEESER, ESQ.

"I […] urge the legislature to examine, within the context of the state's intestacy statute, the confluence of new, ever-expanding birth technologies and the seemingly arcane language and presumptions attendant to the settlement of decedents' estates. I believe that with time and further technological advances, this confluence will engulf more and more of our state's families and the children produced as a consequence of such advances."[1] Although spoken in New Hampshire, these sentiments are universally felt. Simply put: technological advancements in reproductive technology have outpaced legislative action and courts have been forced to fashion remedies with little legislative support.

Whether considering an adoption or a child born after the death of a parent, determining a legally recognized parent-child relationship is an essential first step in determining the legal rights between the parties. Not only does a parent-child relationship determine rights under intestacy, but since federal law often gives deference to a state's determination, rights under intestacy can qualify someone for federal benefits. Furthermore, such relationships are important in determining the recipients of donative transfers. For instance, where a grantor makes a class gift of property in trust to "my issue", does such language include adopted children? stepchildren? children born two (2) years after the death of a parent with the help of medical advances in reproductive technology? Unless such terminology is specifically defined in the instrument, the ultimate beneficiaries may be others than the grantor had originally intended.

[1] Khabbaz v. Commissioner, Social Security Administration, 930 A.2d 1180, 1187 (N.H. 2007) (Chief Justice Broderick concurring) (Court denied recognition of posthumously conceived children as heirs for receipt of Social Security benefits).

This article attempts to provide a brief overview of the various legal issues practitioners need to consider to ensure that a client's estate plan will not fail as the result of legislative inaction and indecision.

I. POST-MORTEM & SPERM-DONOR CHILDREN

A. General Considerations

With respect to children born after the death of a parent, the New Jersey legislature has taken the position of treating an after-born child as living at the death of her father if she was in gestation at such time (and if she lives for at least 120 hours after birth).[2] Clearly, if such requirements are met, the after-born child would maintain all legal rights bestowed upon a child of the decedent. The legislature has been silent on recognizing the rights of children conceived after the parent's death (*i.e.* post-mortem or posthumously conceived children). Courts have been forced to fill this gap, and they have done so for the most part by acting in the best interests of the child.[3]

For example, New Jersey courts have held that twin daughters conceived and born to a decedent over a year after his death were in fact his legal heirs.[4] Furthermore, the Supreme Court has held that there is no time limitation on bringing an action to determine parentage.[5] Such actions may always be brought if such determination is in the best interests of the child.[6] Presently, one key reason for determining parentage is that such determination is often a threshold requirement in bringing claims for federal survivor benefits.

B. Social Security Benefits

Already, claims are being made for federal benefits on behalf of children conceived by decedents long after their deaths. It is important to note that for purposes of determining Social Security benefits for a child of a decedent, federal law looks to the law of intestacy in the decedent's home state.[7] If such State treats the child as an heir for purposes of intestacy, federal law will recognize that child for purposes of granting benefits.[8] Furthermore, federal regulations provide that an adopted child will be considered the child of the decedent if State law

---

[2] N.J.S.A. § 3B:5-8.
[3] For an in-depth discussion see Kathryn Venturatos Lorio's article Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child, Actec Journal, Winter 2008, p.154 (34 ACTEC J. 154).
[4] In re Estate of Kolacy, 332 N.J.Super. 593 (Morris Co. Ch. Div. 2000) (discussed below).
[5] Fazilat v. Feldstein, 180 N.J. 74, 87-89 (2004).
[6] Fazilat, 180 N.J. at 88.
[7] 20 C.F.R. § 404.355(b)(1).
[8] 20 C.F.R. § 404.355(b)(1).

recognizes the adoption.[9] In the absence of state law, administrative law judges have refused to recognize post-mortem children as the legal heirs of the biological parent. Appeals on this issue have met with mixed results.

New Jersey has held twin daughters conceived and born to a decedent after his death to be his legal heirs. In re Estate of Kolacy, 332 N.J.Super. 593 (Morris Co. Ch. Div. 2000). After being diagnosed with leukemia, and before starting chemotherapy, decedent placed his sperm in storage. He died a year later. Almost a year after his death, decedent's wife authorized the use his sperm and had herself inseminated with it through an alternative fertilization procedure. She conceived and gave birth to twin daughters. Kolacy, 332 N.J.Super. at 596. Following the birth of the girls, decedent's wife petitioned the Social Security Administration for benefits on behalf of the girls as being the legal children of the decedent. The administrative law judge denied the request ruling that the girls were not the children of the decedent as defined by state law. Id. at 597. The Chancery Court disagreed. In interpreting the relevant after-born statute broadly, the court held that the basic legislative intent to have children inherit from their parents authorized a ruling that the girls were indeed the legal children of their father. Kolacy, 332 N.J.Super. at 602-605.[10]

Two years after Kolacy was decided, a federal district court in Arizona denied relief to children conceived ten (10) months following their father's death. Gillett-Netting v. Barnhart, 231 F.Supp.2d 961 (D.Ariz. 2002). On appeal however, the 9th Circuit reversed the district court finding that the posthumously conceived children were in fact the children of the decedent, and that therefore, they were entitled to benefits. Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004). Since Arizona had no law directly addressing inheritance rights of a posthumously conceived child, the court instead looked to see whether Arizona law would require the father to provide support had he been alive. Gillett, 371 F.3d at 599. After resolving that question in the affirmative, the court then found that the children were the legitimate children of the decedent entitled to benefits under federal law. Gillett, 371 F.3d at 599.

Both Gillett and Kolacy were decided without specific state law available to address posthumously conceived children. In states that have legislated on the issue, results vary.[11]

---

[9] 20 C.F.R. § 404.356.

[10] See also Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (Mass. 2002) (posthumously conceived children entitled to Social Security Benefits on similar facts to Kolacy).

[11] See Stephen v. Commissioner of Social Security, 386 F.Supp.2d 1257 (M.D.Fla. 2005) (distinguishing Gillett under Florida's state law addressing circumstances under which a posthumously-conceived child would be considered a child of the decedent).

C. Donative Transfers

Consider the situation in a second marriage where a testator devises his residuary estate fifty (50%) percent to his wife, in trust, and fifty (50%) percent in equal shares to his children, *per stirpes*. In an age where vials of the testator's sperm can be stored long after his death, should the estate administration be held open to account for children of the decedent that have not yet been conceived? If not, and the wife subsequently conceives with the decedent's sperm, will the other heirs be forced to relinquish a pro rata share of their class gift? Questions such as these will become more common as advances are made in science and technology relating to posthumous conception.

As a general rule, the grantor's intention will govern how the above questions are answered. Therefore, consider revising the language of the gift.

Sample Language: " I devise my residuary estate fifty (50%) percent to my wife, in trust, and the remaining fifty (50%) percent shall be divided into as many equal shares as there are children of mine then living and deceased children of mine leaving issue who survive me. I devise one such share to the issue of a deceased child, such issue to take *per stirpes* (and not per capita). I direct that this devise shall apply to all children conceived by me during my lifetime, but not to children of mine that may be conceived after my death. It is my intention that no genetic material of mine be used after my death to conceive a child."

There is no statute creating a presumption in favor of either inclusion or exclusion of posthumously conceived children in class gifts.[12] In the absence of specific language, a New Jersey court may be summoned to construe the probable intent of the testator (or grantor).[13]

II. ADOPTED-IN CHILDREN

A. Background

According to the 2000 Federal Census, New Jersey households were home to 58,934 adopted children (of whom 42,614 were reported under the age of eighteen) and 88,748 stepchildren (of whom 57,172 were reported under the age of

[12] Compare the definition of "child" in N.J.S.A. § 3B:1-1 to N.J.S.A. § 3B:3-48, which provides for the construction of class gift terminology.

[13] Engle v. Siegel, 74 N.J. 287, 290 (1977); see also In re Trust Under Agreement of Vander Poel, 396 N.J.Super. 218 (App. Div. 2007) cert. denied, 193 N.J. 587 (2008).

eighteen).[14] With current data expected to be released with the 2010 Federal Census, these numbers are almost certain to rise. While these numbers reflect only a small portion of the 2,600,871 children having been reported to reside in New Jersey households at that time,[15] the unique legal issues such children present need to be carefully addressed.

An "adopted-in" child refers to a child that has been adopted into a parent and child relationship.[16] Once adopted, the child is entitled to all rights and remedies offered to a natural or biological child.[17] The New Jersey Adoption Act[18] provides that upon a final entry of judgment, an adoption shall "establish the same relationships, rights, and responsibilities between the child and the adopting parent as if the child were born to the adopting parent in lawful wedlock".[19] The judgment terminates all parental rights and responsibilities of the biological parent,[20] terminates all rights of inheritance under intestacy from or through that parent,[21] and likewise terminates all rights of inheritance under intestacy from or through the child which existed prior to the adoption.[22] In all cases, the New Jersey Adoption Act is to be construed in the best interests of the child.[23] Furthermore, in construing class gifts, without language to the contrary, adopted children and their respective descendants are included in such gifts to the class.[24]

Since adoption is a process whereby the child often lives with the adopting parent prior to a final judgment, in several New Jersey cases, the death of the adopting parent prior to issuance of the final order created an issue as to who would be considered the legal parent of the child. In such cases, questions of inheritance and other legal rights must be addressed without the guide of specific statutory authority.[25] The death of the adoptive parent before the final judgment

---

[14] Rose M. Kreider, U.S. Census Bureau, Adopted Children and Stepchildren: 2000, 2003, p4. (While already ten (10) years old, the data produced may have only accounted for two-thirds the number of adopted children and stepchildren.) See footnote 3.
[15] Id.
[16] N.J.S.A. § 9:17-39 (Defines "parent and child relationship" as meaning "the legal relationship existing between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.").
[17] At common law, adoption was not recognized as a means of creating an heir: "Solus Deus facit hareden, non homo" ("G-d alone makes the heir, not the man"). For a discussion of early statutory history see In re Will of Holibaugh, 18 N.J. 229, 233-234 (1955); see also Vander Poel, 396 N.J.Super. at 227.
[18] N.J.S.A. §§ 9:3-37 to 9:3-56 (N.J.S.A. §§ 9:3-1 – 36 repealed by L.1953 & L.1977).
[19] N.J.S.A. § 9:3-50(b).
[20] N.J.S.A. § 9:3-50(c)(1) (adoption by stepparent will not terminate the rights of the biological parent).
[21] N.J.S.A. § 9:3-50(c)(2) (see comment above).
[22] N.J.S.A. § 9:3-50(c)(3).
[23] N.J.S.A. § 9:3-37.
[24] N.J.S.A. § 3B:3-48. (presumption does not extend to adult adoptions).
[25] For good cause in cases where an adoption action has been started, the court may direct the entry of judgment as of the date the action was instituted. N.J.S.A. § 9:3-50(b).

can have the effect of removing the legal benefits that would have vested.[26] In such cases, New Jersey courts have often recognized the principal of "Equitable Adoption" in determining whether legal rights should vest notwithstanding a legally incomplete adoption.

B. Equitable Adoption

Equitable Adoption is a legal doctrine the effect of which treats the parent and child as though the parties completed the adoption process. The doctrine can be used to grant legal rights in the parties that would not otherwise exist. The doctrine is rooted in contract law. Courts have held that an "oral agreement to adopt, where there has been a full and faithful performance on the part of the adoptive child but which was never consummated by formal adoption proceedings during the life of the adoptive parent, will, upon the death of the latter and when equity and justice so requires, be enforced to the extent of decreeing that such child occupies in equity the status of an adopted child, entitled to the same right of inheritance from so much of his fosterparent's estate that remains undisposed of by will or otherwise, as he would have been had he been a natural born child."[27]

In other words, Equitable Adoption has become a device used to "support a claim for benefits which would be available if a legally recognized parent-child relationship existed, such as claims for an intestate share, workers' compensation benefits, social security benefits, and life insurance benefits." In re Matter of Adoption of Baby T., 311 N.J.Super. 408, 416 (App. Div. 1998) reversed on other grounds by In re Baby T., 160 N.J. 332 (1999). In applying the doctrine, the federal court in D'Accardi v. Charter, 96 F.3d 97 (4th Cir. 1996), held that inheritance rights vested in an adopted child despite the lack of a formal judgment. In D'Accardi, the court found that an agreement to adopt coupled with actions in pursuance of such adoption (*i.e.* treating the child as his son) entitled the child to inheritance rights under New Jersey law. 96 F.3d at 100-101. Such a finding opened the door to that child receiving Social Security Insurance benefits under federal law.

In addition, the doctrine can be equally useful in those cases where it is the child that dies before the judgment is entered. In one case, parents who had not yet formalized their adoption were granted a posthumous adoption allowing them to bring a wrongful death action. In re Baby T., 160 N.J. 332 (1999). The parents

[26] Adoption of a Child by N.E.Y., 267 N.J.Super. 88 (Union Co. Ch. Div. 1993) (holding a child not to be treated as a Class "A" beneficiary for inheritance tax purposes and Social Security benefits where adoptive parent died prior to a final order of adoption); but see In the Matter of the Adoption of S.W., 412 N.J.Super. 275 (Cumberland Co. Law Div. 2009) (granting adoption where parent died two days before the final hearing).

[27] In re Trust Agreement of Vander Poel, 396 N.J.Super. 218, 233 (App. Div. 2007) (referencing Burdick v. Grimshaw, 113 N.J. Eq. 591 (Court of Chancery 1933).

had brought suit following an order of adoption where the physician administered a faulty dose a medicine causing the death of their not-yet-adopted infant. Although the Supreme Court declined to specifically address the legality of a posthumous adoption, the Court did deny the physician standing to challenge the adoption because she was considered an uninterested party. In re Baby T., 160 N.J. at 310.

As these cases demonstrate, failure to obtain a final order of adoption may not preclude the attachment of rights that would otherwise have attached had the adoption taken place.

III. ADOPTED-OUT CHILDREN

An "adopted-out" child refers to a child whose legal bond with a natural parent has been severed. "The purpose of a judgment of adoption is not only to create a filial relationship between the adopting parents and the child, but equally important, to sever, completely and forever, all rights, duties and obligations between the natural parents and the child." In re McKinley, 157 N.J.Super. 293, 298 (Ch. Div. 1978). This statement best reflects New Jersey's position on children adopted out or away from their biological parents. As previously mentioned, the effect of adoption is to completely sever the bonds between the child and the biological parent.[28] In other words, once the adoption is complete, the adopted-out child is considered a stranger to the biological parent. Such child no longer has intestacy rights from the biological parent. However, for purposes of donative transfers, in cases where the adopted-out child lived with the biological parent as part of that parent's household prior to the adoption, then that child will be included in any general class gifts.[29]

Although no New Jersey court has addressed this issue, the effect of an "adopted-out" child on a class gift has been addressed in other jurisdictions.[30] For example, the New York Court of Appeals has ruled an "adopted-out" child to be not included in class gifts. In re Estate of Best, 66 N.Y.2d 151 (N.Y. 1985). In Best, the child's grandmother provided for a residuary trust for the benefit of her daughter for life. Upon her daughter's death, the trust corpus was to be payable in equal shares to her issue. Her daughter had two (2) children, one (1) of whom was given up for adoption. The question in Best was whether this adopted-out child was to be considered "issue" of the grandmother in purposes of construing her trust. Best, 66 N.Y.2d at 153. In reversing the lower courts, the Court of Appeals held that preserving the child's inheritance rights in his grandmother would defeat

[28] Except for adoptions by the stepparent. N.J.S.A. § 9:3-50(c)(1).
[29] N.J.S.A. § 3B:3-48(b).
[30] see Eric W. Penzer and Robert M. Harper, Cutting Family Ties: The Inheritance Rights of Adopted-Out Children, New York State Bar Association *Journal*, February 2009, Vol. 81, No. 2.

the public policy in facilitating the assimilation of the adopted-out child into his new family. Id. at 155-156. Therefore, the child was not allowed to inherit from his biological grandmother having been adopted-out of the family by the grandmother's daughter. Subsequently, the New York legislature amended § 117 of the New York Domestic Relations law to comport with the decision.

New Jersey's statute N.J.S.A. § 3B:3-48 is similar to the language contained in New York's Domestic Relations Law. Given appropriate weight to the public policy considerations, it seems clear that a like result would be reached in New Jersey. However, nothing in either law prevents the testator or grantor from specifically including adopted-out children as part of the class gift. The law just presents the default position effective in the absence of contrary intent.

IV. ADOPTIONS BY NON-TRADITIONAL FAMILIES

Even before New Jersey began recognizing same-gender civil unions in February of 2007, individuals residing in marriage-like relationships petitioned to be treated as the adoptive parent of the other's child. For the most part, courts have interpreted the New Jersey Adoption Act to grant parenting rights to both partners in marriage-like relationships as doing so was held to be in the best interests of the child.

Of relevance is the provision of the adoption statute providing that adoption terminates the rights of the biological parent unless the petitioner in such adoption proceeding is also the spouse of the biological parent.[31] In cases of same-gender adoption (at least in cases decided prior to 2007) the adopting partner was not technically a "spouse". There was the potential therefore to unwillingly terminate the rights of the biological custodial parent.[32]

However, in the Matter of the Adoption of Two Children by H.N.R., 285 N.J.Super. 1 (App. Div. 1995), the court held that a same-gender partner could adopt the child of the biological mother without terminating the biological mother's rights to her child. Here, one parent conceived with the aid of alternative insemination. After the birth of twins, the partner of the biological mother petitioned to adopt the children. Although not technically within the statute, the court construed the stepparent exception liberally and concluded that it would be in the best interest of the children for them to have two parents. 285 N.J.Super. at 7, 12.

---

[31] N.J.S.A. § 9:3-50(c)(1).

[32] In a recent case decided in New York, the Court of Appeals held that a same-gender partner who has not adopted her partner's child cannot assert rights over the child. However, in situations where the couple entered into a civil union in another state, the court held that New York will recognize the legal parenting status of the couple as defined by such other state. Debra H. v. Janice R. (N.Y. May 5, 2010).

Additionally, in In re Parentage of Robinson, 383 N.J.Super. 165 (Essex Co. Ch. Div. 2005), the court held New Jersey's Artificial Insemination Statute[33] applied to create parenting rights in a same-gender couple in the same manner as a traditional couple. In this case, the couple, having entered into a domestic partnership, lived openly as a married couple. One partner conceived after being alternatively inseminated with sperm of an anonymous donor purchased from a sperm bank. The Court held that the statute, which focuses on the best interests of the child, would be served by granting parenting rights to both partners. Robinson, 383 N.J.Super. at 174-176.

Following this line of cases, it is clear that an adoption by a same-gender couple having entered into a domestic partnership or civil union will have the same effect as would an adoption by a traditional married couple. Legal rights and laws under intestacy will apply to both parents. However, as such legal status often serves as the basis for benefits under federal law, the Social Security Administration may deny benefits under DOMA[34] claimed by the child of an adoptive parent in a same-gender relationship.

V. ADULT ADOPTIONS

In cases where the person to be adopted is over the age of eighteen (18) years, New Jersey provides a separate statutory approach to govern that adoption.[35] It is noteworthy that the effect of an adult adoption is markedly different from that of an adoption of a minor. For example, unlike for a minor whose rights of inheritance are severed from her natural parents, the rights of an adult to inherit from her natural parents are not terminated.[36] Furthermore, while an adopted adult is considered a descendant of the adopting parent, the adopted adult will be excluded from class gifts that would otherwise include the descendants of the adopting parent.[37]

For example, assume grantor establishes a trust for his daughter for her lifetime. Upon her death, the trust is payable to her lineal descendants. If the daughter dies without any lineal descendants, the trust corpus is to be paid to charity. Years later, when the daughter is say seventy-five (75) years old and without children of her own, she adopts a thirty-five (35) year old woman as her lawful daughter. She then dies leaving her adopted daughter as her only heir.

---

[33] N.J.S.A. § 9:17-44 ("If … a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").
[34] "Defense of Marriage Act." P.L. 104-199 (1996).
[35] N.J.S.A. § 2A:22-1 – 3 (New Jersey's first adult adoption statute was enacted March 25, 1925).
[36] N.J.S.A. § 2A:22-3(a).
[37] N.J.S.A. § 2A:22-3(exception (a)).

These were the basic facts of the much discussed case concerning the Doris Duke Trust. In the Matter of the Trust for Duke, 305 N.J.Super. 408 (Somerset Co. Ch. Div. 1995) affirmed, 305 N.J.Super. 407 (App. Div. 1997), cert. denied, 151 N.J. 73 (1997). In this case the adult adoptee brought an action to have herself declared the sole lineal descendant of Doris Duke. The court held that absent the grantor's intent to include adult adoptees as part of the class gift, the presumption would be to exclude such persons from the gift. Duke, 305 N.J.Super. at 427.

The court in Duke applied the "stranger to the adoption" doctrine, which, as codified in exception (a) to N.J.S.A. § 2A:22-3, prevents an adult adopted under this statute from being considered an heir for purposes of construing class gifts to the adopting parent. Presumably these class gifts are made by someone who has nothing to do with the adoption (*i.e.* stranger to the adoption) and therefore, without stating a contrary intent, such stranger's plan of distribution should not be disturbed to include the adopted person. Historically, this presumption used to apply to all adopted persons (including minors). This presumption was changed by In re Coe, 42 N.J. 485 (1964), which held that "children" would not presumptively mean only natural children, but would include adopted children as well. This reversal however, was only limited to adoptions concerning minor children.[38]

VI. STEPCHILDREN

As previously stated, as of the 2000 federal census, 88,748 individuals were identified as stepchildren in New Jersey.[39] Generally, stepchildren have one custodial parent and one non-custodial parent. The child becomes a stepchild when the custodial parent marries an individual other than that child's other legal parent. That individual becomes a stepparent—which is a designation carrying little legal significance. For example, the subsequent marriage does not affect the legal rights of the non-custodial parent towards the child.[40] For purposes of intestacy, the child maintains the right to inherit from both legal parents but not the stepparent.[41] Likewise, in donative transfers to the stepparent's children,

[38] See In re Nicol, 152 N.J.Super. 308 (App. Div. 1977); In re Griswold, 140 N.J.Super. 35 (Morris Co. Prob. Div. 1976); In re Comly, 90 N.J.Super. 498 (Gloucester Co. Prob. Div. 1966) (all three cases holding an adopted adult was barred from inheriting from a "stranger to the adoption").

[39] Rose M. Kreider, U.S. Census Bureau, Adopted Children and Stepchildren: 2000, 2003, p4.

[40] For a good discussion of legal issues affecting stepfamilies see Margaret M. Mahoney's article Stepparents as Third Parties In Relation to their Stepchildren, Family Law Quarterly, Spring 2006, p.81 (40 Fam. L.Q. 81).

[41] N.J.S.A. § 3B:1-1 ("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.)

unless that term is defined as to include stepchildren, the stepchild will not take as part of the class.

There is a special rule with respect to adoptions. In cases where a stepparent adopts his stepchild, such adoption will not terminate the legal rights of the custodial parent.[42] However, in a case where there is another parent—usually the non-custodial parent—such adoption would sever his or her rights to the child.[43] At this point the stepparent becomes a legal parent subject to the same duties of support as the biological parent.

As is often the case, the stepparent is the proverbial third-wheel in a family dynamic that involves two biological parents. In these cases, the non-custodial parent continues to owe a duty of support to the child even though the stepparent may have a far closer relationship with the child. Only a judgment from the court can sever the biological parent's rights to the child. Since a child does not inherit from a stepparent under intestacy, ordinarily, government benefits that depend on such legal relationships are unavailable. Interestingly however, under certain situations, a gift to a stepchild by the stepparent will be treated as a gift to a class "A" beneficiary for New Jersey Inheritance Tax purposes.[44] Note that this benevolent treatment does not extend to the issue of the stepchild. Any amounts passing from the stepparent to the issue of the stepchild (*e.g.* step-grandchildren) will be taxed at the highest rates.[45]

If legal rights beyond those associated with a class "A" beneficiary are desired, the doctrine of "equitable adoption" (discussed above) exists as a potential remedy. If such doctrine applies, an action can be brought following the death of the stepparent to have that stepparent declared the adoptive parent. If successful, legal benefits available between a parent and child will vest between the deceased stepparent and such child.

VII. ILLEGITIMATE CHILDREN

Illegitimate children—children born out of wedlock—were historically denied inheritance rights from either parent. This result has been abolished by

[42] N.J.S.A. § 9:3-50(c)(1). (This is the exception to the general rule that adoptions sever the rights in the biological parent.).
[43] In addition, such adoption would terminate all support payments that would be owed by the noncustodial parent. Past-owed payments would remain an outstanding debt however.
[44] N.J.S.A. § 54:34-2.1 ("The transfer of property passing to any child to whom the decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of parent, provided such relationship began at or before the child's fifteenth birthday and was continuous for ten years thereafter, shall be taxed at the same rates and with the same exemptions as the transfer of property passing to a child of said decedent born in lawful wedlock.").
[45] In re Estate of Hopkins, 41 N.J.Super. 345 (App. Div. 1956).

both statute[46] and case law[47]. The statute has since been repealed, and such children inherit in accordance with the New Jersey Parentage Act[48] meaning that they inherit from both parents. In terms of class gifts (*i.e.* "to my children"), no distinction is made for children born out of wedlock; such children share equally.[49]

VIII. PRETERMITTED & OMITTED CHILDREN

A. Definition of Pretermitted Child

A pretermitted child is a "child […] who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will".[50] In other words, a pretermitted child is a child *unintentionally* omitted from the will. As example, the children born after the will was drafted in the definition above are considered pretermitted children and they may be entitled to statutory relief unavailable to a child that has been intentionally omitted.

B. Intentional Disinheritance

Under New Jersey law, it is well established that a testator may intentionally disinherit his children.[51] Furthermore, a valid will simply omitting a child is sufficient to disinherit that child. No special language of disinheritance is required.

Practice Pointer: While no special language of disinheritance is required, a better practice than simply omitting the child to be disinherited is to include a simple statement of such disinheritance. For example, "I hereby make no provision for my child, John A. Doe."

However, in situations where a testator drafts a will that omits a child, the question becomes whether such omission was intentional (meaning the testator wanted to disinherit that child) or whether such omission was unintentional (meaning the testator really would have wanted that child to share in the testator's estate).

---

[46] N.J.S.A. § 3A:4-7 (repealed by L.1977, c. 412 § 90 eff. Sept. 1, 1978).
[47] In re Estate of Calloway, 206 N.J.Super. 377 (App. Div. 1986); In re Sharp's Estate, 163 N.J.Super. 148 (App. Div. 1978).
[48] N.J.S.A. §§ 9:17-38 to 9:17-59.
[49] N.J.S.A. § 3B:3-48 (construction of class gifts) & N.J.S.A. § 3B:5-7 ("Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.").
[50] Black's Law Dictionary, p.742 (8th Ed. 2004).
[51] In re Cambell's Estate, 71 N.J.Super. 307, 310 (Essex Co. Prob. Div. 1961).

C. Omitted from a Will

For wills making no provision for a child, New Jersey has created a statutory assumption against disinheritance in cases where such child was born or adopted after the execution of the will.[52] The purpose of the statute is to avoid the unintentional omission of the testator's after-born or after-adopted child or children. The statute provides a forced share to the omitted child in two (2) separate situations: Situation (1) is when the testator had no children at the time his will was drafted; and Situation (2) is when the testator did have prior children.[53]

Situation (1): In instances where a testator had no children at the time her will was drafted, the statute provides that an "omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate".[54] To qualify for this statutorily provided forced share, the testator must not have devised substantially all of her estate to the other parent of the child either outright or in trust.

For example, assume testator was unmarried and childless at the time her will was drafted. The will left her entire estate to charity. Subsequent to the will, testator flies to Africa and adopts a child. The adoption is recognized under New Jersey law. Testator then dies having forgotten to update her will to provide for her child. Under these facts, the child would be entitled to the entire estate in accordance with N.J.S.A. § 3B:5-16 (Omitted Child Statute) and N.J.S.A. § 3B:5-4(a) (Intestacy Statute). The charity would receive nothing.

Situation (2): In instances where a testator had prior children, the statute provides that the omitted child is to share in that portion of the estate devised to the other children.[55] Furthermore, such share must be substantially similar in nature to what was devised the other children.[56] In other words, if the testator devised her real property to charity and her brokerage accounts to her children, the omitted child would be entitled to share in the brokerage accounts but not the real property.

For example, assume the testator described above had drafted a will after the adoption of her child from Africa. The will divided her estate into equal

---

[52] N.J.S.A. § 3B:5-16.

[53] New Jersey has a long-standing legal tradition of providing for pretermitted children. see Van Wickle v. Van Wickle, 59 N.J. Eq. 317, 320 (N.J. Ch. 1899) (held a child born after the death of the decedent to be entitled to such child's share that would have been owed had decedent died intestate).

[54] N.J.S.A. § 3B:5-16 (a)(1).

[55] N.J.S.A. § 3B:5-16 (a)(2).

[56] N.J.S.A. § 3B:5-16 (a)(2)(c).

portions with half going to her child and the other half going to charity. Subsequently, testator flies to China and adopts a child. Testator then dies having forgotten to update her will. Under these facts, the children will each take a twenty-five (25%) percent share of testator's estate. The charity will remain entitled to the remaining fifty (50%) percent.

If however in either situation it appears that the omission was intentional, or that the testator provided for the omitted after-born or after-adopted child outside the Will, no forced share will be awarded.[57] Also, where a will includes language to the effect of creating a contingent devise in favor of a surviving "child", even when no child is living at the time of the will, such will is valid as having satisfactorily contemplated an after-born child. In re Campbell's Estate, 71 N.J.Super. 307 (Essex Co. Prob. Div. 1961). In Campbell, the decedent devised her estate to her husband if alive, and if deceased, to her children. This devise was made despite the fact that decedent had no children at the time. The court held such language to be sufficient to contemplate providing for after-born children.

In accordance with Campbell simple drafting language can clarify as to whether the testator intended to include or exclude after-born or after-adopted children (or adult adoptees).

Sample Language: " Any reference to grandchildren, issue, or descendants includes all natural or adopted children, grandchildren, or issue, whether born or adopted before or after the execution of this will, but not including persons adopted after their eighteenth (18th) birthday."

D. Omitted from an *Inter Vivos* Trust

The statute's specific reference to the testator's "will" questions whether a testamentary substitute such as an *inter vivos* trust would also qualify for protection. As it has become common for estate plans to make increased use of these trusts, failure to include after-born or after-adopted children could be devastating.

Although the Restatement (Second) of Property argues that *inter vivos* trusts should be construed by analogy to a state's omitted-child statute,[58] all courts to address this issue have construed the statute narrowly limiting its impact to wills only.[59] New Jersey courts have yet to address this issue.

[57] N.J.S.A. § 3B:5-16 (b).
[58] Restatement (Second) of Property, Donative Transfers § 34.2 (1992).
[59] Kidwell v. Rhew, 268 S.W.3d 309 (Ark. 2007); In re Estate of Jackson, 194 P.3d 1269 (Okla. 2008).

In Kidwell v. Rhew, 268 S.W.3d 309 (Ark. 2007), the Arkansas Supreme Court held that the state's pretermitted-heir statute did not apply to revocable *inter vivos* trusts. In that case, the decedent died intestate having first established a revocable trust during her lifetime. The trust was for the benefit of decedent's daughter, Margie Rhew. Renda Kidwell, an heir excluded from the trust, argued that had the devise been by will instead of trust, she would have been entitled to a share under the statute. Id. at 311. The court held that a will and a trust are separate things and declined to extend the statute when use of the word "will" was plain and unambiguous. Kidwell, 268 S.W.3d at 312.

As previously illustrated in Kolacy, New Jersey courts often look beyond the plain meaning of a statute when the statute fails to address a contingency for which public policy supports. However, it is far from certain that a New Jersey court would apply the reasoning of the Restatement over the plain meaning of the statute. In this case, New Jersey's omitted-child statute was substantially modified in 2004 along with much of the probate code.[60] The statute was changed substantially and yet no reference was made to documents other than wills.

As part of the 2004 amendments, a new term was added in the definitional section. This term, "Governing Instrument", is defined as "a deed, will, trust, insurance or annuity policy, account with the designation "pay on death" (POD) or "transfer on death" (TOD), security registered in beneficiary form with the designation "pay on death" (POD) or "transfer on death" (TOD), pension, profit-sharing, retirement or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type."[61] Inclusion of this new term shows the legislature's recognition of testamentary substitutes. In fact the legislature was aware it was expanding the scope of the probate code's construction beyond wills and donative transfers.[62]

However, it remains to be seen as to whether such expansion applies to children omitted from testamentary substitutes. Despite the inclusion of the term "Governing Instrument" in the probate code, the statute nevertheless references only wills. Given that the Arkansas court in Kidwell felt constrained by the plain language of the statute, a New Jersey court may feel hard-pressed to expand the scope when the legislature chose to specifically reference only wills. Therefore, practitioners must be cautious in that a statutory remedy does not yet exist to protect heirs from being unintentionally omitted from revocable *inter vivos* trusts.

---

[60] 2004 N.J. Sess. Law Serv. Ch. 132 (Senate 708).
[61] N.J.S.A. § 3B:1-1.
[62] "Finally, the bill expands the rules of construction formerly applicable only to wills to other donative transfers." N.J. S. Comm. State., S.B. 708 (January 26, 2004) (report on amendments to the probate code).

IX. Conclusion

While the legislature may not be able to keep pace with scientific advancements in reproductive technology, careful drafting can often remove much of the harm (and suspense) that can result when courts get involved. For example, an estate plan should make reference to adopted children even if none are present and even in situations where the statutory result is in line with the testator's wishes. Specific statements provide clear indications of testamentary intent, and courts give primary weight to the document as drafted.

Conception issues need to be addressed as well. Language should be included in the document given to the client for review, and such language should serve as a discussion point for the client's wishes with respect to the potential for genetic material being used post-death to conceive a child. Keep in mind, in several cases, the decedent did not have any sperm stored during his lifetime, but rather it was his mother wanting a grandchild who asked the doctors to remove his still viable sperm after his death for use in a surrogate. The decedent's wishes on the subject were never determined.[63]

Parent-child relationships form the fundamental core relationship from which legal rights and remedies attach. Such relationships can affect class gifts from other branches of the family, the child's sense of identity, and government benefits that look to state law to determine eligibility. Sensitivity to these issues will result in better planning for the family as a whole.

Robert I. Aufseeser, Esq.
www.robertaufseeser.com

---

[63] See Laura A. Dwyer, Dead Daddies: Issues in Postmortem Reproduction, 52 Rutgers L. Rev. 881 (2000); Also, in 2007, an Israeli court ruled that a dead soldier's family can use his sperm to impregnate a woman he never met. http://www.msnbc.msn.com/id/16871062/ (accessed May 6, 2010).