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The Alabama Supreme Court and Estate Planning- Unintended Consequences

By: Stephen Liss

Succession law does not operate in a vacuum, but instead addresses the disposition of property in a manner that is consistent with other laws. As many clients wish to leave property to their family members, changing laws regarding what constitutes a family have a direct impact on trust and estate laws. In a recent case, *LePage v. Center for Reproductive Medicine,* the Supreme Court of Alabama ruled that embryos kept in a cryogenic nursery are "children" for purposes of Alabama's Wrongful Death of a Minor Act. Specifically, the court wrote, "an unborn child is a genetically unique human being whose life begins at fertilization and ends at death."

While *LePage* did not discuss the broader implications of this rationale on other areas of the law, treating a frozen embryo as equivalent to a living child could impact estate planning.

1. Intestate Succession- If you die without a Last Will and Testament, is each frozen embryo a "child" for purpose of intestate succession? In other words, if you have two children who have been born and 3 frozen embryos, could that mean you have 5 children and your estate will be divided 5 ways? If each embryo is entitled to a share, who is going to take custody of the assets that embryo inherited?

2. Existing Wills and Trusts- A Last Will and Testament or irrevocable trust may not contain a specific definition of "child" or "descendant", in which case the common law definition is used. That would raise the same questions with regard to the division of assets where a grantor or beneficiary has frozen embryos. Even if there is a definition it may not address this very modern issue.

3. Can a Frozen Embryo Die?- Assuming a frozen embryo inherits property, is there a point at which that embryo is considered non-viable so that it would be treated as "dying" and the assets held for it are released to other family members? Is probate required? What if donor sperm or eggs were used, could that individual have a claim against the embryo's estate?

4. Rule Against Perpetuities- Whether or not a frozen embryo can die has other consequences. Most trusts are required to terminate after a certain amount of time, which is referred to as the rule against perpetuities, or the rule against perpetual trusts. The common law says a trust must terminate no more than 21 years after the death of someone who was alive when the trust became irrevocable. If an embryo is alive at fertilization, does this mean having a frozen embryo as a beneficiary allows a trust to continue indefinitely because that embryo is still alive?

5. Use of Inherited Funds- Should the person who has custody of an embryo's assets be allowed to use those assets to pay a surrogate to have the embryo implanted? Given the failure rate for implanted embryos, who will decide if undergoing that procedure is in the best interest of the

embryo? If being implanted is in the best interest of the embryo, would the custodian have a fiduciary duty to expend the funds in that manner? If so, who will supervise that process (selection of a surrogate, selection of a physician, agreement on compensation etc.)?

6. Do Embryos Age?- It's common to say a trust will continue until all children reach a certain age. If frozen embryos are children and therefore trust beneficiaries, does that trust continue until some specified number of years after the embryo was first fertilized, or until the embryo is implanted and the child born as a result reaches a specific age?

7. Notice- Trustees are often required to provide certain information to trust beneficiaries. How does that apply to frozen embryos who are trust beneficiaries because they are children of the trust grantor or children of a beneficiary? Who receives such notice if the biological parents of the embryo has died? Should a court appoint a guardian of the property for the embryo or perhaps name a *Guardian ad Litem*?

8. Generation Skipping Tax- Without getting overly technical, some trusts are required to pay a 40% tax if all remaining trust beneficiaries are two or more generations below the grantor. If the grantor's remaining descendants are frozen embryos and grandchildren can that tax be deferred?

As you can see, defining a frozen embryo as a living child has significant and unpredictable consequences in the area of tax, trust, and estate law. If the Alabama Supreme Court's ruling in *LePage* represents the start of a trend lawmakers, attorneys, and clients will have no choice but to grapple with these difficult issues.