

The Birds and the Bees for Trustees

by James F. McDonough, Jr. on August 20, 2013

Today, an increasing number of children are born with assistance of advanced reproductive technology. Such children may be conceived and born years after the death of a parent. This miracle of science poses difficulties for trustees administering existing trusts and lawyers drafting new trusts.

A typical trust has a current beneficiary who receives distributions of income and principal. The issue of the current beneficiary (child) will receive the distributions upon the child's death. If there are no issues, the interest may pass to the child's siblings or the issue of the siblings. What happens if a child of assisted reproduction is born years after the death of the current beneficiary?

Children of assisted reproduction may result from various combinations of sperm source, egg source, birth mother and parental relationship. A common example is the posthumous child conceived by the wife using the sperm of her deceased husband. Few would argue that the child is a child of the mother. Some may question if the donor consented to a posthumous child; however, most observers would infer consent from the deposit of sperm in a clinic prior to death. How does one evaluate consent where the extraction of sperm occurs after death of the donor?

How does a trustee evaluate the circumstances of a childless couple that uses reproductive technology to conceive a child. If the sperm and egg are from the husband and wife and in vitro fertilization occurs, one would expect the child would be a child of these parents. What if the sperm, the egg or both were donated by third parties? Clearly, the intent of the husband and wife to treat the child as their own should control. What if the husband did not want a child and the wife is impregnated with the sperm of an unrelated donor? Should the trustee recognize the child if the wife is an in-law or should the trustee assume the child is of the marriage?

To properly administer a trust, the class of persons who will succeed to the income and principal distributions must be determined. In trust parlance, the class of beneficiaries must close. If assisted reproduction can occur years after the death of the child, it may be difficult to close the class and effectively administer the trust.

Most parents and grandparents would include an adopted child as part of the class of beneficiaries. Parents and grandparents should ask themselves whether they intend to limit successors to issue having genetic material from blood-relatives. The treatment of same-sex couples should also be considered as it is possible that one or more of these relationships may be encountered in the future. Finally, if there is to be a further division into shares upon the death of a beneficiary, how long must a trustee wait until closing the class of beneficiaries.