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EXECUTIVE SUMMARY:

The authors have long raised as an issue the impact personhood legislation could have on assisted reproduction and, by extension, on estate and trust administration where cryogenically preserved embryos are implicated. Enter the Alabama Supreme Court and its recent decision in *LePage v. Mobile Infirmiry Association*, which highlights the impact personhood legislation and the personhood movement can have in this context.

FACTS:

Between 2013 and 2016, the plaintiffs (three couples in this consolidated appeal) had embryos created outside of the body (or "in vitro") and preserved by the Center for Reproductive Medicine in Mobile, Alabama (the "Center"), which embryos were then stored for possible future use in the Center's facility within the Mobile Infirmiry Medical Center (the "Hospital"). The Hospital is owned and operated by the Mobile Infirmiry Association (the "Association").

In December 2020, a patient at the Hospital allegedly accessed the Center's fertility clinic, removed several embryos from the storage facility and dropped them on the floor, thus rendering the embryos no longer viable for implantation and potential pregnancy.

As a result of these events, the plaintiffs sued the Center and the Association under Alabama's Wrongful Death of a Minor Act seeking damages for the loss of their embryos. The Center and the Association moved to dismiss the plaintiffs' claims and those motions were granted by the trial court, which held that the embryos did not fit the definition of "person" or "child" and, therefore, could not give rise to a claim for wrongful death under the statute. This appeal followed.

COMMENT:

Alabama's Wrongful Death of a Minor Act (the "Act") is codified in Section 6-5-391 of the Alabama Code and provides as follows:

When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390 or, if the father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of the minor may commence an action.

In reversing the trial court's judgment granting the motions to dismiss, the Alabama Supreme Court held that the Act applies on its face to **all** unborn children. Over a decade ago, the same Court had previously held that the Act applied to unborn children in utero (i.e., fetuses); the Court here extended that ruling to (by refusing to create an exception for) unborn children who are not physically located inside a biological uterus at the applicable time. As a result, the Act applies to cryopreserved human embryos and pre-embryos (hereinafter referred to as "embryos").

The Chief Justice's concurring opinion further illustrates Alabama's slippery slope. His concurrence focuses on the Sanctity of Unborn Life Amendment to the Alabama Constitution, stating that "the contentions of the defendants and their amicus are not sustainable in light of the Sanctity of Unborn Life Amendment. The People of Alabama have declared the public policy of this State to be that

unborn human life is sacred. We believe that each human being, from the moment of conception, is made in the image of God, created by Him, to reflect His likeness. . . Carving out an exception for the people in this case, small as they were, would be unacceptable to the People of this State, who have required us to treat every human being in accordance with the fear of a holy God who made them in His image.”

The repercussions of this case will be felt across Alabama (and perhaps other states if there is an appeal). Will patients in Alabama continue to have access to fertility treatment in a state that recognizes embryos as children for purposes of wrongful death liability? It has been widely reported that two fertility clinics in Alabama have already halted (at least temporarily) IVF treatment.^[1]

Current clinical best practices typically result in egg retrieval that enables providers to create more embryos than would be implanted at once in order to spare a woman from multiple painful and risky egg retrieval sessions. Excess embryos are then stored. Under *LePage*, would these embryos need to be stored indefinitely even decades after the genetic contributors had died? Would storage facility contracts that contain an explicit agreement to destroy embryos under certain conditions (e.g., upon the death or divorce of the intended parents) be invalidated? Under *LePage*, would an attempt to transfer the embryos out of state be viewed as contrary to Alabama’s public policy if the purpose of the transfer were destruction of the embryos? Could this mean that numerous embryos must be maintained in Alabama storage facilities contrary to the intention of their intended parents?

Turning to the estate and trust context, personhood, in general, and the *LePage* case, in particular, raise a host of questions.

Inheritance Rights

Section 43-8-42 of the Alabama Code provides that the share of an intestate estate not passing to a surviving spouse (or the entire estate if there is no surviving spouse) passes to the issue of the decedent. Under Section 43-8-47 of the Alabama Code a “[r]elative of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”

For purposes of intestate succession, Alabama law defines the term “issue of a person” as “[a]ll of his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this chapter.”^[2] The term “child” is defined as “any individual entitled to take as a child under this chapter by intestate succession from the parent whose relationship is involved . . .”^[3]

In interpreting the definition of “minor child” in the Alabama Wrongful Death of a Minor Act and holding that it includes embryos, the *LePage* court found that “the phrase ‘minor child’ means the same thing in the Wrongful Death of a Minor Act as it does in everyday parlance: ‘an unborn or recently born’ individual member of the human species, from fertilization until the age of majority. . . . Nothing about the Act narrows that definition to unborn children who are physically ‘in utero.’” Would the same result follow for the definition of “child” in the intestate succession law? How would that impact the administration of an intestate estate where a decedent died leaving embryos? Would an embryo be entitled to a share of the decedent’s estate?

Fiduciary Duty

What about a fiduciary administering an Alabama estate or an Alabama trust in light of the *LePage* decision – if embryos are persons and not personal property, can the fiduciary claim to have

authority over the disposition of the embryos? Would a healthcare power of attorney be required for the fiduciary to make decisions with respect to the embryos? Who could (or would) be willing to sign such a document on the embryos' behalf? Alternatively, a court could require a *guardian ad litem* to be appointed for the embryos, or perhaps the virtual representation provision of applicable law would allow purported siblings to represent the interest of the embryos.^[4]

If embryos are persons, do they represent additional members of a class of trust beneficiaries (e.g., the grantor's issue)? The analysis a fiduciary must perform to determine whether any fiduciary duties are owed to these embryos is challenging at best.

Consider the fiduciary's duty of loyalty and duty of impartiality, both of which are relevant to this analysis. The duty of loyalty requires that the fiduciary administer the property solely in the interest of the beneficiaries. If the embryos are persons and beneficiaries, what does their "interest" look like? Does it require the trustee to use trust funds to store and maintain the embryos cryogenically or does it go beyond that and require that trust funds be used to contract with a gestational carrier to attempt to bring the embryos to birth? The duty of impartiality requires "the balancing of diverse interests and competing claims—concurrently and over time—of the various beneficiaries or objectives."^[5] If an embryo is a person, does the fiduciary owe an equal duty to an embryo as it owes to any other beneficiary? The fiduciary could face potential challenges by the embryos (brought by a *guardian ad litem*) if the embryos' interests are disregarded, but face potential challenges by the current beneficiaries if the embryos' interests are preserved to the detriment of the current beneficiaries.

Rule Against Perpetuities

What does personhood mean for the rule against perpetuities?

Section 35-4A-2 of the Alabama Code provides that a nonvested property interest is invalid unless: (i) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or (ii) the interest either vests or terminates within 100 years after its creation. In other words, Alabama has enacted a version of the Uniform Statutory Rule Against Perpetuities, which is a combination of the common law rule (that an interest is invalid unless it is certain on the date that the interest is created that it would vest within 21 years after the death of the last designated life in being on that date) and the wait and see approach (that permits interests that would be invalid under the common law rule to be evaluated after waiting through the perpetuities period to see whether or not the violation actually occurs).

Should cryopreserved embryos be treated as measuring lives in calculating the vesting period? In other words, is an embryo an "individual then alive" at the creation of the subject interest? Courts have previously held that a fetus is a "life in being" for this purpose, even if the pregnancy later results in miscarriage.^[6] Given the Court's refusal in *LePage* to distinguish "unborn children" in utero from "unborn children" in vitro, it seems possible that the question here could be answered in the affirmative.

In a state that follows the common law rule, as long as one embryo remains frozen, has a perpetual trust effectively been created, regardless of the applicable rule against perpetuities because the embryo was "alive" at the creation of the interest and, if in storage indefinitely, would never "die"? While personhood laws are not designed with the rule against perpetuities in mind, the impact of personhood legislation on the law of trusts is potentially far-reaching.

Generation-Skipping Transfer Tax

If an embryo is a person under Alabama law and the Alabama state constitution, can a taxable termination of a trust ever occur where such embryo is a potential class member of a non-skip class and remains cryopreserved?

A taxable termination is the termination of an interest in property held in trust unless (i) immediately thereafter a non-skip person has an interest in the property, or (ii) no distributions may be made at any time thereafter to a skip person.^[7]

Section 2613(a) of the Internal Revenue Code (the “Code”) defines a “skip person” as (i) a “natural person” assigned to a generation which is 2 or more generations below the grantor’s generational assignment, or (ii) a trust if all interests in the trust are held by skip persons or if there is no person holding an interest in the trust and no distribution can be made from the trust to a non-skip person. Under Section 2652(c)(1) of the Code, a person has an interest in trust property if such person has a right (other than a future right) to receive income or corpus from the trust, or is a permissible current recipient of income or corpus from the trust.

Section 7701(a)(1) of the Code states that the term “person” shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation. At least one private letter ruling has determined that for federal tax purposes, the term “person” does not apply to animals and the interests of the grantor’s dogs in a pet trust is not recognized for purposes of the generation-skipping transfer tax, meaning that a pet trust with human remainder beneficiaries all of whom are skip persons shall be considered a skip person.^[8] But what about an embryo that is recognized as a “person” under applicable state law? If such an embryo was recognized as a person under the trust’s governing law and was recognized as a proper trust beneficiary, would that embryo constitute a non-skip person?

Income Tax

According to guidance recently issued by the Georgia Department of Revenue, Georgians can claim a fetus as a dependent on their state income tax returns as early as 6 weeks gestation (when the unborn fetus has a detectable human heartbeat) since Georgia law recognizes a fetus with a detectable human heartbeat as a “natural person.”^[9] Georgia law includes an unborn child as a natural person and defines “unborn child” as “a member of the species of Homo sapiens at any stage of development *who is carried in the womb.*”^[10] While the Georgia law requires pregnancy in order for an unborn child to constitute a natural person, how will Alabama treat embryos for income tax purposes if an embryo constitutes a person under state law?

In the wake of the *LePage* decision, it remains to be seen how characterizing an embryo as a person under state law for purposes of wrongful death can have ripple effects into other areas of law, including estate and trust administration and taxation.

^[1] Isabel Rosales, Christina Maxouris et al., *Days After Alabama’s Supreme Court ruling that frozen embryos are children, a second clinic pauses IVF treatment*, CNN (February 22, 2024), <http://cnn.com/2024/02/21/us/alabama-ruling-frozen-embryos-facility-pauses-ivf/index.html>

^[2] AL Code § 43-8-1(15)

[3] AL Code § 43-8-1(2)

[4] See, e.g., UTC § 304.

[5] Rest. 3d Trusts, Ch. 15, Introductory Note.

[6] *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 Wash. U.L.Q. 265 (1974).

[7] IRC §2612(a)

[8] PLR 9036043

[9] O.C.G.A. 48-7-26(a)

[10] Ga. Code Ann § 1-2-1 (*emphasis added*)