

## Drafting for Flexibility in Dynasty Trusts

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The trust provisions that are set forth below are selected provisions that would be included in a long-term or “dynasty” trust designed to provide for maximum flexibility in making distributions and modifying the terms of the trust to respond to changes in circumstances over time. This form provides for the creation of separate dynasty trusts for each of the settlor’s three children and their descendants. Descendants of a child who are conceived or placed in gestation and born after the death of a beneficiary as a result of assisted reproductive technology are included as beneficiaries. A separate trust for a child and that child’s descendants does not further divide on a per stirpes or other basis at various generational levels, but continues as one sprinkling trust throughout the duration of the trust for the benefit of all descendants of that child. If in the future a settlor’s child is deceased and has no then living descendants, that separate trust will terminate and the remaining assets of that separate trust will be divided between and added to the continuing trusts for the settlor’s other two children and their descendants, with the following exception. If there is compliance with notice provisions set forth in the trust instrument, a waiting period will be triggered before a trust with no then living beneficiaries will terminate, to allow for posthumous birth of additional descendants who would then become members of the class of beneficiaries eligible to receive distributions from that trust.

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*Miscellaneous Rules*

2. The following rules govern the administration of all trusts.

*Rules Governing Family Relationships  
and Eligibility for Distributions*

2.1 “Descendants” means a person’s children, grandchildren, and more remote issue living from time to time, including those who were adopted (and their descendants) subject to the rules of clauses 2.2 through 2.6.

*Adopted Children*

[**Comment:** clause 2.2 below governs adoptions and overrides normal legal rules under statutes and case law that an adopted person is always treated as the child of the adopting parent. Instead the age of the adopted person determines whether the adopted person will be treated as the child of the adopting parent. The particular age chosen should be discussed with the client. Note that the age of the adopted person is determined at the time of commencing the court proceeding for adoption, not the age when the adoption becomes effective.]

2.2 An adopted child will be regarded as a descendant of the adopting parent if the petition for adoption was filed with the court before the child's thirteenth birthday, and the descendants of that child will be regarded as descendants of the adopting parent. An adopted child will not be regarded as a descendant of the adopting parent if the petition for adoption was filed on or after the child's thirteenth birthday. If a court terminates the legal relationship between a parent and child while the parent is alive, that child and that child's descendants will not be regarded as descendants of that parent. If a parent dies and the legal relationship with the parent's child had not been terminated before the parent's death, the child and the child's descendants will still be regarded as descendants of the deceased parent even if another person later adopts the child.

[**Comment:** clauses 2.3 through 2.6 below set forth rules to determine when a person is to be considered as a child of that person’s biological parent. The precise terminology used is significant. The following provisions make significant distinctions that in some instances are based on when a person was conceived, and in other instances that are based on when gestation commenced and not when the person was conceived. Conception is different from gestation. A person can be conceived by the combination of genetic material in a laboratory setting and yet not be in gestation (such as with frozen embryos which are held for possible later implantation, or gestation).

The rules are broken down into two general categories: children who were in gestation during the biological parent's lifetime (clause 2.3), and children who were not in gestation during the biological parent's lifetime (clauses 2.4 through 2.6). The latter category would include children who are conceived during a biological parent's lifetime but who are not implanted into a woman's body (or when science makes it possible, an artificial womb) for gestation until after the biological parent's death.]

### *Biological Children in Gestation During Lifetime*

2.3 The following rules apply for the purpose of determining whether a person who is in gestation during the lifetime of a biological parent (and the descendants of that person) belong to a class of descendants eligible to receive distributions under clause 1.1.

#### *Child of Biological Birth Mother*

[**Comment:** clause 2.3(a) below applies only to a mother who is both the biological and birth mother of a person. The rule reflects a policy decision that a person will be always treated as the child of the woman who is both his or her biological and birth mother, without regard to the mother's intention to become a parent. For example, the biological child of a woman who carries the baby *in utero* and gives birth to the child will be treated as the child of the mother, whether the mother is married to the biological father, is married to someone who is not the biological father of the child, or is unwed. A person conceived by means other than copulation will be treated as the child of the mother who is both the biological and birth mother, even if the biological father timely revoked his intent to become a biological parent under clause 2.3(c).]

2.3(a) A person whose mother is both the biological and birth mother of that person will be treated as the child of the mother, whether the person was conceived by copulation or by means other than copulation.

#### *Child Conceived By Copulation of Married Parents*

[**Comment:** clause 2.3(b) below sets forth an obvious and simple bright line test. A person who is the biological child of two parents who were married to each other either when that person was conceived or at any time after conception is conclusively the child of the biological father, if conception resulted from copulation of the biological father with the biological mother. The biological father's consent to the use of his genetic material to produce a child is irrebuttably and conclusively presumed. This rule applies only to the biological father, because a person will always be regarded as the child of the biological mother if she is also the birth mother, under the provisions of clause 2.3(a). Thus the rule under clause 2.3(b) covers a child who is conceived by copulation of a married

couple. It also covers a child who is conceived out of wedlock through copulation of unwed biological parents if they then marry each other at any time after conception. Similarly, the rule covers a child who was conceived through copulation of biological parents who were married to each other when the child was conceived but who divorced before the child was born.

Clause 2.3(b) is limited to conception that results from copulation in order to prevent a person from being treated as the husband's child where the wife uses genetic material previously furnished by the husband to produce an embryo by means other than copulation without the biological father's consent. Whether a person conceived by means other than copulation using the husband's genetic material will be treated as the husband's child is governed by clause 2.3(c), which is not limited to biological parents who are married to each other.

If it is established that a person is not the biological child of the husband, the person will not be treated as the husband's child even if born during marriage, unless treated as the husband's child under another clause.]

2.3(b) If a person was conceived by copulation of the biological parents, the person will be treated as the child of the biological father if the biological parents were married to each other when the person was conceived or at any time after conception.

#### *Conception Other Than By Copulation*

**[Comment:** clause 2.3(c) below governs the situation where a child is conceived by means other than copulation of the biological parents, using genetic material provided by the biological parents with the intent to become a parent. The rule applies if the biological parents are married to each other, if the biological parents are not married to each other and either one or both of the biological parents are married to someone else, or if neither biological parent is married. The rule applies to a married couple whose genetic material is combined to produce an embryo which is implanted either in the body of the biological mother or in the body of another woman who is not the biological mother (a gestational birth mother). The rule would also apply to a married man whose wife is infertile, and who provides his genetic material which is combined with the genetic material from a woman who is not his wife by fertilization in vitro with implantation of the embryo either in the body of his wife or in the body of a gestational birth mother.

The intent to become a parent must be acknowledged in a written instrument signed by the biological parent which is not revoked by that parent prior to gestation. The test is applied separately to each biological

parent, so that it is possible for a person to be treated as the child of one biological parent but not the other biological parent, even if both biological parents are married to each other.

The clause does not require that notice of revocation of intent to become a parent be given to anyone. Consideration might be given to requiring notice of revocation of intent to become a parent be given to the biological parent's spouse (if married) or to the other biological parent (if not married). Drafting of such a provision is fraught with tremendous uncertainties, and requiring notice likely would lead to litigation to determine whether notice had been given effectively. On balance the better policy would seem to be not to treat a person conceived by means other than copulation as the child of a biological parent who no longer intended to become a parent, irrespective of the ancillary consequences and effect on the biological parent's spouse or the other biological parent, as those ancillary consequences are likely irrelevant to the testamentary intentions of the settlor of the trust.]

2.3(c) If a person was conceived by means other than copulation, the person will be treated as the child of a biological parent only if that parent provided his or her genetic material with the intent to become a parent acknowledged in a written instrument signed by the biological parent that was not revoked by a subsequently dated written instrument signed by that biological parent before that person was in gestation. The provisions of this clause do not apply to a mother who is both the biological and birth mother of that person.

#### *Spouse of Biological Parent*

[**Comment:** clause 2.3(d) below provides that if a biological parent of a person who is treated as the child of that biological parent is married to someone who is not the other biological parent of that person, that person can be treated as the child of the spouse who is not a biological parent if the spouse evidences an intention to be treated as the parent of that person, without the necessity of going through a formal adoption proceeding. Note that this provision can be used to provide for parentage of both spouses in a same sex marriage.]

2.3(d) If a person is treated under clause 2.3(c) as the child of a biological parent who was married when the person was conceived to someone who is not a biological parent of that person, the person will be treated as the child of the biological parent's spouse if the spouse acknowledged intent to become a parent in a written instrument signed by the spouse that was not revoked by a subsequently dated written instrument signed by that spouse before that person was in gestation.

#### *Father Not Married to Biological Mother and No Prior Written Intent To Become a Parent*

[**Comment:** clause 2.3(e) below applies to a biological father who is not treated as a parent under any of the preceding clauses. A person not treated as a child of the biological father under any of the preceding clauses will be treated as the biological father's child if the biological father acknowledged parentage in writing, openly raised the child as the father's own child, or was adjudicated to be the person's father. Any one or more of those circumstances can be eliminated from the form.]

2.3(e) A person who is not otherwise treated as the child of that person's biological father under the preceding clauses will be treated as the child of the biological father only if:

2.3(e)(1) the biological father acknowledged parentage of the person at any time after conception in a written instrument signed by the biological father;

2.3(e)(2) the biological father openly raised and acknowledged the person as his child; or

2.3(e)(3) parentage was established by adjudication

#### *Child in Gestation on Parent's Date of Death*

[**Comment:** clause 2.3(f) below provides that a child who is in gestation during the lifetime of a biological parent and who is born alive after the biological parent's death is treated as being alive on the biological parent's date of death, subject to survivorship requirements set forth elsewhere in the trust instrument. It is an expression of the doctrine of *en ventre sa mere*.]

2.3(f) A child who is in gestation on the death of a person who is treated as a parent of that child under any of the preceding clauses will be treated as living on that parent's date of death (subject to the general survivorship requirements set forth in clause \_\_\_\_).

#### *Children Not in Gestation During Lifetime*

2.4 Whether or not married, the biological parent of a person who was born after that biological parent's death and who was not in gestation on that biological parent's date of death will not be treated as the parent of that person, and that person will not be treated as the child of that biological parent, unless:

2.4(a)(1) that biological parent acknowledged intent in a written instrument signed by that biological parent to become a parent through the use of genetic material that was not revoked by a subsequently dated written instrument signed by that biological parent, and

2.4(a)(2) the person was born within three years after that biological parent's date of death.

2.5 If a person born within three years after a biological parent's date of death is treated as a child of that biological parent under the provisions of clause 2.4, each person who is a child of that biological parent born within six years after that biological parent's date of death will be treated as a child of that biological parent if all of the other requirements and conditions of clause 2.4 are satisfied.

*Three-Year Waiting Period Before Termination of Interests*

2.6 The provisions of this clause will be applicable to a trust held under clause 1 on the first date after the death of the child for whom that trust is named when there is no then living descendant of that child, and will operate to extend the time for termination of the beneficial interests of the persons for whom that trust is held, but only if the following conditions are met.

2.6(a) A person eligible to receive distributions from that trust must give written notice to the Trustee during that person's lifetime in a written instrument signed by that person that (i) states the person's intent to become a parent through the use of genetic material, and (ii) identifies one or more persons to receive the notice under clause 2.6(b) from the Trustee after that person's death. A person who gives written notice to the Trustee of his or her intent to become a parent can revoke that intent, or can designate other persons to receive the notice under clause 2.6(b), in a subsequently dated written instrument signed by him or her that is delivered to the Trustee during his or her lifetime.

2.6(b) If a person who is eligible to receive distributions from a trust is held under clause 1 has given the Trustee written notice that meets the requirements of clause 2.6(a), the Trustee must give written notice within one month after the first date when there are no then living persons who are eligible to receive distributions from the trust under that clause to each person who was designated to receive it that he or she has a period of six months from the date of receipt of the notice to provide the Trustee with the following:

2.6(b)(1) evidence from a medical doctor or other licensed health care provider, clinic, institution, or authority confirming the existence of the genetic material (or one or more embryos produced with that genetic material) provided by the deceased member of that class of descendants; and

2.6(b)(2) a written statement of intention signed by the person to whom the notice was given under penalties of perjury and in the presence of two witnesses that he or she intends to cause a biological child of the deceased member of that class of descendants to be born within the period prescribed in clause 1.4.

*2.6(c)* The provisions of clause 2.6 will not be applicable with respect to any child or children conceived with genetic material (or with respect to any descendants of any such child or children) provided by a member of a class of descendants for whom a trust is held, and no such child or descendant of any such child conceived with that genetic material shall become a member of the class of descendants eligible to receive distributions from a trust under clause 1 if:

*2.6(c)(1)* that member of the class of descendants who provided the genetic material fails to give the Trustee written notice complying with the requirements of clause 2.6(a), or

*2.6(c)(2)* the person designated to receive the notice under clause 2.6(b) fails to comply with the requirements under that clause on or before the expiration of six months from the date of receipt of the notice from the Trustee under 2.6(b).

The provisions of clause 2.6 shall apply separately with respect to each member of a class of descendants for whom a trust is held under clause 1. No child nor any descendant of a child who is conceived as a result of the use of genetic material and who is excluded as a member of the class of descendants eligible to receive distributions from a trust under clause 1 because of the failure to comply with the provisions of clause 2.6 shall ever become eligible to receive distributions even if there are other members of that class of descendants who are eligible to receive distributions because of compliance with the provisions of clause 2.6.