Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

Episode 20:
The Curious Case of the Kid with Five Parents—Estate planning for assisted reproductive technology

By Warren K. Racusin, Deb Guston, Kimberly Mutcherson

Warren Racusin: I meet with new clients, husband and wife. Of course, as part of the routine ramp up about their situation, I ask them whether they have children. They say, "Oh, yes, we have a little girl, and she actually has five parents." Not missing a beat because I want to sound like a sensitive, new-age kind of guy I say, "Really?" They say, "Yes, a sperm donor, an egg donor, a surrogate, and the two of us."

From the law firm Lowenstein Sandler, you gluttons for punishment, it's season four of *Splitting Heirs*. I'm Warren Racusin. Assisted reproductive technology, or ART, takes in a wide range of medical procedures that assist with conception. IVF, sperm and egg donors, surrogacy, pre-implantation genetic diagnosis. All those procedures are designed to bring immense hope for those struggling with infertility, LGBTQ+ couples, and anyone wishing to start a family outside traditional means. They also raise questions for estate planners. Who is considered a legal parent? Who are the legitimate heirs? How do we protect the interests of children born from these technologies? And what are the ethical issues that lurk in this brave new world?

Fortunately, we've got two certified experts to help us sift this all through. Debra Guston is a partner in the law firm of Guston & Guston in Glen Rock, New Jersey. Deb's practice focuses on family formation through adoption and assisted reproduction and family protection. She's also a lecturer at the Rutgers School of Law, where she teaches family law, assisted reproduction, and adoption law. She serves on the New Jersey Supreme Court's Family Practice Committee. Deb was a member of the group of attorneys who drafted the New Jersey Gestational Carrier Act, and she advocates for legislation in New Jersey to mandate insurance coverage for IVF and other assisted reproduction care and fertility preservation.

Kimberly Mutcherson is co-dean emeritus and a professor of law at Rutgers Law School. She's a nationally recognized scholar in reproductive justice and her work explores critical issues at the intersection of law, bioethics, and family. She is a scholar and resident at NYU Law School's Birnbaum Women's Leadership Center, a senior fellow at Columbia Law School's Center for Gender and Sexuality Law, and a visiting scholar at the University of Pennsylvania Center for Bioethics. You can see, we've got the A-team here.

So, our clients die. Their surviving parent's will names "my children" as heirs. Does that include ART girl? What if the sperm donor says, "Wait, I've got rights here?" What if the grandparents create a trust for the parents naming "my descendants" as the ultimate recipients of the trust property? Can they contest the inheritance?

Deb, you're on the ground dealing with issues like this all the time. Let's start with you. Why don't you give us some thoughts and ideas about these kind of issues and what your clients confront when dealing with them?

Deb Guston: First, Warren, I hope your clients when they did their surrogacy actually got an order from a court saying that they were the parents. Because if they did that, then there's no other people who can contest their legal claim as parents to the children. It's also true that those sperm donor and the egg donor, while they may be genetic parents, when they made their donations under most state law, they terminated any rights that they may have had to that little girl.

Warren Racusin: Is that true because they signed a contract or an agreement that said that, or is that a matter of law, or does that depend what state you happen to be in?

Deb Guston: It depends on the state. Here in New Jersey, we have a statute. In Pennsylvania, they have case law that says if you enter into a contract about donating sperm, it's a valid contract. It really depends on where you are.

Warren Racusin: Let's talk about what's a lot more fun and interesting, which is what happens if the parents hadn't gotten that court order. Then what happens?

Deb Guston: Well, that's a really good question. Again, I think it's a problem for state law. I think the sperm donor and the egg donor are still not parents. I think that's pretty clear anywhere you are, no matter how that happened.

Kim Mutcherson: Part of that is also because there's a presumption that when a child is born into a marriage, is a child of the marriage? That's just basic family law. That's also going to be on the table. There are all these different areas of law that'll come together.

Deb Guston: Yeah. We have growing areas where states and courts are recognizing that if people are actually parenting a child, they intend to parent the child, they're a parent. I agree with Kim 100%. There are so many facets of our family law that feed into it. It's not just the cut and dry scientific stuff.

Warren Racusin: Here in the great state of New Jersey, the law generally, with regard to interpreting a will, is what's called probable intent. Which means you can dive into figuring out what the parents really had in mind when they named "my children" as their descendants. It sounds like this girl would probably be treated as included within that class of beneficiaries that the parents are bequeathing their assets to. What about the grandparents who may have created this trust 50 years ago when assistive reproductive technology was barely a gleam in anybody's eyes? What would happen to that trust at the death of the parents?

Would this girl, this grandchild, be treated as a grandchild and be entitled to inherit from the assets in that trust? Probably a little bit closer question, right?

Deb Guston: Yeah, and no. Again, if there's a parentage order. Is she a genetic descendant of those parents? No. But is she a legal descendant? Yes. A lot of that is going to depend on the language in the trust. I've actually seen some trusts that even just block out adopted children, which seems harsh. But generally, if that's the term used, I think again, their intent and how they treated the child, right, Kim? If this is their granddaughter and they treated her as their granddaughter during their lifetimes, I don't know why the trust wouldn't apply to her.

Kim Mutcherson: Agreed.

Warren Racusin: Even though the grandparents may not have ever thought about the fact that their "grandchild" is the product of biological material other than their child, you think that probably wouldn't make a difference? It might come back to a question of intent.

Deb Guston: It might, but then people's original intents can morph over time I suppose, too. They certainly could have restated the trust, either deny her status as a descendant or confirm.

Kim Mutcherson: I think what Deb said though is also really interesting. Which is that people can write trusts where they say things like excluding adoptive children. That I think would make this more complex. Because at the point where they have said, "We're not interested in our assets being passed on to adopted children," in other words evidencing an intent that they don't want kids who are not genetically related to them to be able to inherit from them, then I think we're going to have to fight a little bit.

Warren Racusin: Is this, in New Jersey at least, and I recognize every state's law may be different and you need to check with lawyers in your own state to see what the law is. But in New Jersey, is this child treated or considered as an adoptive parent of these clients of ours?

Kim Mutcherson: No. They're just children who were born into a family. You don't have to adopt your child. New Jersey actually is a state that will do what are called pre-birth orders. It is understood from the moment that that child is born whose names are going to go on the birth certificate and who are the legal parents of that child.

Warren Racusin: To Deb's point about the ability to amend a trust, it might be worthwhile to have these parents have a conversation with their parents knowing that this trust was created 40, 50 years ago and say, "Hey, here's what's happening. We want to be clear that our daughter's going to inherit someday." That could be an interesting conversation, depending on what the grandparents think. But at least to the theme that runs through now our fourth season of *Splitting Heirs*, that communication is key in doing sound estate planning, you ought to have that conversation with the grandparents here to make sure that everybody's on

the same page. A lot easier to figure it out beforehand. And in New Jersey, as well as a number of other states, a trust, even an irrevocable trust, can be amended and changed under certain circumstances here to clarify what the grandparents really wanted.

It's a nice intersection between the family planning, the parent planning, and the estate planning can all come together in the right way, assuming everybody's talking about it and everybody plans for it.

Kim Mutcherson: I think that's actually part of what can be tricky. The folks who came to talk to you were very clear, "This is how we created our family, this is how we brought a child into our family." Not everybody wants to have those conversations. Some people don't want to say, "We've used a donor." It's hard to not say you've used a gestational carrier because people are going to expect you to look pregnant at some point. That's a pretty hard thing to hide. But other things, you can keep hidden. If people don't want to talk about it, sometimes they're going to find out later on that they've actually made the world harder for their child by virtue of not wanting other people to know how that child came into the world.

Warren Racusin: Some people may think, "Well, how would this issue ever come up?" Well, I suppose one way it could come up is if these parents, these clients, have one or two other children born in the old-fashioned way. There are, as sometimes happens, sibling rivalries. Sometimes those sibling rivalries can get pretty intense, and then parents die, and natural-born children, if that's the right term, I'm not sure that it is or not. Natural-born children say, "Hey, she's not really a child, she's not entitled to anything." Depending upon the size of the estate, there could be enough dollars involved for people to hire lawyers and start fighting about it. It's not beyond the realm of possibility that undealt with, these issues could come up at a terrible time in a very nasty way. Wearing my lawyer's hat, I say that it is far from impossible that this could happen after the fact.

Deb Guston: Yeah. Because one other thought stems from that is that if these parents did not have a will and they did have two children that were their genetic children and this child born of donors and surrogates, now you have a potential problem if they somehow never got that pre-birth order that said they're the parents. Now you've got somebody who may be pushed out by way through the intestacy laws. They're not a genetic child, and those siblings might very well have an argument that, "Oh, this kid was just living in our house. This is not my legal sibling."

Warren Racusin: Let's change the facts a little bit. Single individual freezes embryos for future use and then dies. Can his or her partner use those embryos? Again, if that's the right term. Are children born posthumously entitled to an inheritance? Are they entitled to Social Security survivor benefits? Are they entitled to anything?

Kim Mutcherson: First, you said somebody who is single, so I'm assuming that you mean unmarried, right?

Warren Racusin: Yes.

Kim Mutcherson: Not just somebody who's unpartnered.

Warren Racusin: Yes.

Kim Mutcherson: Somebody who is unmarried, first I would want to know, who did they make those embryos with? Did they make those embryos with the partner? Did the partner come later? Did they have a conversation where one person said, "I want to have kids and I know you're not ready yet, so I'm going to go ahead and make some embryos?" That might become something that we have an issue about.

Second thing that I'm going to want to figure out is what did they sign at the clinic where they made those embryos. Any time you go to a clinic and you make embryos, they've got you signing contracts. Part of that contract is going to say what is the disposition of these embryos if something happens to you. Should they be destroyed? Should they be donated to somebody else? Or is there someone else who's a part of this relationship to whom they should be given? Maybe you're going to have had that conversation. If you're sufficiently sophisticated, maybe you did go to a lawyer beforehand. We're all big fans of going to lawyers before you do these things. Unfortunately, a lot of people don't do that. But maybe you went to a lawyer beforehand and you worked out what all of those details are.

There are different permutations of what could be happening here. But if they're unmarried and if that person is not the person whose genetic material was used in making those embryos, I'm not sure that they could just walk in and say, "Yeah, those embryos are supposed to go to me." Under what authority would they say that they have a relationship to those embryos? Unless somebody's written it down somewhere and given them rights to those embryos, or unless they actually have genetic material, they've got skin in the game in one way.

Warren Racusin: Which I guess begs the question, or highlights the question, who do those embryos belong to, if anybody?

Deb Guston: They belong to the estate of the deceased person who initially created them. Again, to further Kim's multiple scenarios under which this could proceed, if that person used their own genetic material and donor material, I agree with Kim, I don't think that there's going to be a chance that the partner who survives is going to get to use those embryos. Unless there was a contract, or unless there's something in that will that says, "Hey, I am the owner of some embryos. They're being stored at ABC Clinic. If I die, I give control and possession of those embryos to my friend so-and-so." I think the will has to be really clear about this because it's not just giving control and ownership of the embryos, but it's giving them permission to use them, to use them for procreation. Those are really two different issues. Who gets to pay the storage contract is one, and who gets to use them to have a baby is another.

Warren Racusin: In those contracts that this person has with the fertility clinic, do those contracts uniformly or routinely say, "Here's what I want to have happen to this embryo if I die before the embryo becomes a child?"

Kim Mutcherson: There were a series of cases that happened many years ago because clinics were not having people make those kinds of decisions before they made their embryos. Then two people make embryos together, they end up getting divorced, now we're fighting over who gets the embryos because one person wants to use them to make babies and one person says that they should be destroyed. After we had those cases that happened, it became absolutely routine that any reputable clinic, I hope nobody's trying to make embryos in a clinic that is not a reputable clinic, but any reputable clinic is going to have you figure out some of those issues.

Now, you may have signed that in year one and now we're having a dispute in year 15. Then there's a question of, well, maybe we need to have some sort of contemporaneous agreement about what happens with these embryos, those sorts of things. But generally, courts will enforce that contract that you sign when you make the embryos on the first instance.

Warren Racusin: What happens in that case that you just mentioned? That you make the embryos in year one, and then it's year 15 and one or both parents dies. If that agreement says that that child is to be somehow implanted and brought to term, that would still govern?

Kim Mutcherson: Yeah.

Deb Guston: It would give the surviving parent the right to make those choices. I don't think there's any scenario in which someone would be forced to use an embryo. It's really clear I think though that in most states, with the exception at the moment of a couple of states that define embryos as having some rights of personhood, states like New Jersey look at embryos as being property. Special property with special characteristics, so it's not a couch, but it's not a human being. The people who created it have a right to decide what the outcome is going to be for those embryos.

Warren Racusin: You can see, as we talk through this, that there are some huge ethical issues here, as well as legal issues. Should the sperm or egg donors have any say in the upbringing or the inheritance rights of children conceived with their genetic material? What about a surrogate who carries a child, but has no genetic link? Frozen embryos, gametes, our language about these things in our wills and trust talk about gametes and zygotes. Things that I never thought I'd have to think about after freshman biology, but here we are again. A child's conceived after the death of the genetic parent, does that child have inheritance rights? Is it ethical to bring someone into the world without one or both genetic parents present? Is it ethical not to do that?

Then, how about designer kids? There was a great cartoon in The New Yorker a couple of months ago. It's two young women, one's pushing a baby carriage and

the other one isn't. The caption is the woman not pushing the baby carriage saying, "I'd like a baby, it just has to be the right baby."

Beyond the law, how do you struggle with those sort of ethical issues? What are your thoughts about that? I'm looking mostly at Kim, since you teach bioethics, but both of you obviously have thoughts about this that we'd love to hear about.

Kim Mutcherson: Yeah. As you say, I teach a course at my law school and have for a very, very long time now called Bioethics Babies and Baby-Making, which is super fun to teach. One of the reasons why I wanted to teach a course where I wasn't just talking about law, but I was also talking about bioethics is that law is a very blunt instrument. It doesn't always allow us to get into the nuance, and the difficulty, and the complexity of a lot of issues. We live in a world where there's a billion-dollar industry that makes babies. So many things are going to become complex, and difficult, and create lots of controversy when you have a business that makes babies.

All the questions that you were asking. Is it fair to bring a child into the world when one of that child's parents is dead? And maybe has been dead for a very long time. Is it fair for a grandparent to try to get custody over an embryo because they never got to have a grandchild when their child was alive? Now they want to create a grandchild. There are so many different pieces of that puzzle.

I think a lot of what makes this really difficult for us is that usually when we talk about family building and family creation, we think of that as being this incredibly private part of people's lives. We don't necessarily think, "Well, shouldn't a court make a decision about whether that person can have a baby? Shouldn't a court be making these decisions?" We don't think about that. We think about these things as being very private. And yet, because we have taken reproduction out of the bedroom and into a doctor's office, now we have all these other things to think about. Even questions of whether a provider should be able to say to somebody, "I'm not going to work with you because I don't like your family structure. I don't like the way that you want to create a child."

All of those are things that we're going to continually struggle with and that we should continually struggle with because the things that we're talking about here are literally the nature of what it is to be a human being in lots of ways.

Warren Racusin: When you raise these issues in your class, what kind of feedback do you get from your students? I assume these are law students, so they're in their early to mid-20s. What kind of feedback do you get?

Kim Mutcherson: Well, it's interesting. Because I've taught it over a series of years, the experiences of students have shifted. Nobody in the classroom in 2025 is going to be horrified by the idea that children are being created through IVF. That's

such a standard part of the world right now. I will have students in my class who know that that's the way that they came into the world. There's this sense of naturalization about this kind of technology and what it has meant in the world.

And there also tend to be generations of people who do feel like, "If I can pay for it, if I can find a doctor who will do it, then I should be able to make all sorts of decisions about what kind of children I want to have and who I'm going to have those children with." But one of the things I consistently say to my students over the course of the semester is that the conversation that we will have about what's ethical, what are the ethical implications, is often and often should be, very separate from the conversation that we have about law.

Warren Racusin: Sure.

Kim Mutcherson: I can say, "I think maybe it's a really bad idea for somebody to create a child when both of the genetic parents are dead." They died in a car accident, the grandparents swoops in and says, "Hey, we've got these embryos, let's make some babies here." I could say, "That makes me uncomfortable, I don't think that that's a thing that should be done." But I wouldn't necessarily say, "I think that we should make that illegal. I think that we should make that something that people simply cannot do." I think it's really important to keep those two different categories in mind because just because we feel uncomfortable with something doesn't mean that somebody shouldn't be able to do it legally.

Deb Guston: Yeah. The other thing that I'm thinking about too in this is when we talk about donors and donors' rights, I think we're losing sight of really what this process is to a donor. I think to most donors, they're doing something altruistically, they're doing something without expectation that they will have contact with a child conceived with their gametes, that they will have any knowledge of what is going on. Some of them will probably know that a child was born, but very little else. I think the more we try to look at how is the donor feeling about this, the less possibility there is of getting a lot of donors in the future.

Colorado just passed a law. It said that if you donate sperm or eggs in Colorado, or if a clinic uses those sperm or eggs in Colorado to create a baby, that donor has to be disclosed to the child when the child turns 18. It blows apart our thoughts about the privacy, as Kim was saying, of the donor process. People are really worried now that the more open these situations are on a legal basis, and I agree with Kim 100%, what we think may be right doesn't necessarily mean it should be legal or enforceable. People are really worried that there's going to be less and less people willing to be donors if their identities are going to be disclosed in the future.

It cuts both ways in terms of the needs or the desires of everyone. Again, that law came about because everybody was saying, "Well, donor-conceived children have a right to know about their genetic history." That's their history, just like adopted children, really we believe pretty much across the board as a society that adopted children don't have a right to know, one, that they're adopted.

Number two, to have information about their birth families. So two is a movement of looking at the rights of donor-conceived people. It's a careful balance that has to be matched there.

Warren Racusin: What you're saying, coming full circle here, is if my client's child had been conceived, carried, and born in the great state of Colorado, that child would be entitled to know who the egg donor and the sperm donor were?

Deb Guston: At the age of 18.

Warren Racusin: Analogous to adoption, I guess.

Deb Guston: Well, it depends, again, state by state. If you're in New Jersey, an adopted person, again, if they were born in New Jersey, will have a right to get a copy of their original birth certificate once they turn 18 unless the birth parent has specifically opted out, which is really hard for birth parents to figure out how to do or they neglect to do it at some point in time.

Warren Racusin: I guess this all touches on and leads to, finally, a little bit of discussion about, well, how do you plan for all this? We've touched on a lot of this, but just to underscore it. Your wills and your trust should be as clear as they could be, naming children conceived via ART as children who are part of or not part of the disposit of plan. You ought to be clear about it in your documents. You got to think about all these privacy and disclosure issues, you've got to designate guardians and trustees who understand your wishes and the family structure. At least to some extent through good planning, good lawyering, good planning in advance, at least you can control for at least some of these things and not let them spin out of control. Is that a fair conclusion in all this? You got to address all these things.

Kim Mutcherson: And you got to address it with somebody who thinks about these issues a lot. I would not suggest talking to someone who’s never dealt with embryo disposition before, who’s never dealt with the idea of somebody potentially having five different folks who have some sort of relationship that feels like a parental relationship. There are a lot of complexities in this field so it's definitely worth paying the money to talk to somebody who has been down this road before.

Deb Guston: Also, in the surrogacy world, a reputable surrogacy program that matches intended parents and surrogates are usually going to require before intended parents actually sign a contract with their surrogate that they have a will that designates guardians, sets up a trust for their future child to make sure that if something happens to them before the child's born, everything is taken care of.

Warren Racusin: Oh, you mean the surrogate should have a will that says all those things, is that what you mean?

Deb Guston: No, the intended parent.

Warren Racusin: Oh, okay.

Deb Guston: Sometimes we like to have the surrogates have wills as well because we want to make sure that the child she's carrying if she were to die during pregnancy, pregnancy is a pretty risky endeavor, we want to make sure also that that child is not treated as her child for inheritance purposes. There are a lot of complexities even before the baby arrives about things people should be thinking about and doing.

Warren Racusin: Well, we can get I guess a few chuckles about all this, but these are actually profound issues that go to, I think, the very nature of existence and control of the future. I'm really happy that we've had the chance to talk about them with two people who've thought so deeply about these issues. Deb and Kim, thank you so much. We really appreciate it.

Thanks to everybody at Lowenstein and Good2bSocial for helping us put these podcasts together. Mostly thanks to all of you who are listening. We'll see you again next time. Until then, as we say in these parts, have a good one.