

# **ATTACHMENT 1**

## M E M O R A N D U M

**To:** ART Committee (*alias* Committee on UPC Updates to EPIC)  
**From:** James P. Spica  
**Re:** Notice Attachment for UPC Updates to EPIC Proposal  
**Date:** May 28, 2016

---

### INTRODUCTION

The purpose of this memorandum is to sketch what I'll call "a notice attachment." A notice attachment is a set of additions and revisions that can be dropped (if need be) into the Committee's proposal for UPC updates to EPIC ("UPC updates") to prevent the effects of the UPC updates concerning a posthumously conceived child of assisted reproduction or gestational child unless a certain kind of notice is timely received.

A notice attachment is an *attachment* because it is an imposition on the UPC updates: the UPC updates are *better*—in the opinion of the Committee and, evidently, the Uniform Law Commission—*without* a notice requirement. The virtue (if any) of a notice attachment is only that it will diffuse local opposition to the UPC updates' 45-month wait-and-see period for posthumous birth by technologically assisted reproduction.

The local objection to the 45-month wait-and-see period seems to be that it inhibits timely and efficient administration of estates and estate-trusts. Since the Committee regards a notice attachment as a necessary (*if necessary*) *evil*, the attachment sketched below is narrowly aimed at the perceived objection: the attachment makes timely and efficient administration a *condition* for the extraneous requirement of notice.

Another salient feature of the sketched notice attachment is that it distinguishes between notice that genetic material of the decedent is *available* for possible use in posthumous conception, on the one hand, and notice of an actual intention to *use* genetic material of the decedent for posthumous conception, on the other. The sketched attachment requires the former, not the latter. And required notice may be given by *anyone*: it need not be given by a person entitled to *use* genetic material of the decedent for posthumous conception. The intent is to place the least burden on a bereaved person contemplating the creation of human life as is consistent with a notice requirement conducive to timely and efficient administration.

### NOTICE ATTACHMENT SKETCH

A full realization of the notice attachment sketched below would require a line-by-line search for implications throughout the UPC updates. I haven't conducted that search. What follows is rather the result of a conscientious effort to hit the high points.

**Memo:** ART Committee (*alias* Committee on UPC Updates to EPIC)  
**Date:** May 28, 2016  
**Page:** 2

MCL 700.XXXX is added.<sup>1</sup>

**700. XXXX Notice of Availability of Genetic Material for Use in Posthumous Conception**

**Sec. XXXX. (1) Certain Sections of [EPIC] provide that a posthumously born child of a decedent will be treated as living or in gestation at a given time only if the requirements of this Section are satisfied. For purposes of each such Section:**

**(a) If a notice to creditors is published as required in Section 3801 or Section 7608, the requirements of this Section are satisfied only if:**

**(i) Notice that genetic material of the decedent is available for possible use in posthumous conception is given to a person whose contact information is included in the notice to creditors;**

**(ii) The notice is mailed or delivered to, or otherwise comes into to the possession of, the person whose contact information is included in the notice to creditors within 9 months<sup>2</sup> of the publication of the notice to creditors; and**

**(iii) The form of the notice is either a writing including the informant's name and address that is signed by the informant or a valid will, regardless whether the will is admitted to probate.**

**(b) If no notice to creditors is published as required in Section 3801 or Section 7608 within 9 months of the decedent's death, no notice that genetic material of the decedent is available for use in posthumous conception is required by this Section, and the requirements of this Section are deemed to be satisfied without any such notice.**

**(2) If a personal representative or trustee whose contact information is included in a notice to creditors published pursuant to Section 3801 or Section 7608 receives or otherwise comes into possession of notice that genetic material of the decedent is available for use in posthumous conception, and the notice satisfies the requirements of subsection (1)(a) of this Section, the personal representative or trustee shall promptly provide a copy or partial copy of the notice or a statement describing the notice to each other fiduciary known to the personal representative or trustee who may have the power to**

---

<sup>1</sup> The sketched notice attachment comprises the bits that appear in red. What isn't red or blue comes from the current "master" of the Committee's proposal. As to the blue bits, see *infra* note 3.

<sup>2</sup> I've used nine months in the sketch for the notice period and for one other arbitrary cut-off. There's nothing special about nine months for either purpose.

**Memo:** ART Committee (*alias* Committee on UPC Updates to EPIC)  
**Date:** May 28, 2016  
**Page:** 3

control the distribution of the decedent's property or property distributable by reason of the decedent's death. A partial copy of a notice provided pursuant to this subsection shall reproduce as much of the copied notice as is necessary to show that the informant assets that genetic material of the decedent is available for possible use in posthumous conception and that the copied notice meets the other requirements of subsection (1)(a) of this Section. A statement provided pursuant to this subsection in lieu of a copy or partial copy of a notice shall be a signed writing indicating that a notice satisfying the requirements of subsection (1)(a) of this Section has been duly given.

(3) In itself, knowledge that genetic material of the decedent is available for possible use in posthumous conception is not knowledge of an actual intention to use genetic material to create a child after the decedent's death.

\* \* \* \* \*

[MCL 700.2120] (k) [When Posthumously Conceived Child Treated as in Gestation.] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, then if the requirements of Section XXXX are satisfied, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

- (1) in utero not later than 36 months after the individual's death; or
- (2) born not later than 45 months after the individual's death.

\* \* \* \* \*

[MCL 700.2121] (h) [When Posthumously Conceived Gestational Child Treated as in Gestation.] If, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, then if the requirements of Section XXXX are satisfied, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

- (1) in utero not later than 36 months after the individual's death; or

**Memo:** ART Committee (*alias* Committee on UPC Updates to EPIC)  
**Date:** May 28, 2016  
**Page:** 4

(2) born not later than 45 months after the individual's death.

\* \* \* \* \*

[MCL 700.2707] **(g) [Class-Closing Rules.]** The following rules apply for purposes of the class-closing rules:

(1) A child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

(2) If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent's death, **then if the requirements of Section XXXX are satisfied**, the child is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent's death or born not later than 45 months after the deceased parent's death.

(3) An individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

\* \* \* \* \*

[MCL 700.3715] **(gg)** If the personal representative has received notice or has knowledge of an **actual** intention to use genetic material to create a child after the decedent's death, take into account whether the posthumous birth of a child of assisted reproduction or **gestational child**<sup>3</sup> may have an effect on the distribution of the decedent's estate.

\* \* \* \* \*

[MCL 700.3908] **(2)** The personal representative shall not be liable for making a distribution of all or part of a decedent's estate that affects the interests of a posthumously conceived child of assisted reproduction or **gestational child** if the personal representative made the distribution before receiving notice or acquiring knowledge of an **actual** intention to use genetic material to create a child after the decedent's death.

---

<sup>3</sup> Bits that appear in blue have nothing in particular to do with the sketched notice attachment. They are (what I imagine are) needful additions to the UPC updates that I've noticed while composing this memorandum.

**Memo:** ART Committee (*alias* Committee on UPC Updates to EPIC)  
**Date:** May 28, 2016  
**Page:** 5

\* \* \* \* \*

[MCL 700.3957] **(2)** Except as provided in subsection (3), in the case of a posthumously conceived child of assisted reproduction **or gestational child**, the child's right (**if any**) as an heir or devisee, or that of a successor personal representative acting in the child's behalf, to recover property improperly distributed or its value from a distributee is forever barred at the later of 4 years after the decedent's death or 1 year after the time of the property's distribution.

\* \* \* \* \*

[MCL 700.7817] **(oo)** After the trustee receives notice or has knowledge of an **actual** intention to use genetic material to create a child, to take into account whether the posthumous birth of a child of assisted reproduction **or gestational child** may have an effect on the distribution of the trust estate.

\* \* \* \* \*

[MCL 700.7821] **(4)** The trustee shall not be liable for making a distribution of all or part of the trust estate that affects the interests of a posthumously conceived child of assisted reproduction **or gestational child** if the trustee made the distribution before receiving notice or acquiring knowledge of an **actual** intention to use genetic material to create a child.

\* \* \* \* \*

[Declaration of Intent form on next page]

**Memo:**  
**Date:**  
**Page:**

ART Committee (*alias* Committee on UPC Updates to EPIC)  
May 28, 2016  
6

**DECLARATION OF INTENT TO BE PARENT OF CHILD**

You may wish to consult with a lawyer before signing this form. This form is designed to declare your intent. Signing this form is not mandatory.

**IF THE TRANSFER OF EGGS, SPERM, OR EMBRYOS FOR PURPOSES OF ASSISTED REPRODUCTION BY (INSERT NAME OF PROSPECTIVE BIRTH MOTHER) OCCURS AFTER YOUR DEATH, AND SHE GIVES BIRTH TO A CHILD, SHE IS THE CHILD'S PARENT. DO YOU INTEND TO BE TREATED AS THE CHILD'S OTHER PARENT?**

**PLEASE CHECK "YES" OR "NO" AND THEN SIGN AND DATE BELOW:**

\_\_\_\_\_ Yes

\_\_\_\_\_ No

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

If you check "Yes" above:

- In case of multiple births, this form applies to all children born alive from the transfer or transfers that resulted in the births.
- This form is a legal document. Although it will become part of your medical records, it is not protected health information.
- The possibility of a child of yours being born after your death might delay the distribution of your estate or of a trust benefitting your children.
- **If a child of yours is conceived after your death, his or her ability to inherit your property may depend (under the local law of decedents' estates) on your executor's having notice by, at, or near the time of your death that genetic material is then available for use in conception.**
- You can change your mind by revoking this form. Any revocation must be in a written document that you sign and date. An oral revocation will not be effective. If you decide to revoke the form, you should deliver the document revoking the form to the entity so that it will become part of your medical records. You should also notify the prospective birth mother of your decision to revoke.

**CONCLUSION**

That's it.

JPS  
DETROIT 40411-1 1389362v2

# **ATTACHMENT 2**



DRAFT 2

A bill to provide for the ownership of real and personal property by married individuals as tenants by the entireties.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1           Sec. 1. This act shall be known and may be cited as the  
2 "tenancy by entireties in real and personal property act".

3           Sec. 2. As used in this act, "tenants by the entireties"  
4 includes the term tenants by the entirety.

5           Sec. 3. Any interest in real property may be owned by an  
6 individual and his or her spouse as tenants by the entireties. An  
7 interest in real property ~~jointly~~ acquired by individuals married  
8 to each other is presumed to be owned by the spouses as tenants by  
9 the entireties, unless the deed or other instrument of conveyance  
10 expressly provides for some other form of ownership. The common law  
11 of this state applicable to the ownership of real property by



Except as provided in section 7,

acquired

after the effective date of this act may be held by the individual and his or her spouse

1 tenants by the entireties in effect before the effective date of  
2 this act controls unless the common law is contrary to this act.

3 Sec. 4. ~~After the effective date of this act,~~ any interest in  
4 tangible or intangible personal property ~~may be owned~~ by an  
5 individual and his or her spouse as tenants by the entireties.

6 Sec. 5. (1) With respect to all tangible and intangible  
7 personal property transferred to or acquired by an individual and  
8 his or her spouse after the effective date of this act, all of the  
9 following apply:

10 (a) If there is a written instrument of conveyance, title, or  
11 other writing evidencing ownership by the spouses, or a written  
12 agreement between the spouses, whether made before or during the  
13 marriage, the property is presumed to be owned by the spouses as  
14 tenants by the entireties unless the instrument, title, writing, or  
15 agreement expressly provides for some other kind of ownership.

16 (b) If there is no written instrument of conveyance, title, or  
17 other writing evidencing ownership or written agreement between the  
18 spouses, all of the following apply:

19 (i) Tangible personal property transferred to or acquired for  
20 the use of both spouses, such as furniture and furnishings, is  
21 presumed to be owned by the spouses as tenants by the entireties;

22 (ii) Tangible personal property transferred to or acquired for  
23 the use of only 1 of the spouses, such as jewelry or clothing, is  
24 presumed not to be owned by the spouses as tenants by the  
25 entireties.

26 (iii) There is no presumption with respect to intangible  
27 personal property.

provided, however, that, at any time, the fair market value of the property subject to the presumption shall not exceed the amount for a small estate under MCL 700.3982 at that time.



1 (2) A presumption under this section is rebuttable.

2 Sec. 6. (1) This act does not alter the rights of an  
3 individual and his or her spouse who own real or personal property  
4 as tenants by the entirety, including the full right of  
5 survivorship on the death of either.

6 (2) This act does not alter rights under or restrictions,  
7 consequences, and conditions of any agreement between an individual  
8 and his or her spouse, whether made before or during the marriage,  
9 with regard to the ownership and disposition of tangible or  
10 intangible personal property.

11 (3) This act does not affect the application of section 1 of  
12 1927 PA 212, MCL 557.151, to personal property transferred to or  
13 acquired by individuals married to each other before the effective  
14 date of this act or owned by those married individuals as tenants  
15 by the entirety on the effective date of this act.

16 Sec. 7. This act takes effect \_\_\_\_\_.

17 Enacting section 1. This amendatory act does not take effect  
18 unless all of the following bills of the 98th Legislature are  
19 enacted into law:

20 (a) Senate Bill No. \_\_\_\_ or House Bill No. \_\_\_\_ (request no.  
21 04295'15 a).

22 (b) Senate Bill No. \_\_\_\_ or House Bill No. \_\_\_\_ (request no.  
23 04295'15 b).

24 (c) Senate Bill No. \_\_\_\_ or House Bill No. \_\_\_\_ (request no.  
25 04295'15 c).

26 (d) Senate Bill No. \_\_\_\_ or House Bill No. \_\_\_\_ (request no.  
27 04295'15 d).



*Section 7. A Deposit account as defined in MCL  
440.9102(1)(cc) may not be held by an individual  
and his or her spouse as tenants by the  
entireties. TDR*

- 1 (e) Senate Bill No. \_\_\_\_\_ or House Bill No. \_\_\_\_\_ (request no.  
2 04295'15 e).
- 3 (f) Senate Bill No. \_\_\_\_\_ or House Bill No. \_\_\_\_\_ (request no.  
4 04295'15 f).
- 5 (g) Senate Bill No. \_\_\_\_\_ or House Bill No. \_\_\_\_\_ (request no.  
6 04295'15 g).
- 7 (h) Senate Bill No. \_\_\_\_\_ or House Bill No. \_\_\_\_\_ (request no.  
8 04295'15 h).
- 9 (i) Senate Bill No. \_\_\_\_\_ or House Bill No. \_\_\_\_\_ (request no.  
10 04295'15 i).
- 11 (j) Senate Bill No. \_\_\_\_\_ or House Bill No. \_\_\_\_\_ (request no.  
12 04295'15 j).