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Possible Legal Rights of Cryogenically Revived Persons

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Sega is a partner at Venable LLP of Maryland. Sega's practice involves advising closely-held corporations and high net worth individuals on estate, gift and retirement planning issues. Sega identifies and discusses three possible categories of persons revived from a cryogenic state or biostasis. He offers a skilled view of the rights they possess in comparison to existing laws, such as wills and trusts; and proposes areas in which greater emphasis will be required to adequately service all the foreseeable needs of the revived.

Currently, there is no established law on cryogenically preserved persons, so we must draw from existing laws that apply to similar situations. First, we must distinguish what the rights of a revived person ought to be, and then we can identify ways to protect those rights. We must also consider how those rights relate to the institution in which the person is suspended, heirs, descendants, and third parties, such as financial institutions or the state.

The rights depend on the identity of the revived person. That identity can take on three distinct possibilities. If there is full psychological continuity, then the revived person is the same person that was preserved. If there are significant changes in the personality of the individual, then they might not be the same person, but more like an heir or descendant of that person. In this case, we can look to the law that applies to heirs and descendants of deceased

persons, by way of analogy, to define the rights of the revived person. Finally, if there is a total transformation into a completely new person, then the law would be entirely different. We will consider each of these situations as we examine the property, financial, and personal rights of a revived person.

Property and Financial Rights

Property and financial rights involve the right to hold and to sell property. They also include the right to receive and control an inheritance and to designate how assets are distributed upon death. Other relevant financial rights regarding revived persons are Social Security, retirement benefits, and insurance payments.

There are two competing principles in property law. One is that a person should have the right to control property, which means being able to hold it and determine what you want to do with it. Yet this right is circumscribed; it is not

unlimited. This is to ensure that a person is not going to control property indefinitely or hold it in perpetuity. Property should pass to the next generation or to another buyer. This gave rise to the Rule Against Perpetuities, which is the notion that property has to vest to another person within 21 years after the owner's death.

There are a number of states that have repealed the Rule Against Perpetuities, resulting in tension between a historical rule that says a person cannot hold property indefinitely and states that say that a person can hold property indefinitely. Other states have put limits on that indefinite period. For example, Florida limits it to 360 years. Maryland also has a similar limitation on real property. It is important that a person who will be cryogenically preserved choose a state as her domicile that protects her property rights indefinitely. Otherwise, she might lose her property before she is revived.

Personal Rights

Personal rights include citizenship, marital status, family relationships, and other political rights and obligations to or from third parties.

By analogy, we can examine the three bodies of law that discuss people who have disappeared and then reappeared or people who are in a new form. These include the law of absent persons, the legal treatment of cryogenically preserved embryos and semen, and the law of transgendered persons.

The Law of Absent Persons

When someone is absent, the Uniform Presumption of Death Act comes into play. A number of states have adopted this act, which states that if a person has been missing for a period of time, then he or she is presumed dead. The exact period is between four to eight years, depending on the state in which the person lived.

If a person is presumed dead, then his or her estate is probated and the assets are transferred.

Insurance and pension benefits are also distributed.

If we assume that this law is applied to a cryogenically preserved individual where there is a presumption of death, her property would transfer through the normal estate process. Yet after the person is revived, how will that person be treated in relationship to property and other personal rights? To answer that, we can ask how an absent person would be treated if they returned. The answer is dictated by statute in many cases. The person may be reimbursed from the estate fund, a state pool of assets, or the distributee (the heirs of the estate or the purchaser of the property from the estate).

This right might be limited in time or the amount that can be recovered. For example, if a missing person reappears more than five years after the presumption of death took effect, she would not have the right to recover the property.

The legal term "Black Acre" refers to a parcel of land. Imagine if, at the time of a person's disappearance, Black Acre was an unimproved lot. Twenty years later, when the person returns, the land is holding a very prestigious hotel. What does the person recover - the land as improved with a hotel, or the value of the land at the time of her death?

After this analysis, we must ask whether it is an appropriate analogy to compare the law of absent persons to those who are cryogenically preserved. Is a person who is preserved actually absent? The answer is – not entirely. We know where the person is, however, we are not sure that the person will return, or if they do return, what form they will take.

The Donaldson vs. Van De Kamp case established that pre-mortem cryogenics is not currently permitted, but what if this changes in the future?¹ If pre-mortem cryogenics is permitted, then we cannot make the assumption of death because the person is not dead; they are preserved and maintained before death. Thus, as the power to be preserved extends earlier and

earlier prior to this state of death, the analogy to the law of absent persons is lost.

Preserved Embryos and Sperm

Other relevant laws are those relating to cryogenically preserved embryos and sperm. There is some analogy here, particularly if we take the position that the revived person is not the same person, but a derivative. There is a great deal of law on the notion of property rights over embryos and sperm, but there is not much on the status of a fetus that has completed gestation as a result of cryogenically preserved sperm or embryos. In Australia and Tasmania, these fetuses are treated as descendants of the donor.

The sperm and egg are from different donors, and each possesses property rights to the fetus. The rights that the fetus has as an heir or descendant are contingent on its being preserved, which means that there are no real rights. Yet that contingent interest will vest because it becomes fixed after gestation is completed.

By analogy, we can consider that a revived person is an heir of the person who was preserved. Thus, while she is in biostasis, the interest is contingent on the property interests. After he or she is revived, that contingent interest will vest.

Transgendered Persons

Another analogous area of law is the treatment of transgendered persons. The notion is that the identity is changed slightly, but there is also great continuity so several protections are afforded to transgendered persons under their new status. Essentially, a transgendered person retains her same interest in property because she maintains civil rights as a person.

Obligations

We have discussed rights, but what about the other side of the coin – obligations? A revived person maintains her obligations, whether it is to

descendants or to the state. She might owe property, estate, or income taxes. She might have obligations to an insurance company.

Some questions arise. If life insurance was paid upon a person's death, should the insurance company be reimbursed when the person is revived? Should they be reimbursed for the value of the death benefit at the time of death or for the value to which those assets have grown during the period of suspension?

There might be an impact on marital status. If the revived person takes a new spouse who already has children, what are her obligations to them? The answer to these questions depends on whether the revived person is defined as the same person, an heir or descendant, or a completely new person.

Protecting Rights

There are many ways to protect the rights of a cryogenically preserved person. One option is to establish a dynasty trust through estate planning. This is a way to control assets from the grave, so to speak.

A preserved person should consider where he or she wants to be domiciled. Choose a jurisdiction that has repealed the Rule Against Perpetuities. Select one that permits dynasty trusts so the person can take advantage of the fact that property can be held indefinitely until revival.

Similarly, a preserved person may want to have property maintenance trusts. These are trusts that hold assets to maintain homes or other property that you plan to re-inhabit upon revival.

Finally, estate taxes are due upon death. A person who plans to undergo cryogenic preservation should ask whether there is a way to assure that she gets these back when she is revived.

Conclusion

It is probable that revived persons will be treated as an heir of the deceased person. Again, the law will change if pre mortem cryogenics is permitted. Yet, as it stands, she will have rights and obligations as an heir, such as rights to property and obligations to maintain and conserve the property. If she intends to re-access the property as an heir when revived, there is a duty to conserve, maintain, and pay taxes on it during suspension.

These are just some of the possible rights and obligations of cryogenically preserved persons. Any person planning to undergo cryogenic preservation should work with their attorney to manage their assets and obligations in a way that protects them throughout suspension and revival. As the reality of this technology becomes closer, the legal implications will become clearer.



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¹ *The California Court of Appeal, Second District, held that Thomas Donaldson, who has an inoperable, malignant brain tumor, has no constitutional right to either premortem cryogenic suspension or assisted suicide. Donaldson v. Van De Kamp, No. 181830 (Cal.Santa Barbara County Super.Ct.1990), aff'd, 4 Cal.Rptr.2d 59 (Cal.Ct.App.1992). The suit for declaratory and injunctive relief was dismissed at trial and affirmed on appeal.*