

PROBATE WILL FEEL A RIPPLE

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Mississippi Initiative 26 would have only a small effect on the probate transfer of property. The initiative would add the following new section to the Mississippi Constitution:

Person defined. As used in this Article III of the state constitution, “The term ‘person’ or ‘persons’ shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof.”¹

The first clause is critical: the initiative would modify the definition of “person” as used in Article III, not as used in any state statute affecting inheritance or in anyone’s will. There would, therefore, be no direct effect on intestacy or will transfers. But would there be an indirect effect?

Article III, Mississippi’s Bill of Rights, includes prohibitions on the deprivation of property without due process² and the taking of property without due compensation.³ One could argue that limiting the right to inherit (receive), the right of descent (pass by intestacy), and the right to devise (give by will) to individuals who have been born alive⁴ violates due process and amounts to an

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¹ Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), *available at* <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.

² MISS. CONST. art. III, § 14.

³ MISS. CONST. art. III, § 17 (this section uses the word “owner,” not “person”). The structure of the Bill of Rights implies that it protects the rights of “persons.” *See* MISS. CONST. art. III, § 24 (“All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.”); *see also* BLACK’S LAW DICTIONARY 1214 (9th ed. 2009) (defining “owner” as: “One who has the right to possess, use, and convey something; a *person* in whom one or more interests are vested.” (emphasis added)).

⁴ *Harper v. Archer*, 12 Miss. (4 S. & M.), 1845 WL 1978, at *7 (1845); *see also* UNIF. PROBATE CODE § 2-104(a)(2) (2008).

uncompensated taking. Historically, an insurmountable hurdle for this argument would have been that “[r]ights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation” and generally receive no constitutional protection.⁵

That general rule, however, has been modified so that now a total abrogation of the rights of descent and devise *can* amount to a taking.⁶ The right to devise of unborn “persons” (along with all minors) is abrogated by the probate code because no one under eighteen years of age, nor a guardian on his or her behalf, can execute a will.⁷ The right of descent is a tougher question. The Mississippi intestacy statute applies “[w]hen any person shall die” with property not devised.⁸ The general, statutory definition of “person” is not illuminating,⁹ but standard legal definitions of “death” strongly suggest that only individuals born alive—with vital signs and brain function—can “die.”¹⁰

This interpretation would render Mississippi’s probate code unconstitutional as to unborn “persons” by totally abrogating their rights of descent and devise. Faced with this constitutional defect, Mississippi courts would likely incorporate the new constitutional definition of “person” into the intestacy statute and decide that a change in circumstance which renders eventual birth impossible constitutes “death.” The practical result would be that the property of unborn “persons” would descend to kin, if any come forward, rather than automatically escheating to the State.¹¹

This conclusion holds only for the right to transmit, which is relatively minor given that unborn “persons” are unlikely to have

⁵ Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).

⁶ See Hodel v. Irving, 481 U.S. 704, 716-17 (1987). There is no Mississippi case law adopting *Hodel* as a matter of state constitutional law, but Mississippi courts generally look to federal takings law in interpreting the state takings clause. *E.g.*, Walters v. City of Greenville, 751 So. 2d 1206, 1210 (Miss. Ct. App. 1999).

⁷ MISS. CODE ANN. § 91-5-1 (2004); see RESTATEMENT (SECOND) OF AGENCY § 17 cmt. b (1958).

⁸ MISS. CODE ANN. §§ 91-1-3, -11 (2004).

⁹ MISS. CODE ANN. § 1-3-39 (2005).

¹⁰ BLACK’S LAW DICTIONARY 458 (9th ed. 2009) (defining “death”). *But cf.* 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 114 (Miss. 2003) (en banc) (holding that the mother could bring a wrongful death action on behalf of her unborn child “quick” in the womb).

¹¹ 27A AM. JUR. 2D *Escheat* §§ 4, 5 (2008).

their own property. The bigger question is whether such “persons” would inherit. They would not. Unlike the rights to descent and devise, there is no constitutionally protected right to inherit.¹² Thus, with the exception of property owned by unborn “persons,” the existing scheme of probate property distribution should stand.¹³ In probate, the initiative would make a ripple, not a splash.

¹² *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 828 (C.P. Ohio 1974).

¹³ My analysis assumes some variety of textualism is the appropriate approach. See Christopher R. Green, *A Textual Analysis of the Possible Impact of Measure 26 on the Mississippi Bill of Rights*, 81 MISS. L.J. SUPRA 39 (2011). Other contributors to this symposium (and editorialists) believe Mississippi courts would read the new amendment more broadly as a statement of public policy affecting cases in the absence of direct constitutional commands. *E.g.*, Deborah Bell, *Disputes over Frozen Embryos*, 81 MISS. L.J. SUPRA 105 (2011); Editorial, *The 'Personhood' Initiative*, N.Y. TIMES, Oct. 28, 2011, at A30, available at <http://www.nytimes.com/2011/10/28/opinion/the-personhood-initiative.html>. This broad reading is certainly possible, but more likely in cases involving the core concerns of the initiative supporters, like abortion and IVF, than it is in peripheral areas like inheritance.