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Statutory Inheritance Rights of a Posthumously Conceived Child

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On Nov. 21, 2014, Governor Cuomo signed into law EPTL §4-1.3 and amendments to EPTL §11-1.5 to provide a statutory solution to inheritance rights of a posthumously conceived child in New York. New York now joins a group of 20 other states[1] tackling this evolving area of uncertainty due to advancements in the field of reproductive technology. While tax planning may be on the decline due to increased exemption amounts, new planning areas centered around digital assets and now, posthumously conceived children, are emerging as an important component to the estate planning process. This article provides a background to the unsettled inheritance rights of a posthumously conceived child, reviews the new law and discusses certain observations that flow from the passage of the new law.

Background

In general, genetic material such as semen, eggs and embryos can be frozen and preserved for many years allowing for the conception and/or birth of a child to occur after the death of one or both genetic parents. We have all heard about the story of a person suffering from a terminal illness who freezes genetic material so that a child can be conceived after a premature death. Or, the story of a young man who is sent off to combat who stores his sperm so that his spouse can have the option to conceive a child if he fails to return home.

In these common situations, the option to posthumously conceive a child may provide comfort to those who desire that a part of them survive in the event they do not. However, as technology advances, alternative procedures become available. Take, for example, a woman who is approaching her forties and is fearful that she may lose the opportunity to conceive a child. In this situation, the woman may choose to freeze her eggs. Also, as people live longer, they are not ready for marriage or to have children until later in life. These situations have grown recently and while the primary intent is to preserve the ability to have a child while living, the mere existence of such genetic material after death provides the ability for posthumous conception.

With the growing emergence of this new class of children, New York and many other states have been grappling with inheritance rights of a posthumously conceived child ("posthumous

child") upon the death of the genetic parent. Unfortunately, in New York, there is no case law that squarely deals with the issue of whether a posthumous child is a distributee of the genetic parent.

The only reported case dealing with rights of a posthumous child is *Matter of Martin B*,[2] a 2007 case from New York County Surrogate's Court. In *Martin B*, Surrogate Renee Roth considered whether two children conceived by in-vitro fertilization (after their father James died) were eligible to inherit from a trust created by their grandfather, Martin (the father of James).[3] James had stored his sperm for future use by his spouse after he was diagnosed with Hodgkin's lymphoma.[4] The spouse conceived and gave birth to two children several years after the death of James.[5]

The issue before the court was whether the terms "issue" and "descendants" under Martin's trust agreements included a posthumous child of James.[6] If so, such child would be an eligible beneficiary of a class gift. Roth considered and balanced the need for certainty and finality in the administration of estates against the rights of a posthumous child, and ultimately held that the posthumous children were within the class of beneficiaries consisting of Martin's issue.[7]

In a more recent case, *Astrue v. Capato*, the U.S. Supreme Court addressed a split in the circuits regarding a posthumous child's eligibility for Social Security survivor benefits from the child's deceased genetic parent.[8] Upon review, the Supreme Court looked to state intestacy law to determine whether a posthumous child is a distributee. If a child qualified as a distributee under a state's intestacy statute, the child was eligible for survivor benefits.[9] Posthumous children cannot inherit under Florida's intestacy statute so the children were ineligible for the benefits. While *Astrue* involved entitlements to federal benefits, it further highlights the importance of state law in defining inheritance rights of a posthumous child.

In addition to scant case law, New York's existing statutory framework failed to address the situation where a child is conceived after the genetic parent's death. In fact, the wording of existing statutes such as EPTL §4-1.1(c), which deals with after-born children of an intestate estate, would likely result in a New York court finding that a posthumous child would not be a distributee of the genetic parent.[10] These statutes were written before the vast improvements in reproductive technology were even a consideration. Because neither case law nor statute could be relied upon by a posthumous child in asserting inheritance rights, the New York legislature proposed the passage of EPTL §4-1.3 and amendments to §11-1.5, which, together, provide a statutory solution to the inheritance rights of a posthumous child.

EPTL §4-1.3

New EPTL §4-1.3 introduces four requirements for a posthumous child, referred to in the statute as a "genetic child," to inherit from the genetic parent in intestacy or under a will or trust. First, the genetic parent storing the sperm or ova (a/k/a an egg cell) must expressly consent to the use of the genetic material for posthumous conception and authorize a person to make decisions about the use of the genetic material after his or her death.[11] Such consent and authorization must be in a written instrument, which is executed not more than seven years before the death of the genetic parent.[12]

Second, notice of the existence of the genetic material must be provided by the authorized

person to the personal representative of the estate within seven months of the issuance of letters.[13] Third, the authorized person must record the written instrument within seven months of the genetic parent's death with the Surrogate's Court granting letters on the genetic parent's estate.[14] Finally, the genetic child must be in utero within 24 months of the genetic parent's death or born no later than 33 months after the genetic parent's death.[15]

The statute provides further rules and requirements with respect to the writing and a sample form[16] to be utilized by the genetic parent. The writing must be dated and signed by the genetic parent in the presence of two witnesses, neither of whom can be the authorized person under the document.[17] Next, the genetic parent may revoke the written instrument by a new writing executed in the same manner as the written instrument it seeks to revoke.[18] The statute specifically prohibits altering or revoking the written instrument through the will of the genetic parent.[19] Also, if desired, the genetic parent may appoint an alternate authorized person within the writing.[20] Finally, as with EPTL §5-1.4, any authority given to a spouse of the genetic parent is revoked by a divorce or annulment as such is defined under the statute.[21]

If the above requirements are met, the genetic child will be entitled to inherit from the genetic parent as a distributee, should the genetic parent die intestate. Also, the genetic child will have inheritance rights under any trust or will that provides for a disposition of property to a class of beneficiaries that include the genetic child (i.e. the genetic parent's issue, children, descendants, etc.). Importantly, the genetic child's inheritance rights under the statute are not limited to an inheritance from the genetic parent. However, with respect to dispositive instruments in which the genetic parent is not the creator, the new law will be applicable only to wills of persons dying on or after Sept. 1, 2014, and to lifetime trusts executed on or after such date. For instruments created by the genetic parent, the new law is effective immediately.

EPTL §11-1.5

By extending the administration process in recognizing inheritance rights of a posthumous child, the new law amends various paragraphs within EPTL §11-1.5. These amendments accommodate the practical reality of a beneficiary being born 33 months after the genetic parent's death. Specifically, the existing statute now allows the personal representative to delay paying testamentary dispositions or a distributive share, until the birth of the genetic child, if notice of the availability of genetic material of the decedent was furnished pursuant to EPTL §4-1.3.[22]

Observations

Interestingly, the definition of genetic material in EPTL §4-1.3 is limited to sperm or ova and specifically does not include embryos. As discussed earlier, reproductive technology includes the storage of embryos. An embryo is created when a sperm fertilizes an egg cell—a process commonly referred to as conception. Given that New York now has two statutes dealing with after-born children, EPTL §4-1.1 for those conceived before the genetic parent's death, and EPTL §4-1.3 for those conceived after the genetic parent's death, the inheritance rights of a child born from a stored embryo would be governed by the former. Since EPTL §4-1.1 does not provide a writing requirement or limit the length of time between the genetic parent's death and the birth of the after-born child, it appears that inheritance rights in the context of embryos will

continue to present unpredictable outcomes.

While the focus of this article is the inheritance rights of a posthumous child, another issue that arises due to the advancement of reproductive technologies is the property rights of the genetic material. With hundreds of thousands of sperm, eggs and embryos frozen in storage facilities, what are the rules that govern how such material should be disposed of upon the genetic parent's death? The new law states that the use of sperm and ova is subject exclusively to the new statute as well as any valid contract with the storage facility and "may not be the subject of a disposition in an instrument created by the person providing such material or by any other person."[23]

But, what are the boundaries of such a contract, if any? Who is responsible for the expense of managing the stored material, which can go on for years or even decades? Should the genetic parent create a trust to arrange for such expenses? What about embryos? Can embryos be disposed of by the genetic parent's will, along with other property, by the contract with the storage facility, or a combination thereof? These questions are difficult to answer and will likely be part of a growing list of questions as advancements in reproductive technologies continues into the future. The property rights of genetic material may be the next emerging area of uncertainty.

With the advances in reproductive technology and New York's new law, estate planners must ensure that the inheritance rights of a posthumous child are considered and understood as part of the estate planning process. The new law should be discussed with clients, and clients should develop an estate plan that reflects their religious and other views when dealing with a posthumous child. For example, a client may wish to alter the requirements of the new law or exclude a posthumous child altogether, as some clients do with respect to adopted children. One variation that comes to mind might be an additional requirement that the posthumous child be born from the genetic mother and not a surrogate. Also, there may be situations when it makes sense to relax the timing limitations under the new law. For example, in dealing with the administration of a dynasty trust versus the administration of an estate, a client may wish to extend the time in which the child must be born to a period longer than 33 months.

Importantly, estate planners must keep in mind the issue in *Matter of Martin B*. This case is significant because it highlights how inheritance rights of a posthumous child can arise from the actions of future generations. While clients engaged in the planning process may have no desire to store genetic material, they must be mindful that their children and/or grandchildren may utilize the reproductive technologies available today, as well as those unknown technologies available in the future. This is particularly important when a client's estate plan passes wealth to a surviving spouse and children utilizing lifetime trusts that can last for successive generations.

Conclusion

In reviewing EPTL §4-1.3 and the amendments to EPTL §11-1.5, New York has taken a significant step toward establishing clear requirements to govern the inheritance rights of a posthumous child. Only time will tell if the new law strikes the right balance between inheritance rights and the finality of the estate administration process.

Endnotes:

1. Alabama, California, Colorado, Connecticut, Delaware, Florida, Iowa, Louisiana, Maryland, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Texas, Utah, Virginia, Washington and Wyoming.

2. *Matter of Martin B.*, 17 Misc.3d 198, 841 N.Y.S.2d 207 (Sur. Ct. New York Co. 2007).

3. Id. at 199.

4. Id. at 199.

5. Id.

6. Id. at 200.

7. Id. at 204-05.

8. *Astrue v. Capato*, 132 S. Ct. 2021 (2012).

9. Id. at 2033-34.

10. EPTL §4-1.1(c) states the following when defining after-born children: "Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime." See also EPTL §5-3.2(b) which provides that an after-born child must be born during the testator's lifetime or be in gestation at the time of the testator's death and born alive thereafter.

11. EPTL §4-1.3 (b)(1).

12. Id.

13. EPTL §4-1.3 (b)(2). If no letters have been granted within four months of death, such notice must be provided to a distributee of the genetic parent within seven months of death.

14. EPTL §4-1.3(b)(3). If letters have not been granted, then the written instrument must be recorded with the Surrogate who has jurisdiction to issue letters.

15. EPTL §4-1.3 (b)(4).

16. EPTL §4-1.3(c)(5).

17. EPTL §4-1.3(c)(1).

18. EPTL §4-1.3(c)(2).

19. EPTL §4-1.3(c)(3).

20. EPTL §4-1.3(c)(4).

21. EPTL §4-1.3(d).

22. EPTL §11-1.5(a).

23. EPTL §4-1.3(i).