



FEATURE: ESTATE PLANNING & TAXATION

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Children Conceived After Death

What are their inheritance rights?

New York is the most recent state to legislate the inheritance rights of children conceived after the death of one or both parents—a circumstance that was barely imaginable less than a generation ago. Statutes and court decisions on this topic have rapidly developed over the last 15 years, in response to advances in medical technology. The latest state statute on the issue recognizes posthumously conceived heirs, but only under very specific circumstances and with very specific requirements.

How the Question Arises

As the ways in which people have children have expanded beyond the traditional model (husband and wife, natural conception), the law has gradually responded by recognizing inheritance rights for various categories of children once disfavored—adopted or nonmarital children, for example. Children born after the death of a parent (usually the father) have long been treated the same as any other children for these purposes. Until recently, however, the law provided little guidance on the different, and increasingly common, case of children not just born, but actually conceived, after the death of one (or even both) of their genetic parents.

The most common scenario involves freezing genetic material (sperm or eggs) prior to a medical procedure that may have an adverse effect on fertility (chemotherapy or radiation) or prior to a member of the military heading into combat. If the medical treatment is successful or the soldier returns, but the donor is now infertile, conception of a child from that genetic material may

occur during the lives of both parents. The legal status of that child isn't particularly novel: The child was conceived and born during the lives of the parents, using artificial insemination or in vitro fertilization.

Likewise, a woman may choose to freeze eggs if she believes that she'll be postponing procreation past her prime years of fertility, due to various reasons, including lack of a spouse or other co-parent, career advancement or economic motivation. When she later uses the egg to produce a child (whether she herself serves as the gestational mother or uses a surrogate¹), the procedure is legally routine.

More difficult legal questions arise if the donor dies and the surviving spouse or partner (or even a parent of the donor eager for a grandchild) uses the frozen genetic material to conceive the donor's child—possibly many years later. Practical difficulties arise at the time of the donor's death: How long must the estate be held open against the possibility that (additional) children will be born in future years? What if the now-posthumous parent was a beneficiary under a trust that's to be distributed to the now-deceased beneficiary's descendants on his death? How does the trustee know who these children are (or will turn out to be), and how long must the trustee wait to determine this? Will the rule against perpetuities (RAP) be violated by the possibility of an after-conceived child? The requirement of probate law that all children of the decedent receive notice generally doesn't have an exception for after-conceived children, but how can that notice possibly be given?

And, what about those cases in which a man dies unexpectedly—and without having stored any genetic material—and his wife or partner promptly harvests viable sperm and, in due course, uses it to conceive a child or children? On these facts, the policies involved in determining inheritance rights under a will or trust might be different from those that apply if the deceased



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genetic parent had voluntarily contributed the material and consented to its use.

The law is still developing, and it may be some time before we can answer these questions and the others that are sure to arise.

Federal Case Law/Uniform Laws

Several cases have addressed the qualification of children conceived posthumously to receive benefits as survivors of the deceased genetic parent under the federal Social Security laws. After several lower courts expressed vari-

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ous views, the U.S. Supreme Court determined that the Social Security laws require that the state laws of intestate inheritance govern eligibility for survivor benefits.²

Under the Uniform Probate Code (UPC),³ a child will be recognized for inheritance purposes if in utero within 36 months or born within 45 months after the death of the parent. The Official Comment points out that UPC Section 3-7103 gives the personal representative authority to take account of the possibility of posthumous conception in the timing of distribution of the estate assets. The 36-month period for conception, according to the UPC Comment, "is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy." The alternative 45-month period for birth is designed to provide certainty in cases in which it's not possible to ascertain the exact date of implantation and represents a standard 9-month pregnancy added on to the 36-month

period for conception or implantation.

Under the Uniform Parentage Act (UPA),⁴ for purposes of determining parental status of a deceased individual, the approach (and in many cases the result) is quite different. The UPA specifies no particular waiting period. Instead, the donor of the genetic material must have consented "in a record" to be a parent by assisted reproduction and, beyond that, the donor (now described as a "deceased spouse") also must have consented that, "if assisted reproduction were to occur after death, the deceased individual would be a parent of the child." The official UPA Comment indicates a focus at odds with that of the UPC: "This section is designed primarily to avoid the problem of intestate succession which could arise if the posthumous use of a person's genetic materials leads to the deceased being determined to be a parent."

State Law

By now, a majority of the states have addressed at least a portion of the issues presented by the possibility of posthumous conception. Some states have passed legislation, others have court decisions covering the topic and some have both legislation and court cases.

The range of outcomes is broad. In some states, children conceived after death can't inherit. In others, whether they inherit will depend on a combination of factors, including how long after death they're conceived or born, what type of document expresses the donor's consent and how specific the donor was about the use of the genetic material for post-mortem conception (as compared to using it for reproductive purposes in general).

Among the statutes that allow inheritance rights to posthumously conceived children, there are a number of different standards or conditions. In Florida, for example, the decedent parent must expressly provide in a will for the post-conceived child.⁵ Louisiana requires not only a writing by the decedent but also that the decedent authorize his spouse to use the genetic material and follows the UPC's 3-year requirement.⁶ In Virginia, the genetic parents must have been married prior to the donor's death, and the father must have consented to insemination; inheritance will then be allowed if either party died within the 10 months preceding the birth.

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However, if the sperm or ovum donor dies prior to implantation (no matter who donated the other gamete), the deceased donor won't be the parent of the resulting child unless either the implantation occurred before the physician could be reasonably notified of the death or the decedent consented in writing to be a parent prior to implantation.⁷

Case law in some states authorizes inheritance only under particular circumstances. A 2000 New Jersey case⁸ relied, in part, on a statute authorizing inheritance for posthumously born children who were conceived during the life of the deceased parent to support the same result for the posthumously conceived child. That statute was subsequently amended, and it's unclear whether current cases in New Jersey would be decided the same way. A 2002 Massachusetts case authorized inheritance rights as long as a genetic relationship was established and the survivor demonstrated that the decedent affirmatively consented to both posthumous conception and the support of any resulting child, subject to the possibility that too much time had elapsed.⁹ As did New Jersey, Massachusetts amended its statute following this decision and now has enacted the UPC provision. This is just a sampling of the decisions, which go both ways.

New York Law

The leading case in New York is *Matter of Martin B.*¹⁰ Under several trust agreements, income and principal were distributable, in the discretion of the trustees, to and among the "issue" of the grantor. In addition, at the death of the grantor, the grantor's spouse had a testamentary power to appoint to the grantor's "issue" or "descendants" and, in default of exercise of this power, principal was to be distributed to or for the benefit of "issue" then living.

The grantor was survived by a son (with two adult children) and predeceased by a second son, who died of cancer a few months before the grantor. When that son learned of his illness, he deposited sperm with instructions that on his death, it should be held subject to the direction of his wife. Three years after the son's death (and two and a half years after the death of the grantor), the son's wife underwent in vitro fertilization with the preserved genetic material and gave birth to a son. Two

years later, she went through the same process and gave birth to another son. The court determined that there was no clear guidance under the statutes of New York or of Washington, D.C. (which governed certain aspects of the trusts).

The court reviewed the laws in the 10 states that had enacted legislation to that date (seven having adopted at least in part the UPA). The decision also summarized the three cases to that point that dealt with the Social Security survivorship benefits.

Ultimately, the Surrogate's Court decided: "...if an

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individual considers a child to be his or her own, society through its laws should do so as well." In the absence of any other indication of intent on the part of the grantor, the court allowed the two sons of the predeceased child to be beneficiaries of the trusts. The court also urged comprehensive legislation to be enacted by the legislature.

New York has now enacted a statute to deal with some of these questions, choosing as its model 2004 California legislation¹¹ under which posthumously conceived children may inherit under specific circumstances. In late 2014, New York enacted EPTL Section 4-1.3 and amended existing EPTL Section 11-1.5 to provide a similar—and likewise narrow—statutory solution.

Under the New York statute, a child will be recognized for all inheritance purposes (and the RAP won't be violated) if several conditions are met:

- The donor of the sperm or ova signed a document within the last seven years of life (in California, there's



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no time limit) expressly authorizing the use of the genetic material for posthumous reproduction and designating a person to make decisions regarding this use. (The statute includes a model of the written instrument governing the genetic material, which should be used whenever possible.)

- The authorized person gave notice to the executor or administrator of the estate within seven months of the appointment of the executor or administrator. The authorized person must also record the notice in the Surrogate's Court within seven months of death (which usually is prior to the deadline for delivering it to the executor or administrator because of the inevitable delays in the probate or administration process).
- The child was conceived within 24 months or born within 33 months of the donor's death (a year shorter than under the UPC). This permits closing an estate or trust administration earlier than under the UPC but reduces the opportunity for multiple sequential gestations.

The new statute doesn't appear to impose any restriction on the authorized person attempting multiple concurrent gestations with the donor's genetic material, other than the continued unenforceability of surrogacy contracts in the state.¹²

The donor may revoke the designation at any time (although not in a will). A judgment of separation, divorce or annulment automatically revokes the designation of a spouse as the authorized person (under New York, but not California, law). The donor may then designate someone else or decide that the genetic material should no longer be maintained.

The New York legislation covers only a fairly narrow set of circumstances; note that under the statute, *Martin B.* would have been decided the opposite way, denying inheritance rights to the posthumously conceived sons. Unlike California case law, the New York legislation also provides that genetic material isn't property that can be disposed of by a will, and its use is governed only by this legislation and any contract between the donor and the storage facility.¹³ The New York and California statutes don't govern the inheritance rights of children born from frozen embryos created while both parents were alive, even if born long after the death of either or both parents.¹⁴ The wills (and revocable trusts) of

both parents should set forth the intent of the parents on inheritance rights of children born from the frozen embryos after one or both parents have died.

Address Issue in Will

No matter what the default rules of state law are, a will or trust instrument can define terms so as to include or exclude posthumously conceived children (including grandchildren and other more remote descendants). Most often, these questions have arisen in connection with instruments that are silent or in connection with intestacy.

Clients may believe that statutes governing after-conceived children are irrelevant to their estate planning. No one can forecast the future, however, and events that are currently, well, inconceivable may occur many years from now that could trigger the statute. Wills or trust documents can include specific definitions of children, descendants or issue that would override whatever the statutes provide. Because the law is still developing, clients who have strong feelings about these issues (pro or con) and believe it may be at all possible to have a posthumously conceived descendant (even generations down the road) should explicitly state their wishes in wills or trust documents.



Endnotes

1. Note that in New York, surrogacy contracts are still unenforceable. N.Y. Dom. Rel L. Section 122. Compare California case law, which permits surrogacy, for example, *Johnson v. Calvert*, 851 P.2d 776 (1993), and New Jersey law, which prohibits it, *In re Baby M*, 537 A.2d 1227 (1988).
2. *Astra v. Caputo*, 132 S.Ct. 2021 (2012). This case has been the impetus for additional states to consider legislation in this area.
3. Uniform Probate Code Section 2-120(k).
4. Uniform Parentage Act Section 707.
5. Fl. Stat. Ann. Section 742.17(4).
6. La. Rev. Stat. Ann. Section 9:391.1.
7. Va. Code Ann. Section 20-158.
8. *In re Estate of Kolacy*, 753 A.2d 1257 (Ch. Div. 2000).
9. *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257 (2002).
10. *Matter of Martin B.*, 841 N.Y.S.2d 207 (Surr. Ct., New York Co. 2007).
11. Cal. Prob. Code Section 249.5.
12. See *supra* note 1.
13. N.Y. EPTL Section 4-1.3(i).
14. See, for example, Tamar Lewin, "Industry's Growth Leads to Leftover Embryos, and Painful Choices," *New York Times* (June 17, 2015).