LOEB & LOEB LLP

Trusts and Estates

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Life After Death: No Longer Inconceivable

Recent legislation provides a framework for inheritance rights of children conceived after the death of one or both parents in very specific circumstances.

Background – How We Got Here:

It has always been possible for a child, conceived during the lives of both parents, to be born after one of them (usually the father) dies. The after-born child has long been treated the same as any other child for many legal purposes. Indeed, the ancient "rule against perpetuities," which limits the duration of trusts in certain contexts to "lives in being plus 21 years," has, for centuries, included in the "lives in being" part of the formula what has been described in archaic language as a child "en ventre sa mere."

As the ways in which people bear children have expanded beyond the traditional model (husband and wife, natural conception), the law has gradually responded, recognizing inheritance rights for various categories of children once disfavored. For example, the presumption for several decades has been that non-marital children and adopted children inherit on the same basis as all others, reversing former law. As with any presumption, a will or trust can specify a different result – either as to specific individuals or an entire class. For example, many of the wills and trusts we prepare include adopted children of beneficiaries but only if the adoption takes place prior to the time the "child" reaches age 18 (out of a concern about a fraudulent adult adoption for the purpose of transferring an inheritance to a friend or lover). Our default language in New York also reflects the New York statute on inheritance rights of children born out of wedlock. As a general rule, these children will inherit from or through their mother in all events, and from or through their father only if there is an adequate acknowledgement of paternity (which can take a variety of specific forms). In California, many of our estate plans for married couples include only the children specifically identified in their joint trust, any additional children of their marriage and the descendants of those children. Clients can modify these provisions to reflect their intent, of course, and estate plans can be drafted to take into account particular circumstances involving children from prior marriages, as well as assisted reproduction techniques.

The Scenario:

Until recently the law has provided little guidance on the inheritance rights of a child conceived after

death. Although a few court cases over the past five or so years have dealt with unusual circumstances geared to obtaining federal survivorship benefits for a child conceived after the unexpected death of a husband, the recent legislative activity (and the attention of drafters) focuses on a different scenario. Prior to a medical procedure that is expected to have an adverse effect on fertility, such as chemotherapy or radiation therapy, the patient can freeze genetic material (sperm or eggs, or embryos) with the hope and expectation that at some point in the future the healthy spouse or partner will be able to use that material to produce children of the couple. Another scenario involves a member of the military heading into combat who stores genetic material for similar purposes.

If the treatment is successful but leaves the patient infertile, or the soldier returns but is wounded to similar effect, and the conception then takes place during the lives of both parents, the legal status of the child is not particularly novel. This is a child born to its parents and conceived during their lives – albeit using artificial insemination or in vitro fertilization, both well-established techniques. The more difficult question arises if the treatment is unsuccessful and the patient dies or the service member is killed in combat, and the surviving spouse uses the frozen genetic material to conceive a child after the death of the other genetic parent, possibly many years later.

The Questions:

The potential practical difficulties are obvious and relate to determining who the beneficiaries are upon the death of the patient or soldier. How long must the estate be held open against the possibility that additional children will be born in future years? What if the deceased patient or soldier (who is now the posthumous parent) was a beneficiary under a will or trust created by someone else, perhaps a parent or grandparent, which requires a trust to be distributed to his descendants upon his death? How does the trustee know who his children are, and how long must the trustee wait? Technical issues arise associated with probate, in which all children of the decedent are required to receive notice. Probate law generally does not have an exception for after-conceived children. In every probate proceeding where the possibility of after-conceived children exists, must the court appoint a guardian ad litem for potential future children?

The list goes on.

To provide some useful guidance, a number of states, including California and New York, have enacted legislation that deals with some of these questions.

The Legislative Solution:

California

California enacted legislation in 2004 under which a decedent's heirs may include posthumously conceived children who are in utero within two years of the issuance of the decedent's death certificate (or the earlier entry of judgment determining the fact of the decedent's death), if the decedent expressly authorizes the posthumous conception of a child in a signed and dated writing.

The person designated by the decedent to control the decedent's genetic material must give notice of the existence of that material for reproductive use to the decedent's personal representative for the purposes of administering the estate within four months after the issuance of the death certificate (or the earlier entry

of judgment determining the fact of the decedent's death).

If the personal representative receives notice or has actual knowledge within the four-month period that the decedent's genetic material is available for purposes of posthumous conception, the personal representative may not make a distribution of the estate until two years after the decedent's death, except in the following circumstances:

- The personal representative has written notice that the person designated by the decedent does not intend to use the material for the posthumous conception of a child of the decedent.
- The birth of a child of the decedent conceived after death will have no effect on the proposed distribution, payment of death benefits, determination of rights to property to be distributed on the decedent's death, or the right of any person to make certain probate claims.
- A petition for early distribution has been filed.

New York

New York enacted a similar statute late last year. The law, effective Nov. 21, 2014, determines whether or not children of persons who died on or after Sept. 1, 2014, are deemed to be beneficiaries under wills or lifetime trusts (assuming the will or trust is silent on the issue). The new law applies to the genetic parent's will or trust no matter when signed, but it will apply to inheritance under an instrument created by someone else (perhaps a grandparent) only if the instrument was signed (or became irrevocable) on or after Sept. 1, 2014.

Under the New York legislation, a child will be recognized for all inheritance purposes if several conditions are met:

- The donor (referred to as the genetic parent) of the genetic material (sperm or ova – embryos are not covered by this new law) must have signed a document within the last seven years of life that expressly authorizes the use of the genetic material for posthumous reproduction and that also designates a person to make decisions regarding use of the genetic material.
- The person designated in the instrument must give notice of his or her authority and the existence of the genetic material to the executor or administrator of the genetic parent's estate within seven months after the executor or administrator is appointed.
- The same notice must be recorded in the Surrogate Court within seven months of death (which will almost certainly be prior to the deadline for delivering it to the executor or administrator, due to the inevitable delays in the probate or administration process).
- The child must be conceived within 24 months of death or born within 33 months after death.

Fortunately, the statute includes a model of the document it requires, which should be used whenever applicable.

Effect of Subsequent Divorce or Separation:

Under the New York legislation (but not California law), if the person designated in the contract to make decisions regarding use of the genetic material is married to the genetic parent at the time the document

is signed, a subsequent judgment of separation, divorce or annulment of the marriage automatically revokes the written designation. Presumably in this case the genetic parent could designate someone else or decide that the genetic material should no longer be maintained. (The genetic parent may also revoke the designation at any time, but not in a will.)

Other Aspects:

Under the "rule against perpetuities" (mentioned above), a child in utero is considered a "life in being" for purposes of measuring the maximum duration of a trust. Under both the existing California law and the new New York statute, a trust does not violate this rule merely because of the possibility of a child being born after expiration of the permitted duration period, even though the child would be a beneficiary under the legislation. This is not new in California, but results from the application of legislation adopted in 1991 as part of the Uniform Statutory Rule Against Perpetuities.

In addition, the New York statute makes it clear that the genetic material is not property that can be disposed of by a will, and its use is governed only by this legislation and any contract between the genetic parent and the storage facility. California case law, on the other hand, currently recognizes that a decedent's genetic material (e.g., sperm) is property that can be disposed of by a will (subject to any contractual agreement between the decedent and the storage facility).

The New York and California statutes do not affect the inheritance rights of a child who was conceived and then frozen as an embryo while both parents were alive, even if the child is born long after the death of either or both parents. If this scenario applies to any client, both parents' wills (and revocable trusts) should set forth the intent of the parties to inheritance rights of children born from the frozen embryos after one or both parents has died.

How Does This Affect You?

What if you don't agree with the result under the statute? In this case, it is easy enough for us to draft a will or trust to include a definition of children, descendants or issues that will override whatever the statute provides. But if the will or trust is silent, the statute will prevail.

While many clients may believe this issue has no applicability to them, it is impossible to forecast the future, and events many years down the road, occurring to descendants or other beneficiaries, could bring the statute to bear. If you have strong feelings or wishes about these issues, consider whether you want to override the application of the statute. For our California clients, our default trust provisions concerning the identity of the settlor's children, grandchildren and more remote descendants generally would exclude posthumously conceived children, and would need to be revised if a client wishes to include these children in accordance with the statutory procedure.

For our New York clients, our default will and trust provisions generally do not deal explicitly with posthumously conceived children. As a result, the New York statute on postmortem conception would apply. In theory, the default provisions in our wills and trusts regarding non-marital children (described in the Background above) might preempt the new statute (because a child conceived and born after

the marriage has terminated by death of one of the spouses is at least technically born out of wedlock). Under our default language, however, the only non-marital child who does not inherit is one whose father has not acknowledged paternity, and since the documentation required to trigger the New York statute granting inheritance rights to posthumously conceived children is also sufficient to satisfy this condition of acknowledgement of paternity for non-marital children, the only case in which the child would not inherit under our language is where the conditions of the new law, including the required document, have not been fulfilled anyway.

Because the law is still developing, if you have strong feelings or wishes about these issues and believe that it is possible that you will have a posthumously conceived descendant, you should state your wishes in the will or trust.

In addition, the new New York law covers only a fairly narrow set of circumstances. Many other open issues remain under different scenarios, including the use of surrogate mothers (still unlawful in New York) or the latest medical development – the use of genetic material from two different mothers (mitochondrial and nuclear DNA) for the egg, in addition to the standard genetic material from the father. The U.K. has now allowed this three-parent technique to proceed (the bill was approved by the House of Lords in late February after earlier passage in the House of Commons), and it raises obvious inheritance questions along similar lines to the postmortem conception situation addressed by the new legislations in California and New York (which are silent on the three-parent technique).

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