Life After Death

Assisted Reproductive Technology (ART) is continually changing the landscape of families and potential heirs. This is both miraculous and, at times, confounding.

As modern technology has made posthumously conceived children possible, estate planning practitioners are left looking for guidance on how to best serve their clients. Attorneys need to know how to legally prepare their clients for unknown future children, draft comprehensive estate planning documents to include such children, administer estates or trusts where posthumously conceived children may be beneficiaries or distributees, and potentially represent individual posthumously conceived children.

Some states have addressed posthumously conceived children and, presumably in the coming years, more states will legislate these matters. To ensure estate planning statutes remain relevant, they should be reviewed and revised to make sure future heirs are not unintentionally left out of the equation. One step in this direction came when New York enacted EPTL 4-1.3 in 2015.

Let's take a hypothetical situation: B dies as a New York domiciliary in 2015 and is survived by two minor children. Under B's 2010 will, B provided for separate share beneficiary's trusts "for any children living at my death." The will does not mention posthumously conceived children, and at the time of the execution of the will B had no stored genetic material. The trusts are discretionary and include a complete right of withdrawal when each child attains age 25. The two testamentary beneficiary's trusts are funded in 2015.

In 2016, B's surviving spouse conceives a child using B's genetic material, and the child is born in 2017. Is the posthumously conceived child considered a distributee? Do the monies in the two testamentary beneficiary's trusts need to be reallocated?

The answer to both questions is *yes*, *as long as B followed the conditions of New York EPTL 4-1.3*. If B did not follow the conditions of EPTL 4-1.3, the posthumously conceived child will not be considered a distributee.

EPTL 4-1.3 provides that a child conceived and born after the death of a genetic parent can still inherit from the genetic parent's estate if certain conditions are met. Those conditions are summarized below.

EXPRESS WRITING

In order for a posthumously conceived child to be considered a distributee of their deceased parent (or other relative), a genetic parent must give written permission (an "express writing"), within seven years prior to the parent's death, expressly consenting to the use of their genetic material to conceive a child after their death, and authorizing an individual ("authorized individual"), in writing, to make decisions about the use of the genetic material.

The express writing:

1) must be signed by the genetic parent in the presence of two witnesses. The witnesses must have attained age 18 and cannot include the authorized individual;
2) may be revoked in writing by the genetic parent. The revocation must be executed in the same manner as the original writing;
3) may not be altered or revoked by the genetic parent's last will and testament;
4) may designate a successor authorized individual.

EPTL 4-1.3 includes a sample of an express writing, which could be used by a genetic parent.

NOTICE

After the death of the genetic parent, the authorized individual must give written notice indicating that the genetic material is available for posthumous conception. The notice must be sent by certified mail, return receipt requested, or by personal delivery within seven months from the date of issuance of letters testamentary or administration to the executor or administrator.

If no executor or administrator has been appointed within four months of the death of the genetic parent,

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Preparing for Posthumously Conceived Heirs

By Emilee K. Lawson Hatch

the authorized individual must give written notice within seven months to a distributee of the genetic parent.

RECORDING REQUIREMENT

The authorized individual must also record the express writing which expressly gave them permission to make decisions regarding the genetic material. The express writing would be recorded in the office of the surrogate having jurisdiction to issue letters to the executor or administration of the deceased genetic parent's estate.

TIME LIMIT

In any event, the posthumously conceived child must have been in utero within 24 months after the genetic parent's death or born within 33 months after the genetic parent's death.

EFFECT OF DIVORCE

If the genetic parent was married to the authorized individual at the time the express writing was executed, and they subsequently divorce or receive an annulment or legally separate, then the authority granted to the named authorized individual is revoked.

APPLICABILITY

EPTL 4-1.3 applies to wills of individuals dying on or after September 1, 2014, and to existing lifetime instruments that are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after September 1, 2014. Lifetime instruments may include beneficiary designations, trust documents, and powers of appointment in trusts.

RULE AGAINST PERPETUITIES

The statute clarifies that it only applies for the purpose of determining whether a posthumously conceived child is regarded as an intended heir. The rule against perpetuities focuses on the ability of a person to have a child at some future time, and will still apply to posthumously conceived children who are considered disregarded heirs by the statute.

BOTTOM LINE

Given the potential challenges fiduciaries may face when distributing property, it is important for estate planners to assist testators and settlors to clarify their intent.

As states differ in their statutes addressing posthumously conceived children (or lack thereof), the state in which the deceased genetic parent was domiciled at the time of their death is crucial to determining heirship of the genetic child.

Discussions about abstract situations involving future children require a sensitive discussion with the client and precise language in their documents.

If a posthumously conceived child is properly considered a distributee of their deceased genetic parent, in accordance with EPTL 4-1.3, then the child will be treated, for estate inheritance purposes, the same as any other child of the deceased genetic parent. This means that the child may also be considered an heir of the deceased genetic parent's relatives (grandparents, aunts and uncles, etc.).

NEXT STEPS AND BEST PRACTICES

If individuals work with an estate planning attorney, they can prepare an estate plan that thoughtfully administers their estate so that their assets pass to their chosen beneficiaries. Discussions about abstract situations involving future children require a sensitive discussion with the client and precise language in their documents. Best practices will be developed over time, but may include some of the following:

- Attorneys should ask each client if the client has any genetic material being stored for purposes of conception. EPTL 4-1.3 specifically references "sperm or ova," although presumably the statute would also cover embryos that were created using the deceased genetic parent's egg or sperm.
- Attorneys should be provided with copies of any agreements their client entered into with ART agencies or any facility providing storage of the genetic material.
- Clients may want to have their attorney review the ART and storage contracts before they are executed.
- Forms should be developed in accordance with the requirements of the statute. The attorney should provide an explanation of EPTL 4-1.3 (preferably in writing). The explanation would be given to the client as well as the authorized individual(s), so that they are notified of the strict requirements of the statute.
- When drafting estate planning documents, the attorney should consider referring to the express writing, and further indicate that a plan is in place for an authorized individual to make decisions as to the client's genetic material.
- Attorneys may want to update the definition of issue and descendent in their wills and trusts to specifically reference EPTL 4-1.3.
- If an attorney is hired to represent an executor/administrator and they are aware of an express writing, whether it has been recorded or not, the attorney should proceed prudently. The executor/administrator should be instructed not to distribute the estate funds until it is determined whether a posthumously conceived child may come into existence.
- The existence of a legal parent-child relationship may give rise to other important rights such as inheritance from relatives of the deceased genetic parent, Social Security survivors' benefits, and other retirement and pension survivor benefits.
- Since states' inheritance laws differ, it will be important to talk with clients about their intended domicile in order to determine which laws will decide whether a posthumously conceived child will be included as a distributee.
- Young adults often delay in having a will prepared, but given the strict requirements of this statute, prospective parents and new parents should be strongly encouraged to focus on working with an attorney to complete their estate planning documents.
- Parents who have used ART are often sensitive to privacy. If those parents want to retain a sense of privacy for themselves and their family after their death, trust planning may be appropriate. The parent could specifically create a trust for a posthumously conceived child.
- If a grandparent knows that their child would like to provide for posthumously conceived heirs, the grandparent may want to revise their estate planning documents to specifically include those children.