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REPORT ON LEGISLATION BY THE
TRUSTS, ESTATES AND SURROGATE'S COURTS COMMITTEE

A.7461-A	**M. of A. Cook**
S.4779-B	**Sen. Bonacic**

AN ACT to amend the estates, powers and trusts law, in relation to inheritance by children conceived after the death of a genetic parent.

STATUS: Passed Assembly (98-36); Passed Senate (59-0)

THIS BILL IS APPROVED AND
WE URGE THE GOVERNOR TO SIGN IT INTO LAW

BACKGROUND

The ability to store sperm and/or ova ("genetic material") for future use, combined with the ability to produce an embryo via in vitro fertilization, have made it possible for a child to be conceived after the death of one or both of the child's parents. What rights, if any, a child conceived after the death of a parent would have in that parent's estate, or in trusts created for the benefit of that parent and his or her "issue" is at best unclear. The amendments to the New York, Estates, Powers and Trusts Law (the "EPTL") contained in the above-referenced bill (the "Proposal") would provide clarity.

In summary, the Proposal would amend the EPTL to add a new Section 4-1.3 which would provide that, if certain conditions are met, a child conceived after the death of a parent with the genetic material of such parent (a "genetic parent") would be considered (i) a distributee of the genetic parent, and (ii) included in the class of the genetic parent's issue for any disposition made by the genetic parent at any time, and for any disposition made by anyone other than the genetic parent after September 1, 2014.

The Proposal would also amend EPTL §11-1.5 to provide, *inter alia*, that the Executor or Administrator of a genetic parent's estate may delay paying a testamentary disposition or distributive share until the birth of a genetic child entitled to inherit under EPTL § 4-1.3, provided that notice of the existence of the genetic parent's genetic material has been given (as required by EPTL § 4-1.3(b)).

For the reasons indicated below, we support the Proposal.

PROPOSED LEGISLATION

EPTL § 4-1.3

The Proposal specifies the conditions that must be met in order for a child, who was conceived with the genetic material of a genetic parent after that genetic parent's death, to have limited inheritance rights. The Proposal accomplishes this by creating a new section of the EPTL (EPTL §4-1.3), which provides as follows.

Section 4-1.3(a)(1) defines "genetic parent" as a man who provides sperm or a woman who provides ova used to conceive a child after the death of the man or woman.

Section 4-1.3(a)(2) defines "genetic material" as the sperm or ova provided by a genetic parent.

Section 4-1.3(a)(3) defines "genetic child" as a child conceived with the genetic material of a genetic parent, but only if and when such child is born. (This requirement of birth eliminates any questions regarding whether a fertilized zygote has any inheritance rights.)

The rights of a genetic child are contained in new Section 4-1.3(b) which provides:

> "For purposes of this Article, a genetic child is the child of his or her genetic parent or parents and notwithstanding paragraph (c) of Section 4-1.1 of this part,[1] is a distributee of his or her genetic parent or parents, and notwithstanding subparagraph (2) of paragraph (a) of Section 2-1.3 of this chapter,[2] is included in any disposition of property to persons described in any instrument of which a genetic parent of the genetic child was the creator as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator if it is established that:
>
> (1) The genetic parent, in a written instrument executed no more than seven years before the death of the genetic parent (in a form set forth in the statute):
>
> (a) Expressly consented to the use of his or her genetic material to conceive a child after his or her death; and
>
> (b) Authorized a person to make decisions regarding the use of the genetic parent's genetic material after the genetic parent's death; and

[1] EPTL § 4-1-1(c) provides that distributees conceived before, but born alive after, the death of a decedent take as if they were born during the decedent's lifetime.

[2] EPTL § 2-1.3(a)(2) provides that children conceived before but born alive after a disposition becomes effective are included in a class distribution made to "persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or any other person."

(2) The person authorized to make decisions regarding the use of the genetic parent's genetic material gave notice, by certified mail, return receipt requested, or by personal delivery, that the genetic parent's genetic material was available for the purpose of conceiving a child of the genetic parent, and such notice was given:

(a) Within seven months from the issuance of Letters Testamentary or Letters of Administration with respect to the genetic parent's estate, to the person to whom such Letters were issued, or

(b) If no Letters have been issued within four months of the death of the genetic parent, then within seven months of the death of the genetic parent, to a distributee of the genetic parent; and

(3) The person authorized to make decisions regarding the use of the genetic parent's genetic material recorded the written instrument within seven months of the genetic parent's death in the office of the Surrogate who issued or had authority to issue Letters Testamentary or Letters of Administration with respect to the genetic parent's estate; and

(4) The genetic child was in utero no later than twenty-four months after the genetic parent's death or born no later than thirty-three months after the genetic parent's death."

Section 4-1.3(c) provides that the written instrument referred to in ETPL §4-1.3(b)(1) must be:

(1) Signed by the genetic parent in the presence of two witnesses, both of whom must also sign the instrument, both of whom must be eighteen years of age, and neither of whom may the person authorized to make decisions regarding the use of the genetic parent's genetic material;

(2) May be revoked only by a written instrument signed by the genetic parent in the same manner;

(3) May not be altered or amended by the genetic parent by Will;

(4) May authorize an alternate to make decisions regarding the use of the genetic parent's genetic material if the first person so authorized dies or becomes incapacitated before the genetic parent's death.

EPTL § 4-1.3(c)(5) then provides a sample form for the consent required by that paragraph.

EPTL § 4-1.3(d) provides that if a genetic parent gave authority to make decisions regarding the use of his or her genetic material to a person who was his or her spouse at the time of signing the instrument, that authority will be deemed to be revoked if the marriage between the two ends in divorce or annulment.

EPTL § 4-1.3(e) provides that process need not issue to a genetic child who is the distributee of the genetic parent pursuant to Sections 1003 or 1403 of the Surrogate's Court Procedure Act unless the genetic child is in being at the time the process issues. (This will ensure that the possibility that a genetic child may be born at some point in the future will not unduly delay the administration of an estate by providing that Letters can be issued without notice to a genetic child unless and until a genetic child is born.)

EPTL § 4-1.3(f) deals with the inheritance rights of genetic children under instruments created by persons other than the genetic parent. It provides that, except as provided in EPTL § 4-1.3(b), for purposes of EPTL § 2-1.3, a genetic child who is entitled to inherit from a genetic parent is a child of the genetic parent for purposes of a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another. However, unlike EPTL § 4-1.3(b), which can apply to instruments created by a genetic parent regardless of date, EPTL § 4-1.3(f) will only apply to Wills of persons dying on or after September 1, 2014, to lifetime trusts executed before that date which are subject to the grantor's power of amendment on that date, and to all lifetime trusts executed on or after that date.

EPTL § 4-1.3(g) deals with the anti-lapse rules of EPTL § 3-3.3. It provides that a genetic child entitled to inherit from a genetic parent under EPTL § 4-1.3(b) is included in the terms "issue", "surviving issue" and "issue surviving" as used in EPTL § 3-3.3.

EPTL § 4-1.3(h) provides that the possibility that a genetic child may be born at some point in the future shall be disregarded for purposes of determining whether a disposition violates the rule against perpetuities contained in EPTL § 9-1.1. This provision is similar to the provision in EPTL § 9-1.3(e)(3) directing that the possibility of adoption shall be disregarded.

Finally, EPTL § 4-1.3(i) provides that the provisions of EPTL § 4-1.3, and the terms of any contract made by the genetic parent and the institution storing the genetic parent's genetic material, will govern the disposition of the genetic material. EPTL § 4-1.3(i) expressly states that genetic material cannot be disposed of by Will.

Amendments to EPTL § 11-1.5

As mentioned above, the Proposal would also amend EPTL §11-1.5(a)-(d) to provide that the Executor or Administrator of a genetic parent's estate may delay paying a testamentary disposition or distributive share until the birth of a genetic child entitled to inherit under EPTL § 4-1.3, provided that notice of the existence of the genetic parent's genetic material has been given (as required by EPTL § 4-1.3(b)). The Proposal would also (i) authorize the Executor to require that a bond be posted whenever a genetic parent's Will directs a disposition to be made before the birth of a genetic child, (ii) allows the Executor or Administrator to decline demands to make distributions before a genetic child's birth, and (iii) requires an Executor or Administrator to pay six percent interest on bequests from the date of birth of a genetic child (rather than from the date that is seven months from the issuance of Letters if a genetic child is born more than seven months after Letters have issued).

All of these amendments to EPTL §11-1.5 are intended to clarify when and for how long a fiduciary can delay distributions due to the possibility of the birth of a genetic child, and what the fiduciary can do if he or she wants to make distributions before the birth of a genetic child.

OBSERVATIONS

Perhaps the most important element of the Proposal is that it makes a genetic child an intestate distributee of his or her genetic parent, if the genetic child is born within the time frame imposed by, and in accordance with all of the conditions of, EPTL § 4-1.3. This is crucial because in 2012 the Supreme Court, in Astrue v. Caputo, 132 S. Ct. 2021, stated that a posthumously conceived child is entitled to his or her genetic parent's social security survivorship benefits only if the child would be entitled to inherit from his or her genetic parent under the relevant state intestacy laws.

Another important element is that the Proposal provides clarity regarding how instruments are to be interpreted, how estates and trusts are to be administered, and how the rule against perpetuities is to be applied, in cases where a genetic child could be conceived.

In addition, it is worth noting how limited the Proposal is. A genetic child will not be considered a distributee of any other person (such as an ancestor of the genetic parent). Nor would a genetic child be included in a disposition made to "issue" by any person other than a genetic parent unless the disposition is made after September 1, 2014. For example, suppose a grantor creates a trust for the benefit of all of his "issue." Suppose further than the grantor has a daughter who predeceases him, but leaves genetic material which is used after her death to conceive a "genetic child" whose conception and birth satisfy all of the requirements of new EPTL § 4-1.3. That genetic child would not be included within the class of beneficiaries because the trust was created by someone other than the genetic parent (unless the trust was created after September 1, 2014). Consequently, the Proposal would thus allow anyone other than the genetic parent to draft an instrument that excludes genetic children, if he or she so desires. And the Proposal would allow the genetic parent to exclude a genetic child from inheriting by simply refusing to allow his or her genetic material to be used after his or her death.

The time requirements are also very limiting. In vitro fertilization does not always work. Often, multiple attempts are needed. Given that, and a typical 40 week gestation period, requiring a genetic child to be in utero no later than twenty-four months after the genetic parent's death or to be born no later than thirty-three months after the genetic parent's death means, practically, that the number of genetic children a genetic parent can have is very limited. Moreover, no estate or trust will have to be held open indefinitely to see if a genetic child is born. Thirty-three months after the death of a genetic parent, an Executor or Trustee can assume that no genetic child entitled to inherit will be born.

Finally, the Proposal answers Surrogate Roth's call for comprehensive legislation to resolve the issues raised by advances in biotechnology in the one New York case to date that addressed the rights of posthumously conceived children, Matter of Martin B, 841 N.Y.S.2d 207 (Sur. Ct., New York County, 2007). In that case, two children conceived after the death of their father were held to be beneficiaries of trusts created by their father's father for the benefit of the grantor's issue. The Surrogate reached her decision after a search for the grantor's intent as

gleaned from a reading of the trust agreements, which is paradoxical because in 1969 (when the trusts were created) the grantor could not have contemplated these new technologies. If that situation were to arise again today, with the Proposal having been enacted, those children could not be held to be beneficiaries because (i) they were born outside of the time period required by the Proposal, and (ii) the trusts at issue were drafted before September 1, 2014.

For all of the foregoing reasons, we recommend that the Proposal be adopted.

Committee on Trusts, Estates & Surrogate's Courts[3]
Sharon L. Klein, Chair

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[3] This report was prepared by a subcommittee consisting of John Olivieri (Chair), Megan Knurr, William LaPiana, Chi-Yu Liang and Glenn Opell.