New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
An ALM Publication
Trusts&Estates
WWW.NYLJ.COM
MONDAY, AUGUST 31, 2015

Birth After Death

Artificial insemination complicates estate planning and administration.

BY TERENCE E. SMOLEV AND CHRISTINA JONATHAN

Famous sayings by the elderly through the ages: "Life was simpler in the past;" "In the good old days …" "If it was good enough for us, it's good enough for you."

The rules of inheritance were also simpler in the past. A man and a woman had a child, the child was their heir, and was entitled to inherit from each of them. If a woman became pregnant and the father-to-be died, the fetus, born live, was the father-to-be's heir, and was entitled to inherit from him.

Life has become more complicated in recent years as advances have been made with respect to artificial insemination, and storing eggs and sperm for future use. In earlier years, you knew when a man's sperm caused conception with an egg of a live female, in that female. Now that is not always the case. Eggs can be fertilized by a sperm years after the eggs and the sperm were stored by those men and women. This certainly complicates estate planning and administration.

The lawyers' responsibilities as to these issues have thus become more complicated. Should the estate planning lawyer ask clients about the topic of having stored their eggs and sperm? Should that lawyer insert provisions in estate planning documents to provide clarity as to these issues? Should the lawyer dealing with an estate's administration be cognizant of the possibility that unborn heirs may exist inside the storage freezers holding sperm and eggs?

It can be said that this issue came to a head when the U.S. Supreme Court had to decide the right to Social Security Benefits of a child with

© BIGSTOCK

a deceased father. In *Capato*,[1] Karen Capato and Robert Capato married in 1999, and planned to have children. Shortly after their marriage, Robert was diagnosed with esophageal cancer. Due to his deteriorating health, Robert's sperm was frozen and stored for later use by his soon to become widow. The sperm was used after the father's death and twins were born. The widow then applied for benefits under the Social Security Act. At the time of the father's death he was a Florida domiciliary. The Florida intestacy Laws hold that a posthumously conceived child could not inherit from the father. The Social Security Administration, following Florida law, denied the child insurance benefits to Karen Capato. She then appealed the decision of the Social Security Administration.

Capato began its travels through the federal court system in the U.S. District Court for the District of New Jersey, where the widow challenged the Social Security Administration's denial of surviving child's insurance benefits for the posthumous children of her husband. The District Court affirmed the Social Security Administration's denial of benefits. The Court of Appeals for the Third Circuit affirmed in part, vacated in part, and remanded to the District Court. The Supreme Court granted Certiorari. The court held that the following of state law was a reasonable method to determine a child's right to benefits, thereby upholding the Social Security Administration decision.[2]

Now comes the entry of New York into the issue of posthumously conceived children. In 2013, *Bosco v. The Commissioner of Social Security*, was argued in the Southern District of New York.[3] This matter was very similar to *Capato*. A mother of a posthumously born child sought survivor insurance benefits for her child. The Social Security Administration denied the request and the denial was brought to the court. The court ruled that a posthumously born child was not entitled to benefits. Seeing that this issue would become more prevalent, if not already an issue as to inheritance rights of after born children, legislation was enacted by the New York State Legislature and signed into law by the governor, providing an addition to the Estate, Powers and Trusts Laws (EPTL) to deal with the issue.

EPTL §4-1.3 was signed into Law in November 2014, along with amendments to EPTL §11-1.5. The intent of the new law and the amendments is to solve the issue of posthumously conceived children.

The new statute refers to the after-born heir as a "genetic child." EPTL §4-1.3 provides four requirements to be met for a genetic child to inherit from the genetic parent. These following requirements are operative whether we are dealing with intestacy, will or trust.

First, the genetic parent must have expressly consented in writing, no more than seven years before death, to use the parent's genetic material for posthumous conception;

Second, notice of the existence of the genetic material must be provided to the representative of the estate within seven months of the issuance of letters testamentary or administration;

Third, the representative of the estate must record the written instrument with the Surrogate's Court within seven months of death, and with the court granting the letters to the personal representative;

TERENCE E. SMOLEV *practices law at the Law Offices of Terence E. Smolev, P.C.* CHRISTINA JONATHAN *is an associate at the firm.*

Fourth, 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.[4]

If the requirements of EPTL §4-1.3 are met, then the genetic child is entitled to inherit from the genetic parent under intestacy or any will providing for distribution to a class which would include the genetic child, such as "issue."

Considering the increasing use of stored genetic material, it should become a routine conversation between the estate planning lawyer and the client(s) as to this subject matter. If a client informs the lawyer of the existence of stored genetic material, then appropriate documentation should be created and executed by the client.

EPTL §11-1.5 deals with the extension of time for the delay in distributing assets until the genetic child is born. This coincides with the 33 months statutory provision in EPTL §4-1.3.

An issue not dealt with is the storing of live embryos. This issue was discusses in a prior New York Law Journal article (Jan. 12, 2015) by former Nassau County Surrogate C. Raymond Radigan and his co-author, David R. Schoenhaar. As of now, no New York statute deals with the issues of ownership, transferability, allowing the embryo to grow to birth, or whether that embryo must grow inside a human body or in a laboratory. These issues may be able to be dealt with by a contract, will or trust provision, or otherwise. It would seem that there should be some statute enacted to deal with these issues that will become more prevalent as years pass.

Most lawyers learn about conflicts of law between the laws of different states in law school, but not every lawyer comes across the applicability of conflicts in practice. In dealing with genetic material, embryos and the common movement of Americans among the 50 states, conflicts of law may arise as to which states' laws control the issues of genetic material, genetic children and parents, as well as the issue of embryo conservation, ownership and transferability. That's a lot for estate planning lawyers to swallow.

Documents

What estate planning documents should deal with the issues above mentioned? Should a male's will provide for transfer of ownership or possession of stored sperm? Should that male's will direct what should happen to that stored sperm when 33 months have passed after his death and no birth has occurred under New York Law? Should a female's will provide for ownership or possession of her stored eggs? If it's possible that another state's laws are more liberal than those of New York, can provisions be placed in a New York domiciliary's will as to which state's law should deal with the sperm, eggs, or embryo? These issues transcend the issue of birth within 33 months. They deal with ownership and possession. What about the issue of to whom can the genetic material and embryos be donated, and for what purposes, i.e., scientific research, or other individuals wanting but not able to have children? What confidential issues are raised by these questions? Certainly there is a lot to deal with.

EPTL §4-1.3 was signed into Law in November 2014, along with amendments to EPTL §11-1.5. The intent of the new law and the amendments is to **solve the issue of posthumously conceived children.**

Possibly, the estate planning lawyer should include certain powers to cover some or all of the above questions in a General Power of Attorney (POA) naming agents for a living individual who later becomes unable to make decisions. However, a POA agent's powers die with the grantor of the POA.

Possibly, a living or testamentary trust can have as part of its corpus genetic material and embryos of the grantor. Then the trust would own the genetic material. Powers can be given to the trustee as to how to deal with the genetic material and embryos, lifespan, transferability, use and the like. Of course, issues of an embryo as a living being need to be fleshed out. Can sperm, eggs and embryos be destroyed after a period of time? Can the trustee make those decisions without being subject to criminal charges and lawsuits from disagreeing individuals, groups or heirs of the donor? A significant issue that needs to be dealt with is how litigation may ensue from right-to-life organizations relating to these issues as to individual family matters. Do such groups have standing to challenge decisions of family members, executors, administrators or trustees? Will courts believe that guardians need be appointed to protect the rights of genetic material and frozen embryos?

As to the conflict of laws issue, can the estate planning lawyer designate in estate planning documents which state's laws should apply as to the above issues? What if the genetic material is stored in one state and a separated husband and wife are in different states? Which state controls the use and storage of the genetic material and embryos? From *Capato* we know that Florida law terminates rights of posthumous children on the death of the father. New York does not. Therefore, if a family was considering having posthumous children, Florida should not be state of domicile at the father's death.

The authors have not done an analysis of the laws of all 50 states as to which states allow rights for posthumous children, what period of time the child can be born after death of a father and be considered an heir entitled to inherit from the father. Similarly, they have not analyzed each state's laws as to rights of embryos, nor the laws as to the length of time for storage and use of genetic material and embryos, if any. Laws of foreign nations may also be considered. However, this article is meant to raise the issues caused by advancing science and the desires of couples, and individuals to have children using their own or someone else's genetic material or embryos. As science continues to advance, estate planning law needs to catch up or be in step with the continuing scientific advances and desires of clients. Laws need to be enacted to protect family representatives (executors, administrators, and trustees) when making decisions regarding a deceased person's genetic material and embryos. EPTL §4-1.3 and similar laws in other jurisdictions are only the beginning of law changes that are sure to come in the years ahead. Estate planning lawyers need to be cognizant of the developing area of law.

1. *Astrue v. Capato*, 132 S. Ct. 2021 (2012).
2. Id.
3. *Bosco v. Astrue*, S.D. New York (2013).
4. EPTL §4-1.3.

The Law Offices of Terence E. Smolev, P.C.
100 Jericho Quadrangle
Suite 208
Jericho, NY 11753
516-931-9500 Fax: 516-977-2314
www.smolevlaw.com