Elder Law/ Trusts & Estates

New Inheritance Rights for Children Conceived After Death

Laws are often unable to keep up with issues that arise from developing biotechnology. This is especially true for the advances in assisted reproductive technologies and the lag of state inheritance laws to address the rights of children conceived after the death of a parent.

Amy F. Altman

On November 14, 2014, Governor Cuomo passed a new statute, EPTL § 4-1.3, and amended sections of EPTL § 11-1.5 to resolve these open issues under New York law. This article will review the new law and investigate whether these new provisions address the panoply of issues raised prior to its passage.

The use of assisted reproductive technologies has increased dramatically over the past two decades.[1] Many reasons for the rise in the storage of genetic material, such as eggs, sperm and embryos exist. These reasons include: early detection of life threatening diseases, infertility, individuals in the military and individuals who simply want the option to wait until later in life to have children. The rise of these scenarios coupled with the access and availability of assisted reproductive technologies have added to this growing phenomenon.

Prior Cases

Prior to the enactment of EPTL § 4-1.3, the few cases that involved the rights of posthumously conceived children demonstrated that this issue has manifested itself across the economic spectrum, from a family with substantial means eager to qualify for trust distributions, to a lower income family attempting to qualify for federal benefits.

In *Astrue v. Capato*, a husband froze his genetic material after obtaining a terminal diagnosis.[2] His wife gave birth to twins after his death using in vitro fertilization and subsequently applied for survivor's insurance benefits. Her application was denied by the Social Security Administration on the basis that the children had to be eligible to inherit under the state's intestacy laws. The Capatos lived in Florida where the intestacy laws do not recognize children who were not in utero during the parent's lifetime. The US Supreme Court agreed that the state's inheritance statute controlled eligibility to federal entitlements and deemed the children ineligible for benefits. This case underscored the importance of clarifying state statutes in this context.[3]

An earlier case addressed the issue of whether a posthumously conceived child could inherit from a trust. Decided in 2007, *In re Martin B.* considered whether two grandchildren who were conceived from frozen genetic material after the death of their father, could inherit from a trust created by their grandfather in 1969.[4] The question was whether these children qualified as "issue" and "descendants" under the terms of the trust.

The court addressed the tragic circumstances and the fact that the father, who died prematurely of cancer, would consider these children his own since he planned for such an event to occur.[5] Nevertheless, it was the grandfather's intent gleaned from the trust documents, as opposed to the father's wishes, which was the controlling factor. Clearly, few in 1969 could have foreseen these circumstances. Ultimately the Court held that the children did in fact qualify to inherit from the trust. However, the Surrogate urged the legislature to pass "…need for comprehensive legislation to resolve the issues raised by advances in biotechnology.[6]"

The New EPTL § 4-1.3

EPTL § 4-1.3 defines "genetic material" as sperm or ova (egg cells)[7]. A "genetic parent" is defined as a man who provides sperm or a woman who provides ova used to conceive a child after their death.[8] A child conceived from the genetic material and born after the death of the genetic parents is defined as a "genetic child".[9] The statute establishes multiple requirements necessary for a genetic child to inherit from a genetic parent, either under intestacy or under a will or trust.

First, the genetic parent must have expressly consented, in a written instrument, to the use of his or her genetic material and authorized a person to make decisions about the usage of said genetic material after their death (the "authorized person").[10] This express written consent must take place no more than seven years before the death of the genetic parent.[11] The written consent must be dated and signed by the genetic parent in the presence of two witnesses who are over the age of eighteen.[12] Neither of the witnesses can be the same as the authorized person under the document.

The statute also provides that an alternate to the authorized person can be selected in in the event the authorized person dies before the genetic parent.[13] Revocation of the written consent can be done by a new writing, executed in a similar fashion to the consent.[14] Interestingly, the revocation of the written consent cannot be effectuated by a provision in the genetic parent's will.[15] The statute sets forth a form that can be used as a sample for written consent of a genetic parent.[16]

Second, the authorized person must give notice of the availability of the genetic material (for the purpose of conceiving a child) to the person to whom letters have been issued within seven months of the issuance of letters, or if no letters have issued, within four months of death of the genetic parent.[17] In addition, notice must be given to a distributee of the genetic parent within seven months of the genetic parent's death.[18] Notice may

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IN BRIEF

Member Activities

Cullen and Dykman LLP is pleased to announce the selection of **Christopher Palmer**, a commercial banking attorney in the firm's Garden City office, as its new managing partner, effective July 1. Palmer takes over as managing partner from **Thomas J. Douglas, Jr.**, who served in that role since 2002, and who will remain with the firm.

Marian C. Rice

Patricia E. Salkin, dean of the Touro Law Center, was appointed the Touro Graduate and Professional Division Interim Provost, serving as the Chief Academic Officer for the Graduate and Professional Division at Touro and providing leadership, policy formation and guidance for faculty and academic programs. Salkin will continue to serve as Dean of the Jacob D. Fuchsberg Touro Law Center while the search for a permanent provost continues.

Matthew F. Didora has joined Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP as Partner and Director of the firm's Commercial Litigation Department, representing clients in all phases of complex commercial litigation, including at trial and on appeal. Executive Partner and co-chair of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP's Family & Matrimonial law department, **Samuel J. Ferrara**, recently achieved an AV Preeminent® rating by Martindale-Hubbell® and is recognized as one of the "Top 10 Divorce Law Attorneys in Long Island" by Ten Leaders.

Farrell Fritz congratulates partner **Jason S. Samuels** on his recent appointment to a two year term as Chair of the Nassau County Bar Association's (NCBA) Construction Law Committee and counsel **Katherine (Kate) A. Heptig**, has recently been named Chair of the Nassau County Bar Association's Corporation, Banking & Securities Law Committee. Samuels concentrates his practice in construction law representing contractors, owners and developers in a variety of matters while Heptig provides general tax and corporate guidance to businesses and individuals.

Michael A. Ciaffa, a resident of Garden City, has become of counsel in the litigation department at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, handling a wide variety of complex civil litigation matters, from their inception through appeal. Mr. Ciaffa was a Nassau County District Court Judge from 2009-2014, where he presided over the busy trial and motion calendar, hearing thousands of no-fault disputes and other civil matters.

Thomas R. Slome, a member of Meyer, Suozzi, English & Klein, P.C. and Chair of the firm's Bankruptcy Practice and Co-Chair of its Corporate Finance Practice representing a wide variety of companies in all aspects of commercial law, including corporate reorganization, bankruptcy related litigation, creditors' rights, and out of court debt restructuring, has been elected as the Board of Directors Chairman of Big Brothers Big Sisters of Long Island.

Pegalis & Erickson, LLC, the pre-eminent law firm representing plaintiffs in medical malpractice action, announces the election of three of its partners to the New York State Trial Lawyers Association (NYSTLA) Board of Directors and the appointment of one of its attorneys to the executive board of the Nassau County Women's Bar Association (NCWBA). **Stephen E. Erickson**, senior partner at Pegalis & Erickson, LLC, has been re-elected to the NYSTLA Board of Directors for the 2015 to 2018 term. **Annamarie Bondi-Stoddard**, Managing Partner at the law firm was elected NYSTLA Deputy Treasurer for the 2015 - 2016 year while **Gary Nielsen** was named to the NYSTLA Board of Directors for the 2015 to 2018 term. **Linda Oliva**, a West Hempstead resident will serve as NCWBA's President-elect for the 2015-2016 year, in this, her fourth term on the board.

Leslie Tayne of Melville-headquartered financial firm Tayne Law Group, P.C. has been elected Vice Chair of Nassau/Suffolk Law Services (NSLS) Committee's Advisory Council. **Jeffrey M. Kimmel**, a veteran litigator and head of the medical malpractice group at the Woodbury law firm of Salenger, Sack, Kimmel & Bavaro, LLP has been sworn in to serve on the NSLS Advisory Council. Established in 1966, NSLS is one of the largest providers of free civil legal assistance in New York.

Karen Tenenbaum of the Melville tax law firm, Tenenbaum Law, P.C. was recognized as a finalist of the SmartCEO CPA & ESQ Award in the Industry Practice area. Ms. Tenenbaum was nominated for her leadership, accomplishments, innovation and success. **Brad Polizzano** of the Firm recently spoke on the topic of IRS and NYS Tax Collections for the New York State Society of Certified Public Accountants, Manhattan/Bronx Chapter, Small Firm Committee. Mr. Polizzano also discussed Foreign Tax Issues with the National Conference of CPA Practitioners, Nassau/Suffolk Chapter.

Jay Davis is pleased to announce that **Londyn Graham**, a graduate of Hofstra University Law School, is now a member of the law firm Jay Davis, PLLC.

Gary Sastow, a partner at the White Plains law firm of Brown, Gruttadaro, Gaujean & Prato PLLC, was recently named Westchester County's Leading Health Care Attorney at the "Above the Bar" Awards. Mr. Sastow, was also a speaker at the firm's new speaker series aimed at educating current and prospective clients on topics and issues that can affect their personal and professional lives.

Melissa Negrin-Wiener, a partner at Genser Dubow Genser & Cona concentrating her practice in elder law, Medicaid eligibility planning, asset protection planning, disability matters, guardianships, estate planning and Veteran benefits, was inducted as President of the Suffolk County Women's Bar. Ms. Negrin-Wiener also appeared as a guest on WHPC's radio (90.3 FM) "Law You Should Know" hosted by NCBA member **Ken Landau**, discussing the growing use of mediation to resolve elder law issues and keep families together.

The Nassau Lawyer welcomes submissions to the IN BRIEF column announcing news, events and recent accomplishments of its members. Due to space limitations, submissions may be edited for length and content.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for nearly 35 years, Ms. Rice is a Past President of NCBA.

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be given by certified mail, return receipt requested or by personal delivery.[19]

Third, the authorized person must file the written instrument within seven months of the genetic's parents death with the Surrogate's Court authorized to grant letters, whether or not letters have not been issued.[20]

Lastly, the genetic child must be in utero within twenty-four months of the genetic parent's death and born no later than thirty-three months after the genetic parent's death in order to qualify to inherit.[21]

As a result of the enactment of EPTL § 4-1.3, and the potential that an estate will be opened for thirty-three months, amendments were also made to EPTL § 11-1.5 to extend the time by which a fiduciary can delay payment of dispositions under a testamentary instrument or an intestate share until a genetic child is born.[22] This gives the fiduciary flexibility to hold back distributions until all distributees are born (as opposed to in utero) and protection from other beneficiaries who may want to demand distributions prior to the birth of the genetic child.

Analysis

Now that the legislature has addressed the issue by passage of a new statute, does the statute address the issue comprehensively? The good news is that for children born from frozen sperm and eggs, the statute does a good job of defining requirements and time frames by which a genetic child can qualify to inherit from the genetic parent's estate.

One glaring omission from the statute, is that only sperm and ova are defined as "genetic material" but what about frozen embryos? One could argue that EPTL § 4-1.1(c), which deals with after born children extends to frozen embryos. EPTL § 4-1.1 states that a child conceived during the lifetime of the decedent, but born after his death, is considered a distributee[23]. Embryos are by definition fertilized, and presumably fit into the definition of "a child conceived during the lifetime of the decedent." If frozen embryos created during the decedent's lifetime fall under this statute, then there may be an un-intended result. None of the requirements listed in EPTL § 4-1.3 would apply to frozen embryos.

It begs the question: why should a child conceived from a frozen embryo of a deceased parent not have the same notice and timing requirements as a child conceived from frozen sperm or eggs? The result seems incongruous, and leaves open many of the same issues the statute was intended to prevent.

It must be noted that an overarching and an overlapping issue is the storage of the genetic material and the agreements with storage facilities. A case which has recently been in the headlines involves two frozen embryos of actress Sophia Vergara and her ex-boyfriend Nick Loeb. They signed an agreement with a storage facility that stated that if they wanted to change the current, *i.e.* frozen state of the embryos, the facility would require the consent of both parties. Loeb now argues that the agreement did not contemplate a situation where the couple would be separated (apparently required by California law) and therefore, he wants to void the agreement and have the ability to bring the embryos to term via surrogate.[24]

What happens if the written consent given by the genetic parent contradicts the agreement with the storage facility? For example, if the authorized person under the consent form for inheritance purposes, is different than the one designated under the agreement with the storage facility? Which document controls? The storage agreement or the consent? This may lead to further disputes or a delay in obtaining the genetic material, and ultimately a delay in the possible conception and birth of a child within thirty-three months from the date of the decedent's death.

This also leads to a question of timing. It is well known that one of the main purposes for enacting the statute was to set a deadline by which an estate may be closed, instead of the possibility that genetic children can be born far into the future and still inherit from an estate, thereby theoretically keeping an estate open indefinitely. That being said, are there circumstances under which the thirty-three month birth deadline can reasonably be extended? What if the person trying to conceive had legitimate health reasons for the delay? It is important for estate planning practitioners to keep in mind that a testator may be able to preemptively extend deadlines through carefully crafted testamentary provisions.

Given that biotechnology has forged a new reality, the passage of EPTL § 4-1.3 is a major development which establishes clear requirements for how genetic children are eligible to inherit from their parent's estate. How this statute will play out in the context of family dynamics and complex advanced reproductive technologies situations remains to be seen.

Amy F. Altman is a senior associate at Meltzer, Lippe, Goldstein & Breitstone, LLP. Amy's practice focuses on estate planning, estate administration and estate and trust litigation. She has a special interest in cases involving supplemental needs trusts, art law, and posthumously conceived children.

1. www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Obstetric-Practice/Perinatal-Risks-Associated-With-Assisted-Reproductive-Technology.
2. *Astrue v. Capato*, 132 S.Ct. 2021 (2012).
3. *Id.*
4. *Matter of Martin B.*, 17 Misc.3d 198 (Sur. Ct., N.Y Co. 2007).
5. *Id.*
6. *Id.*
7. EPTL § 4-1.3(a)(2).
8. EPTL § 4-1.3(a)(1).
9. EPTL § 4-1.3(a)(3).
10. EPTL § 4-1.3(b)(1).
11. *Id.*
12. EPTL § 4-1.3(c)(1).
13. EPTL § 4-1.3(c)(4).
14. EPTL § 4-1.3(c)(2).
15. EPTL § 4-1.3(c)(3).
16. EPTL § 4-1.3(c)(5).
17. EPTL § 4-1.3(b)(2)(A).
18. EPTL § 4-1.3(b)(2)(B).
19. EPTL § 4-1.3(b)(2).
20. EPTL § 4-1.3(b)(3).
21. EPTL § 4-1.3(b)(4).
22. EPTL § 11-1.5(a).
23. EPTL § 4-1.1.
24. Jacqueline Hurtado & Michael Martinez, *Sofia Vergara reportedly sued by ex-fiance over their frozen embryos*, CNN (Apr. 21, 2015), avialable at www.cnn.com