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With reproductive tech advances, legislature recognizes posthumously conceived children

Recent malfunctions in fertility storage tanks have brought the topic of reproductive technology to the headlines of the news cycle. We recognize more and more how individuals have looked to Assisted Reproductive Technology, or ART, as a vehicle to help grow their families. But what are the implications of ART for inheritance purposes?

Posthumous children, or children born after a decedent's death, have historically presented issues for legislatures across the country. Lawmakers have wrestled with the concept of whether a posthumous child should be considered a descendant with regards to an instrument, such as a will or trust, or if a descendant dies without an instrument, and assets pass in accordance with the laws of intestate succession.

Now, with modern reproductive technology, another issue is posed with posthumous children that are conceived after the decedent's death.

Imagine a couple who looked to ART to grow their family and created multiple embryos, and after the birth of their first child, one spouse unexpectedly dies.

Layer the scenario with the fact that the couple always planned to have two children. The decedent would have wanted the surviving spouse to have another child and for the second child to inherit equally.

Approximately half of U.S. states have enacted statutes which explicitly address posthumously conceived children and their inheritance rights by either denying or granting these rights.

One state that has been silent on the rights of intestate succession is Florida, by only providing for heirs conceived before a decedent's death.

On the other hand, states such as California and New York will allow posthumously conceived children to inherit from the decedent if they die intestate.

In the past, Illinois has recognized that posthumous children should inherit from a decedent as if they were born during the decedent's lifetime but has required the child be in utero at the time of death. This means that any child conceived at a later date would not be considered a descendant of the decedent.

However, on Aug. 11, the Illinois legislature passed Public Act 100-85, which broadened the scope as to what posthumous children can inherit. This act became effective as of Jan. 1, amends the Probate Act of 1975 and addresses intestate distributions and property rights under instruments (where someone dies with a will or trust).

Intestate succession for children

With regards to intestate succession, a child not in utero at the decedent's death will inherit as if the child was born during the decedent's lifetime if the following four conditions are met:

- The child is born of the decedent's gametes;
- The child is born within 36 months of the death of the decedent;
- The decedent provided written consent to be the parent of this child; and
- The administrator of the estate receives a signed and acknowledged written notice within six months of the decedent's date of death that notes that the decedent's gametes exist, the person has the intent to use the gametes to result in a child within 36 months, and the person has the intent to raise the child as their own.

If all of these conditions are met, the child will inherit as if they had been born during a decedent's lifetime. Although there is now a lengthened period of time that a child can be born after the decedent's death, there still needs to be a written notice created that demonstrates the intention of the decedent with regards to this child.

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A poorly drafted notice or one with elements missing could cause the court to reject this document and not allow the child to inherit.

Wills, trusts and children

The Illinois legislature also addressed posthumous children and instruments.

Children in utero at the time of the decedent's death are considered a child of the decedent unless there is an express term in the instrument that indicates intent to exclude this child.

On the other hand, a child not in utero at the time of the decedent's death will not be considered a child of the decedent with regards to instruments unless (1) the intent to include the child is demonstrated by express terms in the instrument or (2) the fiduciary or other holder of the property treated the child as a decedent based on a good faith interpretation of Illinois law and made a distribution before Jan. 1, 2018.

This legislation also demands an affirmative statement made in a decedent's will or trust for the child to inherit or receive distributions under the document. The statute also notes intent to exclude posthumous children not in utero at the decedent's death is presumed if the instrument does not address this issue.

Overall, this legislation demonstrates lawmakers' intent to conform to modern technologies and the increasing challenges that are facing parents.

Clients who go through the ART process are often overwhelmed with truly life-changing decisions as they look to grow their families and take meticulous steps to properly plan and create a family unit.

Now more than ever, in addition to the medical planning, individuals looking to ART need to take proactive measures to work with an attorney to create customized estate planning tools which document their intentions for existing children, expectant children and posthumously conceived children.

A special thanks to Chuhak & Tecson, P.C. law clerk Corinne Pforr for her contribution to this column.

THE BUZZ

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