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Memorandum Urging Approval
TRUSTS AND ESTATES LAW SECTION

T&E #6-GOV

June 20, 2014

S. 4779-B
A. 7461-A

By: Senator Bonacic
By: M. of A. Cook
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the estates, powers and trusts law, in relation to rights of a child conceived after the death of a genetic parent of such child

LAW AND SECTION REFERRED TO: EPTL Section 4-1.3

THE TRUSTS AND ESTATES LAW SECTION SUPPORTS THIS LEGISLATION AND URGES ITS ENACTMENT INTO LAW

With the advent of artificial reproductive technology, it is now possible for a decedent to conceive children after death. Despite the scientific advances that have occurred in recent years, however, the law has failed to keep pace with science, leaving many questions open. One of the open questions is whether posthumously-conceived children ("posthumous children") can inherit as distributees and beneficiaries of class gifts benefitting the "children" of their natural parents. The Office of Court Administration's Surrogate's Court Advisory Committee ("OCA") has proposed amendments to the Estates, Powers and Trusts Law ("EPTL") which would qualify certain posthumous children as beneficiaries of the aforementioned classes (the "Proposal"). For the reasons explained more fully below, the Trusts and Estates Law Section SUPPORTS the Proposal.

BACKGROUND

As it relates to posthumous children, the law of inheritance is, in many respects, unsettled. The vast majority of states have yet to take any legislative action to resolve whether posthumous children should be permitted to inherit from their deceased natural parents.[1] In the absence of such guidance, courts have reached divergent views concerning the inheritance or succession rights of posthumous children.[2]

[1] Gail Goldfarb & Judith E. Siegel-Baum, "Modern Technology, Entrenched Law and 'Martin B.'", N.Y. L.J., Feb. 11, 2008, at 3.
[2] *Astrue v. Capato*, 132 S. Ct. 2021, 2027 (2012); *see also Finley v. Astrue*, 270 S.W.3d 849, 854 (Ark. 2008) (referencing the conflicting case law).

In all but one of the reported decisions addressing the inheritance and succession rights of posthumous children, courts have been confronted with cases concerning the Social Security Administration's (the "SSA") denial of applications for Social Security survivor benefits. The SSA Commissioner interpreted the statutory provisions governing survivor benefits to require that posthumous children qualify as decedents' distributees under state intestacy law in order to receive survivor benefits.[3] A split developed among the federal Courts of Appeals as to whether reference to state intestacy law was necessary to determine a posthumous child's eligibility for survivor benefits.[4]

In 2012, in *Astrue v. Capato*, the Supreme Court of the United States resolved the circuit split, holding that the SSA's interpretation of the United States Code as requiring reference to state intestacy law to determine the status of a posthumous child as a recipient of survivor benefits was entitled to deference.[5] Based upon that holding and the governing state intestacy law, the Court concluded that the posthumous child in question was ineligible for survivor benefits.[6]

There appears to be only one reported case in the United States that addresses the rights of posthumous children to take as beneficiaries of class gifts under a will or trust.[7] In that case, *Matter of Martin B.*, former New York County Surrogate Renee R. Roth found that two children who were born to the widow of a trust grantor's son and conceived after the son's death were their father's children for the purposes of determining whether the children were beneficiaries of the subject trusts.[8]

In so holding, however, Surrogate Roth wisely noted that "[t]here is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology."[9] The Surrogate noted that, under New York's current statutory schemes, a child must be conceived during a decedent's lifetime in order to inherit as an intestate distributee, after-born child under a will, or beneficiary of a class gift.[10]

Mindful of the developments in science and the legal principles discussed above, OCA has made a comprehensive, well-reasoned proposal to add EPTL § 4-1.3 and to amend EPTL § 11-1.5, which adequately address the inheritance rights of posthumous children in New York. The Proposal is discussed in detail below.

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[3] *Astrue*, 132 S. Ct. at 2029-34.
[4] *See id.*
[5] *See id.*
[6] *See id.*; *see also Amen v. Astrue*, No. 4:10-CV-3216, 2013 WL 274923, at *2 (D. Neb. Jan. 24, 2013) (applying the principles articulated by the Supreme Court).
[7] *See* Exhibit "A".
[8] *Matter of Martin B.*, 17 Misc.3d 198, 199-205, 841 N.Y.S.2d 207 (Sur. Ct., New York County 2007).
[9] *See id.*
[10] *See id.*; EPTL §§ 2-1.3, 4-1.1, and 5-3.2.

THE PROPOSAL

In order for what the statute defines as a "genetic child" to be treated as a child of his or her "genetic parents" for inheritance purposes under the new EPTL § 4-1.3, the following four (4) requirements must be met: (a) the genetic parent storing sperm or ova must expressly consent, in writing, to the use of the sperm or ova (the "genetic material") for posthumous reproduction and authorize a person to make decisions as to the use of that genetic material after the genetic parent's death; (b) within seven (7) months of the genetic parent's death, the person authorized to make decisions as to the genetic material must give notice of its existence to the personal representative of the genetic parent's estate or, if no personal representative has obtained letters within four (4) months of the genetic parent's death, such notice must be given to a distributee of the genetic parent; (c) the person authorized to make decisions as to the genetic material must record the writing under which he or she has authority to act with the Surrogate's Court granting letters to the personal representative of the genetic parent's estate or, if letters have not issued, the notice must be recorded with the Surrogate's Court having jurisdiction to issue letters; and (d) the posthumous child must be *in utero* within twenty-four (24) months or born within thirty-three (33) months of the genetic parent's death.

With respect to the writing that is required, the Proposal sets forth a sample form in EPTL § 4-1.3(c)(5) that imposes two (2) conditions: (a) the genetic parent must sign the writing "in the presence of two [(2)] witnesses [who are] at least eighteen [(18)] years of age, neither of whom is a person authorized to make decisions about the use of the genetic parent's genetic material"; and (b) the genetic parent must sign and date the form which must also be properly witnessed. The instrument must be fully executed not more than seven (7) years prior to the genetic parent's death. Moreover, the writing: (a) may only be revoked by a written instrument executed by the genetic parent in the same manner as the instrument that it purports to revoke; (b) may not be amended or revoked by the genetic parent's will; and (c) may "authorize an alternate to make decisions if the person designated dies before the genetic parent or is unable to exercise the authority granted under the instrument."

In addition to the foregoing, the Proposal "revokes the authority given under the written instrument to the genetic parent's spouse should [their] marriage end in divorce, annulment, or a judgment or order of legal separation is entered against the spouse." This revocation language is analogous to that which is contained in EPTL § 5-1.4 (concerning dispositions to and beneficiary designations of an ex-spouse).

Further, when the requirements of EPTL § 4-1.3 have been met, a genetic child who is entitled to inherit from his or her genetic parent's estate would be included in the terms "issue", surviving issue", and "issue surviving" as defined in EPTL § 3-3.3. Such genetic child would not be entitled to process, unless the child is *in utero* at the time that process issues and would not have the effect of rendering any distributions violative of the so-called rule against perpetuities.

In order to minimize the administration delays that might arise due to the possibility of a posthumous child's birth, the Proposal suggests amendments to EPTL § 11-1.5. Under the proposed amendments to EPTL § 11-1.5, the personal representative of the genetic parent's

estate need not pay a testamentary disposition or distributive share until: (a) the "completion of the publication of notice to creditors or if no notice is published, before the expiration of seven [(7)] months from the time letters were granted"; or (b) the birth of a posthumous child who is entitled to inherit under the new EPTL § 4-1.3, provided that notice of the genetic parent's genetic material's existence has been given in compliance with said statute. Additionally, the amended EPTL § 11-1.5: (a) authorizes the personal representative of the genetic parent's estate to require that a bond be posted whenever the genetic parent's will "directs a disposition to be paid before the" posthumous child's birth; (b) permits the personal representative to decline demands to pay dispositions before the posthumous child's birth; and (c) requires the personal representative to pay interest at the statutory rate of six (6%) percent beginning at the later of the expiration of seven (7) months after the grant of letters or the birth of the posthumous child.

Finally, if enacted, the proposed amendments to the EPTL would "take effect immediately and apply to the estates of decedents dying on or after" the date of enactment. That is, except to the extent that it governs the rights of non-marital children under the testamentary or lifetime trust instruments of persons other than the parents of posthumous children. In such circumstances, the new EPTL § 4-1.3 would only apply to the wills of testators who die on or after September 1, 2013; to lifetime instruments executed before that date, but which can be revoked or amended on or after September 1, 2013; and to all lifetime instruments executed on or after September 1, 2013.

REASONS TO SUPPORT THE PROPOSAL

The bill is a well-reasoned answer to the difficult legal questions that have arisen in the wake of advances to reproductive technology. If enacted, the Proposal would ensure that posthumous children would inherit from their deceased genetic parents' estates, to the extent that such inheritances are consistent with the intentions of their genetic parents. In addition, the Proposal would answer the concerns of executors, trustees, and creditors, as well as beneficiaries who are born and/or conceived before the deaths of their genetic parents, that the estate or trust administration process enjoys some level of finality and the class of permissible beneficiaries closes within a reasonable period of time of a decedent's death. Given the manner in which the Proposal balances the foregoing concerns, it is worthy of support.

CONCLUSION

Based on the foregoing, the Trusts and Estates Law Section supports this legislation urges Governor Cuomo to **APPROVE** it.

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