Legal planning for posthumous parenthood

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Legal parentage is seemingly defined and then redefined every few years as our laws catch up with continuing advances in reproductive technology and assistance, recognition of same-sex marriage and acknowledgment of de facto parenthood.

One new(er) area of legal parentage that has hit the news is the concept of children conceived after a parent's death. This raises the issue of whether we should be including such parentage in our pre- and postnuptial agreements and estate plans.

Australian Olympic snowboarding gold medalist Alex "Chumpy" Pullin "welcomed" a son last fall – 15 months after Pullin died in a diving accident. The athlete's widow had her husband's sperm harvested after his death and implanted using in vitro fertilization, or IVF.

In another example, a New York judge ruled in 2019 that the parents of a West Point cadet who died in a skiing accident could retrieve their son's sperm as a security to carry on their family lineage. A family in Israel harvested and froze their deceased daughter's eggs. A mother in the United States, however, lost her bid to do the same to produce a grandchild.

There is no standard across the United States for posthumous retrieval and/or use of a decedent's genetic material to conceive a child. Maryland, however, has addressed this issue, in part, through statute.

Md. Code Ann., Health-Gen. § 20-111, which applies only to donors known to the party intending to become a parent (i.e., not donative material to a tissue bank or a fertility clinic), provides that to use the decedent's genetic material, the decedent must have consented to posthumous use. If the consent was given after 2012, it must be (i) in writing and (ii) signed by the donor or their agent in the donor's presence and at their direction.

The punishment for not having obtained consent is relatively minor. A person who violates the statute is guilty of only a misdemeanor. A first offense is a fine not to exceed $1,000. Second and subsequent offenses are fines not to exceed $5,000.

Although the fines are minor, the repercussions for a posthumously conceived child can be severe. Whether parentage is recognized affects the child's ability to obtain Social Security benefits or even claim under the decedent-parent's estate.

Under the estate code, posthumously conceived children may receive the statutory allowance or be in line for intestate succession only if the following three factors are satisfied: (i) the decedent-parent consented in writing to posthumous conception pursuant to § 20-111, (ii) they consented to be a parent to the posthumously conceived child and (iii) the child is born within two years of the decedent-parent's death.

To take under a trust, the posthumously conceived child must prove the foregoing three factors and additionally establish that the decedent-parent was the creator of the trust and that the trust became irrevocable on or after Oct. 1, 2012.

As you can see, this little-thought-about area of law can have a large impact on our clients and their potential offspring.

As a practice, we should be asking our family law and estate planning clients whether they have or intend to have stored genetic material and what their intentions are.

When drafting pre- and postnuptial agreements and estate plans, clients can protect themselves by carefully crafting language around the disposition of stored genetic materials upon death or even upon the dissolution of the marital relationship.

Clients may be comfortable with a spouse in an intact marriage having posthumous access to their genetic material, but they may not want a separated spouse (or anyone else, for that matter) having the same access.

Furthermore, clients may be completely comfortable with their genetic material being used posthumously and may want to account for any future-born children in their estate planning.

Attorneys can draft into any agreement or estate plans provisions that specifically address the intention of the party/parties, the disposition of the genetic material, and who may use it and how.

When drafting these provisions, attorneys should be mindful of the holding in Jocelyn P. v. Joshua P. In discussing IVF agreements, the court held that, to be enforceable, an agreement must include express and affirmative designations of the parties' intent, as opposed to boilerplate or recitation of a fertility center's agreement.

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