



PROPER PLANNING MAY CREATE PEACE OF MIND



August 2007

THE LAW KEEPS PACE WITH ADVANCES IN BIOTECHNOLOGY

The law is beginning to keep pace with the advances being made in biotechnology, namely assisted reproductive technology (ART). On July 30, 2007, a New York Surrogate Judge ruled that two children who were conceived after the death of their father qualified as “issue” and “descendants” for the purpose of inheriting from their grandfather’s trust. In Re: Martin B. NYSlip Op 27306.

**Facts:** The children's father was diagnosed with Hodgkins Lymphoma in 2001. The father chose to deposit a sample of semen at a laboratory to be cryopreserved and held subject to the directions of his wife after his demise. Three and five years after his death, his wife underwent in vitro fertilization with his cryopreserved semen and gave birth to two boys.

The deceased man’s father was the Grantor of several trusts. The trust documents gave the trustees discretion to sprinkle principal to and among Grantor’s ‘issue’ during his wife’s life. It also provided that upon the Grantor’s wife’s death the principal would be distributed as she directed under her special testamentary power to appoint to Grantor’s ‘issue’ or ‘descendants.’

***“Children born as a result of biotechnology with the consent of their parents are entitled to the same rights for all purposes as those of a natural child.”***

**Law:** New York does not have a statute that directly considers the rights of a post-conceived child. Nor has New York adopted the Uniform Parental Act. New York’s probate law provides that a posthumous (after-born) child’s right to inherit under a will is limited to a child conceived during the decedent’s lifetime.

The Court then looked at laws of other jurisdictions, including Florida, which have addressed the inheritance rights of a post-conceived child. Florida Statute 742.11 provides that any child born within wedlock who has been conceived by artificial or in vitro insemination is irrefutably presumed to be the child of the husband and wife so long as both spouses consented in writing to the procedure or the use of donated eggs or embryos. However, Florida Statute 742.17 provides that a child conceived from the eggs or sperm of a person who died before the transfer to a woman’s body may inherit only if the parent explicitly provides for the child in the will.

The Court reasoned that if the parent consented to be a parent to the child then post-conceived infants should be treated as part of their father’s family.

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“When I was born, I was so surprised I didn’t talk for a year and a half.”

—Gracie Allen

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