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New science of human conception triggers questions over inheritance

By Patricia Manson
Law Bulletin staff writer

Advances in science are outpacing the evolution of the law.

More and more children nowadays are being conceived in ways that would have sounded like something out of Aldous Huxley's novel "Brave New World" only a short time ago.

But many states do not have statutes that take into account the situation of posthumously conceived children, offspring conceived with a dead parent's genetic material through the use of such reproductive technology as artificial insemination or in vitro fertilization.

These children are often left out in the cold when it comes to such matters as eligibility for government benefits or the right to inherit from a parent who left no will.

"The law can't keep up with medical technology," Sheldon F. Kurtz said. "Medical technology moves a whole lot faster. Changing the law takes a lot longer."

Kurtz, a professor at the University of Iowa College of Law, is doing his part to remedy that situation.

Kurtz helped draft an Iowa law that allows people to protect the rights of any child conceived after their death.

As a member of the Uniform Law Commission, Kurtz also helped draft model probate legislation that states may use as the basis for their own statutes concerning the inheritance rights of posthumously conceived children.

Kurtz said such statutes have benefits for parents as well as children.

Many of the people who bank their sperm or eggs are cancer patients or members of the military, Kurtz said.

Kurtz said the ability to have a child together even after the death of one of the spouses provides emotional comfort for both parties.

Professor Scott A. Shepard of The John Marshall Law School said Illinois law makes no provision for such children.

A "posthumous" child entitled to inherit under Illinois law — and under the law of many other states — is a child who was conceived before a parent's death but born after it, said Shepard, who teaches courses on property law and the law of estates and trusts.

Only about a dozen states have statutes that address the rights of posthumously conceived children.

Some of those states — including California, Delaware, Louisiana and Virginia as well as Iowa — allow posthumously conceived children to inherit only if the deceased parent left written permission for his or her genetic material to be used to conceive a child.

And some of those state statutes set time limits on the birth or conception of the child.

For example, California requires the child to have been conceived within two years of the parent's death, while Iowa has a two-year deadline and Louisiana has a three-year deadline for the child's birth.

Shepard said there is a consensus among courts that there must be a time limit on producing children who might have a claim on a deceased parent's assets.

Deadlines are needed to provide finality in the settlement of estates, Shepard said.

"The courts aren't going to countenance opening up an estate or providing paternal benefits years and years after the parent has died," he said.

Family law attorney H. Joseph Gitlin of Gitlin, Busche & Stetler in Woodstock said courts have split on whether a posthumously conceived child may inherit or collect benefits in the absence of a state law specifically addressing the matter.

The split stems from the fact that a child's inheritance rights and eligibility for such benefits as Social Security survivor benefits are based on state law, Gitlin said.

Gitlin said the Massachusetts Supreme Court in 2002 issued what apparently was the first ruling by an American court of last resort on the issue of the inheritance rights of children conceived after their father's death.

In *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257 (Mass. 2002), the state high court held that Massachusetts law required a woman seeking Social Security benefits for herself and twins conceived with her late husband's sperm to show that her husband consented to both the posthumous reproduction and the use of his estate to support the children.

Gitlin said the New Hampshire Supreme Court held in 2007 that such actions were not enough to establish inheritance rights

under that state's laws — and therefore the right to collect survivor benefits — for a posthumously conceived child.

In *Khabbaz v. Commissioner of Social Security*, 930 A.2d 1180 (N.H. 2007), the state high court said a parent must be alive when his or her child is conceived in order for the child to qualify as the parent's "surviving issue."

The New Hampshire Supreme Court said that principle trumped signed documents in which a terminally ill man stated that he wanted his wife to use his sperm to conceive a child after his death and that he wanted the child to be legally recognized as his.

Gitlin said differences in state laws prompted the San Francisco-based 9th U.S. Circuit Court of Appeals to reach different results in two unrelated cases.

In *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), the 9th Circuit ruled that twins born in Arizona 18 months after their father's death were his natural and biological children and therefore his dependents as defined by the Social Security Act.

But in *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir. 2009), the 9th Circuit ruled that a girl conceived in California with her late father's sperm following his death was not his dependent.

The 9th Circuit noted that there was no evidence that the father had entered an assisted reproduction agreement as required by California law.

In fact, the 9th Circuit said, the evidence showed that the man's widow had arranged to have his semen extracted from his body following his death.

The Iowa statute that Kurtz helped draft did not help a child born in 2003, two years after her father died of leukemia.

In August, the St. Louis-based 8th Circuit held in *Beeler v. Astrue*, No. 10-1092, that the girl did not qualify as the "natural child" of her father under Iowa law in effect when she was born.

This week, the U.S. Supreme Court agreed to hear the Obama administration's appeal of a ruling by the Philadelphia-based 3rd Circuit. *Astrue v. Capato*, No. 11-159.

In *Capato v. Astrue*, 631 F.3d 626 (3d Cir. 2011), the 3rd Circuit held that twins conceived after their father's death were eligible for survivor benefits under New Jersey law.