S T A T E  O F  N E W  Y O R K

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Cal. No. 365

2013-2014 Regular Sessions

I N  A S S E M B L Y

May 21, 2013

Introduced by M. of A. COOK, WEINSTEIN -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary -- advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

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

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The estates, powers and trusts law is amended by adding a new section 4-1.3 to read as follows:

S 4-1.3 INHERITANCE BY CHILDREN CONCEIVED AFTER THE DEATH OF A GENETIC PARENT

(A) WHEN USED IN THIS ARTICLE, UNLESS THE CONTEXT OR SUBJECT MATTER MANIFESTLY REQUIRES A DIFFERENT INTERPRETATION:

(1) "GENETIC PARENT" SHALL MEAN A MAN WHO PROVIDES SPERM OR A WOMAN WHO PROVIDES OVA USED TO CONCEIVE A CHILD AFTER THE DEATH OF THE MAN OR WOMAN.

(2) "GENETIC MATERIAL" SHALL MEAN SPERM OR OVA PROVIDED BY A GENETIC PARENT.

(3) "GENETIC CHILD" SHALL MEAN A CHILD OF THE SPERM OR OVA PROVIDED BY A GENETIC PARENT, BUT ONLY IF AND WHEN SUCH CHILD IS BORN.

(B) FOR PURPOSES OF THIS ARTICLE, A GENETIC CHILD IS THE CHILD OF HIS OR HER GENETIC PARENT OR PARENTS AND, NOTWITHSTANDING PARAGRAPH (C) OF SECTION 4-1.1 OF THIS PART, IS A DISTRIBUTEE OF HIS OR HER GENETIC PARENT OR PARENTS AND, NOTWITHSTANDING SUBPARAGRAPH (2) OF PARAGRAPH (A) OF SECTION 2-1.3 OF THIS CHAPTER, IS INCLUDED IN ANY DISPOSITION OF PROPERTY TO PERSONS DESCRIBED IN ANY INSTRUMENT OF WHICH A GENETIC PARENT OF THE GENETIC CHILD WAS THE CREATOR AS THE ISSUE, CHILDREN, DESCENDANTS, HEIRS, HEIRS AT LAW, NEXT OF KIN, DISTRIBUTEES (OR BY ANY TERM OF LIKE IMPORT) OF THE CREATOR IF IT IS ESTABLISHED THAT:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(1) THE GENETIC PARENT IN A WRITTEN INSTRUMENT EXECUTED PURSUANT TO THE PROVISIONS OF THIS SECTION NOT MORE THAN SEVEN YEARS BEFORE THE DEATH OF THE GENETIC PARENT:

(A) EXPRESSLY CONSENTED TO THE USE OF HIS OR HER GENETIC MATERIAL TO POSTHUMOUSLY CONCEIVE HIS OR HER GENETIC CHILD, AND

(B) AUTHORIZED A PERSON TO MAKE DECISIONS ABOUT THE USE OF THE GENETIC PARENT'S GENETIC MATERIAL AFTER THE DEATH OF THE GENETIC PARENT;

(2) THE PERSON AUTHORIZED IN THE WRITTEN INSTRUMENT TO MAKE DECISIONS ABOUT THE USE OF THE GENETIC PARENT'S GENETIC MATERIAL GAVE WRITTEN NOTICE, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OR BY PERSONAL DELIVERY, THAT THE GENETIC PARENT'S GENETIC MATERIAL WAS AVAILABLE FOR THE PURPOSE OF CONCEIVING A GENETIC CHILD OF THE GENETIC PARENT, AND SUCH WRITTEN NOTICE WAS GIVEN;

(A) WITHIN SEVEN MONTHS FROM THE DATE OF THE ISSUANCE OF LETTERS TESTAMENTARY OR OF ADMINISTRATION ON THE ESTATE OF THE GENETIC PARENT, AS THE CASE MAY BE, TO THE PERSON TO WHOM SUCH LETTERS HAVE ISSUED, OR, IF NO LETTERS HAVE BEEN ISSUED WITHIN FOUR MONTHS OF THE DEATH OF THE GENETIC PARENT, AND

(B) WITHIN SEVEN MONTHS OF THE DEATH OF THE GENETIC PARENT TO A DISTRIBUTEE OF THE GENETIC PARENT;

(3) THE PERSON AUTHORIZED IN THE WRITTEN INSTRUMENT TO MAKE DECISIONS ABOUT THE USE OF THE GENETIC PARENT'S GENETIC MATERIAL RECORDED THE WRITTEN INSTRUMENT WITHIN SEVEN MONTHS OF THE GENETIC PARENT'S DEATH IN THE OFFICE OF THE SURROGATE GRANTING LETTERS ON THE GENETIC PARENT'S ESTATE, OR, IF NO SUCH LETTERS HAVE BEEN GRANTED, IN THE OFFICE OF THE SURROGATE HAVING JURISDICTION TO GRANT THEM; AND

(4) THE GENETIC CHILD WAS IN UTERO NO LATER THAN TWENTY-FOUR MONTHS AFTER THE GENETIC PARENT'S DEATH OR BORN NO LATER THAN THIRTY-THREE MONTHS AFTER THE GENETIC PARENT'S DEATH.

(C) THE WRITTEN INSTRUMENT REFERRED TO IN SUBPARAGRAPH (1) OF PARAGRAPH (B) OF THIS SECTION:

(1) MUST BE SIGNED BY THE GENETIC PARENT IN THE PRESENCE OF TWO WITNESSES WHO ALSO SIGN THE INSTRUMENT, BOTH OF WHOM ARE AT LEAST EIGHTEEN YEARS OF AGE AND NEITHER OF WHOM IS A PERSON AUTHORIZED UNDER THE INSTRUMENT TO MAKE DECISIONS ABOUT THE USE OF THE GENETIC PARENT'S GENETIC MATERIAL;

(2) MAY BE REVOKED ONLY BY A WRITTEN INSTRUMENT SIGNED BY THE GENETIC PARENT AND EXECUTED IN THE SAME MANNER AS THE INSTRUMENT IT REVOKES;

(3) MAY NOT BE ALTERED OR REVOKED BY A PROVISION IN THE WILL OF THE GENETIC PARENT;

(4) MAY AUTHORIZE AN ALTERNATE TO MAKE DECISIONS ABOUT THE USE OF THE GENETIC PARENT'S GENETIC MATERIAL IF THE FIRST PERSON SO DESIGNATED DIES BEFORE THE GENETIC PARENT OR IS UNABLE TO EXERCISE THE AUTHORITY GRANTED; AND

(5) MAY BE SUBSTANTIALLY IN THE FOLLOWING FORM AND MUST BE SIGNED AND DATED BY THE GENETIC PARENT AND PROPERLY WITNESSED:

I, _____,
(YOUR NAME AND ADDRESS)
CONSENT TO THE USE OF MY (SPERM OR OVA) (REFERRED TO BELOW AS MY "GENETIC MATERIAL") TO CONCEIVE A CHILD OR CHILDREN OF MINE AFTER MY DEATH, AND I AUTHORIZE

_____
(NAME AND ADDRESS OF PERSON)

TO DECIDE WHETHER AND HOW MY GENETIC MATERIAL IS TO BE USED TO CONCEIVE A CHILD OR CHILDREN OF MINE AFTER MY DEATH.
IN THE EVENT THAT THE PERSON AUTHORIZED ABOVE DIES BEFORE ME OR IS UNABLE TO EXERCISE THE AUTHORITY GRANTED I DESIGNATE

_____
(NAME AND ADDRESS OF PERSON)
TO DECIDE WHETHER AND HOW MY GENETIC MATERIAL IS TO BE USED TO CONCEIVE A CHILD OR CHILDREN OF MINE AFTER MY DEATH.
I UNDERSTAND THAT, UNLESS I REVOKE THIS CONSENT AND AUTHORIZATION IN A WRITTEN DOCUMENT SIGNED BY ME IN THE PRESENCE OF TWO WITNESSES WHO ALSO SIGN THE DOCUMENT, THIS CONSENT AND AUTHORIZATION WILL REMAIN IN EFFECT FOR SEVEN YEARS FROM THIS DAY AND THAT I CANNOT REVOKE OR MODIFY THIS CONSENT AND DESIGNATION BY ANY PROVISION IN MY WILL.

SIGNED THIS DAY OF ,

_____
(YOUR SIGNATURE)
STATEMENT OF WITNESSES:
I DECLARE THAT THE PERSON WHO SIGNED THIS DOCUMENT IS PERSONALLY KNOWN TO ME AND APPEARS TO BE OF SOUND MIND AND ACTING WILLINGLY AND FREE FROM DURESS. HE OR SHE SIGNED THIS DOCUMENT IN MY PRESENCE. I AM NOT THE PERSON AUTHORIZED IN THIS DOCUMENT TO CONTROL THE USE OF THE GENETIC MATERIAL OF THE PERSON WHO SIGNED THIS DOCUMENT.
WITNESS:
ADDRESS:
DATE:
WITNESS:
ADDRESS:
DATE:

(D) ANY AUTHORITY GRANTED IN A WRITTEN INSTRUMENT AUTHORIZED BY THIS SECTION TO A PERSON WHO IS THE SPOUSE OF THE GENETIC PARENT AT THE TIME OF EXECUTION OF THE WRITTEN INSTRUMENT IS REVOKED BY A FINAL DECREE OR JUDGMENT OF DIVORCE OR ANNULMENT, OR A FINAL DECREE, JUDGMENT OR ORDER DECLARING THE NULLITY OF THE MARRIAGE BETWEEN THE GENETIC PARENT AND THE SPOUSE OR DISSOLVING SUCH MARRIAGE ON THE GROUND OF ABSENCE, RECOGNIZED AS VALID UNDER THE LAW OF THIS STATE, OR A FINAL DECREE OR JUDGMENT OF SEPARATION, RECOGNIZED AS VALID UNDER THE LAW OF THIS STATE, WHICH WAS RENDERED AGAINST THE SPOUSE.

(E) PROCESS SHALL NOT ISSUE TO A GENETIC CHILD WHO IS A DISTRIBUTEE OF A GENETIC PARENT UNDER SECTIONS ONE THOUSAND THREE AND ONE THOUSAND FOUR HUNDRED THREE OF THE SURROGATE'S COURT PROCEDURE ACT UNLESS THE CHILD IS IN BEING AT THE TIME PROCESS ISSUES.

(F) EXCEPT AS PROVIDED IN PARAGRAPH (B) OF THIS SECTION WITH REGARD TO ANY DISPOSITION OF PROPERTY IN ANY INSTRUMENT OF WHICH THE GENETIC PARENT OF A GENETIC CHILD IS THE CREATOR, FOR PURPOSES OF SECTION 2-1.3 OF THIS CHAPTER A GENETIC CHILD WHO IS ENTITLED TO INHERIT FROM A GENETIC PARENT UNDER THIS SECTION IS A CHILD OF THE GENETIC PARENT FOR PURPOSES OF A DISPOSITION OF PROPERTY TO PERSONS DESCRIBED IN ANY INSTRUMENT AS THE ISSUE, CHILDREN, DESCENDANTS, HEIRS, HEIRS AT LAW, NEXT OF KIN, DISTRIBUTEES (OR BY ANY TERM OF LIKE IMPORT) OF THE CREATOR OR OF ANOTHER. THIS PARAGRAPH SHALL APPLY TO THE WILLS OF PERSONS DYING ON OR AFTER SEPTEMBER FIRST, TWO THOUSAND FOURTEEN, TO LIFETIME INSTRUMENTS THERETOFORE EXECUTED WHICH ON SAID DATE ARE SUBJECT TO THE

GRANTOR'S POWER TO REVOKE OR AMEND, AND TO ALL LIFETIME INSTRUMENTS EXECUTED ON OR AFTER SUCH DATE.

(G) FOR PURPOSES OF SECTION 3-3.3 OF THIS CHAPTER THE TERMS "ISSUE", "SURVIVING ISSUE" AND "ISSUE SURVIVING" INCLUDE A GENETIC CHILD IF HE OR SHE IS ENTITLED TO INHERIT FROM HIS OR HER GENETIC PARENT UNDER THIS SECTION.

(H) WHERE THE VALIDITY OF A DISPOSITION UNDER THE RULE AGAINST PERPETUITIES DEPENDS ON THE ABILITY OF A PERSON TO HAVE A CHILD AT SOME FUTURE TIME, THE POSSIBILITY THAT SUCH PERSON MAY HAVE A GENETIC CHILD SHALL BE DISREGARDED. THIS PROVISION SHALL NOT APPLY FOR ANY PURPOSE OTHER THAN THAT OF DETERMINING THE VALIDITY OF A DISPOSITION UNDER THE RULE AGAINST PERPETUITIES WHERE SUCH VALIDITY DEPENDS ON THE ABILITY OF A PERSON TO HAVE A CHILD AT SOME FUTURE TIME. A DETERMINATION OF VALIDITY OR INVALIDITY OF A DISPOSITION UNDER THE RULE AGAINST PERPETUITIES BY THE APPLICATION OF THIS PROVISION SHALL NOT BE AFFECTED BY THE LATER BIRTH OF A GENETIC CHILD DISREGARDED UNDER THIS PROVISION.

(I) THE USE OF A GENETIC MATERIAL AFTER THE DEATH OF THE PERSON PROVIDING SUCH MATERIAL IS SUBJECT EXCLUSIVELY TO THE PROVISIONS OF THIS SECTION AND TO ANY VALID AND BINDING CONTRACTUAL AGREEMENT BETWEEN SUCH PERSON AND THE FACILITY PROVIDING STORAGE OF THE GENETIC MATERIAL AND MAY NOT BE THE SUBJECT OF A DISPOSITION IN AN INSTRUMENT CREATED BY THE PERSON PROVIDING SUCH MATERIAL OR BY ANY OTHER PERSON.

S 2. Paragraphs (a), (b), (c) and (d) of section 11-1.5 of the estates, powers and trusts law, paragraph (a) and subparagraph 1 of paragraph (b) as amended, and such section as renumbered by chapter 686 of the laws of 1967, and paragraph (d) as amended by chapter 634 of the laws of 1985, are amended to read as follows:

(a) Subject to his OR HER duty to retain sufficient assets to pay administration and reasonable funeral expenses, debts of the decedent and all taxes for which the estate is liable, a personal representative may, but, except as directed by will or court decree or order, shall not be required to, pay any testamentary disposition or distributive share before the completion of the publication of notice to creditors or, if no such notice is published, before the expiration of seven months from the time letters testamentary or of administration are granted, OR, IF NOTICE OF THE AVAILABILITY OF GENETIC MATERIAL OF THE DECEDENT HAS BEEN GIVEN UNDER SECTION 4-1.3, BEFORE THE BIRTH OF A GENETIC CHILD WHO IS ENTITLED TO INHERIT FROM THE DECEDENT UNDER SECTION 4-1.3.

(b) Whenever a disposition is directed by will to be paid in advance of such publication of notice or the expiration of such seven month period OR THE BIRTH OF A GENETIC CHILD ENTITLED TO INHERIT FROM THE DECEDENT UNDER SECTION 4-1.3, the personal representative may require a bond, conditioned as follows:

(1) That if debts of the decedent appear, and the assets of the estate are insufficient to pay them or to pay other testamentary dispositions entitled, under SECTION 13-1.3, to payment equally with or prior to that of the disposition paid in advance, the beneficiary to whom advance payment was made will refund it, or the value thereof, together with interest thereon and any costs incurred by reason of such payment, or such ratable portion thereof, as is necessary to pay such debts or to satisfy the rights, if any, of other beneficiaries under the will.

(2) That if the will, under which the disposition was paid, is denied probate, on appeal or otherwise, such beneficiary will refund the entire advance payment, together with interest and costs as described in subparagraph (1), to the personal representative entitled thereto.

(c) If, after the [publication of notice to creditors or the] expiration of seven months from the time letters are granted OR THE BIRTH OF A GENETIC CHILD ENTITLED TO INHERIT FROM THE DECEDENT UNDER SECTION 4-1.3, as the case may be, the personal representative refuses upon demand to pay a disposition or distributive share, the person entitled thereto may maintain an appropriate action or proceeding against such representative. But, for the purpose of computing the time limited for its commencement, the cause of action does not accrue until the personal representative's account is judicially settled.

(d) In any action or proceeding to compel payment of a disposition or distributive share, the interest thereon, if any, shall, in the case of a disposition, be at the rate fixed in the will or, if none is so fixed, in any case at the rate of six percent per annum commencing THE LATER OF, seven months from the time letters, including preliminary or temporary letters, are granted OR THE BIRTH OF A GENETIC CHILD OF THE DECEDENT ENTITLED TO INHERIT UNDER SECTION 4-1.3.

S 3. This act shall take effect immediately and shall apply to estates of decedents dying on or after such date; provided, however, that the provisions of paragraph (f) of section 4-1.3 of the estates, powers and trusts law, as added by section one of this act, shall apply to the wills of persons dying on or after September 1, 2014, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.