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Chapter 775: Babies with Bucks—Posthumously Conceived Children Receive Inheritance Rights

Summer A. Johnson

Code Sections Affected

Family Code §§ 7611, 7630, 7650 (amended); Health and Safety Code § 1644.7 (new); Insurance Code §§ 10172, 10172.5 (amended); Probate Code §§ 249.5, 249.6, 249.7, 249.8 (new), § 6453 (amended).
AB 1910 (Harman); 2004 Stat. ch. 775

[Chapter 775] seeks to establish the conditions under which a child conceived after a parent has died is entitled to inheritance rights as if the child were born in the lifetime of the parent.[1]

I. INTRODUCTION

Gaby Vernoff gave birth to a daughter four years after the death of her husband.[2] No, she didn't use an anonymous sperm donor to achieve her dream of motherhood—she used sperm taken from her deceased husband that had been preserved for this purpose.[3] Although her daughter is biologically related to both Gaby and her late husband Bruce, existing California law does not presume Bruce is the father of the child because he passed away long before their daughter's conception.[4]

In 1949, scientists discovered the process of long-term storage of sperm when they found that adding glycerol before freezing sperm allowed the sperm to be stored for up to ten years.[5] As a result, men, such as those with cancer and soldiers heading off to battle, are cryogenically storing large amounts of genetic material for future use.[6] Women will likely join the ranks in the future, as the storage of human eggs, now experimental, becomes an option for women.[7] In addition to frozen genetic material, there are about 400,000 frozen embryos stored in the United States.[8]

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1. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1910, at 3 (May 4, 2004).
2. Robert Salladay, *'Dead Dads' Bill Takes on Difficult Legal Question*, L.A. TIMES, May 17, 2004, at A1.
3. *Id.*
4. *Id.*
5. Cindy L. Steeb, Note, *A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights, An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137, 140 (2000).
6. Salladay, *supra* note 2.
7. *Id.*
8. *Id.*

Under existing California law, any child born outside of three hundred days of a divorce or death of a parent is not presumed to be the child of that parent.[9] Because the deceased parent is not legally considered his or her child's parent, a posthumously conceived child would not be considered for intestate succession—necessary to receive the inheritance to which the child otherwise would be entitled—nor would the child receive any insurance proceeds the parent might wish to confer upon him or her.[10]

The goal of Chapter 775, subject to certain conditions, is to allow for a child born to a predeceased parent to inherit as though he or she had been born during the life of his or her parent.[11]

II. LEGAL BACKGROUND

Existing law provides that, for the purposes of intestate succession, the requisite parent-child relationship must be established between a person and that person's natural parents or between an adopted person and that person's adopting parent or parents.[12] A natural parent and child relationship is established under the Uniform Parentage Act of the Family Code.[13] Existing law provides that a man is presumed to be the natural parent of a child under certain circumstances.[14] Additionally, existing law provides that a person may bring an action to determine the existence or non-existence of a father and child relationship.[15] A person may also bring an action to determine the existence of a mother and child relationship—the provisions used to determine the existence or non-existence of a father and child relationship may be used to the extent practicable.[16]

Moreover, existing law provides that life insurance proceeds shall be paid whenever possible within thirty days after the death of the insured.[17] Where the insurer fails or refuses to pay within the thirty-day period, interest shall accrue at

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9. CAL. FAM. CODE § 7611(a) (West Supp. 2004) (A man is presumed to be the natural father of a child if "[h]e and the child's mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death or . . . divorce . . . .").

10. *See* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1910, at 3 (May 4, 2004) (Existing law "[p]rovides that relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent. Thus California law currently limits the class of posthumously conceived children to those who were conceived prior to the parent's death.").

11. *Id.*

12. CAL. PROB. CODE § 6450 (West Supp. 2004).

13. *Id.* § 6453; *see also* Steeb, *supra* note 5, at 164 ("The Uniform Parentage Act was approved in 1973 at a time when state law treated legitimate and illegitimate children differently, including their right to intestate succession. The Uniform Parentage Act establishes a parent-child relationship between a child and the natural or adoptive parent, regardless of the marital status of the parents").

14. *See* CAL. FAM. CODE § 7611 (West Supp. 2004) (providing that a man is presumed to be the natural father of a child if he and the child's natural mother are married and the child is born during the marriage or within 300 days after the marriage is terminated by death or divorce).

15. *Id.* § 7630.

16. CAL. FAM. CODE § 7650 (West 1994).

17. CAL. INS. CODE § 10172.5(b) (West 1993).

not less than the then current rate of interest.[18] When the insurer makes such a payment in accordance with the terms of the policy, such payment fully discharges the insurer from all claims under the policy unless, before payment is made, the insurer has received, at its home office, written notice by another person claiming an interest or entitlement to the payment.[19]

III. CHAPTER 775

A. *Establishing Parentage*

Chapter 775 provides a broader standard of presumed parentage. Under this enlarged standard, a man or woman is presumed to be the natural parent of a child if the child is *in utero*[20] within the required time after the death of the decedent[21] and the decedent has provided in a signed writing, witnessed by a competent witness that his genetic material is to be used for posthumous conception.[22] The decedent must specify the person to whom the use of the genetic material is granted for the conception of a child.[23] "The child must be *in utero* using the decedent's genetic material within two years from the date of the death certificate or entry of a judgment determining the fact of the decedent's death, whichever comes first."[24] The child or the child's representative must give notice within four months of decedent's death, to a person who has the power to control the distribution of the decedent's property, that the decedent's genetic material was available for posthumous conception.[25]

Any interested party may bring an action to determine the existence of the father and child relationship under the broadened natural parentage standard.[26]

B. *Inheritance Rights*

Under Chapter 775, for purposes of determining intestate succession, a natural parent relationship now includes the relationship established when a decedent leaves his genetic material with written authorization for the use and conception of a posthumous child.[27]

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18. *Id.* § 10172.5(a).

19. *Id.* § 10172.

20. *See* BLACKS LAW DICTIONARY 829 (7th ed. 1999)(defining "*in utero*" as "[i]n the womb; during gestation or before birth").

21. CAL. FAM. CODE § 7611(f) (amended by Chapter 775); *id.* § 7650 (b).

22. CAL PROB. CODE § 249.5(a)(1) (enacted by Chapter 775).

23. *Id.* § 249.5(a)(3)(A)-(B).

24. *Id.* § 249.5(c).

25. *Id.* § 249.5(b).

26. CAL. FAM. CODE § 7630(b) (enacted by Chapter 775).

27. CAL. PROB. CODE § 6453(c) (amended by Chapter 775).

When the person in charge of distribution of the decedent's property receives notice that the decedent made genetic material available for posthumous conception, he or she may not make a distribution of property until two years after decedent's death.[28] If the person in charge of distribution of the decedent's property does not receive timely notice of the availability of the genetic material, he or she may make the distribution of the decedent's property as if the child has predeceased the decedent.[29] The person is not liable for making such a distribution of the decedent's property.[30]

IV. ANALYSIS

The author of Chapter 775 states, "[i]t is my belief that there is a need for legislation in this area of the law in order to provide guidance to the courts as well as interested parties and participants when the question of inheritance rights of posthumously born children comes into question."[31] Legislation is indeed necessary as the incidence of requests for access to a deceased partner's sperm continues to increase. A recent study reported that eighty-two requests were made for postmortem retrieval of sperm from forty clinics, with the majority being made in the last year of the study.[32] Additionally, several cases have been brought against sperm banks by wives or girlfriends who seek to obtain frozen sperm deposited by their husbands or boyfriends while they were alive.[33] Some clinics do not routinely release sperm to the surviving partner.[34] A 1998 study of reproductive clinics revealed that almost half (45%) would not allow the use of decedent's sperm by a girlfriend or widow while more than a third (35%) allowed such use.[35] As these statistics suggest, attempting posthumous conception of a child is a frequent occurrence.

As will be discussed further below, only nine states have directly addressed the question of posthumously conceived children and inheritance through legislation.[36] This has left case law to fill the void left by the majority of states who have not directly addressed the issue. The cases dealing with the disposition of sperm or other biological material have relied upon the intent of the grantor(s) to control the outcome.

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28. *Id.* § 249.6(a) (enacted by Chapter 775).
29. *Id.* § 249.7.
30. *Id.* § 249.6(d).
31. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1910, at 3 (May 4, 2004).
32. Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 93-94 (2004).
33. *Id.* at 94-95.
34. *Id.* at 91, 95.
35. *Id.*
36. *Id.* at 98.

In 1984, the French Tribunal decided the case of *Parplaix v. Cecos.*[37] Alain Parplaix deposited his sperm at a government-run sperm bank after being told that chemotherapy treatment for testicular cancer would leave him sterile.[38] Alain and his girlfriend were married two days before his death.[39] Alain's wife then attempted to obtain his sperm for artificial insemination.[40] The French Tribunal determined that in the absence of clear, written instruction, Alain's intent controlled and since he had not directly expressed his intent, his wife and family were in the best position to determine Alain's intentions.[41]

In a divorce case involving the disposition of frozen embryos, *Davis v. Davis*,[42] a Tennessee court held that the wife could not obtain the embryos and implant them after the divorce because the Davis' had not expressly provided for the disposition of the unused embryos and, further, because the husband had no wish to become a parent.[43]

The first case in the United States to deal with a bequest of frozen sperm was *Hecht v. Superior Court.*[44] In that case, William Kane committed suicide, leaving explicit instructions as to the disposition of sperm he had deposited at a sperm bank.[45] He requested his sperm to be released to his girlfriend, Deborah Hecht, and her physician in the event of his death.[46] Kane also bequeathed his sperm to Hecht in his will, and left a letter to his two adult children and his potential unborn child.[47] After attempts to settle the will, Kane's two adult children filed separate will contests.[48] The trial court ordered the sperm to be destroyed.[49] Hecht sought a peremptory writ of mandamus to vacate the decision of the trial court.[50] The court of appeal held for Hecht finding that Kane expected to retain control over his sperm after he gave it to the sperm bank; therefore, Kane could bequeath his sperm for posthumous use at least where his intent was clear.[51]

The above cases consider whether a child is to be born at all, based on the grantor's intent. However, that is only half the story. The cases do not establish the parentage of a child or whether or not a posthumously conceived child will be

37. Steeb, *supra* note 5, at 149.
38. *Id.* at 149-50.
39. *Id.* at 150.
40. *Id.*
41. *Id.* at 151.
42. 842 S.W.2d 588 (Tenn. 1992), *cert denied* Stowe v. Davis, 507 U.S. 911 (1993).
43. Steeb, *supra* note 5, at 151.
44. 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (1993).
45. *Id.* at 840, 20 Cal. Rptr. 2d at 276.
46. *Id.*
47. *Id.* at 840-41, 20 Cal. Rptr.2d at 276-77.
48. *Id.*
49. *Id.* at 844-45, 20 Cal. Rptr. 2d at 279-80.
50. *Id.*
51. *Id.* at 850-51, 20 Cal. Rptr. 2d at 283-84.

able to share in part of the decedent's estate, should the decedent not leave a will. It is this gap that Chapter 775 seeks to fill by focusing on the grantor's intent.[52]

States that have directly addressed the issue have come to differing results. For example, Louisiana has a law similar to Chapter 775. It provides that a child born after the death of the decedent will be the child of the decedent if the decedent authorized his surviving spouse to use his sperm and the child is born within three years of the decedent's death.[53] Colorado, Delaware, Texas and Washington have extremely similar statutes[54] that, for example, provide:

> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.[55]

Massachusetts simply provides that, for inheritance purposes, "[p]osthumous children shall be considered as living at the death of their parent."[56]

Several states and national organizations that have addressed this issue have generally found against a presumption of parenthood regardless of the intent of the grantor. Professing this view, Florida allows a child born posthumously to make a claim against the decedent's estate only if he or she has been provided for in the decedent's will.[57] Similarly, North Dakota does not consider the decedent-donor to be the posthumously born child's parent.[58] Finally, for inheritance purposes, Virginia does not consider a child born more than ten months after the death of the decedent-donor to be the parent of the posthumously born child.[59]

In 1988, the National Conference on Uniform State Laws adopted the Uniform Status of Children of Assisted Conception Act (USCACA), which provides that an individual who dies before implantation of an embryo is not the parent of the resulting child.[60] The purpose of the USCACA was to "'provide finality for determining parenthood of those whose genetic material is utilized in the procreation process after their death' and to 'avoid the problems of intestate

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52. *See* CAL. HEALTH & SAFETY CODE § 1644.7 (enacted by Chapter 775) (providing that any entity that receives genetic material shall provide a form to any depositor that may be used to convey the intent of the depositor with respect to the use of that genetic material for the purpose of conceiving a child posthumously).

53. LA. REV. STAT. ANN. § 9:391.1 (West 2004).

54. COLO. REV. STAT. § 19-4-106 (2003); DEL. CODE ANN. tit. 13, § 8-707 (Michie Supp. 2003); TEX. FAM. CODE ANN. § 160.707 (West 2004); WASH. REV. CODE § 26.26.730 (2004).

55. DEL. CODE ANN. tit. 13, § 8-707 (Michie Supp. 2003)

56. MASS. GEN. LAWS ANN. ch. 190, § 8 (West 2004).

57. FLA. STAT. ANN. § 742.17 (West 2003).

58. N.D. CENT. CODE § 14-18-04 (2003).

59. VA. CODE ANN. § 20-164 (Michie 2004).

60. Knaplund, *supra* note 32, at 99.

succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent.'"[61]

V. CONCLUSION

The differing approaches regarding posthumously conceived children between states must be reconciled in favor of the unborn child. The statutes and regulations that seek to strip children of their parentage and inheritance rights do so for the sake of convenience in determining property rights for intestate succession.[62] Statutes such as Chapter 775 provide a good balance between the need to settle the decedent's estate quickly, for the benefit of the other designees, and providing legal parentage and inheritance rights to a child born within two years of the decedent's death, when the decedent's intent to do so is in writing.[63] Chapter 775 also follows the relevant case law by allowing the decedent's intent to control, rather than an arbitrary bright-line rule that removes posthumously born children from intestate succession.

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61. *Id.*
62. *Supra* notes 56-59 and accompanying text.
63. *Supra* notes 19-22 and accompanying text.