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CLIENT MEMORANDUM

Inheritance Rights of a Posthumously Conceived Child

In light of advancements in assisted reproductive technology, a new provision of New York law, Inheritance by Children Conceived After the Death of a Genetic Parent (EPTL 4-1.3), was recently enacted. It applies to estates of genetic parents dying on or after November 21, 2014. It also applies to wills executed, or trusts created or amended, on or after September 1, 2014 by persons other than the genetic parent.

A. Conditions that must be met before a Genetic Child will be considered an issue of Genetic Parent

The statute governs when a genetic child inherits. The term "genetic child" means a child of the sperm or ova provided by a genetic parent. Subject to the effective date rules, the genetic child will be considered a "distributee" (someone entitled to a share of the estate of a decedent) for purposes of the laws of intestacy, and will be included as a beneficiary of a disposition of any document of which the genetic parent, or any person other than the genetic parent, was the creator which refers to the terms issue, children, descendants, heirs, heirs-in-

law, next of kin and distributees (or any other terms of like import) of the genetic parent, if the following conditions are met:

1. Consent to use of Posthumous Genetic Material and Appointment of Authorized Person: The genetic parent executed a written instrument not more than seven years before the death of the genetic parent: (A) expressly consenting to the use of the genetic parent's genetic material to posthumously conceive his or her genetic child; and (B) authorizing a person (the "authorized person") to make decisions about the use of the genetic parent's genetic material after the death of the genetic parent.

The written instrument must be signed by the genetic parent in the presence of two witnesses, neither of whom is the person authorized under the instrument to make the decisions about the use of the genetic parent's genetic material, and may name an alternate authorized person if the initial authorized person is unable to act.

The written instrument cannot be altered or revoked by a provision in the genetic parent's will, and may only be revoked by the genetic parent's execution of another written instrument, which must be executed in the same manner as the initial written instrument. However, the authority given to a person who is a spouse of the genetic parent at the time of execution is revoked upon the dissolution of the marriage.

The statute provides a sample of a written instrument that will satisfy the requirements.

2. Notice: The authorized person gives notice by certified mail, return receipt requested, or by personal delivery, to the executor or administrator of the estate of the genetic parent (or if no executor or administrator has been appointed within four months of the death

of the genetic parent, to a distributee of the genetic parent) within seven months of the death of the genetic parent that the genetic material was available for the purpose of conceiving a genetic child.

3. **Filing:** The written instrument is recorded in the appropriate Surrogate's Court office within seven months of the genetic parent's death.

4. **Timing:** The genetic child was in utero no later than twenty-four months after the genetic parent's death, or born not later than thirty-three months after the genetic parent's death.

B. Embryos

The statute only mentions ova and sperm, but not embryos (which are formed by the combination of eggs and sperm). Embryos are seemingly governed under a separate statute which provides that a child of a decedent must be conceived prior his or her death and born alive to be considered a distributee of the decedent. This can lead to seemingly unfair results as minor differences determine whether a child may inherit as an issue of the decedent.