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Fertility Law Considerations For Estate Lawyers

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Technology now allows cryopreservation of sperm, ova and embryos, which can be used to conceive a child after the donor's death. However, Canadian legislation requires the prior written consent of the donor in order to posthumously use his/her genetic material. Thus, in the context of estate planning, it is appropriate to inquire whether the testator or potential beneficiaries have banked genetic material and, if so, how children born through the use of such material are to be treated in one's estate plan.

CONSENT

The *Assisted Human Reproduction Act*[1] regulates the donation of genetic material. Pursuant to section 8 thereof, donor consent is required before any materials can be removed from the body or used for any specific purpose.

If sperm, ova or embryos have been stored, the client should address whether he/she consents to the posthumous use of banked genetic material. Also, a solicitor may inquire whether genetic material can be retrieved (upon death or after becoming incompetent) in the event no sperm or ova were previously banked.

PROVIDING FOR CHILDREN CONCEIVED AFTER DEATH

The right of a child, conceived prior to but born after a parent's death, is clearly established at law. However, the rights of children conceived after the death of a parent are less clear; some experts argue that the contingent interest of a child conceived posthumously is equivalent to that of a child conceived prior to a parent's death.[2]

Regardless, preserved genetic material has the potential to create delays in estate administration. Assuming consent, without instructions regarding a time limit for use of genetic material, the estate trustee must decide whether to distribute the assets and exclude the potential unborn child, or to suspend distribution until the stored materials have been used or destroyed. Some clients may wish to specify a time limit. While a short window will provide certainty, a longer time period will provide a greater opportunity to achieve a successful pregnancy.[3] The client may wish to provide the estate trustee with discretion to withhold assets until receiving notice from the authorized party that they no longer intend to use the decedent's genetic material. If the will stipulates a fixed time limit for use of genetic material, the will should also require the estate trustee to notify the spouse of any time limitation forthwith.

Another potential issue in estate administration is when the testator's beneficiaries have stored genetic material. For example, a grandparent may not know that their beneficiary-child stored genetic material and consented to its use. Solicitors may inquire of the testator whether any of the testator's children (or other beneficiaries) have stored genetic material and, if so, how these potential biological grandchildren (or children) are to be treated. Otherwise, class gifts to "my issue" or "my (grand)children" will generally include individuals who are born following the death of the testator. Accordingly, class gifts made in a will should specifically limit a class to individuals conceived before the death of a biological parent – if that is the testator's intention.

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DONATED GENETIC MATERIALS

Increasingly, people seek assistance conceiving a child through the use of donated genetic material. In terms of the rights of a biological child conceived from a donor's sperm or egg, most jurisdictions have consistently denied inheritance rights to a child conceived with genetic material from an anonymous donor. In addition, there is currently no mechanism in Canada for individuals conceived with the use of anonymous genetic material to learn the identity of their donor parent. As such, anonymous donors of sperm or ova are generally isolated from the rights and obligations between parents and their children.[4]

In addition to the potential for family law obligations, there is the possibility of dependant support applications.[5] If the donor develops an actual relationship with the child, then both family law obligations and dependant support obligations may accrue. However, again, where a child has not been close to a biological parent and has not historically received financial support from him/her, it is unlikely that a court will order dependant support by an anonymous donor.

SUGGESTED CHECKLIST FOR DRAFTING SOLICITORS

In light of these new developments in estate matters, the following questions may assist drafting solicitors:

Stored Sperm/Ova

- ☐ Any sperm, ova or embryos store (for example at a fertility clinic)?
- ☐ If sperm, ova or embryos stored, for what purpose?
- ☐ Was consent to the use of sperm, ova or embryo authorized to anyone other than the client and, if so, to whom and for what purpose specifically?
- ☐ Was consent to the use of sperm, ova or embryos authorized post-mortem?
- ☐ If so, should any time limitations apply to this use?
- ☐ Should a surviving partner be required to provide the fiduciary with notice of intent to use sperm/ova and, if so, should there be a time limitation on this requirement?
- ☐ Any limits to fiduciary liability?
- ☐ What effect, if any, should marriage or remarriage have?

Donated Sperm/Ova

- ☐ Whether sperm/ova ever donated to a fertility clinic?
- ☐ If so, whether this was done anonymously?
- ☐ If yes, was the intention that children conceived after death or children conceived with donated sperm/ova be included within will?
- ☐ Whether sperm/ova donated outside fertility clinic?
- ☐ Any relationship with children conceived using genetic materials?
- ☐ Was the intention that children conceived with donated sperm/ova outside fertility clinic be included within will?
- ☐ If yes, was the intention that children conceived after death with donated sperm/ova be included within will?

[1] *SC 2004, c. 2.*
[2] *See In Estate of K, 1996 WL 1746080, 131 FLR 374 (Tasmania SC). See also Clare E. Burns & Anastasija Sumakova, "Mission Impossible: Estate Planning and Assisted Human Reproduction" (2010), 60 ETR (3d) 59 at 9.*
[3] *See Benjamin C. Carpenter, "Sex Post Facto: Advising Clients Regarding Posthumous Conception" (2012), ACTEC Law Journal, Vol. 38:187, at 219-220.*
[4] *See Pratten v British Columbia (Attorney General), et al, 2012 BCCA 480.*
[5] *Part V of the Succession Law Reform Act, RSO 1990, c. S.26.*

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