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Estate Planning – Fertility Issues

Recent technologies allow the cryopreservation of sperm, ova, and embryos long after a donor's death, and, with it, the potential use of such materials to conceive a child after death. Canadian legislation currently allows the use of banked materials following death, with the written consent of the individual whose materials have been preserved. When sperm, ova, or embryos have been preserved, it may be appropriate to discuss whether the testator wishes to express consent within a will, and if so, whether children conceived after death are intended to qualify as a "child" or "issue" under the will.

Canadian decisions have recognized parental rights and obligations of donor biological parents, who are known to the children conceived using donated sperm or ova. If such children exist, it is a good idea that it be considered whether adequate provision for their support has been made within the will, if any is required, to assist in the prevention of dependant's support claims.

The primary issues involving fertility law in estate planning are (1) the consent of a testator who has banked materials for those materials to be used after his or her death; and (2) whether children conceived after the testator's death are to receive a share of the testator's estate.

Suggested checklist questions for drafting solicitors include:

- Any sperm, ova, or embryos being stored at a fertility clinic;
- Consent to the use of sperm, ova, or embryos post-mortem; consent for what purposes and authorized use by whom;
- Whether sperm/ova were ever donated to a fertility clinic; and

Intention that children conceived after death or children conceived with donated sperm/ova be included within will.