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Preserving the Rights of Children Conceived After Death

Most frequently, when estate lawyers advise clients regarding rights that may automatically expire following the death of a spouse, it is in respect of the six-month period during which an election for an equalization of net family properties must normally be made under the *Family Law Act*. Alternatively, it may be a reference to the limitation period of six months following the issuance of a Certificate of Appointment of Estate Trustee during which an application for dependant's support should normally be made.

Several years ago, however, the *Succession Law Reform Act*, RSO 1990, c S-26 (the "**SLRA**"), was amended to provide for the recognition of rights of children conceived after death using genetic materials left by the deceased. In order for such a child to be recognized as a "child" or "issue" under the SLRA, notice of the intention to conceive a child using the genetic materials left by the deceased must be provided to the Estate Registrar for Ontario within six months of date of death. Subsection 1.1(1) of the SLRA provides as follows:

Posthumous conception, conditions

The following conditions respecting a child conceived and born alive after a person's death apply for the purposes of this Act:

1. The person who, at the time of the death of the deceased person, was his or her spouse, must give written notice to the Estate Registrar for Ontario that the person may use reproductive material or an embryo to attempt to conceive, through assisted reproduction and with or without a surrogate, a child in relation to which the deceased person intended to be a parent.
2. The notice under paragraph 1 must be in the form provided by the Ministry of the Attorney General and given no later than six months after the deceased person's death.
3. The posthumously-conceived child must be born no later than the third anniversary of the deceased person's death, or such later time as may be specified by the Superior Court of Justice under subsection (3).
4. A court has made a declaration under section 12 of the *Children's Law Reform Act* establishing the deceased person's parentage of the posthumously-conceived child. 2016, c. 23, s. 71 (6).

A surviving spouse may bring an application or motion for the extension of the six-month deadline to provide notice to the Estate Registrar and courts may order an extension if considered "appropriate in the circumstances" (s 1.1(3)). There do not yet appear to be any reported decisions in which courts have reviewed the factors to be considered on such an application or motion.

A suspensory order may be made to prevent the administration of an estate on application by a surviving spouse who provides notice under section 1.1 of the SLRA (s 59(2)). Absent notice provided in a manner consistent with the requirements of the SLRA and/or a related application to assert the unborn child's rights in the predeceasing parent's estate, however, the estate may be administered without the consideration of the interests of a child conceived after death. Accordingly, when representing a surviving spouse in circumstances where the deceased may have left and consented to the use of genetic materials to conceive a child (the *Assisted Human Reproduction Act*, SC 2004, c 2, and its regulations set out the requirements in terms of the form of consent required from the deceased donor parent in detail), they should be encouraged to provide written notice to the Estate Registrar and advise the estate trustee of the intention to conceive a child within six months of death, and, in many cases, as soon as possible after death to prevent any distribution of assets in a manner inconsistent with the child's interests in the estate.

Similarly, when representing an estate trustee, it would be prudent to caution them against making any distributions that may ultimately be inconsistent with the rights of an unborn child within six months of death if they are uncertain whether genetic materials have been left by the deceased that a surviving spouse may choose to use in the conception of a child.