

Mission Impossible: Estate Planning and Assisted Human Reproduction

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The enactment of the *Assisted Human Reproduction Act*¹ has been an important step in the development of a legal framework for the increased use of assisted reproduction technology in modern family planning. The *Act* creates a uniform federal scheme for the use of genetic material for reproductive purposes based on the free and informed consent of the donor, whether the genetic material is used by the donor himself or herself, by a spouse or common-law partner, or by a third party. The uniformity of the legislative scheme is important as it has removed an element of unpredictability that had previously been prevalent in all aspects of assisted reproduction. However, unpredictability remains in respect of the such simple legal acts as empowering a personal representative to act on your behalf with respect to the use of your genetic material and drawing a will to provide for your children that are born through assisted reproduction. This is because neither the *AHRA* nor the current legislation dealing with succession, parentage, and decisions during incapacity, adequately address these topics.

In the face of this legislative uncertainty, estate solicitors must develop knowledge of the technology and science involved in assisted human reproduction, and insight into how both the judiciary and the legislature may respond to this novel legal subject.

The first part of this paper addresses different aspects of the collection and use of genetic material, and in particular, the requirement of consent of the donor, the legal status of the genetic material, and what issues ensue when planning for mental incapacity and death. Specifically, we examine the question of whether, and how, the consent to the collection and use of genetic material can be delegated to a personal representative. This requires a consideration of whether genetic material can be characterized as property.

The second part of the paper will address succession issues that arise with respect to so-called after-born or posthumous children. After-born or posthumous children are those children born after the death of one of the donors of genetic material. For purposes of this paper, this includes

¹ *Assisted Human Reproduction Act* S.C. 2004, c. 2. ("*AHRA*")

children born from embryos in existence at the time of a donor's death, or created thereafter, that are later implanted in their intended mother or gestational surrogate's uterus.

Part I: Collection and use of genetic material

The collection and use of human genetic material, which includes gametes (sperm and eggs) and embryos (fertilized eggs), is governed by the provisions of the *Assisted Human Reproduction Act*. The principle underlying the Act is that of "free and informed consent ... as a fundamental condition of the use of human reproductive technologies."² In accordance with that principle, section 8 of the *Act* declares that:

(1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

(2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

(3) No person shall make use of an *in vitro* embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.

Under the *Assisted Human Reproduction Act*, the only regulations that have been adopted to date, address the requirement of consent in more detail. In cases of deposited genetic material or stored embryos, the consent as to the specific use of that genetic material within the enumerated permitted uses is to be given by the donor or donors.³ In cases of post-mortem collection of genetic material, the consent to the collection and to the specific use of the material has to be obtained from the donor during his or her lifetime.

The importance of the consent of the donor in the Canadian legislation is consistent with the position taken in other jurisdictions. For example, the European Court of Human Rights has used a rights-based analysis and focused on the intention of the donor as a reflection of the fundamental human liberty to conceive or not to conceive.⁴ In the United Kingdom, the *Human Fertilisation and Embryology Act*⁵ forms the legislative framework. Schedule 3 addresses the consent to use or storage of genetic material which can be withdrawn by either party before the fertilization or the use of embryos. There have been several cases in the UK that deal with the *Act* and the Human Fertilisation and Embryology Authority - an independent statutory regulator

² Section 2.

³ *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, s. 3.

⁴ Clare E. Burns and Claire Houston, "Beneficiaries on Ice: Assisted Reproductive Technology and Succession Law in Ontario" (Paper presented to the Ontario Bar Association, 5 February 2008).

⁵ *Human Fertilisation and Embryology Act 2008* (U.K.), 2008, c.22.

set up by the *Act* for IVF treatment and human embryo research. These cases demonstrate the centrality of consent.

In *L. v. The Human Fertilisation and Embryology Authority, Secretary of State for Health*⁶, the court declared that it was not possible to lawfully remove or authorize the removal of gametes from a deceased who had not given an effective consent in advance.⁷ *Evans v. Amicus Healthcare Ltd. and Others*⁸, on the other hand, dealt with the consent to the use of embryos. Ms. Evans was diagnosed with a pre-cancerous condition of her ovaries and was offered IVF treatment prior to their removal. She and her partner signed the relevant forms which also indicated that in accordance with the *Human Fertilisation and Embryology Act 1990* either of them could withdraw consent at any time before the embryos were implanted. The couple attended a clinic and had treatment resulting in six embryos being stored. Later the couple's relationship ended and the man withdrew his consent to the embryos being implanted. It was held that the embryos could not be implanted.

The requirement of consent for all purposes – post-mortem collection, use of unfertilized gametes or use of fertilized embryos – is firmly established under the *AHRA*. Two questions that are likely to arise in the estate law context and that are not conclusively answered by the *AHRA* are:

- 1) what is the legal status of the genetic material? More specifically, is there a possibility of residual claims for embryos and gametes as "property" of a deceased's estate, even if the use of that "property" is regulated by *AHRA*; and
- 2) is it possible to authorize one's personal representatives to give consent under the *AHRA*?

Can You Devise, Bequeath or Dispose of Genetic Material as Property?

In Ontario, the *Succession Law Reform Act*⁹ provides in section 2 that "A person may by will devise, bequeath or dispose of all property (whether acquired before or after making his or her will) to which at the time of his or her death he or she is entitled either at law or in equity." Property is not defined in the *Act*. Consequently an argument could be advanced that genetic material is property within the meaning of the *SLRA* but not for other purposes.

What would the significance of being able to claim the deceased's genetic material under the estate? Even if it is property for the purposes of the *SLRA*, the use of genetic material is

⁶ *L. v. The Human Fertilisation and Embryology Authority, Secretary of State for Health* [2008] EWHC 2149 Fam.

⁷ *Ibid.*, at para. 161.

⁸ [2005] Fam 1.

⁹ *Succession Law Reform Act*, R.S.O. 1990, c.S.26. ("*SLRA*")

regulated by the *AHRA*, and the consent of the deceased for any specific use will presumably still be needed. However, establishing that the genetic material is property within the meaning of the *SLRA*, in combination with actual possession of the genetic material, may override the consent of the deceased to the specific use of genetic material (for example, if a deceased husband consented to the use of his genetic material by a third party, his wife's right to inherit the residue of the deceased's estate as provided for in the deceased's will might permit her to compel its distribution to her and thus preclude the use of it by the third party.)

The potential characterization of genetic material as property within the meaning of the *SLRA* may be viewed as objectionable as it could be said to amount to the objectification of the human body. However, the meaning of "property" in this context could be argued to simply be a deeming provision to the extent that it defines the right that someone (a beneficiary under the estate) can have over the genetic material. In this regard, quasi-property interests have already been recognized in human body parts and tissues in general – here one can analogize the right to control reproductive genetic material to the executor's right to control the disposition of the deceased's body.¹⁰

Case law in Canada and the United States has addressed this issue. In *Caulfield v. Wong*¹¹, a case from Alberta, the court gave Ms. Caulfield a property right over frozen embryos created from her and Mr. Wong's genetic material:

When Mr. Wong provided his sperm to assist in the conception of children, he did so as a friend of Ms. Caulfield's [...] He extended a courtesy to a friend by giving her a gift of his sperm He knew what it would be used for [...] **The gift was an unqualified gift** given in order to conceive children. Mr. Wong fully knew that Ms. Caulfield could use the fertilized embryos when and as she chose. That was implicit in his gift to her. **The remaining fertilized embryos remain her property. They are chattels that can be used as she sees fit.**¹² (emphasis added)

The case was decided before the *AHRA* came into force, however, and, as a result, its status as an authority on the issue is therefore debatable.

In *Hecht v. The Superior Court of Los Angeles*¹³, the court found that at the time of his death, the deceased had an interest "in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction", which was sufficient to constitute "property" for within the meaning of section 62 of the *Probate Act*. The sperm thus formed a part of the deceased's estate.

¹⁰ *Abeziz v. Harris Estate*, [1992] O.J. No. 1271.

¹¹ *Caulfield v. Wong*, [2005] A.W.L.D. 2498, [2005] A.J. No. 428.

¹² *Ibid.*, at para. 21.

¹³ 20 Cal. Rptr. 2d 275 (Cal. App. 1993).

Further, in *Hecht v. The Superior Court of the County of Los Angeles*¹⁴, the court clarified that the deceased sperm was a "unique form of property." Although it could be characterized as "property", it was not an "asset" of the estate subject to allocation as among various beneficiaries. The court held that this characterization simply means that a particular individual has a property interest over the sperm.

The widely discussed case of *Moore v. The Regents of the University of California*¹⁵ can also provide some guidance. That case dealt with intellectual property and considered the use of genetic material in the emerging biotechnology industry. The court refused to recognize a property interest in tissues or cells that had been removed from one's body for therapeutic purposes, and deferred to the legislature to develop a specialized property-like regime for human body parts, tissues etc.:

[...] since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.¹⁶

The dissent by Mosk J., however, outlined the flexibility inherent in the concept of property and in common law in general, and made a compelling argument:

The concepts of property and ownership in our law are extremely broad. ... A leading decision of this court approved the following definition: "The term "property" is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." (*Yuba River Power Co. v. Nevada Irr. Dist.* (1929) 207 Cal. 521, 523 [279 P. 128].)

Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a "bundle of rights" that may be exercised with respect to that object - principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift. ...¹⁷

If a Canadian court found the *Moore* discussion to be compelling it could choose to deem sperm and ova as "property" within the meaning of the *SLRA* thus giving estate trustees the authority

¹⁴ 59 Cal. Rptr. 2d 222 (Cal. App. 1996).

¹⁵ 793 P.2d 479 (Cal. 1990).

¹⁶ *Ibid.*, at p.7.

¹⁷ *Ibid.*, at p. 25.

to otherwise dispose of a deceased's genetic material but not to consent to its use for the purposes set out in the *Assisted Human Reproduction Act*.¹⁸

It is important to note that it would likely be much more difficult to characterize a fertilized embryo as opposed to an unfertilized gamete as property. In *Davis v. Davis*¹⁹, the court determined that embryos are not, strictly speaking, either "persons" or "property", but occupy an interim category that entitles them to special respect because of their potential for human life. In *Caulfield*, although the court gave Ms. Caulfield a property interest in the frozen embryos, the decision was based on qualifying Mr. Wong's sperm and not embryos as an "unqualified gift". Accordingly, it is unlikely that embryos can be disposed of, bequeathed or devised.

Can You Effectively Delegate to Your Estate Trustee the Authority to Consent to the Use of Genetic Material After Your Death?

Given that the ability to bequeath, devise or dispose of genetic material is not certain, the issue becomes whether a donor could in any event expressly delegate to his or her estate trustees the authority to consent to the use of his or her genetic material. The regulations of the *Assisted Human Reproductive Act* make it clear that the consent must be obtained from the donor during his or her lifetime. However, the regulations do not specifically prohibit conditional consents. Thus, it is arguably open to a donor to say, for example, "I consent to the collection and use of my sperm after my death provided that my estate trustees also consent in writing." In this way it may be that the donor can effectively delegate authority to his or her estate trustees to consent to the use of the genetic material. If such a consent was drafted its efficacy would not be assured on the current state of the law. However, given its reference to estate trustees, it should at a minimum, be executed in accordance with the relevant required formalities for the execution of testamentary documents.²⁰

Can Personal Representatives Consent to the Collection and Use of Genetic Material During a Donor's Incapacity

The *Substitute Decisions Act*, 1992²¹ provides two avenues for delegating decision-making power: the power of attorney for property and the power of attorney for personal care. The former may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will.²² In the case of personal care decisions, a capable person may appoint a person to make decisions on his or

¹⁸ *Abeziz v. Harris Estate*, *supra* note 11.

¹⁹ 842 S.W. 2d 588 (Tenn 1992).

²⁰ See: *Substitute Decisions Act*, ss. 4-8.

²¹ *Substitute Decisions Act*, 1992, S. O. 1992, c. 30.

²² *Ibid.*, s.7(2).

her behalf if he or she becomes incapable of making one or more decisions regarding personal care and expresses instructions regarding such decisions.²³

In the context of assisted human reproduction, the decisions at issue are the use of deposited genetic material (sperm, ova, and embryo) and the collection of genetic material. "Decision", in its turn, means an informed and specified consent as required under the *Assisted Human Reproduction Act*.

If the definition of property can be extended to include sperm and ova, as discussed above, then powers of attorney for property arguably could operate to allow an attorney to execute the consent required under the *AHRA*, at least in respect of genetic material already removed from the donor's body.

However, an attorney for property cannot make testamentary decisions on behalf of the donor of the power. A testamentary gift occurs when the donor or testator intends to make a gift that is effective only at the donor's death and is revocable until then. If a document is not intended to have any operation until the settlor's death, it is testamentary; if it is intended to transfer property or set up a trust in the present, even if performed after the donor's death, it is not testamentary.²⁴

Thus, an attorney for property arguably cannot make a decision with respect to what happens with the donor's property (genetic material) upon the donor's death. However, transfer and use of previously deposited genetic material prior to death and during incapacity can arguably be authorized.

As discussed above, another drafting option if a donor would like his or her attorney to have this decision making authority is to draft a conditional consent under the *AHRA* and include it within the terms of the power of attorney for property. Whether this would be effective remains to be seen.

What is certainly unlikely is that a decision about collection of genetic material from an incapable person could be characterized as coming within the ambit of a power of attorney for property. After all, the living person is not property on any theory.

This leads to the question of whether that decision could be within the authority of a power of attorney for personal care. Section 49 of the *Substitute Decisions Act*, 1992 specifies that a

²³ The Annotated Power of Attorney for Personal Care, CLE (1 March 2005). *Substitute Decisions Act* s. 46(2) to (5).

²⁴ Halsbury's Laws of Canada (Wills and Estates) (2007), at 137, 138.

provision that confers authority to make a decision concerning the grantor's personal care is effective to authorize the attorney to make that decision if:

(a) the *Health Care Consent Act, 1996* applies to the decision and that Act authorizes the attorney to make the decisions,

or

(b) the *Health Care Consent Act, 1996* does not apply to the decision and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, subject to any condition in the power of attorney that prevents the attorney from making the decision unless the fact that the grantor is incapable of personal care has been confirmed.

The *Health Care Consent Act*²⁵, in its turn, applies to decisions relating to treatment, admission to care facilities and personal assistance services for persons lacking the capacity to make decisions about such matters.

Section 6 of the *Health Care Consent Act* provides that the *Act* does not affect the law relating to giving or refusing consent on another person's behalf to certain procedures such as sterilization and the removal of regenerative or non-regenerative tissue for implantation in another person's body. The latter refers to organ transplantation and could arguably be said to apply to genetic material as well. The reference to sterilization is more significant, because as with collection and use of genetic material, it pertains to the reproduction and the basic decisions to conceive or not to conceive. It would be logical to assume that decisions with respect to reproduction should be excluded from the purview of the *Health Care Consent Act*, and it is supported by the fact that specific legislation – the *Assisted Human Reproduction Act* – was enacted to deal with that. Accordingly it seems unlikely that the powers of attorney for personal care can be used to consent to the collection of genetic material.

In conclusion then, the ability to use powers of attorney to delegate the authority to consent to the collection and use of genetic material is very much in doubt.

As we understand it, it is now routine for oncology teams treating adults of an age where they would normally be considering becoming parents to offer them the collection of genetic material prior to treatment so as to preserve this option. Accordingly, lawyers faced with clients in such a situation (and perhaps with all clients) drawing wills and powers of attorney should consider whether written consent to collection and use of genetic material should be part of the estate plan. It is clear that this is not the standard practice at the moment but in this regard the profession, like the legislation, is lagging behind both science and society.

²⁵ *Health Care Consent Act, 1996*, S. O. 1006, c. 2, Sched. A.

PART II: AFTER-BORN CHILDREN

Intestate Succession

When parents die without wills, their children's inheritance rights are dictated by the applicable intestate succession laws. In Ontario, Part II of the *SLRA* governs intestate succession. In particular, it sets out the entitlement of spouses, children, and remoter issue.

Section 1 of the *Act* defines "child" as including a child conceived before and born alive after the parent's death, and "issue" as including a descendant conceived before and born alive after the person's death. Furthermore, sections 47(1) and (2) of the *Act* state that

...where a person dies intestate in respect of property and leaves issue surviving him or her, the property shall be distributed, subject to the rights of the spouse, if any, equally among his or her issue who are of the nearest degree in which there are issue surviving him or her.

...where any issue of the degree entitled under subsection (1) has predeceased the intestate, the share of such issue shall be distributed among his or her issue in the manner set out in subsection (1) and the share devolving upon any issue of that and subsequent degrees who predecease the intestate shall be similarly distributed. (emphasis added)

Thus when a person dies intestate, it is their legally married spouse, their children and their issue, as defined in the *Act*, who will inherit.

There are effectively two elements to the definitions of child and issue in the *Act*: (i) a linear genetic connection; and (ii) conception (the definition of "child" reiterates the second component). Both are problematic in the assisted reproduction context.

The word "descendant" implies a threshold lineal genetic connection between a deceased person and an heir which will often be absent in the assisted reproduction context. Although, there may be a genetic connection (when intended parents are the genetic parents of a child born to a gestational carrier), when donated genetic material is used, such connection will not exist.²⁶ It is important to differentiate between a genetic and a biological connection, which terms are often incorrectly used interchangeably. The distinction between the two is evident with respect to the determination of parentage where, for example, a gestational carrier will have a biological connection to the child as the birth mother, whereas the intended parents whose genetic material was used will have a genetic connection to the child. (This distinction will also be important with testamentary provisions.) This element of the definitions of child and issue is apparently based in Victorian notions of paternal responsibility predicated on fathers being responsible only for children they sired. Such notions are long outdated but persist in the Ontario legislation such that children whom the deceased has demonstrated a settled intention

²⁶ Two possibilities: intended parents where one parent is the genetic parent and the other parent is the intended parent, or intended parents where neither parent is genetically related to the child.

to treat as theirs only have dependant's relief rights not automatic rights of succession. Thus, it may well be that competing beneficiaries could successfully argue that a child born through assisted reproduction who is not genetically linked to the deceased cannot inherit on an intestacy.

This is counterintuitive inasmuch as paternal lineal genetic connections in Ontario can conclusively be established through production of a birth certificate²⁷ and yet we know that approximately ten percent of fathers listed on birth certificates are not genetically connected to their children.²⁸ Thus it is clear that this element of the test was only honoured as a matter of form even before the advent of assisted human reproduction. Nevertheless, the risk remains that an after-born child could be excluded from intestate succession on the basis they are not genetically connected to their parents.

The second part of the definition also poses particular problems for after-born children. Normally, a child conceived before the death of the intestate parent and *en ventre sa mere* at the time of the death meets the definition of child or issue on the basis that they were conceived before the death of their father. However, in the assisted reproduction context, stored genetic material may be used and/or a frozen fertilized embryo may be implanted, after the death of the intestate parent. Although the definition of "children" and "issue" doesn't explicitly exclude either scenario, the Canadian courts have not yet had a chance to consider whether such a child has been "conceived before death" within the meaning of the legislation.

This question has been examined in several courts in the United States and Australia in two contexts: the availability of social security benefits and intestate succession. The results, as could be expected, are not uniform.

Two cases consider the conception status of after-born children for the purposes of social security benefits. In *Re Estate of William Kolacy*²⁹, the New Jersey Superior Court pronounced that two children conceived in vitro and born after the death of their father qualified for insurance benefits under the *Social Security Act*. The court considered the legislative intent behind the *Act* "to deal fairly and sensibly with children resulting from traditional sexual activity". However, since the effect of reproductive technology was not anticipated by the legislature, the court relied on "a basic legislative intent to enable children to take property from their parents and through their parents from parental relatives" in order to grant the status of an heir to both children. Importantly, the court used the term "offspring" which seems to have been intended to underline a genetic connection between the deceased and the children. Similarly, a court in Massachusetts recognized the estate rights of after-born children in *Woodward v.*

²⁷ See: *Children's Law Reform Act*, R.S.O. 1990, c.12, as am., s.8.

²⁸ Carolyn Abraham, "Mommy's Little Secret" *The Globe and Mail* (14 December 2002).

²⁹ 332 N.J. Super. 593 (2000), 753 A. 2d 1257.

*Commissioner of Social Sec.*³⁰, albeit in certain limited circumstances. It stated that three factors had to be established before rights would be extended to the after-born child: a genetic relationship between the child and the deceased parent, the consent of the deceased parent to posthumous conception, and evidence that the deceased parent agreed to provide support for any child resulting from posthumous conception.

A similar disparity in results exists among courts considering whether after-born children have been "conceived before death" in the intestate succession arena.

In a 1996 Tasmania case, *In Estate of K*³¹, the court asked whether as a matter of policy, the law should distinguish between a child *en ventre sa mere*, and his or her sibling who was at the same time a frozen embryo for purposes of intestate succession. In answering that question, the court decided the following:

If an in vitro child, born posthumously, is at birth the biological child of the father and mother, irrespective of the date of implantation, and in all other respects (except time) identical to a child *en ventre sa mere* the then legal principles applicable to a child *en ventre sa mere* should likewise be afforded to an in vitro child. If a child *en ventre sa mere* is not regarded as living (in terms of law) but has a contingent interest dependent on birth, then in logic the same status should be afforded to an embryo.³²

In contrast, a New Hampshire court opted for a strict interpretation of the term "surviving issue."³³ Even though the deceased consented to the use of his sperm by his wife to achieve pregnancy, and indicated that it was his "desire and intent to be recognized as the father of the child to the fullest extent allowable by law", the court did not extend inheritance rights to a posthumously conceived child. Similarly, in *Finley v. Astrue*³⁴, an Arkansas court decided that a child born from the implantation of a frozen embryo after the death of the father did not meet the definition of "conceived before death". The moment of conception, in the Court's view, was the moment of implantation. Moreover, the court found that the relevant provision under the Arkansas intestacy laws was rationally related to legitimate government purposes of benefitting the children perceived to be most likely to be dependent upon a deceased wage earner for support. Such interpretation doesn't recognize the increased use of assisted reproduction technology in today's society.

Obviously, the most effective way to resolve the question of whether after-born children are to be included in the definition of child or issue as those terms are used in the *SLRA*, and intestate

³⁰ 435 Mass. 536, 760 N.E.2d 257, 17 A.L.R.6th 851 (Mass. 2002).

³¹ 1996 WL 1746080 (TASSC).

³² *Ibid.*, at pp. 6 and 7.

³³ *Khabbaz v. Commissioner, Social Sec. Admin*, 930 A.2d 1180 (2007).

³⁴ 601 F.Supp.2d 1092.

succession law elsewhere in Canada, is legislative reform. However, this is unlikely to occur in the near future given the corollary policy debates that are likely to arise in the context of any legislative discussion of the concept of conception.

For the moment then, prudent parents will protect their children from this uncertainty by executing wills and/or obtaining declarations of parentage consistent with the decision in *A. (A.) v. B. (B.)*³⁵ so that these children will fall within the definitions in the *SLRA*. Concomitantly, it is important for solicitors, when discussing estate planning issues with their clients, to emphasize the need for such planning, particularly where a child has been born through assisted reproduction.

Recognizing that some parents will inevitably fail to take the necessary planning steps, the following are some thoughts about factors Canadian courts may consider if the issue of the entitlement of after-born children to take on an intestacy is litigated.

- *Genetic Connection* Although several decisions in the United States and Australia recognize the rights of after-born children, an existing genetic connection has been central to making that determination. Considering the nature of assisted reproduction technology and the ways that the external genetic material is used, the genetic connection "test" needs to be supplemented by the nature of the relationship between the deceased and the child, and the status of the deceased as an intended parent. In this context, it might be successfully asserted, as it was in *A. (A.) v. B. (B.)*, that the failure of the intestacy legislation to keep pace with scientific realities has created a gap that can be judicially addressed through the application of the *parens patriae* jurisdiction which would permit the Court to expand the definition of child or issue to include a particular child.
- *Conceived before death and born alive* It might be that a court would follow the Arkansas court's logic and say that conception only occurs at implantation of an embryo. Alternatively, a court might conclude that a frozen embryo is conceptually conceived before death by virtue of the intent to create life evidenced by the combination of ova and sperm. It makes little sense, however, from a policy perspective to differentiate between frozen embryos and frozen genetic material (used with the consent of the deceased parent) when in our federal legislation we have already taken the policy decision to permit post-mortem conception. Also, from a rights-based perspective, there is no policy basis to differentiate between a child *en ventre sa mere* and a child born from a frozen embryo or from the use of frozen genetic material.³⁶ Thus, there may be

³⁵ *A. (A.) v. B. (B.)*, [2007]. 220 O.A.C. 115.

³⁶ See the passage from *Re Estate of K.*

room for a creative constitutional paramountcy argument to be advanced in reliance on the federal legislation to compel an interpretation under the provincial legislation that conception occurs for the limited purpose of the operation of the *Success Law Reform Act* at the moment of the donor's consent to the post-mortem use of the genetic matter.

- *The weight to be given to the intent of the deceased* The concept of intent is central to the use of genetic material consistent with the terms of the *Assisted Human Reproduction Act*. In *Re Martin B*³⁷, the court relied on the consent of the deceased parent to the use of his sperm by his wife to grant the same rights to the posthumous children as if they were a "natural child." Relying on the consent of the deceased could be argued to replace the genetic connection between the child and the parent where the parent was actively involved in arranging the conception of the child.
- *The timeframe for the administration of the estate and the extent of the duties of the administrator* These issues have been explicitly addressed in several cases. For example, in *Kolacy*, the court was willing to grant the status of an heir to a posthumous child "unless doing so would unfairly intrude on the rights of other persons (including other heirs) or would cause serious problems in terms of the orderly administration of estate." The court suggested imposing a time limit for when an after-born child can take from the estate and that such a time limit may be enacted by the legislature or imposed by the court on a case-by-case basis. The court in *In Estate of K* discussed the report of the Tasmanian Committee to Investigate Artificial Conception and Related Matters which stated, among other things, that if an estate has been distributed, the ability of after-born children to inherit may be limited. However, an executor could not be held responsible for an occurrence unless he had knowledge. Although the court doesn't focus on the administration of the estate in that particular decision, the discussion touches upon the role and the responsibilities of the estate administrator, and how they should be amended in the assisted reproduction context.
- *The Charter of Rights* The *Children's Law Reform Act*³⁸ removed the distinction between natural and adopted children (section 1(2)), and between children born inside and outside of marriage (section 1(1)). A logical question that arises in the assisted reproduction context is whether a continued distinction between children born through traditional reproduction and children born through assisted reproduction is justifiable constitutionally. A challenge on this basis would be the logical extension of the arguments advanced in *A. (A.) v. B. (B.)* (although not dealt with by the Ontario Court of Appeal).

³⁷ 17 Misc. 3d 198 (2007).

³⁸ *Children's Law Reform Act*, R.S.O. 1990, c.12.

Testate Succession

It is beyond the scope of this paper to consider every possible issue that could arise in will drafting as a consequence of the existence of genetic material or the birth of after-born children. Therefore, we will raise only a few issues for consideration.

Assisted Human Reproduction Act consents In our view, the profession should develop a standard practice of solicitors who draft wills discussing with their clients whether genetic material currently exists and the issues of consent related to post-mortem collection and use of genetic material. Clients will then have the opportunity to take the planning steps necessary to fulfill their wishes.

- *The terms "issue" and "children"* The terms "issue" and "children" as used in testamentary documents are capable of different interpretations based on expressed testamentary intent, various legislative definitions, and the common law. Drafting solicitors would be wise therefore to discuss with their clients whether they have children born as a consequence of assisted reproduction and, in turn, consider whether express terms need to be included in those clients' wills to ensure that those children fall within or outside those definitions depending upon the clients' intent in that regard.
- *Born within Marriage Clause* It remains relatively common for drafting solicitors to use definition clauses that limit the definition of children or issue to those born with marriage. This is often justified for male testators on the basis that it will limit the need for estate trustees to inquire into the existence of possible children. However, regard needs to be had to whether those clauses should now be amended to make it clear that children born to the legal spouse of the deceased at date of death, through post-mortem use of the deceased's genetic material, fall within the definition of children born within marriage.
- *The need for time limits* As noted above, one of the issues arising from the existence of after-born children is the delays their potential inheritance might cause in the administration of an estate. Thus, if a class gift to children or issue is contained in a will without a clear limitation with respect to what constitutes being "alive" on the class closing date, estate trustees aware of the existence of embryos, and the existence of a consent to its post-mortem use, may not be able to distribute for a lengthy period – perhaps years-while a surviving spouse considers whether to implant the embryos. Accordingly, regard should be had in drafting wills to the possible use of fixed definitions of who is alive.

CONCLUSION

We titled this paper "Mission Impossible" because we are not convinced at this moment in the development of the law of assisted reproduction, that any solicitor advising clients in an estate planning context can adequately address their clients' needs. However, with further discussion and, perhaps, legislative reform, we believe these matters can and should be progressed so that more certain advice can be provided to parents about the steps necessary to plan for and protect their genetic material, its use and their children.