Human Reproductive Technology: The Great Uncertainty for Estates

For certain, there have been many advantages gained through the advances in technology, and reproductive science is no exception. Countless wishful parents have fulfilled their dream of a family using assisted reproduction. Louise Joy Brown, the world's first test tube baby was born in 1978, and it is estimated another eight million babies, like her, have been born since. However, reproductive technology has also created some challenges in the world of estate planning and administration.

Estate planning and administration is concerned with distributing one's property at death among a group of identified beneficiaries. However, the lines are blurring around what that property is and who, exactly, the beneficiaries may be in light of the proliferation in the use of reproductive technology. Undoubtedly, this field generates many more questions than it answers.

Reproductive property rights after death

Familiarity with some reproductive technology terms helps to understand the various challenges present. According to Canadian Federal legislation, "reproductive materials" ("RM") are defined as sperm and ova ("eggs"), and alone these are not capable of life. An "embryo" is defined as a human organism within the first 56 days of development following fertilization and, under proper conditions of human implantation, it is capable of life.[1]

Provided that a deceased donor left written consent, their spouse or common-law partner (collectively referred to as "partner") may use the donor's RM for posthumous procreation.[2] A man who freezes sperm before starting cancer treatments who subsequently dies, may leave consent for the use of that sperm by his spouse to create an embryo and attempt to have a child – a posthumous child for the father. This permission includes rights not only to store reproductive material and embryos, but also the right to harvest fresh reproductive material from the deceased's body. For example, the partner of a woman who dies in a car accident may choose to remove eggs from her body, create an embryo, and use a surrogate to birth the child.

There is no regulation or consensus on what form this written consent must take, or where it should be kept. In some cases it forms a contract between the donor and a potential user, or with an assisting fertility clinic. In other cases, it is included in a Will, or a unilaterally signed document. But, what if the deceased donor's written consent was never obtained, or cannot be located after the donor's death? Does the surviving partner have any other recourse?

In several Canadian provinces, partners have successfully brought legal actions to have RM or embryos recognized as personal property. "Property" is something that can be owned and divided, awarded, gifted and bequeathed. In a 2016 British Columbia case, a man froze his sperm but died without signing any consent or leaving a Will. Under the rules of intestacy, his wife was the sole beneficiary of his estate, and the court found the frozen sperm to be the property of his estate and awarded it to the wife.[3]

Nonetheless, it seems that a partner's right to use reproductive material posthumously will be balanced against the responsibilities of parenthood. Undeniably, procreation places both legal and financial obligations on parents. As a matter of public policy, courts seem unwilling to impose those obligations on an unwilling parent in the case of RM. They may deny one partner access to reproductive material if doing so would create unwanted support obligations for the other partner, and his or her estate.

Who, exactly, can inherit from an estate?

Posthumous birth and inheritance is now possible in two Canadian provinces. Both British Columbia and Ontario have

[1] *Assisted Human Reproduction* Act, S.C. 2004
[2] *Assisted Human Reproduction* Act, S.C. 2004
[3] *K.L.W v Genesis Fertility Centre*, 2016 BCSC 1621

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passed legislation that permits children conceived after death to inherit under an estate. Rights to succession are now assured in these two provinces as long as certain conditions are met. To ensure a posthumous child's inclusion among estate heirs, the surviving spouse or partner of the deceased must provide timely notice of his or her intention to use RM to procreate. Once notice is given, the child must be born alive within two or three years, depending on the province. And, the deceased must be the parent of the child.

It's not unthinkable that other provinces may adopt similar rules as assisted reproduction becomes increasingly more popular with hopeful parents, particularly in same sex relationships. So, what does all of this mean for estate planning and administration?

If any family members may have donated and stored RM or embryos, it is vital to discuss assisted reproduction matters when reviewing estate planning goals with your legal advisor. Knowing whether consents are in place, and where they are kept will reduce surprises and facilitate the process after a donor's death when haste becomes important. Consider how gifts might be made from your estate if a posthumously conceived child were included among your beneficiaries. Would this affect your estate distribution decisions?

Executors must be equally vigilant to ensure they have included all possible beneficiaries before distributing the assets of an estate. And, if a RM donor dies intestate (without a Will), any posthumously conceived children would be entitled to their statutory shares in the provinces of Ontario and British Columbia.

Estate documents are not the only ones needing revision to account for the ramifications of reproductive technology. Any agreements that affect property, such as cohabitation, prenuptial and marriage contracts, as well as powers of attorney, should be drafted with the implications of RM in mind. In addition, entitlements to benefit plans, such as pensions, should be carefully reviewed before anything is distributed.

Can attorneys for property and personal care dictate our procreation?

Power of attorney documents authorize named individuals to manage and make decisions about property and personal care if the grantor of the power is alive, but cannot make those decisions for themself. This raises questions about the ability of attorneys to use their authority to make decisions about procreation for an incapable person. It is possible that a spouse or partner, acting as attorney, could provide consent on behalf of an incapable partner to use stored RM for procreation, or for a medical procedure required to extract RM. And, if one, or both, of the partners were in a subsequent partnership, it may also be possible for two different individuals acting as property and personal care attorneys to be in conflict around the access to, and use of, RM. Although these issues have not yet been examined by our courts or addressed by legislation, it is surely only a matter of time.

Seek professional advice

The forces of assisted reproductive technology are profoundly changing our conventions around property and succession rules. Moreover, they are impacting Canadian families, their legal advisors and estate administrators in unprecedented ways. A complete and open discussion with your estate lawyer is the best insurance that reproductive property and family heirs, known or unknown, are managed with insight and legitimacy.

For more information, please speak to your BMO financial professional.

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