Posthumous Conception: Recent Changes to the *Succession Law Reform Act* and their Impact on Estate Law

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A. Introduction

As of January 1st, 2017, new rules regarding parentage were put into effect by the Ontario government, pursuant to the *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016* (the "*AFAEA*")[2]. These changes have far-reaching consequences in the legal realm, primarily in the areas of family law and estate law.

One change of particular interest to estate practitioners is the creation of succession rights for posthumously conceived children, pursuant to the amendments of the *Succession Law Reform Act* (the "*SLRA*")[3]. These changes not only affect the estate of the deceased parent of the posthumously conceived child, but also the estates of the grandparents and other relatives of the child.

B. Background

Prior to January 1st, 2017, the definition of "child" in the *SLRA* included a child conceived before and born alive after the parent's death.[4] Similarly, the definition of "issue" included a descendant conceived before and born alive after the parent's death.[5] These definitions contemplated posthumous birth, but did not contemplate posthumous conception.

With the advent of new reproductive technologies, sperm, eggs and embryos can all be frozen, stored and then thawed for future use. Many individuals are availing themselves of these new technologies in order to preserve their ability to have children later in life or after medical interventions that cause sterilization, such as chemotherapy. While not yet common, posthumous conception is a scenario that will become more prevalent in the coming years. For that reason, estate practitioners must be aware of the legal effects of the new legislation and be able to anticipate unintended consequences for their clients.

C. Amendments to the *SLRA*[6]

Prior to January 1st, 2017, the parent of a child, for the purposes of succession, was the father or mother of a child. The terms "father and "mother" have been deleted in the *SLRA* by the *AFAEA* and parentage is now determined in accordance with Part 1 of the *Children's Law Reform Act*[7] (the "*CLRA*").[8]

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[2] S.O. 2016, c. 23 (the "*AFAEA*").

[3] R.S.O. 1990, c. 26, as amended (the "*SLRA*").

[4] *SLRA*, s. 1(1).

[5] *Ibid.*

[6] A summary chart of these amendments is attached as Schedule "A".

[7] R.S.O. 1990, c. C.12, as amended (the "*CLRA*").

[8] The rules of parentage are complex in nature and will not be discussed in this paper outside of the rules that apply to posthumous conception.

The *AFAEA* also expanded the definitions of "child" and "issue" in subsection 1(1) of the *SLRA* to include children and descendants conceived[9] and born after the death of a parent, provided all of the following conditions, set out in a new subsection 1.1(1), are met:

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.[10]

The new section goes on to provide for the definition of certain terms contained within the section, as well as further details regarding procedure:

> Interpretation
>
> (2) For the purposes of paragraph 1 of subsection (1), "assisted reproduction", "embryo", "reproductive material", "spouse" and "surrogate" have the same meaning as in section 1 of the *Children's Law Reform Act*.
>
> Extension of time
>
> (3) On motion or application, as the case may be, by a surviving spouse who gives notice under paragraph 1 of subsection (1), the Superior Court of Justice may make an order extending the period referred to in paragraph 3 of that subsection, if the Court considers it appropriate in the circumstances.[11]

1. Notice to the Registrar

As stated above, in order to have the expanded definition of "child" and "issue" apply, notice must be provided to the Estate Registrar within 6 months of the date of death of the deceased, of an intention to use the reproductive material of a deceased person.

The form of Notice is provided by the Ministry of the Attorney General and is available under the *Succession Law Reform Act* Forms tab of the Ontario Court Services webpage. A copy of the Notice is attached as Schedule "B".

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[9] Under s. 1(3) of the *CLRA*, conception through assisted reproduction is deemed to be the date on which the reproductive material or embryo is implanted in the birth parent.
[10] *SLRA*, s. 1.1(1).
[11] *SLRA*, s. 1.1(2) and (3).

a. Spouse

It is of interest to note that in order to satisfy clause 1 of subsection 1.1(1), only the spouse of the deceased, at the time of his or her death, can use the reproductive material or an embryo to conceive a child who will have rights under the *SLRA*. The definition of spouse for this section is deemed to be that of section 1 of the *CLRA*:

> "spouse" means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage;

There is no statutory definition of "conjugal relationship". Ontario courts have tended to follow a non-exhaustive list of factors set out in the case of *Molodowich v. Penttinen*[12] in determining whether parties are in a "conjugal relationship".

The restriction on who may apply is related to the limitations imposed by the regulations to the federal *Assisted Human Reproduction Act*[13]. The regulation essentially limits the use of a deceased's human reproductive material, for the purpose of creating an embryo, to the donor's spouse or common-law partner.[14]

b. Receipt and Retention of Notices

Notice of an intention to use reproductive material of a deceased person is only required to be provided to the Estate Registrar for Ontario.[15] It therefore can be concluded that the Estate Registrar will be responsible for retaining all notices and, presumably, notifying applicants for probate about:

- notices that have been filed prior to the date an application for probate is filed;
- notices that are filed while the probate application is being processed; and
- notices that are filed after a Certificate of Appointment has been issued.

As well, given the estate representative's duty to ascertain heirs, there may be a positive obligation to search the records of the Estate Registrar for any filed notices.[16]

At a minimum, notices will need to be retained for 3 years and 90 days, as evidence that the notice was filed properly, in cases where a child is posthumously conceived and born. Given the court's power to extend the deadline in clause 3 of subsection 1.1(1), it is possible that notices will need to be retained for longer than that period, however until there has been judicial interpretation of clause 3, notices may need to be kept indefinitely.

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[12] (1980), 1980 CanLII 1537 (ON SC), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).
[13] Regulation SOR/2007-137, S.C. 2004, c. 2.
[14] Section 3(a)(ii) and 4(1).
[15] Contrast this to the B.C. *Wills, Estates and Succession Act* [SBC 2009] c. 13, which requires that notice be provided to the deceased's representative, beneficiaries and intestate successors.
[16] Note, the notice will be linked only to the estate of the deceased parent even though the notice may also affect the estates of the deceased parent's antecedents and relatives.

c. Non-Compliance

From the wording of clause 2, it appears that failure to adhere to the form required, or failure to meet the strict deadline will result in a rejection of the notice. However, will this non-compliance with the notice requirements preclude any succession rights to the posthumously conceived child? Can the acts or omissions of one of the child's parents forever extinguish the rights of a child to inherit or receive support from the other parent, or will there be some form of recourse available?[17]

2. Birth of Child Within 3 Years of Death

Clause 3 of subsection 1.1(1) requires that the posthumously-conceived child be born no later than the third anniversary of the deceased person's death, subject to the granting of an extension under subsection 1.1(3) by the court. An extension may be granted in "appropriate circumstances".

The question of what are "appropriate circumstances" and what is a reasonable extension will be dependent on the particular facts of each case. This creates some uncertainty in the administration of estates. Estate representatives will presumably know within 6 months of death that a surviving spouse intends to use the deceased's reproductive material to conceive posthumously. They will also have a general timeline of 3 years post-death in which they can expect a child to be born. However, the court's ability to extend this deadline in "appropriate circumstances" leaves much uncertainty with respect to the administration of an estate.

Given that the request for an extension must be brought by motion or application, it can be assumed that the estate representative will have notice of the requested relief. However, can the estate trustee oppose the request for an extension? Will other interest parties, such as beneficiaries or creditors be granted standing to challenge the extension request?

3. Declaration of Parentage

Lastly, in order for a posthumously conceived child to qualify for succession rights or support rights, a declaration of parentage must be obtained. This declaration is obtained on application to the Superior Court of Justice under section 12 of the *CLRA*, which states:

> Posthumous conception
>
> 12 (1) A person who, at the time of a deceased person's death, was his or her spouse, may apply to the court for a declaration that the deceased person is a parent of a child conceived after his or her death through assisted reproduction.
>
> Time limit
>
> (2) An application under subsection (1) may not be made,
>
> (a) until the child is born; and
> (b) unless the court orders otherwise, later than 90 days after the child's birth.

[17] Contrast this to the principal that the limitation of a minor's claim will not commenced until the minor has reached the age of majority.

Declaration

(3) The court may grant the declaration if the following conditions are met:

1. The deceased person consented in writing to be, together with the applicant, the parents of a child conceived posthumously through assisted reproduction, and did not withdraw the consent before his or her death.

2. If the child was born to a surrogate, the applicant is a parent of the child under section 10, and there is no other parent of the child.

Pursuant to subsection 15(2) of the *CLRA*, the declaration is deemed to be effective from the date of birth of the child.

a. Spouse

The ability to apply for the declaration is again restricted to the spouse of the deceased, as of the time of his or her death. An intended co-parent, who is not a spouse of the deceased, appears to be precluded from obtaining this declaration. As with the notice provision, the definition of spouse for this section includes both married spouses and persons living in a conjugal relationship outside of marriage.

b. Consent in writing to parentage

An applicant will be required to prove, on a balance of probabilities, that the deceased provided written consent to parentage of a posthumously conceived child, and that said consent was not withdrawn.

There is no prescribed form of consent under clause 1 of subsection 12(3). The adequacy of the consent will be a matter for the court to determine, applying the general rules of evidence. The consent may require judicial interpretation or may be challenged on various grounds.

Whether consent was withdrawn will likewise be an evidentiary issue. As stated, the withdrawal of consent need not be in writing. If withdrawal of consent is verbal, there will be an obvious need for corroboration.

c. Procedural matters

There are no specifics in regard to the procedure for the application for a declaration of parentage. One would presume that the estate of the deceased person would need to be a party to the application, but would beneficiaries under a Will and intestate successors have standing, as interested parties, to oppose the application?

As mentioned above, the *SLRA* allows for a posthumously conceived child to be born up to 3 years after death of the intended parent's death, with the possibility of an extension of this deadline. The application for a declaration of parentage must be brought after the child's birth, but no later than 90 days after birth, unless the court orders otherwise. If an application for a declaration of parentage is opposed, it could be many years before a posthumously conceived child is declared the child of the deceased. An estate trustee will need to balance the rights of existing beneficiaries to the timely administration of an estate against the rights of the not-yet conceived beneficiary to share in the estate.

Non-Compliance

The same issues that have been raised with respect to notice under subsection 1.1(1) will also apply with respect to the procedural requirements of an application for a declaration of parentage: will procedural non-compliance forever extinguish the rights of a posthumously conceived child to inherit or receive support from the deceased parent's estate?

D. Testate Estates and Will Interpretation[18]

As discussed, the definitions of "child" and "issue" in the *SLRA* have been expanded to include children and descendants conceived after the death of the person, provided the conditions of subsection 1.1(1) are met.

Under subsection 2(1) of the *CLRA*, these definitions will apply to "instruments", unless a contrary intention is expressed in the instrument. If a Will is considered an instrument, the terms "child", "children" and "issue" will be interpreted in accordance with the updated *CLRA* and *SLRA*. However, under subsection 2(3) of the *CLRA*, it appears that the application of subsection (1) to instruments not made under an Act, such as Wills, is not retroactive.[19] If this interpretation is correct, Wills that were made prior to January 1st, 2017, will be interpreted in accordance with the definitions and rules of parentage of the previous versions of the *CLRA* and *SLRA*, and the expanded definitions will not apply. For the purposes of discussing the effects of the *AFAEA*, this commentary will be directed to testamentary instruments made after January 1st, 2017.

Pursuant to the rule of convenience, where there are existing members of a class, that class will close on the testator's death, even where it is theoretically possible for more members of the class to be born later.[20] The class will not close if there are no members of the class as of the date of death.[21] It is not clear whether the amendments to the definition of "child" and "issue" under the *SLRA* override this rule of construction. Does the class of beneficiaries remain open until the deadlines set out in the *CLRA* and *SLRA* expire, or must the deceased's Will specifically state that the class will remain open?

If the amendments do not alter the application of the rule of convenience, posthumous children and issue will only inherit under a Will if there are no members of that class alive as of the date of death, or if the Will specifically provides for inheritance by posthumously conceived children.

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[18] Distribution of testate estates will be subject to dependant support claims made on behalf of the posthumously conceived child, as discussed later in the paper. If a suspensory order is obtained in conjunction with the commencement of the claim, the distribution of the estate could be suspended until the claim is resolved.

[19] This interpretation is subject to challenge for a number of reasons. First, unless a contrary intention is indicated, a Will speaks from the date of the testator's death and is generally interpreted in accordance with the laws in effect at that time. A testator is presumed to know the law, and if capable, is able to amend his or her Will to reflect actual intentions. Second, the amendments to the *SLRA* do not include any provisions addressing application of the amended definitions in the *CLRA* to Wills made before January 1st, 2017. Contrast this to the change effected in 1978 with respect to children born out of wedlock. The 1978 change was reflected in s. 2(1) of the *CLRA*, with s. 2(2) clarifying that the change applied to instruments made on or after March 31st, 1978. The change was also reflected in s. 1(3) of the *SLRA*, with s. 1(4) clarifying that it applied to Wills made on or after March 31st, 1978. Section 1.1(1) of the *SLRA* does not have a clause comparable to subsection 1(4). The question arises as to whether the omission of an application clause in the *SLRA* was intentional or inadvertent, or whether it is even needed, given s. 2(3) of the *CLRA*.

[20] Knaplund, Kristine S., *Postmortem Conception and a Father's Last Will*, 46 Arizona Law Review 91, 91 (2004) at page 109.

[21] *Ibid.*

If the amendments serve to keep the class open as of date of death, various possibilities exists and the terms of the Will will be paramount. If the Will restricts the definitions of "child" and "issue" to children and issue conceived prior to death, a posthumously conceived child will have no inheritance rights under the Will, and will be limited to a dependant support claim. If the Will uses, but does not define the terms "child" and "issue", the definitions of those terms will be in accordance with the *CLRA*. As a result, posthumously conceived children and issue may fall into a class of beneficiaries entitled to inherit under the Will.[22]

Recommendations for Planning Solicitors:

Planning solicitors are advised to discuss with their clients whether posthumously conceived children and issue are intended to inherit under the Will. Wills will need to contain clear definitions of "child", and "issue" and will need to specify a time at which the members of a class are to be determined.

It is also recommended that clients be questioned about any existing stored reproductive material or any intention to store reproductive material, whether by them or by their children and grandchildren. If the client confirms the possibility of posthumous conception, a planning solicitor may wish to review the documents relating to the use of the reproductive materials[23], and discuss the written consent to parentage required under the *CLRA*.

As discussed, the *SLRA* contains time limits in regard to the birth of a posthumously conceived child. However, these time limits can be altered by the terms of a Will. Shorter timelines for conception and/or birth may be set out in the Will, so as to minimize delay to the administration of the estate. Longer timelines may be preferred in cases where a successful pregnancy and birth are desired. Where the timelines in the Will are different from those in the *SLRA* and *CLRA*, the Will should include a requirement that the estate trustee notify the deceased's spouse of these timelines.

One option for estate planning solicitors to consider is the creation of a trust for posthumously conceived children. This would therefore create a separate class of beneficiaries. The terms of the trust could fix a date for the determination of members of the class and would provide a gift-over to alternative beneficiaries. This will allow an estate to be administered in a more-timely manner, with more certainty and protection for the estate trustee.[24]

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[22] The expanded definition of "child" would obviously not apply where children are identified by name in the Will.

[23] Use of genetic material is regulated by the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, which requires that written consent be provided by the donor of the material, whether before or after the donor's death (s. 8).

[24] In this regard, solicitors may need to assess if there is a potential problem created by the rule against perpetuities, given that no changes were made to the *Perpetuities Act*. Will a posthumously conceived child (as defined in the *CLRA* rather than under the Will) be considered a life in being? If not, then the perpetuity period may be limited to a maximum of 21 years (there being no life in being). Or, where there is a gift-over to a grandchild in trust, and the trust is to go until age 21, it is possible that the life in being is the testator's child. In this case, the grandchild might not be born until 3 years (or longer with court order) after the child's death. The grandchild would be 18 years of age, or possibly younger, at the end of the perpetuity period. The question of whether a posthumously conceived child will be considered a life in being has not been addressed by the changes under the *AFAEA*. As a result, solicitors will need to provide comprehensive advice to their clients about the impact of the rule against perpetuities and will need to ensure that the terms of the client's Will do not result in the voiding of a gift.

E. Intestate Estates[25]

Where an individual does not have a valid Will, the definitions of "child" and "issue" under the *SLRA* will apply to the distribution of the estate.[26]

Because of the amendment to the definition of "child" and "issue" in the *SLRA*, the posthumously conceived child and issue of the deceased parent will be entitled to share in the distribution of the parent's estate, provided the conditions under subsection 1.1(1) are satisfied.

As stated above, an estate administrator, who files an application for probate, will presumably have been notified by the Estate Registrar that the deceased's spouse has filed notice under subsection 1.1(1). Under section 26 of the *Estates Administration Act*[27], an intestate estate cannot be distributed within the first year of death. It will be up to the estate administrator to decide after the expiry of the 1-year period whether to distribute the estate, or wait for a child to be conceived.[28]

The intestacy provisions of s. 47 of the *SLRA* have also been amended to include new subsections (10) and (11), which state:

> (10) For the purposes of this section, descendants and relatives of the deceased conceived and born after the death of the deceased shall inherit as if they had been born in the lifetime of the deceased and had survived him or her, if the conditions in subsection 1.1(1) are met.
>
> (11) The right of a descendant or relative to whom subsection (10) applies begins on the day he or she is born.

Subsection (10) operates to extend inheritance rights of posthumously conceived children to the estates of their relatives and antecedents, e.g. grandparents, uncles, etc.

Subsection (11) acts to crystallize the claims of posthumously conceived children as of the date the child is born. Until the child is born, no claim exists.[29]

An estate administrator has the right to distribute an intestate estate after the first anniversary of the date of death, however, a posthumously conceived child may not be born for some time after that. If the child's entitlement does not crystallize until date of birth, does it follow that an estate administrator is permitted distribute the entire estate before the birth of the child, thus preventing that child from receiving his or her proportionate share of the estate?[30]

The 1985 report of the Ontario Law Reform Commission on "Human Artificial Reproduction and Related Matters" provides some guidance in regard to the interpretation of these provisions. The report

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[25] Distribution of intestate estates will be subject to dependant support claims made on behalf of the posthumously conceived child, as discussed later in the paper. If a suspensory order is obtained in conjunction with the commencement of the claim, the distribution of the estate could be suspended until the claim is resolved.

[26] Pursuant to ss. 2(1) and 2(2) of the *CLRA*, the amendments apply as of January 1st, 2017.

[27] R.S.O. 1990, c. E. 22, as amended.

[28] As stated in footnote 24, this will be subject to a suspensory order obtained in conjunction with a dependant support claim.

[29] This subsection appears to apply to intestate inheritance from both a deceased parent and a deceased antecedent or relative. Contrast this with s. 8.1 of the B.C. *Wills, Estates and Succession Act*, in which the crystallization of a claim, to the date the child is born, is only applicable to claims of a "descendant… to inherit from the relatives of a deceased person". The question therefore arises as to the intended application of s. 47(11), i.e. was it intended to only apply to entitlement in the estates of grandparents and other relatives?

[30] Again, this would not be permitted if a suspensory order is in effect.

recommended that estates that have already been distributed should not be disturbed, nor should there be any postponement of distribution in cases where [reproductive material] is held in cryopreservation.[31] It appears that the wording of subsection (11) is intended to reflect this recommendation. Furthermore, the amendments to the intestacy provisions by the *AFAEA* did not provide for the suspension of the distribution of estate upon receipt of the notice under subsection 1.1(1).[32]

As a result, the logical interpretation is that upon the birth of a posthumously conceived child, the child will be entitled to share proportionately in the undistributed estate, but will have no claim against the portion that has been distributed.[33]

F. Dependant Support

The definition of "child" for the purpose of Part V of the *SLRA* includes posthumously conceived children.[34]

Section 57 of the *SLRA* has been amended by the addition of subsection (2), which states:

> (2) For the purposes of clause (c) of the definition of "dependant" in subsection (1), where the conditions in subsection 1.1(1) are met in relation to a child conceived and born alive after the death of the deceased, the deceased is deemed to have been, immediately before his or her death, under a legal obligation to provide support to the child.

Section 59 has been amended to allow an application, by a surviving spouse, on behalf of a posthumously conceived child, to make application for dependant support, where notice has been given under subsection 1.1(1), and where the child has not yet been conceived.[35] This application must be commenced within 6 months of the deceased parent's death.[36] Upon application, the court may order that the administration of the deceased's estate be suspended, in part or in whole, for such time and to such extent as the court deems appropriate.[37]

In cases of posthumous conception, if a certificate of appointment is obtained forthwith after death, it is possible that a testate estate could be fully distributed before an order under section 59 is granted. On an intestacy, this would not be as likely, given that an administrator is restricted by section 26 of the *Estates Administration Act* from distributing the assets before the 1-year anniversary of death. Time will therefore be of the essence in commencing dependant support claims on behalf of posthumously conceived children.

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[31] Ontario Law Reform Commission on "*Human Artificial Reproduction and Related Matters*" (1985), at pages 180-181.
[32] The 2008 report of the Manitoba Law Reform Commission on *Posthumously Conceived Children: Intestate Succession and Dependants Relief* strongly recommends that any legislation should include "a 'hard cutoff' date before which the estate may not be distributed" (at page 180).
[33] This interpretation appears to run contrary to the intended purpose of the amendments, which is to recognize a posthumously conceived child's entitlement on intestacy.
[34] Pursuant to ss. 2(1) and (2) of the *CLRA*, the amendment applies as of January 1st, 2017.
[35] *SLRA*, s. 59(2).
[36] *Ibid.*
[37] *SLRA*, s. 59(1).

G. Vesting Under Section 9 of *Estates Administration Act*

As discussed in footnote 23, the legislature did not make any consequential amendments to the *Perpetuities Act*[38] to deal with posthumous birth, nor did it make any amendments to sections 9-13 of the *Estates Administration Act*. Section 9 applies to intestacies and to certain Wills. It provides that real property not disposed of, conveyed to, divided or distributed among the persons beneficially entitled thereto will vest in those beneficiaries 3 years following the death of the deceased, unless the estate representative registers a caution. Registration of a caution will extend the vesting period by an additional 3 years and can be renewed or withdrawn.

Generally, this should not pose an issue since the 3-year vesting period will coincide with the requirement for the posthumously conceived child to be born within 3 years. However, if the 3-year birth requirement is extended by the court, an estate representative must then consider whether:

- a caution should be registered so as to preserve a posthumously conceived child's vesting rights;
- a caution should not be registered so as to preclude a posthumously conceived child's vesting rights; or
- to distribute the property, as discussed, above respecting intestate distributions.

H. Conclusion

In response to advances in reproductive technology, the legislature has taken steps to ensure that posthumously conceived children are afforded some rights with respect to the estates of their deceased parents and relatives. The changes to the *CLRA* and *SLRA* appear to strike a reasonable balance between the rights of these children and the other considerations such as the rights of other beneficiaries and dependants, and the timely and orderly administration of estates.

As the frequency of posthumous conception increases in the future, many questions will arise with respect to the interpretation of these statutory amendments. Unfortunately, until judicial interpretation has occurred on the amended legislation, a great deal of uncertainty will exist with respect to the rights of posthumously conceived children and the obligations of estate trustees. Estate planning lawyers will have an important role in advising their clients on the effects of the new legislation and drafting testamentary documents to reflect their clients' intentions.[39]

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[38] R.S.O. 1990, c. P.9.

[39] The changes to the SLRA and in particular, succession rights of posthumously conceived children and issue have been discussed by a number of organizations and members of the estates bar. In the process of writing this paper, I have reviewed numerous articles and have incorporated some thoughts and ideas contained in those articles into this paper. I refer you to the following informative articles and blogs: Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, 1985; Alberta Law Reform Institute, *Assisted Reproduction After Death: Parentage & Implications*, March 2015; Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief*, November 2008; Clare E. Burns and Anastasija Sumakova, *Mission Impossible: Estate Planning and Assisted Human Reproduction*, 2010 Canadian Bar Association National Conference; Susan Gary, *Posthumously Conceived Heirs*, GPSolo Magazine, September 2005; Darren Lund, *All About Estates*, various blogs between March 31st, 2017 and August 4th, 2017, (allaboutestates.ca); Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 Arizona Law Review 91, 91 (2004); Suzanna Popovic-Montag, *Fertility Law Considerations for Estate Lawyers*, The Probater, Volume 23, Number 1, March 2017 and *Fertility Beyond the Grave*, Blog August 2, 2017 ; Kimberley A. Whaley and Helen Likwornik, *Life After Death: Modern Genetics and the Estate Claim*; WELPartners Blog, March 1, 2009, published in the Estates, Trusts & Pensions Journal [Vol.28]; Mary Kate Zago, *Second Class Children: The Intestate Inheritance Rights Denied to Posthumously Conceived Children and How Legislative Reform and Estate Planning Techniques Can Create Equality* (2014). Law School Student Scholarship. 609.

Schedule "A"

Amendments to the *Succession Law Reform Act,* RSO 1990, Chapter S. 26 Pursuant to the *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, SO 2016, c.23 – Bill 28	
Old Version (In force Dec. 10, 2016 to Dec. 31, 2016)	**New Version** (In force January 1st, 2017)
Definition/Interpretation	
Section 1(1) "child" includes a child conceived before and born alive after the parent's death;	**Section 1(1)** "child" includes, (a) a child conceived before and born alive after the parent's death, and (b) a child conceived and born alive after the parent's death, if the conditions in subsection 1.1 (1) are met;
Section 1(1) "issue" includes a descendant conceived before and born alive after the person's death;	**Section 1(1)** "issue" includes, (a) a descendant conceived before and born alive after the person's death, and (b) a descendant conceived and born alive after the person's death, if the conditions in subsection 1.1 (1) are met;
Section 1(1) "parent" means the father or mother of a child;	**Definition of "parent" in subsection 1(1) of the Act is repealed.**
Section 1(1) "spouse" means either of two persons who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act;	**Section 1(1)** "spouse", except in Part V, has the same meaning as in section 1 of the *Family Law Act*; s. 1 *FLA*: "spouse" means either of two persons who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

Section 1(2) **Polygamous marriages** (2) In the definition of "spouse", a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.	**Subsection 1(2) of the Act is repealed.**
Section 1.1 did not exist.	**The following section was added following the section before the heading to Part I.** **Posthumous conception, conditions** 1.1 (1) 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. **Interpretation** (2) For the purposes of paragraph 1 of subsection (1), "assisted reproduction", "embryo", "reproductive material", "spouse" and "surrogate" have the same meaning as in section 1 of the *Children's Law Reform Act*. **Extension of time** (3) On motion or application, as the case may be, by a surviving spouse who gives notice under paragraph 1 of subsection (1), the Superior Court of Justice may

	make an order extending the period referred to in paragraph 3 of that subsection, if the Court considers it appropriate in the circumstances.
Intestate Succession	
Section 47(10) and (11) did not exist. Section 47 of the Act ended at the following subsection: **Descendants conceived but unborn** (9) For the purposes of this section, descendants and relatives of the deceased conceived before and born alive after the death of the deceased shall inherit as if they had been born in the lifetime of the deceased and had survived him or her.	**Section 47 of the Act is Amended by adding the following subsections:** **Descendants posthumously conceived** (10) For the purposes of this section, descendants and relatives of the deceased conceived and born alive after the death of the deceased shall inherit as if they had been born in the lifetime of the deceased and had survived him or her, if the conditions in subsection 1.1 (1) are met. **Right to inherit** (11) The right of a descendant or relative to whom subsection (10) applies to inherit begins on the day he or she is born.
Support of Defendants	
Section 57 "spouse" means a spouse as defined in subsection 1 (1) and in addition includes either of two persons who, (a) were married to each other by a marriage that was terminated or declared a nullity, or (b) are not married to each other and have cohabited, (i) continuously for a period of not less than three years, or (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child. ("conjoint")	**The definition of "spouse" in section 57 of the Act is repealed and the following substituted:** "spouse" has the same meaning as in section 29 of the *Family Law Act*. s. 29 *FLA*: "spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children's Law Reform Act*.
Section 57(2) did not exist.	**Section 57 of the Act is Amended by adding the following subsection** **Dependant posthumously-conceived child** (2) For the purposes of clause (c) of the definition of "dependant" in subsection (1), where the conditions in subsection 1.1 (1) are met in relation to a child conceived and born alive after the death of the deceased, the deceased is deemed to have been,

	immediately before his or her death, under a legal obligation to provide support to the child.
Section 59(2) did not exist.	**Section 59 of the Act is amended by adding the following subsection:** **Posthumous child not yet conceived** (2) An application may be made under subsection (1) by a surviving spouse who gives notice under paragraph 1 of subsection 1.1 (1) on behalf of a child of the deceased that is referred to in the notice and is not yet conceived, if the application is made no later than six months after the death of the deceased.

Schedule "B"

Ontario Ministry of the Attorney General

Notice to Estate Registrar of Ontario (Posthumous Conception)

Submit to: Estate Registrar of Ontario
c/o Toronto Estates Office
Superior Court of Justice
330 University Ave
Toronto ON M5G 1R7

I, _____ (Name of Surviving Spouse), the surviving spouse of _____ (Name of Deceased Spouse), hereby give notice to the Estate Registrar for Ontario as required under section 1.1 of the *Succession Law Reform Act* that I 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 _____ (Name of Deceased Spouse) intended to be a parent.

Surviving Spouse

First Given Name	Second Given Name
Third Given Name	Surname
Full Current Mailing Address (street or postal address) (city or town)	(county or district)

Deceased Spouse

First Given Name	Second Given Name
Third Given Name	Surname
Date of Birth (yyyy/mm/dd)	Date of Death (yyyy/mm/dd)
Last mailing address (if different than address of spouse provided above) (street or postal address) (city or town)	(county or district)

This Notice must be submitted to the Estate Registrar of Ontario no later than six months following the date of death.

_____
(Signature of Surviving Spouse)

_____
Date (yyyy/mm/dd)

SAMPLE ONLY

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