

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

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”).

One change, which will impact estate planning and administration, is the creation of succession rights for children of a deceased person, conceived and born after the death of that person.¹ Should certain conditions be satisfied, these children will be entitled to inherit and/or receive support from the estate of the deceased parent and potentially from the estates of the relatives of that deceased parent.

Amendments to the *Succession Law Reform Act*

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 *Succession Law Reform Act* (the “SLRA”) by the AFAEA and parentage is now determined in accordance with a set of rules in Part II of the *Children’s Law Reform Act* (the “CLRA”).²

The AFAEA also expanded the definitions of “child” and “issue” in the SLRA to include children and descendants conceived and born after the death of a parent, provided a number of conditions are met:

1. **Notice:** The spouse of the deceased must give written notice to the Estate Registrar for Ontario that the spouse may use reproductive material (sperm, eggs) or an embryo to attempt to conceive a child in relation to which the deceased person intended to be a parent. The notice must be in a prescribed form and given no later than six months after the deceased person’s death. Where an estate representative files an application for probate, it appears that the Estate Registrar will notify the estate representative that a notice of intention to conceive has been filed.
2. **Birth of child:** 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 court, in appropriate circumstances.
3. **Declaration of Parentage:** A court has made a declaration establishing the deceased person’s parentage of the posthumously conceived child. In order to obtain a declaration of parentage with respect to the deceased

person, the spouse must establish that the deceased provided written consent to parentage of a posthumously conceived child, and that said consent was not withdrawn.

Impact on Estates

Testate Estates and Will Interpretation

As discussed, the definition of “child” and “issue” in the SLRA has been expanded to include children and descendants conceived after the death of the deceased, provided the above-noted conditions are met. These new definitions will apply to a person’s Will, unless a contrary intention is reflected in the Will. It appears that this change is not retroactive, and therefore only Wills drafted after January 1st, 2017, will be subject to the new definitions.

Clients will need to advise their lawyer if they, their children or other beneficiaries under their Will, have stored or intend to store any reproductive material (eggs, sperm, embryos). If so, clients will need to decide whether they want posthumously conceived children and issue to inherit under the Will.

On the drafting side, lawyers will need to draft Wills that contain clear definitions of “child”, and “issue” so as to reflect the intentions of their clients. Lawyers may consider a separate testamentary trust for posthumous conceived children, with strict time limits and notice requirements. Lawyers may also wish to review the clients’ documents relating to the use of stored reproductive materials,³ and discuss the written consent to parentage required under the CLRA.

Intestate Estates

Where an individual does not have a valid Will, the definitions of “child” and “issue” under the CLRA will apply to the distribution of the estate, and a posthumously conceived child of the deceased parent will be entitled to share in the distribution of the parent’s estate, provided the conditions set out above are satisfied. Posthumously conceived children may also be entitled to inherit from the estates of their relatives and antecedents, e.g. grandparents, uncles, etc.

Dependant Support

Under the new definitions, posthumously conceived children may be entitled to dependant support from the estates of deceased parents. The conditions discussed above will need to be satisfied, and a claim will need to be commenced, on behalf of the posthumously conceived child, within six months of the deceased's parent's death. This claim will be stayed until the birth of the child.

Estate Administration Generally

The expansion of the definitions of the terms "child" and "issue", and the related procedural steps to establish parentage of a posthumously conceived child, will complicate the administration of certain estates. In these estates, delay in the administration of the estate may be inevitable, especially where a dependant support claim is commenced. As well, the estate representatives may be subject to additional responsibilities and duties, which could result in new areas of risk and liability.

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. 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. Both clients and lawyers must be aware of the potential effects of the new legislation and ensure that the client's intentions are reflected in his or her estate plan.⁴

¹ Advances in technology have enabled sperm, eggs and embryos to be stored for future implantation. The date of conception is considered to be the date on which the reproductive material or embryo is implanted in the birth parent.

² The rules of parentage are complex in nature and will not be discussed in this article.

³ 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).

⁴ This topic was presented by the author on Day 2 of the 20th Annual Estates and Trusts Summit on October 17th, 2017.



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