LIFE AFTER DEATH: MODERN GENETICS AND THE ESTATE CLAIM[†]

Kimberly A. Whaley[*] *and Helena Likwornik*[**]

The purpose of this paper is to consider certain estate law issues that are bound to arise given recent scientific advances in the field of genetics and assisted reproduction. This paper will also consider how the courts are likely to react to these issues.

Science has advanced by leaps and bounds in terms of genetic and reproductive technologies. Genetic testing to determine parentage has been available for decades, and has begun to play a prominent role in legal proceedings, from assessing biological relationships for the purposes of estate disputes to governmental child support collection efforts. DNA testing allows for efficient and cost-effective testing of biological relationships in estate disputes.

While DNA testing can assist in determining or resolving legal disputes, other scientific advances in genetics are almost certain to give rise to their own unique disputes. People are increasingly taking advantage of the opportunities offered by modern science to produce children by means of artificial insemination in a host mother, or freeze their sperm, ova or embryo for use at a later date.

How will Courts in the future interpret the words "mother", "child" and "issue" in light of current legislation, where, for example, a child has three different mothers:

1. a "genetic mother" (who provides the egg and half of the genetic code);
2. a "gestational mother" (who provides the use of her uterus and gives birth to the child); and,
3. a "social mother" (who raises and cares for the child)?

Where an estate trustee must search for all existing "issue" of a deceased, what is she to make of a fertilized embryo that has been frozen for later use?

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* Partner, Whaley Estate Litigation, Toronto.

** Associate, Whaley Estate Litigation, Toronto, at the time of writing.

1. Recent Advances

(1) Freezing Gametes or Sex Cells

For quite some time now, it has been possible to obtain and freeze sperm cells. There have, however, been significant recent advances with respect to freezing a woman's unfertilized eggs. In September 2007, CTV ran a story on advances in egg-freezing technologies that could extend women's fertility. According to the story, Canadian researchers have developed a technique that could make it much easier for women who are infertile to have children.

The method, developed at Montreal's McGill University Health Centre, freezes human eggs "in the blink of an eye". While older egg preservation techniques resulted in the destruction of about half of the eggs, the new technology is able to preserve nearly all of them. The new technology uses liquid nitrogen to "fast-freeze" the eggs and prevent the damaging formation of ice crystals that occurs in slower freezing processes.

In late April of 2005, a Montreal woman who underwent the method gave birth to a boy, thought to be the first child in the country created from frozen eggs. In September 2007, 20 babies were born using frozen eggs at the McGill Health Centre.

Women are freezing their eggs for a variety of reasons: one woman was diagnosed with breast cancer, and at risk of losing her fertility from the cancer treatments; another was close to forty and wanted to have the option of having children later.

(2) Gestational Surrogacy

Gestational surrogacy is not a particularly new phenomenon. A gestational surrogate has an embryo inserted into her uterus following in vitro fertilization ("IVF"). The embryo is produced with the egg and sperm of the commissioning couple, or in some cases, donated gametes. The surrogate provides only the womb for gestation and makes no genetic contribution. A couple may choose to request a gestational surrogate where a woman has no uterus or is unable to carry a pregnancy to term.

(3) Genetic Surrogacy

There are different types of surrogacy and of surrogacy arrangements. The surrogate may be artificially inseminated with the sperm of the commissioning father and will become the genetic

mother, hence the genetic surrogate. Success rates of pregnancy are generally higher for artificial insemination than for IVF, and therefore by extension genetic surrogacy is generally more successful than gestational surrogacy.

Surrogacy can also be referred to as a pre-conception arrangement, or contract motherhood, and is one of the more ethically volatile categories of the new reproductive technologies. Although this practice is not as common in Canada as it is in the United States, a number of Canadian fertility clinics have offered the service. The surrogate arrangement may or may not involve the use of a broker, or lawyer, with accompanying fees.

Women who are unable to overcome their infertility through other new reproductive technologies may opt for use of a gestational or genetic surrogate in order to obtain an infant. Some medical conditions - such as diabetes, heart problems or severe high blood pressure - may also prevent an otherwise fertile woman from carrying a baby to term. However, most people have heard accounts of surrogates being commissioned simply because the commissioning couple does not wish to submit to the months of pregnancy and labour of delivery. There is little, if any, existing documentation on which to estimate the proportion of each of these, or other, reasons for using reproductive technologies.

According to the US Centre of Disease Control, 134,260 assisted reproductive procedures were performed in the U.S. in 2005 alone, resulting in 38,910 live births (deliveries of one or more living infants) and 52,041 infants.[1]

2. Questions Raised by these Recent Advances in the Estates Context

A large number of estates-related issues are raised by these developments. For example, where a deceased has frozen his or her sperm or eggs, to whom does this property devolve upon death? A clinic will generally obtain a man's consent to the disposition of his frozen sperm in the event of his death. It has been argued that since there is no property interest in the body, gifts of frozen genetic material are technically not included in gifts of one's residuary estate and may not be made by specific bequest. Under this interpretation, the right to use frozen genetic material would be a question of contract law.[2]

1. Department of Health and Human Services, Centers for Disease Control and Prevention, 2005 Assisted Reproductive Technology (ART) Report, <http://www.cdc.gov/art/ART2005/index.htm>.

However, there have been several US cases where the ownership interest in a testator's sperm after death was raised as an issue. In *Hecht v. Superior Court*,[3] a California court held that sperm is still uniquely the donor's cell (in other words, the donor's property) and as such should devolve by will.[4]

Ontario law may treat this question differently, since the body of a testator is not treated as property that devolves by will. Rather, it is arguably the executor, or estate trustee, who has the authority to make decisions regarding the body of a deceased person. In the Ontario Superior Court of Justice case of *Sopinka (Litigation Guardian of) v. Sopinka*,[5] the Quinn J. clarified the law in determining that it is definitively the executor of an estate who has the authority to dispose of the body of a deceased, the remains of a deceased, including cremated ashes.[6] This duty includes a right of possession of the body for the purposes of disposition. More recently, in *Bedont Estate (Re)*,[7] Gordon J. of the Ontario Superior Court held that burial was the responsibility of the estate trustees.

Such right of possession exists against even the wishes of the surviving spouse of a deceased.[8]

The rights of the personal representative in respect of burial continue after burial, otherwise those "who oppose the executor [would] disinter the body as soon as it was buried".[9] The duty to dispose of the remains of a deceased person is circumscribed by the obligation to do so in a dignified manner.[10] This duty also includes disposal in a manner befitting of the deceased's station in life,[11] and in a manner suitable to the estate of the deceased.[12]

2. See Joshua S. Rubenstein, "Life after Death" (2007), *STEP Journal*, April 2007, for an exposition of this argument.
3. 16 Cal. App. 4th 836 (1993), 59 Cal. Reptr. 2d 222 (Cal. CT. App 1996).
4. Sherry Levitan, "Party of Five: Legal Issues of Assisted Reproduction" in the materials for the Law Society of Upper Canada's Seventh Annual Estates and Trusts Law Summit, December 1 and 2, 2004, at p. 9a-13 to 9a-14.
5. (2001), 55 O.R. (3d) 529, 42 E.T.R. (2d) 105 (S.C.J.).
6. Kimberly A. Whaley, "The use of DNA testing in Contested Estates Matters" (2004), 23 E.T.P.J. 140 at para. 7, pp. 143-44.
7. (2004), 9 E.T.R. (3d) 59 (Ont. S.C.J.).
8. *Hunter v. Hunter* (1930), 65 O.L.R. 586, [1930] 4 D.L.R. 255 (H.C.J.), at p. 596.
9. *Waldman v. Melville (City)* (1990), 65 D.L.R. (4th) 154, 36 E.T.R. 172, [1990] 2 W.W.R. 54 (Sask. Q.B.), at para. 2.
10. *Abeziz v. Harris Estate* (1992), 34 A.C.W.S. (3d) 360, [1992] O.J. No. 1271 (QL) (Ct. (Gen. Div.)), at para. 22; *Saleh v. Reichert* (1993), 104 D.L.R. (4th) 384, 50 E.T.R. 143, 41 A.C.W.S. (3d) 227 (Ont. Ct. (Gen. Div.)).
11. *Tzedeck v. McIntyre Estate*, [1952] 4 D.L.R. 529, [1953] 1 S.C.R. 31, [1952] S.C.J. No. 46 (QL).
12. *Williams v. Williams*, [1881-5] All E.R. Rep. 840, 20 Ch. D. 659, at p. 664.

There have been several cases in the U.S. dealing with ownership or custody of frozen embryos. For example, in *Davis v. Davis*,[13] the issue was raised as to whether frozen embryos were property or children and, consequently, whether the question was one of ownership or custody. The court refused to decide the larger question, and instead decided the particular case in favour of the ex-husband's interests, finding that his interest in not becoming a parent outweighed the ex-wife's interest, because she sought to donate the embryos to another couple.[14] It is unclear whether the outcome would have been different if the ex-wife had intended instead to use the embryos herself.

Similar issues have not yet arisen in Canadian courts, but are sure to arise in the near future.

As the procedure of freezing genetic material becomes more common, the legislature may be forced to turn its mind to the question of the testamentary disposition, or disposition on intestacy, of frozen sperm and ova.

The question of inheritance by posthumously conceived individuals also arises. Most jurisdictions have well-established law with respect to the rights of inheritance of individuals conceived prior to but born after death. For example, the *Succession Law Reform Act*[15] (*SLRA*) provides in s. 47(9) that 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.

Where implantation occurs after the donor's death, however, the law is less clear. Usually one of two approaches is taken: either the individual born of implantation after death has no inheritance rights, or a short grace period, usually two years after death, is allowed for inclusion of these individuals. Since the *SLRA* only includes those conceived *before* death, the law of Ontario does not currently recognize implementation of a gamete even shortly after death. The question of proof in this area could be a complicated one.

Furthermore, it is unclear how the law would treat frozen embryos, that is, already fertilized eggs. This will depend on how the word "conceived" in the *SLRA* will be interpreted. If fertilization is treated as equivalent to conception, then such embryo would qualify as "conceived before death" for the purposes of the Act, even if they were implanted much later.

This possibility would of course raise great difficulties in terms of the ability of an executor to determine the eligible descendants at the

13. 842 S.W. 2d 588 (Tenn. 1992).
14. Levitan, *op. cit.*, footnote 4, at p. 9a-14.
15. *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

time of death. Likely, the legislature will have to intervene to re-establish certainty as to the determination of heirs for the purposes of distributing the estate.

The question of who qualifies to make a dependant's relief claim against the estate of a deceased person is also complicated by new developments.

3. Where the Law Stands

(1) Intestacy

The *SLRA* currently defines entitlement to an estate on an intestacy by reference to "issue". Issue is defined under the *SLRA* to include "a descendant conceived before and born alive after the person's death". The word "descendant" is not a defined term under the *SLRA*.

> 47(1) Subject to subsection (2), 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.
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> 47(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.

The courts will therefore have to determine how "descendant" is to be interpreted and whether it is to include relationships non-traditionally conceived. The Oxford dictionary defines "descendant" as a "blood relative of (an ancestor)". As such, there is certainly room for courts to include as "descendants" those born of frozen gametes, or of surrogates, where the "ancestor's" sperm or ovum is used.

(2) Paternity, Maternity, and Parentage Presumptions and DNA testing

The common law presumptions of paternity have been codified in Ontario's *Children's Law Reform Act*,[16] (*CLRA*).

Section 1(1) of the *CLRA* provides that, except in the case of legal

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

adoption, "for all purposes of the law of Ontario a person is the child of his or her *natural parents* and his or her status as their child is independent of whether the child is born within or outside marriage" [emphasis added]. The exception is in cases of adoption where s. 1(2) of the *CLRA* applies, providing that the adopted "child is the child of the adopting parents as if they were the natural parents" once the child has been adopted.

Once a child has been adopted, the adopted child is no longer a child of his or her natural parents but a child of the adopting parents.[17]

In particular, s. 158(1) of the *CFSA* defines an "adopted child" as a person who is adopted in Ontario and, in accordance with s. 158(2)(a), as of the date of the making of an adoption order, the adopted child becomes the child of the adoptive parents and the adoptive parent becomes a parent of the adopted child; and the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is a spouse of the adoptive parent. Of particular importance where dealing with matters involving a child who may have been a natural child of a particular parent or parents, but is then subsequently adopted is s. 158(4) of the *CFSA* which states:

> 158(4) In any will or other document made at any time before or after the 1st day of November, 1985, and whether the maker of the will or document is alive on that day or not, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be deemed to refer to or include, as the case may be, a person who comes within the description as a result of an adoption, unless the contrary is expressed.

Section 158(5) of the *CFSA* clarifies that any interest in property or right of the adopted child that has indefeasibly vested before the date of the making of an adoption order, or that vested before the first day of November, 1985, is not adversely affected by the application of the *CFSA*.

Section 1(4) of the *CLRA* abolishes the distinction of legitimacy:

> 1(4) Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section.

17. *Child and Family Services Act*, R.S.O. 1990, c. C.11 (*CFSA*), as amended, ss. 157-159.

The rules of construction in the *CLRA* mandate that a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship or parent and child as determined under s. 1.[18]

How is the term "natural parents" in the *CLRA* to be interpreted in light of recent reproductive advances?

The *CLRA* provides for certain presumptions whereby a male person can be recognized in law to be the father of a child. Section 8(1) of the *CLRA* provides as follows:

> 8(1) Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child in any one of the following circumstances:
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> 1. The person is married to the mother of the child at the time of the birth of the child.
> 2. The person was married to the mother of the child by a marriage that was terminated by death or judgment of nullity within 300 days before the birth of the child or by divorce where the decree *nisi* was granted within 300 days before the birth of the child.
> 3. The person marries the mother of the child after the birth of the child and acknowledges that he is the natural father.
> 4. The person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child is born within 300 days after they ceased to cohabit.
> 5. The person has certified the child's birth, as the child's father, under the *Vital Statistics Act* or a similar Act in another jurisdiction in Canada.[19]
> 6. The person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child.

The *CLRA*[20] also provides that in the case of conflicting presumptions, no presumption shall be made as to paternity and no person is recognized in law to be the father. However, ss. 4 and 5 of the *CLRA* provide for an application process to obtain a declaration of paternity[21] recognized at law, or a declaration of maternity[22]

18. *CLRA*, s. 2(1) and (2).
19. *Vital Statistics Act*, R.S.O. 1990, c. V.4.
20. *CLRA*, s. 8(3).
21. *CLRA*, s. 4(2).
22. *CLRA*, s. 4(3).

recognized at law, and a process for any person to apply to the court for a declaration that a male person is his or her father or for any male person to apply to the court for a declaration that a person is his child.[23]

However, s. 5(2) of the *CLRA* provides that unless both the persons whose relationship is sought to be established are living, no application shall be made under s. 5(1).

In other words, a declaration of paternity cannot be made under s. 5 of the *CLRA* unless both the persons whose relationship is sought to be established are living. This is a significant limitation imposed on the court in dealing with a deceased person and a deceased person's estate.

Section 5(3) of the *CLRA* provides:

> 5(3) Where the court finds on the balance of probabilities that the relationship of father and child has been established, the court may make a declaratory order to that effect and, subject to sections 6 and 7, the order shall be recognized for all purposes.

The *CLRA*[24] also permits a person to file a statutory declaration affirming that he or she is the mother or father of a child and the filing of a joint declaration of parentage by both a mother and a father of a child.

Given modern advances which permit a child's genetic paternity to be determined to a degree of certainty greater than a 99.9%, the usefulness of applying the presumptions is open to debate.

Under the *CLRA*,[25] the court may grant leave to a party to obtain blood tests and, by inference DNA tests, where parentage is in dispute.

There are a number of cases in which the court has taken advantage of this legislative provision to order DNA tests.[26]

The common law and the legislative presumptions under the *CLRA* give rise to some surprising and seemingly inconsistent results when applied to various situations that may arise when recent reproductive technology is used. Where the couple is married or cohabitating, and the female and male undergo IVF using their own gametes, and the child is carried by the genetic/intended mother, the female is the child's mother and the male the child's father. Where the

23. *CLRA*, s. 5(1).
24. *CLRA*, s. 12.
25. *CLRA*, s. 10.
26. See, for example, *Family and Children's Service of Waterloo Region v. D. (B.)* (2002), 37 R.F.L. (5th) 36, 120 A.C.W.S. (3d) 451 (Ont. S.C.J.); *Children's Aid Society of Brant v. H. (H.)* (2007), 45 R.F.L. (6th) 457, 2007 ONCJ 477, [2007] O.J. No. 4083 (QL).

female and male undergo IVF using her eggs and donor sperm, and the child is carried by the genetic/intended mother, the female is the child's mother, and the male (and not the donor) is the child's father. In order to sever the bond entirely between the child and the male donor, the intended father in such a case may wish to adopt the child. Where the female and male use a donor egg and the male's sperm, the female (and not the donor) is the child's mother and the male is the child's father. Where the female and the male undergo IVF using a donor embryo, the female is the child's mother and the male the child's father. In this case, neither of the genetic parents is an intended parent, but only the intended parents are presumed to be the mother and father of the child. In such a case, post-birth adoption is an option, but is rarely done since the birth mother would also be the adoptive mother. Where the female and male undergo IVF using their own gametes, and the embryo is transferred to a gestational surrogate, the gestational surrogate is presumed to be the mother and her husband or common law partner is presumed to be the father. DNA tests may reverse the presumption of paternity and the intended parents may apply for a declaration of parentage under s. 12 of the *CLRA*, or make application for stepparent adoption to achieve the intended outcome. The same legal scenario applies in considering the common law presumption of parentage to the reproductive technology on certain assumptions, whether either donor sperm, or eggs, or both, are used.[27]

Since the legislative presumption of parentage is in favour of the birth mother and her husband or common law partner, what happens if the birth mother changes her mind upon the birth of the child and wishes to keep the child herself? Alternatively, could an egg or sperm donor claim parentage of her or his child after birth?

Many intended parents, who make use of a surrogate to produce a child, enter into agreements that make the intentions of all parties clear. This is recommended, yet likely not always achieved, allowing for these issues to potentially be rectified later. Even more problems arise where there is no legislative regime in place. These agreements can later be used as evidence of pre-conception intent. Such agreements may include a Sperm Donation Agreement, an Ovum Donation Agreement, an Embryo Donation Agreement or a Gestational Carrier Agreement.

27. See Table of Parentage in Levitan, *op. cit.*, footnote 4, at p. 9a-9, applying the common law presumptions of parentage.

(3) Will Interpretation

Common law vesting rules also come into play where gametes or embryos are cryopreserved and the meaning of "children" or "issue" must be interpreted for the purpose of construing a will. Take for example a case in which a testator makes a bequest of the residue of his estate to all the children of his son. Where the son has cryopreserved his sperm with instructions that they may be used by any woman, the class of all of the children of the testator's son would remain indefinitely open. The so-called "rule of convenience" and the *Perpetuities Act*[28] would be relevant to such a scenario.

The "rule of convenience" in *Feeney's Canadian Law of Wills*[29] provides as follows:

> Where the context and circumstances of a case leave the time for ascertaining the members of a class uncertain, the court likely will rely upon certain rules of construction for distribution of both real and personal property. They have a common basis in that they are founded on a presumption that only persons in being are intended to take, and thus serve the interest of the living donees. What is more important is that these rules facilitate the administration of the estate. For this reason, they are known collectively as the rule of convenience.

Where there are existing members of a class, at the testator's death, they take under the will to the exclusion of all after-born members. However, if at the time of the testator's death, there are no members of the class, the class stays open for all members born at any time in the future.[30]

Since the *Perpetuities Act*[31] provides that every interest in property must vest not later than 21 years after the death of the last life in being at the time the interest was created, and "in being" is defined in s. 1 as "living or conceived", it is unclear whether embryos would count as a life "in being" so as to defy the limits imposed by the Act.

(4) Dependant's Support in accordance with the *SLRA*

Since the *SLRA* includes in the definition of "dependant", the social definition of "a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family",[32] modern

28. *Perpetuities Act*, R.S.O. 1990, c. P.9.
29. James A. MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed. looseleaf (Toronto: LexisNexis, 2000), at p. 14.9.
30. See Barry Corbin, "Cryopreservation & Surrogacy: Implications for the Estate Practitioner" (presented at the Seventh Annual Estates and Trusts Law Summit, Law Society of Upper Canada, December 1-2, 2004), at p. 9b.
31. *Supra*, footnote 28, at s. 6.

reproductive advances are less disruptive here. The entitlement to dependant support is based on the social relationship, as defined in the *SLRA*, between individuals as opposed to a biological or genetic one. The *Family Law Act*[33] (*FLA*) provides that support obligations existing prior to death bind the estate.

What remains unclear with respect to the question of dependant support is whether a person, who is connected to an individual only by reason of genetic material, or surrogacy, may make a claim against the estate of her genetic parent or surrogate. For example, where a minor child is the product of the deceased's egg, but was raised by another intended mother, does he or she have a claim against the egg donor's estate for dependant support?

In the 1983 Ontario Surrogate Court case of *Ruby (Re)*,[34] Haley J. gave a detailed review of the court's powers in an estate matter concerning a dependent's support claim and the application of the interacting statutes, the *CLRA*, the *FLA*, the *CFSA*, and the *SLRA*.

In *Ruby*, it was argued that the *CLRA* ousted the jurisdiction of the court to determine parentage in any other proceeding. Under s. 8 of that Act, where there is no presumption of parenthood, a declaration of parentage under s. 5 could be made only by the Supreme Court of Ontario (as it was then known), and then (by s. 5(2) of the *CLRA*) only where both persons whose relationship is sought to be established are living. Haley J. asserted that s. 5(2) of the *CLRA* was a declaration of public policy to the effect that no parentage inquiry should be undertaken when one party is dead. She further asserted that it could not have been the legislature's intention that such a principle apply to matters under the *SLRA*. While acknowledging that the *FLA*, the *CLRA*, and the *SLRA* were enacted in the same period as part of the general reform of legislation for support matters, Haley J. saw no basis for finding that there were any overriding policy principles that should apply to all three statutes, regardless of the specific wording of the individual Act.[35]

Quebec, Newfoundland and Labrador, and the Yukon have legislation that specifically addresses this question. For example, the *Civil Code of Quebec*[36] provides that "the contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and child born of

32. *SLRA*, s. 57.
33. *Family Law Act*, R.S.O. 1990, c. F.3.
34. (1983), 43 O.R. (2d) 277 (Surr. Ct.).
35. For further analysis of this case, see Whaley, *op. cit.*, footnote 6, at pp. 146-47.
36. *Civil Code of Quebec*, S.Q. 1991, c. 64.

the parental project." The legislation of Newfoundland and Labrador and the Yukon are to the same effect.[37]

Ontario has no such legislation.

4. Recent Cases

In the last couple of years, there have been a number of cases that have interpreted existing legislation liberally to adapt to modern social and scientific advances in the estates law context.[38]

Recently, the Nova Scotia Court of Appeal released a precedent-setting estates law decision in *Miller v. Staples Estate*.[39] In that case, a woman claimed that she was the daughter of a man who had died intestate. On that basis, she was claiming entitlement to half of his $700,000 estate. The court ordered a DNA test to verify the woman's claim. The DNA test was ordered under r. 22.01 of *Nova Scotia Civil Procedure Rules* which provides for a medical examination when "the physical or mental condition of a party" is in issue.

The court held that in cases where there is a "clear factual foundation or some plausible evidence" that a claimant may not be a biological descendant of someone who dies intestate, it is appropriate to order a DNA test. Roscoe J., speaking for the court reasoned as follows:

> DNA profiling is such a highly reliable method of determining parentage that the interests of justice will generally best be served by obtaining the evidence so that the truth may be ascertained in an efficient and effective manner. The objects of the Rules as defined in Rule 1.03 would thereby be enhanced. In this case to require a trial to determine the right of Ms. Hanes to inherit without DNA evidence means the ultimate decision would be based on 40 year old hearsay, evidence of declarations against interest and the ancient presumption of legitimacy, instead of the near 100% accurate, advanced, science of genetics.[40]

This case represents a significant step forward in terms of the court's increased and demonstrated willingness to accept DNA evidence in the determination of estates disputes even in the face of long-standing legal presumptions. It sends a strong message that the courts may now be more willing to exercise their discretion to obtain the best possible evidence. While this is a Nova Scotia case and is not binding in Ontario, it does have strong persuasive value and will likely prove compelling to Ontario courts.

37. See Corbin, *op. cit.*, footnote 30.
38. See Whaley, *op. cit.*, footnote 6, at pp. 147-155.
39. (2006), 278 D.L.R. (4th) 535, 28 E.T.R. (3d) 161, 250 N.S.R. (2d) 72 (C.A.).
40. *Miller*, *supra*, footnote 39, at para. 32.

The equivalent applicable Ontario legislation can be found in the *Courts of Justice Act*:[41]

> Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Rule 33 of the Ontario *Rules of Civil Procedure*[42] regarding medical examinations of parties serves as a supplement to s. 105 of the *Courts of Justice Act*,[43] empowering the court to order physical or mental examination of any party whose physical or mental condition is in question in any proceeding. Accordingly, this includes all civil proceedings.

Consideration should be given to the parameters of r. 33.01 through r. 33.08.[44]

In the recent case of *Montgomery Estate v. Miller*,[45] the Ontario Superior Court was faced with an application by the executor of an estate for the advice of the court concerning the definition of "children". The facts of the case were as follows. The deceased died in 2005. The residue of her estate was to be divided among her late husband's nieces and nephews. One of the nephews, L, predeceased the deceased. The executor wanted to know whether or not "children" in the Will was to be interpreted as including L's stepchildren. L did not adopt the two children after his marriage but had always treated them and referred to them as his children. The two children were always included in family gatherings and included in every way in the family.

Morin J. held in that case that the definition of "children" included the stepchildren. In every sense of the word, the children had enjoyed a relationship with the deceased and her husband of grandparents to grandchildren. On that basis, it was inconceivable that the deceased had intended to exclude the stepchildren from the benefits of her residuary clause in the event that L predeceased her.

Another case that, although not directly addressing estates issues, is likely to have implications in the estates law context, is the 2007 decision of the Ontario Court of Appeal in *A. (A.) v. B. (B.)*.[46] That case involved a female same-sex couple, A.A. and C.C., who were in a

41. *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, s. 105(2).
42. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.
43. *Supra*, footnote 41.
44. *Supra*, footnote 42.
45. (2006), 24 E.T.R. (3d) 138, 149 A.C.W.S. (3d) 174, [2006] O.J. No. 2214 (QL) (S.C.J.).
46. (2007), 278 D.L.R. (4th) 519, 83 O.R. (3d) 561, 220 O.A.C. 115 (C.A.), leave to appeal to S.C.C. refused 285 D.L.R. (4th) 255, [2007] 3 S.C.R. 124 *sub*

stable long-term relationship and decided to have a child. To this end, C.C., asked her male friend, B.B., to be the biological father of D.D. B.B. played a role in the child's life, but the two women were his primary providers and caregivers. The child referred to A.A. and C.C. as his mothers.

At trial, the trial judge found that he did not have jurisdiction to make an order under the *CLRA* or through the exercise of court's inherent *parens patriae* jurisdiction. The trial judge therefore dismissed the application. On appeal, the Court of Appeal allowed the appeal and issued a declaration that A.A. was a mother of the child. The court made this order on the basis of its *parens patriae* jurisdiction after finding that it was contrary to the child's best interests to be deprived of legal recognition of parentage of one of his mothers. The Court of Appeal however agreed with the trial judge that the *CLRA* contemplates only one mother and one father of a child and that since there was no ambiguity in the statute, it was not open to the court to use the *Canadian Charter of Rights and Freedoms*[47] values to interpret this legislation. The court, however, found that advances in the appreciation of the value of other types of relationships and in the science of reproductive technology had created gaps in the *CLRA*'s legislative scheme which did not allow the court to make the declaration sought. There was no other way to fill the deficiency except through the exercise of court's *parens patriae* jurisdiction. A.A. and C.C. could not apply for an adoption order without depriving the child of the parentage of B.B., which would not be in the child's best interests. There were always three parents of D.D. It was the opinion of the court that this legislative gap was not deliberate; there was nothing in the history of the *CLRA* to suggest that the legislature had made a deliberate policy choice to exclude children of lesbian mothers from advantages of equality of status.

Rosenberg J.A. viewed the nature of the court's inherent jurisdiction as being much broader and more discretionary than Aston J. did. In the opinion of Rosenberg J. A.:

> Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The *CLRA*, however, does not recognize these forms of parenting and thus the children of these

nom. Alliance for Marriage and Family v. A. (A.), 231 O.A.C. 395 *sub nom. A.A. v. B.B.*.

47. *The Constitution Act, 1982*, Part I.

> relationships are deprived of the equality of status that declarations of parentage provide.[48]

The Alliance for Marriage and Family, a coalition of five organizations which support traditional forms of marriage and family, appealed to the Supreme Court of Canada and sought to be added as a party under R. 18(5) of the *Rules of the Supreme Court of Canada*.[49] LeBel J., for the court, dismissed the application without costs on the basis that the applicant did not have standing to ask for leave to appeal.

The decision in this case is likely to have consequences for future estates law disputes. For example, as indicated above,[50] the *CFSA* provides that for the purposes of a will or other document, a reference to a person described in terms of relationship by blood shall be deemed to include a person who comes within the description as a result of an adoption, unless the contrary is expressed. Consequently, the acknowledgment of A.A. as another parent of the child would mean that the child would qualify to inherit on an intestacy from A.A., B.B. and C.C.

The cases above all suggest that the courts may well be increasingly receptive to changes in norms and science with respect to their implications for estates issues. There remains, however, a risk of inconsistent case law without legislative reform.

5. Legislative Change

The *Assisted Human Reproduction Act*[51] was proclaimed in part on April 22, 2004, and notice of proclamation was published on May 5, 2004. The Act sets out a list of prohibited activities relating to the purchase of donor gametes, and the payment of compensation to surrogates. Reasonable costs incurred in the course of the donation or surrogacy may, however, be legally reimbursed. The Act does not speak to the issue of establishing parentage of children born with the assistance of reproduction technology.

If Ontario decides to embark upon the process of legislative change where reproductive technologies or genetic testing are concerned, the process will likely be a slow one. The Report of the Royal Commission on New Reproductive Technologies was released in 1993. In 1996, the Advisory Committee on Reproductive and Genetic Technologies was established to advise Health Canada on

48. *A. (A.) v. B. (B.)*, *supra*, footnote 46, at para. 35 (C.A.).
49. *Rules of the Supreme Court of Canada*, SOR/2002-156, R. 18(5).
50. See footnote 18.
51. *Assisted Human Reproduction Act*, S.C. 2004, c. 2.

moratorium compliance and other developments. In the same year, Bill C-47, the *Human Reproductive and Genetic Technologies Act*, was introduced to prohibit unacceptable reproductive and genetic technology practices including the commercialization of gametes and embryos, surrogacy, cloning, non-medical sex selection, maintenance of embryos outside the womb, post-mortem retrieval of gametes, embryo transfer between human and other animals, research on gametes or embryos without donor consent, *etc*. It was not until 2004 that the *Assisted Human Reproduction Act* received Royal Assent.

6. Conclusions

The aim of this paper has been to raise for consideration some of the issues that will be faced in estates law in light of modern scientific advances. The law, as it stands, especially in Ontario, is ill-equipped to address these issues.

As long ago as 1985, the Attorney General for Ontario requested an inquiry into legal issues relating to the practice of human artificial insemination, including "surrogate mothering" and transplantation of fertilized ova to a third party.[52]

The resulting 1985 Report addressed a number of issues raised in this paper. For example, the Report considered the rights of a child conceived from cyropreserved sperm after the father's death and concluded in favour of full inheritance rights for the child except where the estate has already been distributed. Similarly, the Report recommended that the distribution of an estate should not be postponed simply because sperm is held in cryopreservation.

The Report, was, however, not acted upon.

Perhaps it is time for Ontario to revisit some of these questions. Otherwise, the courts will have little guidance in the treatment of these questions as they arise. The risk is that haphazard and inconsistent case law will result, providing no certainty for practitioners and the public.

52. Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, (Toronto: The Commission, 1985), vol. 1, p. 1.