# ESTATES TRUSTS & PENSIONS JOURNAL

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## FROM THE LEGISLATURES

# Posthumously-Conceived Children Born in Ontario: What are Their Rights and What do Estate Trustees Need to Know?

## CONTENTS

## PART I: INTRODUCTION

The laws of parentage and succession have drastically evolved in Ontario over the last few years. When these laws first took shape, certain familial and reproductive means such as posthumous (after death) conception, surrogacy (gestational and traditional), gamete (sex cell) and embryo donation, and multi-parent families (including same-sex families) were considered radical notions. Despite seismic ideological shifts, those concepts were still considered progressive in Ontario prior to September 29, 2016, the date when Bill 28, *All Families are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016* was first read and carried in its Legislative Assembly.

On January 1, 2017, the *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016*[1] (the "*AFAEA*") came into force and effect. The *AFAEA* amended several laws in respect of parentage and succession in Ontario, including: the *Children's Law Reform Act*[2] ("*CLRA*"), the *Vital Statistics Act*[3] ("*VSA*"), and the *Succession Law Reform Act*[4] ("*SLRA*").

The impact of the *AFAEA* upon the laws of parentage and succession in Ontario is addressed within, and so too are the legislative requirements for using assisted reproductive technology ("ART") to conceive a child posthumously. Also addressed are the rights of children posthumously-conceived and born in Ontario. Lastly, various issues that estate trustees must consider in light of a possible claim for dependant support under the *SLRA* on behalf of a posthumously-conceived child are set out herein.[5]

1. S.O. 2016, c. 23 – Bill 28.
2. R.S.O. 1990, c. C.12.
3. R.S.O. 1990, c. V.4.
4. R.S.O. 1990, c. S.26.
5. This paper is not written for the purposes of providing legal advice but to bring various evolving issues under the law to light. The list of issues as set out herein is not exhaustive.

## PART II: BACKGROUND OF THE LAWS OF PARENTAGE AND SUCCESSION IN ONTARIO

The laws of parentage and succession are inseparable in Ontario. In the decision of *A. (A.) v. B. (B.)*,[6] the Ontario Court of Appeal explained that a declaration of parentage determines lineage and ensures that the child will inherit upon an intestacy of his or her parent.[7]

### 1. Overview of the Laws of Parentage

Previously, a person was a parent of a child in accordance with those provisions of the *CLRA*, *VSA*, and *Child Youth and Family Services Act*.[8] This tripartite legislation regulated parentage by biological or gestational connection and adoption orders. The legislation, however, failed to provide for children born by use of ART who were not biologically connected, carried to term or adopted by their intended parent(s). This legislative gap began to be remedied due to the resolution of *Grand v. Ontario (Attorney General)*,[9] and ultimately the enactment of the *AFAEA*.

In *Grand*, an application was commenced challenging the constitutionality of certain provisions of the *CLRA* and *VSA*, including those dealing with the definition of parentage. As a result of minutes of settlement signed between the parties, the Attorney General of Ontario acknowledged that those laws failed to "provide equal recognition and equal benefit and protection of the law to all children, without regard to their parents' sexual orientation, gender identity, use of assisted reproduction or family composition."[10] Consequently, a declaration was made on consent that those parts of the *CLRA* and *VSA* respecting parentage were unconstitutional and of no force and effect, in light of s. 15 of the *Canadian Charter of Rights and Freedoms*,[11] and because those laws could not be justified in a free and democratic society under s. 1 of the *Charter*.

6. (2007), 83 O.R. (3d) 561, 2007 ONCA 2 (Ont. C.A.).
7. *A. (A.) v. B. (B.)*, *supra*, footnote 6, at para. 14.
8. *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1.
9. 2016 CarswellOnt 8390, 2016 ONSC 3434 (Ont. S.C.J.).
10. *Grand*, *supra*, footnote 9, at para. 48.
11. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).

### 2. Overview of the Laws of Succession

In Ontario, the laws of testate (with a will) and intestate (without a will) succession are provided for in the *SLRA*. Although the common law provides for paramount testamentary freedom, subject to the discretion of public policy, the *SLRA* constrains that principle by requiring a deceased, whether testate or intestate, to at least make "adequate provisions for the proper support" of his or her dependants.[12]

The laws of parentage in Ontario are necessary to determine who is entitled to benefit from the assets of an estate of a deceased, whether testate or intestate, or upon an application for dependant support. In respect of testate succession, the definitions of "child" and "issue" are necessary to determine who benefits from class gifts and lapsed gifts in wills. In respect of intestate succession, determining who falls within the definitions of "child" and "issue" in the *SLRA* is paramount. Finally, a dependant "child" of a deceased has automatic standing under the *SLRA* to make an application for dependant support, if adequate provisions for their proper support were not made.

## PART III: AMENDMENTS TO THE LAWS OF PARENTAGE AND SUCCESSION IN ONTARIO BY THE *AFAEA*

### 1. Amendments to the Laws of Parentage by the *AFAEA*

Arising from the decision in *Grand*, the Ontario Legislature enacted the *AFAEA* to amend those parts of the *CLRA* and *VSA* with respect to parentage. The *AFAEA* provides for the increased use of ART for family building and multi-parent family units. ART is commonly used for purposes such as the collection and storage of gametes, the creation and storage of embryos, and *in vitro* fertilization ("IVF"). The use of ART is federally regulated by the *Assisted Human Reproduction Act, 2004*[13] and its regulations. The *AHRA* includes criminal offences, which upon conviction or indictment carry penalties including fines or imprisonment.

The focus of parentage in Ontario has shifted to a pre-conception intention to parent, rather than genetics or carriage

12. *SLRA*, s. 58(1).
13. S.C. 2004, c. 2 ("*AHRA*").

of a child. Consequently, the *AFAEA* includes a presumptive exclusion that a person who provides reproductive material or an embryo to conceive a child, or carries a child to term, is no longer a parent if certain legislative criteria are met. This new legislative regime affords the rights and responsibilities of parentage to those persons who had a pre-conception intention to parent, even upon their death, which includes the obligation to make adequate support for those children born by alternative means.

### 2. Amendments to the Laws of Succession by the *AFAEA*

The *AFAEA* expanded the scope of who qualifies as a "child", "issue" and "dependant" under the *SLRA*. These amendments significantly impact estate planning since those classes now include persons born by way of ART who are not biologically connected, carried to term, adopted, and posthumously born and/or posthumously-conceived to their intended parent(s).

Additionally, the previous legislative scheme of parentage in Ontario exposed the assets of the estates of known gamete and embryo donors and surrogates (gestational or traditional) to satisfy claims for dependant support orders by children born by such means, as those persons were presumptively parents at law without a declaration of non-parentage. The potential of such claims increased particularly due to the rising use of DNA evidence in estate litigation matters.[14]

Notably, the *AFAEA* amended the *SLRA* to provide for rights to children conceived and/or born in Ontario after the death of their intended parent(s). Those children are now recognized under the *SLRA* as a "child", "issue" or "dependant" if certain criteria are met. In those circumstances, posthumously-born and/or posthumously-conceived children will receive an automatic right of succession upon an intestacy, standing to benefit from class gifts and lapsed gifts in wills, and standing to bring a claim for dependant support under the *SLRA*, if adequate provisions for their proper support were not made.

14. See "Life After Death: Modern Genetics and the Estate Claim", by Kimberly A. Whaley and Helena Likwornik, *WEL Blog* (March 1, 2009).

## PART IV: RIGHTS OF POSTHUMOUSLY-CONCEIVED CHILDREN UNDER THE *SLRA*

### 1. Amendments to the Definition of "spouse" under the *SLRA* by the *AFAEA*

The definition of "spouse" is necessary for determining the rights of succession for a posthumously-conceived child, because only those children born to a surviving spouse of a deceased may benefit under the provisions of the *SLRA*.[15]

The definition of "spouse" in the *SLRA*, except for Part V, now has the same meaning as in s. 1 of the *Family Law Act*.[16] As such, a "spouse" means either of two persons who:[17]

(a) are married to each other, or
(b) have together entered into a marriage that is voidable or void in good faith.

In Part V of the *SLRA*, "spouse" has the same meaning as in s. 29 of the *FLA*, which includes persons who are not married to each other and have cohabitated for a period of not less than three years.[18]

### 2. Amendments to the Definition of "child", "issue" and "dependant" under the *SLRA* by the *AFAEA*

Section 71(1) of the *AFAEA* amended the definition of "child" and "issue" in s. 1(1) of the *SLRA*. Under the *SLRA*, the definition of "child" now includes:[19]

(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[.]

The definition of "issue" now includes:

15. *SLRA*, s. 1.1(1).
16. *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*").
17. *SLRA*, s. 1(1).
18. *SLRA*, s. 57(1); *FLA*, s. 29.
19. *SLRA*, s. 1(1), emphasis added.

(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[.][20]

The new definition of "child" has the same definition under Part V of the *SLRA* in respect of applications for dependants' support. The definition in Part V of the *SLRA* for "child" also includes "a grandchild and a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody."[21]

### 3. Distinction in the *SLRA* between Children Conceived but Unborn before Death and Children Posthumously-Conceived and Born Alive after Death

The *AFAEA* amended the *SLRA* to include a clear distinction between the definitions of a "child" and "issue" either conceived but unborn before death (*e.g.*, conceived before but born alive after a parent or person's death), or posthumously-conceived (*e.g.*, conceived and born alive after a parent or person's death).

In the context of a "child", the former scenario in which a child is conceived but unborn before the death of a parent is most easily discernible: a parent dies before the birth of their child but after conception, whether such child was conceived through ART and with or without a surrogate.

The latter scenario of a child posthumously-conceived and born alive after a parent's death may be less discernible: the stored or removed genetic material of a deceased is used after death by their spouse to create an embryo for the purposes of conception through ART, with or without the use of a surrogate.

In the context of "issue", the former scenario of a descendant conceived but unborn before death is also more easily discernible. This scenario may exist when a child is conceived, but not born before his or her grandparent dies leaving a will, which provides for a class gift to the issue of his or her children in equal shares *per stirpes*. In that scenario, the descendant conceived before death but born afterwards will inherit under the deceased grandparent's will as his or her "issue". If the

20. *Ibid.*
21. *SLRA*, s. 57(1).

grandparent was intestate, the child conceived but born after his or her death shall inherit as if they had been born in the lifetime of the deceased and had survived him or her.[22]

Similarly, the second scenario of an issue posthumously-conceived and born alive after death may be less discernible. This scenario may exist when a grandparent dies, leaving a will that provides for a gift-over to the issue of his or her predeceased child in equal shares *per stirpes*. If the spouse of the predeceased child conceives and births a child after the death of the grandparent, by use of ART and with or without a surrogate, the child born by such means will inherit as "issue" of the deceased grandparent in accordance with the gift-over in his or her will. If the grandparent was intestate, the child posthumously-conceived and born after his or her death shall inherit as if a surviving issue, if the conditions in s. 1.1(1) of the *SLRA* are met.[23] The right of the child to inherit begins on the day he or she is born.[24]

## 4. Applications for Dependant Support by Posthumously-Conceived Children under the *SLRA*

Part V of the SLRA governs support orders for dependants of a deceased. An application for dependant support is a two-step process.

First, an applicant must have standing under the *SLRA* to make an application for dependant support. To qualify as a "dependant" under Part V of the *SLRA*, an applicant must fall within one of the enumerated definitions of a dependant within s. 57(1) of the *SLRA*. The definition includes persons of a relationship as defined, and to whom the deceased was providing support or was under a legal obligation to provide support immediately prior to death.

A posthumously-conceived child automatically has standing under Part V of the *SLRA*, if the conditions of s. 1.1(1) of the *SLRA* are met, since the deceased will be deemed to have immediately before his or her death been under a legal obligation to provide support to a child conceived and born alive after death.[25]

Second, an award of support will only be made where a

22. *SLRA*, s. 47(9).
23. *SLRA*, s. 47(10).
24. *SLRA*, s. 47(11).
25. *SLRA*, s. 57(2).

deceased, whether testate or intestate, has not made "adequate provisions for the proper support" of his or her dependants.[26] This stage of the analysis is completely contextual and must be considered in light of those legal obligations of a deceased and the circumstances of the dependant as set out in the 19 factors under s. 62 of the *SLRA*, as well as the moral obligations of the deceased to provide for his or her dependants consistent with the jurisprudence.[27]

An application for dependant support should be made no later than six-months from the grant of certificate of appointment of estate trustee. After that time, an applicant must seek leave to pursue an order for dependant support as to any portion of the estate remaining undistributed at the date of the application.[28]

## PART V: CONDITIONS AND CONSENT REQUIREMENTS FOR POSTHUMOUS CONCEPTION AND THE USE OF REPRODUCTIVE MATERIALS IN ONTARIO

### 1. Conditions for Posthumous Conception under the *SLRA*

Each of the following conditions respecting a child posthumously-conceived and born alive after a parent's death apply for all purposes under the *SLRA*:[29]

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*

26. *SLRA*, s. 58(1).
27. *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 (S.C.C.), reconsideration / rehearing refused (1994), 5 E.T.R. (2d) 210 (note) (S.C.C.); *Cummings v. Cummings* (2003), 223 D.L.R. (4th) 732, 5 E.T.R. (3d) 81 (Ont. S.C.J.), affirmed 2004 CarswellOnt 99 (Ont. C.A.), leave to appeal refused 2004 CarswellOnt 2686 (S.C.C.); *Zavet v. Herzog*, 2018 ONSC 3398 (Ont. S.C.J.), additional reasons 2018 CarswellOnt 12414 (Ont. S.C.J.).
28. *SLRA*, s. 61(1)-(2).
29. *SLRA*, s. 1.1(1).

*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.

It is clear that there are numerous directives and time limits which must be met in order for a posthumously-conceived child to benefit under the provisions of the *SLRA*.

First, only a surviving "spouse" can give written notice to the estate registrar for Ontario of the intention to use reproductive material to attempt to conceive a child by use of ART, with or without a surrogate, to which the deceased intended to parent. The definition of "spouse" under Part V of the *SLRA* has the same meaning as in s. 29 of the *FLA*.

Second, notice to the estate registrar for Ontario must be provided by the surviving spouse no later than six-months after the deceased spouse's death.

Third, the posthumously-conceived child must be born no later than the third anniversary of the deceased spouse's death. Though, on a motion or application by the surviving spouse, the Ontario Superior Court of Justice may make an order extending this timeline if the court considers it appropriate to do so in the circumstances.[30] Notably, it is not yet known what the scope of an "appropriate" circumstance for the extension of this timeline will be since there is no known court decisions as yet.

Lastly, the surviving spouse must bring an application for parentage establishing the deceased spouse's parentage of the posthumously-conceived child. A declaration of parentage in accordance with s. 12(3) of the *CLRA* must be made on or before the first anniversary of the child's birth, unless the court orders otherwise.[31]

## 2. Consent Requirements for the Use of Reproductive Material for Posthumous Conception in Ontario

The provisions of the *SLRA*, as amended by the *AFAEA*, with respect to posthumously-conceived children, must not be applied carelessly. Since these laws pertain to the use of reproductive material of a deceased person for the purpose of conception, and as such, the laws under the *AHRA*, and its

30. *SLRA*, s. 1.1(1)(3).
31. *CLRA*, s. 13(5)(1).

regulations, strictly apply. Moreover, the *SLRA* expressly states that a declaration of parentage in accordance with s. 12 of the *CLRA* must be made before a posthumously-conceived child can benefit under the provisions of the *SLRA*.

### *(i) Consent under the AHRA for use of reproductive material for posthumous conception*

The provisions for consent in respect of the use of genetic material for conception are set out at s. 8 of the *AHRA*. Section 8 of the *AHRA* states as follows:[32]

> *Use of reproductive material without consent*
>
> 8(1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.
>
> *Posthumous use without consent*
>
> (2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.
>
> *Use of in vitro embryo without consent*
>
> (3) No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.

*Assisted Human Reproduction (Section 8 Consent) Regulations*[33] are divided into three parts, with each part regulating consent given for the distinct use of those three subsections of s. 8 of the *AHRA*: (1) the use of stored reproductive material for the purpose of creating an embryo; (2) removal of human reproductive material from a donor's body after death for the purpose of creating an embryo; and (3) the use of an *in vitro embryo* (*i.e.*, *in vitro* fertilization).

Again, the *AHRA* is federal legislation, which governs the laws of ART and carries with it criminal charges for contravention. Section 61 of the *AHRA* applies in respect of s. 8 of the *AHRA* and the *Consent Regulations*. Additionally, s. 61

32. *AHRA*, s. 8.
33. SOR/2007-137 (the "*Consent Regulations*").

of the *AHRA* provides that a person who contravenes such provisions is guilty of an offence and:[34]

(a) is liable, on conviction or indictment, to a fine not exceeding $250,000 or to imprisonment for a term not exceeding five years, or to both; or
(b) is liable, on summary conviction, to a fine not exceeding $100,000 or to imprisonment for a term not exceeding two years, or to both.

### *(ii) Consent under the CLRA for a declaration of parentage of a posthumously-conceived child*

Section 12 of the *CLRA* sets out the legislative framework for seeking a declaration of parentage in respect of a deceased spouse whose reproductive material was used to conceive a child after death through ART.

Section 12(3) of the *CLRA* states that a declaration of parentage may be granted if the following conditions are met:[35]

(a) 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.
(b) 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.

A declaration of parentage in respect of s. 12(3) of the *CLRA* must be made on or before the first anniversary of the child's birth, unless the court orders otherwise.[36]

## 3. Exceptions in the Case Law for the Written Consent Requirement

### *(i) Lack of written consent for purposes of the AHRA*

In *W. (K.L.) v. Genesis Fertility Centre*,[37] the British Columbia Supreme Court waived the requirement that there be written consent to release the sperm of a deceased to his wife after his death for her to create embryos for reproductive

34. *AHRA*, s. 61.
35. *CLRA*, s. 12(3).
36. *CLRA*, s. 13(5)(1).
37. 2016 CarswellBC 3209, 2016 BCSC 1621 (B.C. S.C.).

purposes in accordance with s. 8(1) of the *AHRA* and ss. 3(1) and 4(1) of the *Consent Regulations*.

In this decision, a surviving spouse made an application to the court to seek a declaration that the sperm of her deceased husband held by Genesis Fertility Centre be released to her for her use absolutely to create embryos for reproductive use.

The surviving spouse argued that sperm was the deceased's property which passed to her absolutely as his only surviving intestate beneficiary. She also argued that the sperm be released to her for the purpose of creating embryos for reproductive use without her deceased husband's written consent. The circumstances of the deceased's genetic material retrieval, freezing and storage were such that, the court determined, that his intention was that the sperm be used after his death for the purpose of reproduction. Accordingly, the British Columbia Supreme Court determined that:[38]

> ... in the circumstances of this case, [the deceased's] consent, although not in writing, specifically contemplated the [surviving spouse's] reproductive use of his stored sperm after his death, and was sufficient to satisfy the fundamental objective of the *AHRA* that the donor's consent must be both free and informed. Accordingly, the Court may order the release of the [sperm] to the [surviving spouse] to enable her use of that material for the purpose of creating an embryo.

The decision of the British Columbia Supreme Court in *Genesis Fertility* has not yet been applied by the courts in Ontario. Though, the courts in Ontario may soon be required to determine whether it is the "fundamental objective of the *AHRA* that the donor's consent must be free and informed" where reproductive material is to be released without express written consent of a deceased. Since the courts in Ontario will be applying federal legislation, they may decide to apply such legislation with the same lens as the courts in British Columbia in the case of *Genesis Fertility*.

In contrast, the Ontario Court of Appeal recently released the decision of *S.H. v. D.H.*[39] In this decision, the Ontario Court of Appeal strictly applied the AHRA and its regulations in a situation where a divorced spouse sought to withdraw his written consent given to a fertility clinic for his former spouse to use reproductive material to conceive a child to which they had previously intended to parent. The two spouses had previously

38. *W. (K.L.) v. Genesis Fertility Centre, supra*, footnote 37, at para. 136.
39. 2019 ONCA 454 (Ont. C.A.).

arranged for embryos to be created by IVF from anonymous gamete donors. The spouse was implanted with an embryo and she became pregnant and birthed a child. The other embryos were frozen and stored at a fertility clinic. Following the divorce, the spouse sought to be implanted with an embryo in order to conceive a second child genetically connected to the first child, but the other spouse refused to provide his consent.

The Ontario Court of Appeal determined that since the former spouse's consent was deemed to be withdrawn in accordance with s. 14(3) of the *Consent Regulations*, the fertility clinic was not in a position to provide the other spouse with the embryo for the purposes conception.

Though the decision of the Court of Appeal in *S.H. v D.H.*, does not deal with the issue of lack of written consent in circumstances where extrinsic evidence would demonstrate that a deceased spouse would have provided consent in writing, as was the case in *Genesis Fertility*, this decision however, clearly explains how the courts in Ontario are to adhere to the federal legislative framework in the *AHRA*, and its *Consent Regulations* which govern the use of ART. The following passage is illustrative of this analysis:[40]

> This decision turns on the interpretation and application of the governing legislation and regulations. In some jurisdictions, where the state has not regulated in the field of reproductive technology, private law contract principles apply. In Canada, however, Parliament has imposed a consent-based, rather than a contract-based, model through legislation and regulation. As I will explain, the correct interpretation and application of the relevant legislative framework determines the result in this case.

### *(ii) Lack of written consent for purposes of the CLRA*

In the decision of *M.R.R. v. J.M.*,[41] Freyer J. of the Ontario Superior Court of Justice granted a declaration of non-parentage in accordance with s. 13 of the *CLRA* to a person who donated sperm by sexual intercourse to conceive a child.

In this decision, the sperm donor was presumptively a parent within the meaning of s. 7(1) of the *CLRA* because he donated

40. *S.H. v. D.H.*, *supra*, footnote 39, at para. 5.
41. 2017 CarswellOnt 6290, 2017 ONSC 2655 (Ont. S.C.J.).

sperm by sexual intercourse without a pre-conception agreement declaring that his intention was not to be a parent. Despite not having entered into a pre-conception written agreement in accordance with the *CLRA*, Freyer J. held that "the evidence points to the fact that the parties had an agreement that [the donor] would be a sperm donor and would not be a parent to the conceived child."[42] In summary, Freyer J. found that the evidence of communications between the parties and their actions and inactions supported the conclusion that there was a pre-conception agreement between them with respect to parentage and non-parentage, despite it not having been in writing.

Notwithstanding the decision to order a declaration of non-parentage without the existence of a pre-conception written agreement, her Honour stated the following:[43]

> This case should not stand for the proposition that parties are not required to reduce their agreements to writing. Rather the facts in this case highlight how crucial it is for parties to have a written agreement clearly defining their intentions before a child is conceived. Decisions as to whether or not to be a parent to a child are far better reached in a dispassionate setting rather than in the emotional place following the conception and birth of the child.

Much like *Genesis Fertility*, it is unclear if the decision in *M.R.R. v. J.M.* will apply to alleviate the need for written consent in circumstances where a surviving spouse seeks a declaration of parentage to conceive a child posthumously through the use of ART, with or without a surrogate. Arguably, the following passage my be of use:[44]

> Section 13 does not contain any guidance with respect to what factors the court should consider. However, the legislative intention in enacting the amendments to the *CLRA*, the overall scheme of the Act and the legislative context described above all suggest that pre-conception intent is an important consideration in a declaration made pursuant to s. 13.

42. *M.R.R. v. J.M.*, *supra*, footnote 41, at para. 155.
43. *M.R.R. v. J.M.*, *supra*, footnote 41, at para. 164.
44. *M.R.R. v. J.M.*, *supra*, footnote 41, at para. 85.

# PART VI: GUIDELINES FOR ESTATE TRUSTEES IN ONTARIO REGARDING THE RIGHTS OF POSTHUMOUSLY-CONCEIVED CHILDREN

## 1. Determine if Notice has been Delivered to the estate registrar for Ontario

The *AFAEA* amended the *SLRA* to plainly state that a child conceived and born alive after the parent's death will fall under the definition of a "child" for the purpose of that act "if the conditions in subsection 1.1(1) are met."[45]

As demonstrated, one such condition arising from s. 1.1(1) of the *SLRA*, is that the deceased's spouse must give written notice to the estate registrar for Ontario that they intend to conceive a child by use of ART (with or without a surrogate) to which the deceased intended to be a parent.[46]

In the circumstances where an estate trustee is aware that the deceased may have arranged with their spouse to conceive a child upon their death by the use of ART, it is incumbent upon the personal representative to check with the estate registrar for Ontario to determine if any such notice was filed. Moreover, even if a personal representative is not aware of the deceased's intentions to parent, it is prudent to check the estate registrar for Ontario to determine if a potential application for dependant support may have been made as against the assets of the estate before distribution.

Since there is no mechanism for leave for a deceased's spouse to file such a notice with the estate registrar for Ontario after the six-month anniversary of their spouse's date of death, an estate trustee should be able to take comfort that a child posthumously-conceived without such strict compliance with the provisions of the *SLRA*, will not fall under the amended definition of "child" in s. 1(1) of the *SLRA*. Notwithstanding, the courts in Ontario have yet to determine the validity of the conditions for posthumous conception under the *SLRA*.

45. *SLRA*, s. 1.1.
46. *SLRA*, s. 1.1(1)(1).

## 2. Are the Provisions of the SLRA in Respect of Posthumous Conception Discriminatory?

Section 1.1(1) of the *SLRA*, as amended by the *AFAEA*, provides that only a child posthumously-conceived to a "spouse" of a deceased person will be considered a "child" or "issue" for purposes of the *SLRA*.

Section 1.1(2) of the *SLRA* clarifies that the term "spouse" under s. 1.1(1) of the *SLRA* has the same meaning as in s. 1 of the *CLRA:* which means "the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage."[47] This narrow definition excludes children born to persons who enter into a pre-conception parentage agreement with one or more persons in which they agree to be, together, parents of a child yet to be conceived. Under s. 9 of the *AFAEA*, persons who are not spouses but enter into pre-conception parentage agreements are to receive the same rights and obligations of parentage as those persons who fall under the definition of spouse under s. 1 of the *CLRA*.

The incorporation of the definition of spouse at s. 1.1(2) of the *SLRA*, as set out in s. 1 of the *CLRA*, appears to violate s. 15 and s. 1 of the *Charter* in the same manner that the *CLRA* and *VSA* were declared to be discriminatory in *Grand*, by failing to "provide equal recognition and equal benefit and protection of the law to all children, without regard to their parents' sexual orientation, gender identity, use of assisted reproduction or family composition."[48]

Therefore, as it stands, s. 1.1(2) of the *SLRA* may face constitutional challenge as it only provides for rights of succession to posthumously-conceived children to a "spouse" of a deceased person, and excludes those children born to parents under a pre-conception agreement.

If an estate trustee is tasked with administering an estate of a deceased person who entered into a pre-conception agreement with one or more persons with the intention to parent a posthumously-conceived child, that fiduciary may be charged with the obligation of seeking advice and directions as to whether a constitutional challenge is necessary to protect the assets of the estate for that posthumously-conceived child's proper support.

47. *CLRA*, s. 1(1).
48. *M.M.R. v. J.M.*, *supra*, footnote 41, at para. 48.

### 3. When Can an Estate Trustee Distribute Assets?

An application for dependant support can be made without leave up until six-months from the grant a certificate of appointment of estate trustee in respect of all of the assets of an estate,[49] including those assets listed in s. 72 of the *SLRA* ("s. 72 assets").[50] Notably, therefore, an estate trustee must proceed with caution when distributing the property of the estate prior to the expiration of that limitation period.

In *Re Dentinger*,[51] the Ontario Surrogate Court held that an estate trustee distributing s. 72 assets prior to the expiration of the six-month limitation period under s. 61(1) of the *SLRA*, will be held personally liable should insufficient assets remain in the estate to satisfy an order for dependant support.

On the other hand, the Divisional Court explained in the case of *Re Dolan*,[52] that s. 72 assets are not included within the net valuation of an estate to satisfy an award of dependant support, following the expiration of the six-month limitation period.

Since the *AFAEA* amended the *SLRA* to provide that a child posthumously-conceived and born up to three years after the death of his or her parent is to qualify as a "dependant" of the deceased under Part V of the *SLRA*, one questions whether the principles as established in *Re Dentinger* and *Re Dolan* will apply where those assets are required to satisfy an order for dependant support brought on behalf of a posthumously-conceived child more than six-months after the issuance of the grant of certificate of appointment of estate trustee.

An estate trustee may, therefore, be required to seek advice and directions of the court before making a distribution. This may be so, particularly where an estate trustee has knowledge from the notice provided to the estate registrar but a suspensory order has not been made.

### 4. Suspensory Order

The spouse of a deceased may make a suspensory order on behalf of a posthumously-conceived child no later than six-months after death.[53] A suspensory order may suspend, in

49. *SLRA*, s. 61.
50. *SLRA*, s. 63(2)(f).
51. (1981), 128 D.L.R. (3d) 613 (Ont. Surr. Ct.).
52. 1983 CarswellOnt 618 (Ont. Div. Ct.).
53. *SLRA*, s. 59(2).

whole, or in part, the administration of the deceased's estate for such time and to such extent as the court may decide.[54] An estate trustee must abide by any such suspensory order.

## PART VII: CONCLUDING COMMENTS

The laws of parentage and succession are inseparable in Ontario. Consequently, the amendments to the laws of parentage by the *AFAEA* have a significant impact upon the succession rights of children of deceased persons who dies testate or intestate. Most significant is the development of rights of posthumously-conceived children in Ontario under the *SLRA*, as those children can now benefit from the assets of the estates of their predeceased parent(s) or other ascendant(s), and have standing as a dependant to seek dependants' support.

The recent developments to the law of parentage and succession in Ontario are reflective of an increased use of ART for family building and multi-parent family units. It is also demonstrative of our rapid demographic and societal growth, which seemingly transitions the primary focus of parentage, and therefore succession, from genetics or carriage of a child to a pre-conceived intention to parent.

Since these laws continue to evolve, so will the responsibilities and obligations of estate trustees. Specifically, the responsibility of an estate trustee to collect and manage the assets of a deceased's estate for those persons whom he or she intended to benefit, or where the deceased was required to make adequate provision for proper support under the law.

As the use of ART and posthumous conception continues to evolve at a rapid pace, it is likely that so too will the jurisprudence surrounding its regulation and the corresponding rights of those children born by such means. In respect of the laws of succession under the *SLRA*, the jurisprudence may quickly evolve to determine its constitutionality, extend the timelines for the notice period to the estate registrar for Ontario, and extend the limitation period for an application for dependants' support to be made on behalf of a posthumously-conceived child. Moreover, the jurisprudence may also evolve to clarify the requirement for an estate trustee to protect s. 72

54. *SLRA*, s. 59(1).

assets following the lapse of the limitation period for an application for dependants' support to be made on behalf of a posthumously-conceived child.

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