Patchwork Families
Defining the Modern Family

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Estate Planning for the Future Family

Legal Issues Regarding Use of Genetic Material, Assisted Reproductive Technology and Posthumous Conception

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New World – New Terms

- **Gamete**: a mature sexual reproductive cell; in humans a sperm cell or an ovum.

- **Zygote**: when two human *gametes* meet – that is, a sperm cell and an ovum – you get a zygote, a fertilized egg.

- **Embryo**: an organism in the early states of growth and differentiation. A review of definitions as they relate to human embryos reveals that the word embryo is generally agreed to be used for the period between the fourth day following fertilization until some point before the 8th week following fertilization. Following that period the embryo is a fetus.
New World – New Terms cont’d

- **Gestational surrogacy**: the intended parents to achieve a pregnancy by first creating embryos through IVF with their own eggs and sperm and then transferring these embryos to another woman, called the *gestational carrier*, or *gestational surrogate*.

- **In vitro fertilization (IVF)**: is a reproductive technology in which an egg is removed from a woman, joined with a sperm cell from a man in a test tube (in vitro). The cells fuse to form single cell called a *zygote*, which then starts dividing, becoming an embryo.
History

1770 – first reported intrauterine insemination
1950 – first child born using frozen sperm
1986 – first child born using frozen egg
2004 – child born using sperm frozen for 21 years
Ownership and use of genetic material

- First: Is genetic material property?
  - Yes
  - Embryos may be treated differently though

- Second: Entitlement to and use of genetic material
  - Who can use?
  - Who gets to decide?
  - To whom does genetic material and resulting embryo belong?
    - sperm donor?
    - egg donor?
    - person commissioning use?
    - surrogate?
Planning Documents to deal with

- Power of Attorney (POA)

- Living Will/Personal Directive/Power of Attorney for Personal Care (PD)

- Will
Material already stored - deal with as property - POA or Will

But if not already retrieved then deal with in PD

• Is extraction after incapacity or death allowed?
• Who can authorize?
• Who can use genetic material after extracted?
• How long can material be stored after extracted?
• Make sure POA and PD are not in conflict
• Requirement to tell executor or trustee of intent to use?
POA and Will

- Ask clients if they have genetic material stored.
- Is there a contract dealing with?
- Does contract allow person under POA or Will to deal with?
- Who can deal with, in what circumstances and what are the terms of use?
- Use for how long after storage, incapacity or death?
- Is genetic material to be destroyed in future?
- Who makes decision to destroy?
- Who pays for storage and costs associated with storage and use?
- Requirement to tell executor or trustee of intent to use?
Statement of Intent

Statement Regarding Ownership and Control of My Genetic Material

I have frozen genetic material that is presently being stored for my later potential use. The following are my instructions regarding the ownership and control of such genetic material in the event of my incapacity or death:
Incapacity

If I am incompetent:

During any period that I am incompetent, I authorize my wife in her sole discretion to use my genetic material for reproduction, to donate my genetic material for scientific research, or to destroy my genetic material.

• In POA give authority to make decisions regarding storage and transfer of genetic material and to initiate, consent to and pay for ART procedures while incapacitated.

• In PD consent to retrieval and use of gametes during incapacity.
After My Death:

If I predecease my wife, my genetic material shall be controlled exclusively by, and shall be released to and used by, my wife in her sole discretion. If I survive my wife, or to the extent my wife has not taken control of any genetic material in storage [two years] from the date of my death, such genetic material shall be donated for scientific research, if possible, or if not, then destroyed. Any interests that a child born from such genetic material may have under this instrument, however, shall be subject to Clause__________.

• Then what happens to the child born?

Succession Rights
Succession Issues: Definitions

• Definition of who is a child, grandchild, descendant or issue
  • Trusts and Wills
  • Most documents presently in place do not consider this

• Often definition relates to blood lines only

• Male orientated definitions

• *En ventre sans mere* – only saves children born within 9 months- misses out on posthumously conceived children

• Biological – may not include child where genetic material donated or surrogacy
Succession Issues:

- When does class close?
- Who will be included in class?
- When is the administration of estate concluded?
- How long does trustee or executor need to wait?
- Onus on trustee or executor to seek out genetic material? Determine who can use it and by when - give notice of distribution of estate.
- Onus on trustee or executor if given notice of genetic material?
- What is liability of trustee or executor re: distributing estate – delay to people alive at death of deceased vs. including people who are yet born?
Example of legislation: Alberta Family Law Act

8.1(2): If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a male person only, the parents of the child are:

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person is declared to be a parent, the male person and a person who

   (i) was married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child’s conception, and

   (ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child’s conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only
8.1(4): If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person and a female person, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person and female person are each declared to be a parent, the male person and the female person;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only
Alberta Family Law Act cont’d

- Only circumstance in which parentage might be established for ART conceived child is:
  1. heterosexual relationship
  2. with human reproductive material or embryo provided by male person
  3. or by both a male and female person
- Worse on death - does not deal with intervening death of donors
- Leaves out:
  - parentage for the child conceived after mother has died using a surrogate
  - parentage for posthumously conceived child of same sex relationship
  - parentage for couples using donated material and surrogacy, without a Court Order
Issues: Succession rights

• To whom does the child belong?

• Part of what family group for succession purposes?

• Legislated benefits such as pensions and government benefits?

• Tax issues- what tax regime is child subject to?
• Reference could be to “genetic parent” or “parent” or “intended parent”.

• Include definition of “genetic material” that could state:

“provided that if an individual had commissioned the use of a donor’s gametes in place of his or her own to create one or more zygotes, blastocysts, or embryos, such zygotes, blastocysts, or embryos shall be deemed the individual's genetic material.”
Genetic Materials

Plan for it

Options in drafting

1. Ignore
2. Restrict
3. Full inclusion
Only deal with children conceived before but born after a parent’s death:

*Posthumous Children:* The members of any class described in this instrument shall include any child born alive who was [conceived before but born after] [born within nine months after] [in gestation at the time of] the death of the child's father, unless the child becomes a member of that class only by reason of adoption after birth.
Exclude all Posthumously conceived children:

*Posthumously Born and Posthumously Conceived Children:* A child who is born after the death of a parent shall not be deemed a child of that parent for any purposes under this will, unless the child was in gestation at the time of the parent's death and born alive within ten months after that parent’s death.
1. Posthumously Conceived Children. The following provisions shall apply for purposes of this will:

(a) Statement of Intent: I intend for any child conceived with the help of assisted reproductive technology after the death of a genetic parent to be treated as a child of the deceased parent, subject to those conditions I have established in Paragraph 1(b). I recognize that assisted reproductive technology is evolving, and the language I have used may not accurately capture all scenarios possible at or after my death. To the extent that the language is vague, creates an ambiguity, or fails to cover a specific situation, the will should be construed liberally to grant interests to posthumously conceived children.

(b) Conditions: A posthumously conceived child shall be considered the child of the deceased parent, but only if (1) the deceased parent had consented [in writing] to the posthumous use of his or her genetic material by the surviving partner for purposes of reproduction (either directly or through a surrogate), (2) the surviving partner is not married at the time of the child's birth, and (3) with respect to any class of which the child would be a member under this will, the child is born on or before the [second] anniversary of the class-closing event. Any child who meets these requirements shall be deemed to have been living immediately before the class-closing event.

(c) Exception For Fiduciary Discretion: If a child would meet the first two requirements of 1(b) and, at the time of the deadline established above, the fiduciary has actual knowledge that the surviving partner is attempting to or otherwise intends to have a child (or children) using the deceased parent's genetic material, the fiduciary may, but shall not be required to, retain for that child (or children) a share of the assets as though the child (or children) was born before the deadline.
(d) Limitation of Liability: No fiduciary shall be liable for distributions that the fiduciary should have made to or set aside for a posthumously conceived child pursuant to (b) if the fiduciary did not have actual notice at the time of the distribution that the decedent had preserved genetic material. Once the fiduciary receives such notice, however, the fiduciary shall set aside an appropriate share of my estate or the affected trust until the deadline provided under (b) has expired (subject to the fiduciary's discretion under (c) to retain assets) or the surviving partner states in a writing to the fiduciary that he or she does not intend to use the preserved genetic material for reproduction. No transferee shall be liable for or have any obligation to refund distributions received from a fiduciary that the fiduciary should have made to or set aside for a posthumously conceived child pursuant to (b).

(e) Definitions: For purposes of this will, a “posthumously conceived child” shall mean a child conceived through the use of assisted reproductive technology after the death of one or both of the child's genetic parents and born alive. Conception shall be deemed to occur upon the fertilization of an egg inside a woman's body; provided that if fertilization occurs outside of the body or a fertilized egg is removed from a woman's body, conception shall be deemed to occur when the fertilized egg (as a zygote or at any later stage in its development) is transferred to a woman's body for implantation in her uterus. “Genetic material” shall include any cell, part of a cell, or group of cells that includes any part of the individual's genome and which may be used for reproductive purposes, including without limitation a gamete, zygote, blastocyst, or embryo.
Drafting cont’d

Or:

• A child born more than [ten months] [two years] [three years] after the death of a person will not be considered a child of the person.

• A child born more than ten months after the death of a person will be considered the child of the person only if (1) the child is born no later than [three] years after the death of the person; (2) the person's genetic material was used to create the child; and (3) the person consented [in writing] to the use of the genetic material to create a child [after the person's death].
Solutions:

- minor children only – some countries can only adopt minors
- condition - must live with while a minor or for a certain number of years
- must adopt before a certain age
- adoption must be complete within a certain time after death or event named
Adoption: drafting examples

1. A child adopted by a person will be included in the term descendant only if (options)

   (a) The child is adopted after having lived in the household of the person as a minor;

   (b) The child is adopted by the person prior to attaining age [5] [12] [18] [21] [25].

2. Adoption Begun Before Death

   “An adoption begun before the person's death, if the adoption is legally completed within [two] years after the person's death, shall be deemed completed prior to the person's death.”

3. Adoption by Someone Other Than Descendant

   “A child who would be a descendant for purposes of this trust but was adopted by the spouse [or partner] of the child's birth parent or after the death of the child's birth parent will continue to be a descendant of both birth parents unless the decree of adoption terminates the parental rights of the birth parent who is a descendant under the terms of this trust.”
Adoption: Issues

• Adoption of adult partner – all 50 US States allow adult adoption
• Done to provide statutory or contractual rights and benefits
• Also provides succession rights
Other Issues:

Surrogacy and A.R.T.:

• Fees charged
• Human Rights violations
• Surrogate left with child
• Illegal in some countries – required to go offshore
• Europe – legislation - rights of a child to know origins and genetic make-up
• Issuance of birth certificates and passports