The Story of "Emma" And "Isabella" The Litigious Embryos and Other Tales
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I. INTRODUCTION

There is no question that the dynamic of the modern day family has become increasingly complex, and this poses significant challenges for estate planning practitioners who are required to navigate this complexity advising on succession planning. The traditional understandings of “child”, “family” and “parent” have been significantly affected by rapidly advancing assisted reproductive technologies (ART), the use of others' genetic material and surrogacy. Physiological issues that once constrained whether, how, and when conception could occur for couples have become less of a barrier; same-sex couples can conceive children through IVF, or by enlisting a surrogate; genetic material can be cryopreserved to delay conception until a more suitable time in one's life, and have even made conception possible long after death.

Understandably, the law's traditional notions of 'family', and specifically, statutory definitions of “child” and “descendants” are proving inadequate to address these types of issues. The emergence of posthumously conceived children and similar other issues has therefore challenged legislatures and courts alike, and it will be necessary for estate planning practitioners to engage with these issues in order to mitigate perhaps unintended consequences of the law and of previously drafted documents.

Practitioners must consider what sorts of issues will they face, and how can they best respond to the legal challenges so as to provide the best service to their clients in times of uncertainty? The central issues to be discussed involve ownership of, or entitlement to either stored or harvested genetic material, and what role, if any, might be played by personal directives (PDs), powers of attorney (POAs) and what succession rights, if any, ART and posthumously conceived children are, or should be, entitled to.

It is crucial that practitioners understand the issues so that they are equipped to:

- articulate these issues to their clients, helping them to understand how they apply to them;
- explain the applicable law to their clients, whilst assessing its compatibility with their clients' desires; and
• draft testamentary documents in a way that properly addresses their clients' concerns.¹

Estate planning practitioners are uniquely situated to help their clients through this period of uncertainty and have an important role to play in ensuring that any deficiencies or peculiarities of the law are considered and included or excluded depending on a client's wishes and beliefs.

1. Genetic Material - Property, Ownership, Entitlement

A preliminary issue arises when the donor of genetic material has died as it must be ascertained whether or not genetic material is property, subject to ownership and/or entitlement. It should be noted though, given the unique nature of genetic material, ownership does not automatically entail authorization for use; courts and legislatures have repeatedly demonstrated the paramountcy of consent when it comes to the use of genetic material for posthumous conception.² This is due to the fact that the use of genetic material to conceive is interwoven with a person's reproductive rights. Matters become even more complex where a person has died prematurely, without storing their genetic material, and a surviving partner (or a family member) seeks to harvest genetic material for future reproductive use. The primacy of consent regarding the use of genetic material for posthumous conception requires consideration of what role, if any, documents such as powers of attorney (POAs) and personal directives (PDs) might play in the context of controlling or harvesting a deceased's genetic material.

1.1 Genetic Material = “Property”

Courts have had the opportunity to consider whether or not genetic material constitutes property in various contexts, and in various common law jurisdictions. The findings have been relatively unanimous, establishing that stored genetic material is property.

Notably, however, embryos have been distinguished in some common law jurisdictions as having a unique status compared to sperm and ova due to their potential for human life. The Supreme Court of Tennessee remarked that “embryos were not, strictly speaking, either 'persons' or 'property', but occupy an interim category that entitles them to special respect because of their potential for human life.”³ Although, Canadian courts have been more inclined to define stored embryos as property, as

² Interestingly, it has been argued that giving primacy to consent of the deceased for posthumous conception is illogical, since dead people cease to have interests and therefore it would be better to presume consent as a matter of safeguarding the existing interests of the surviving partner. See H. Young, “Presuming Consent to Posthumous Reproduction”, (2014) 27 J.L. & Health 68.