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Wills, Trusts & Estates

No legislative gap in assisted human reproduction legislation, B.C. Court of Appeal says

By **Ian Burns**

(December 2, 2020, 9:30 AM EST) -- B.C.'s highest court has ruled a woman cannot use her late husband's reproductive material to have a new child, despite her assertions he wanted a larger family during life.

The B.C. Court of Appeal decision in *L.T. v. D.T. Estate* 2020 BCCA 328 gives interpretation to the federal *Assisted Human Reproduction Act* (AHRA) and its regulations, which prohibit the removal of human reproductive material without the donor's prior, informed written consent. The couple in question, identified as Mr. and Ms. T, were married and had one child when Mr. T died. According to court documents, Mr. T made comments about wanting to expand his family but they had never given any thought to the posthumous use of his reproductive material.

After her husband's sudden death, Ms. T brought an urgent application for the removal of his reproductive material. She argued the Act had to be read in light of common law interpretations of implied consent and there was a legislative gap in the AHRA related to obtaining consent from donors who have suddenly passed away.

B.C. Supreme Court Justice David Masuhara granted Ms. T's request for the removal of the reproductive material but did not accept her other arguments, concluding that no such gap existed (*L.T. v. D.T. Estate (Re)* 2019 BCSC 2130). And the Court of Appeal upheld that determination, with Justice David Harris considering her argument an "invitation to amend the statute and an attempt to create substantive rights that do not otherwise exist and are inconsistent with the AHRA."

"This regulation is clear and unambiguous. It applies to all persons who could remove genetic material and requires informed, written consent by the donor before death. It provides for no exceptions," he wrote. "It does not confer any jurisdiction on a court to avoid the universality of its application or to exempt a person from its operation where the necessary conditions for consent have not been complied with."

Jasmeet Wahid, Kahn Zack Ehrlich Lithwick LLP

Parliament has declared definitively what will count as consent for removing reproductive material posthumously from a donor, Justice Harris wrote.

"No other forms of 'consent' can have any application in rendering the posthumous removal of reproductive material lawful," he wrote. "Implied, hypothetical, imputed, or substituted consent are simply not consent for the purpose of avoiding the prohibition set out [in the Act and the regulation]. Parliament has provided for legal certainty in what is, without doubt, a morally challenging and humanly complex area."

Justice Harris was joined by Justices Richard Goepel and Patrice Abrioux in his decision, which was issued Nov. 24. Jasmeet Wahid of Kahn Zack Ehrlich Lithwick LLP, who represented Ms. T, said she was in the midst of determining whether to seek leave to appeal so it was hard to comment on the decision.

"This is an appellate decision considering a number of arguments including statutory interpretation of federal legislation," she said. "It has significance not just for people in B.C. but all across Canada because it is federal legislation. And it is a novel, unique case — the first reported decision of this nature, and I think that we are all kind of digesting it."

Geoffroy Legault-Thivierge, media relations officer with Health Canada, said the government intervened in the case to explain the history and policy rationale of the AHRA and assist the court on its interpretation of the provisions.

Jeannette Aucoin, Clark Wilson LLP

"These prohibitions are consistent with one of the underlying principles of the *Assisted Human Reproduction Act*, in which the Parliament of Canada recognizes and declares that 'the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies,'" he wrote in an e-mail. "Amendments are not contemplated at this time. The court found that Parliament has clearly defined the only circumstances in which it is lawful to remove and use reproductive material from a donor posthumously."

A number of legal experts agreed the case was the first time a Canadian appeal court had decided on the posthumous use of reproductive material. Jeannette Aucoin of Clark Wilson LLP said the case involved a tragic set of circumstances, but it brings to light the very high standard of consent under the AHRA.

"Because of the circumstances of [Mr. T's] death they were never able to become aware of the requirements," she said. "There is just no place to go if they are being strict on the consent requirements — and it is this principle of free and informed written consent which is so critical to why this failed."

Maneesha Deckha, Lansdowne Chair in Law at the University of Victoria, said the result is heartbreaking for Ms. T but the legal analysis based on statutory interpretation was correct. But she added the AHRA is a patchwork after the effect of constitutional litigation that has challenged it in previous years.

Maneesha Deckha, Lansdowne Chair in Law at the University of Victoria

"There was also controversy that surrounded the constitution of the regulatory agency initially set up to regulate in this area," she said. "It would be productive to revisit the Act (and not just draft regulations) in general given the interim years since it was enacted and the changes both in social attitudes and technology regarding assisted human reproduction and simply to effect more cohesion and less of a patchwork."

And Aucoin said it would be helpful if the case was taken to the highest level to see what the Supreme Court has to say about it.

"I think the principle of written free and informed consent is vital to this but my gripe with these things is that people don't know the requirements — there are so many people involved in fertility process but they probably haven't signed all the consent forms, and this is a very strict compliance interpretation," she said. "It would be helpful just to get the Supreme Court to weigh in on whether any amendments might be good to consider."

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