

# Building Families through Assisted Reproduction – Fertility Law and Contracts

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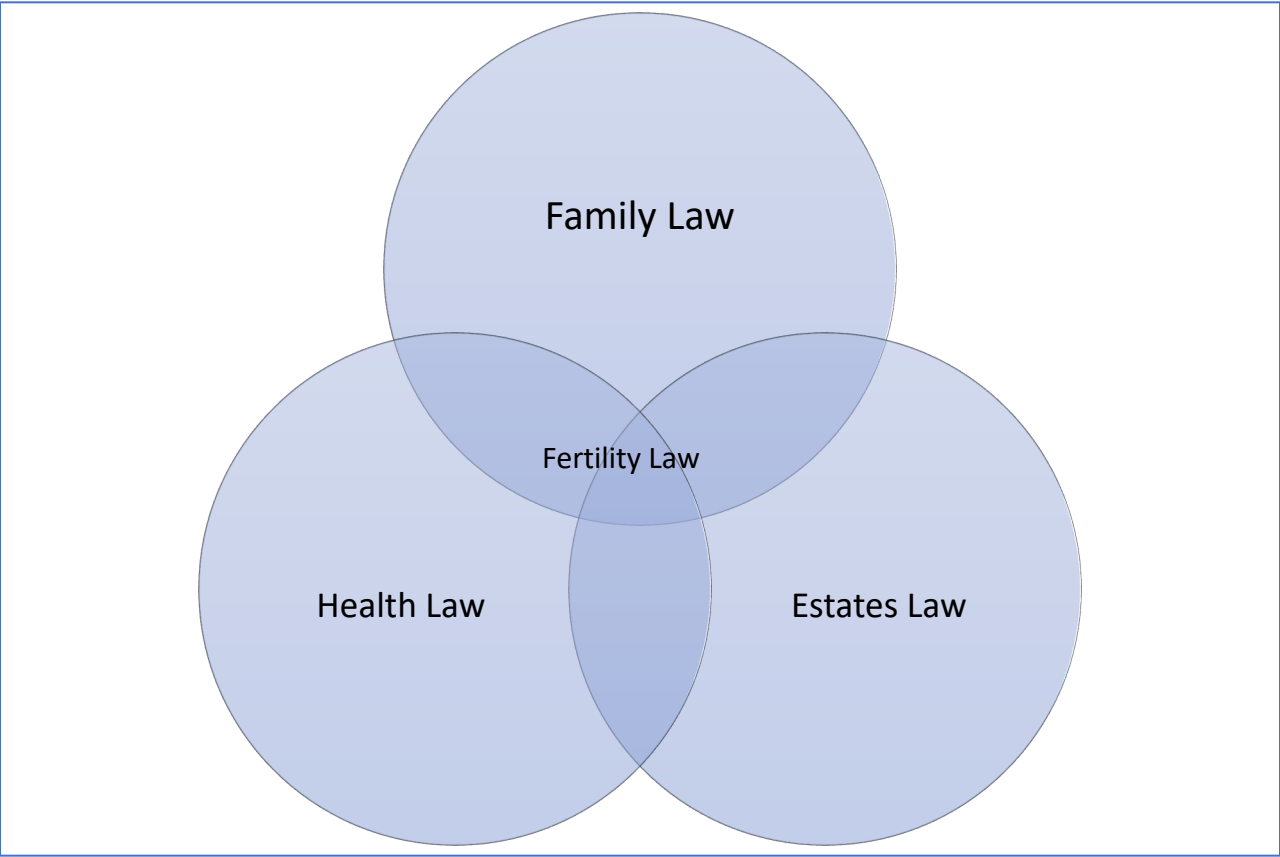
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# Overview of Presentation

1. Overview of Legal Schemes
2. *Assistant Human Reproduction Act, S.C. 2004, c. 2 (the “AHRA”);*
3. *Parentage: Family Law Act, S.B.C. 2011, C. 25 (the “FLA”);*
4. *Fertility Law Agreements;*
5. Family Law Agreements- cohabs and separation agreements
6. Questions.





## What is Assisted Reproduction?

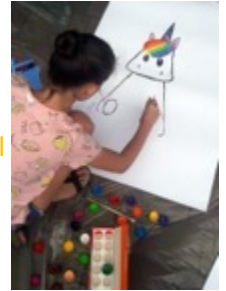
- “Assisted reproduction means a method of conceiving a child other than by sexual intercourse”
- Assisted reproductive technologies (ART) include:
  - in vitro fertilization (IVF)/ inter-uterine insemination (IUI)
  - egg/ova donation
  - sperm donor insemination
  - surrogacy
    - Gestational surrogacy – surrogate has no genetic connection
    - Traditional surrogacy – surrogate provides egg

Stat: 1 in 5 couples have fertility challenges



## Terminology: *Family Law Act* - Section 20

- **“assisted reproduction”** is a means of conceiving a child other than by sexual intercourse;
- **“birth mother”** is the person who gives birth to the child (regardless of whether her human reproductive material was used in the child’s conception);
- **“donor”** is a person who, for the purpose of assisted reproduction other than for the person’s own reproductive use, provides:
  - His or her own human reproductive material (sperm or egg/ova), from which a child is conceived, or
  - An embryo created through the use of his or her human reproductive material;
- **“human reproductive material”** means a sperm, an ovum or another human cell or human gene, and individually includes any of them;
- **“intended parent”** or **“intended parents”** are a person who intends, or 2 persons who are married or in a marriage-like relationship who intend, to be parents of a child and, for that purpose, the person or the 2 persons make an agreement with another person before the child is conceived that:
  - The other person will be the birth mother of a child conceived through assisted reproduction; and
  - The person, or the 2 persons, will be the child’s parent or parents on the child’s birth, regardless of whether that person’s or those persons’ human reproductive material was used in the child’s conception;
- Section 20(2): A child born as a result of assisted reproduction is deemed to have been conceived on the day the human reproductive material or embryo was implanted into the birth mother;



# Legal Framework: Federal

## The Federal *Assisted Human Reproduction Act (AHRA)*

Assisted reproduction has been regulated in Canada since 2004, when the federal government enacted the *Assisted Human Reproduction Act*

- Enacted under the federal criminal law power;
- Prohibits some procedures completely, for example:
  - Human cloning, transplanting the reproductive material of a non-human life form into a human being, etc. – s. 5;
  - payment for reproductive material (s.7) and surrogacy services (s.6);
  - use of reproductive material without consent (s.8);
  - reimbursement of expenses for donors/surrogates except in accordance with regulations (s.12);
- Regulates other activities including sperm and egg donation, surrogacy;

Parts of the AHRA were struck down as ultra vires the federal government in 2010 but the prohibitions remain.

The AHRA did not deal with the legal status or legal parentage with respect to children born through assisted reproduction, which falls under provincial jurisdiction.

## Penalties

### *AHRA prohibitions criminal in nature:*

- breach of sections 5 – 7 and 9 (ie cloning, payment for services, consent) is a criminal offence, punishable on indictment by a maximum \$500,000 fine and 10 years in prison;
- breach of other provisions (e.g. s. 8, consent, or s. 12, reimbursement of expenses) – somewhat lesser penalties (max \$250,000 on indictment, 5 years).

### *1st (and only) prosecution under the AHRA*

Leia Picard, Canadian Fertility Consultants (CFC) in Ontario, was convicted on three counts in the first prosecution under the Assisted Human Reproduction Act (charged laid in 2013)

She pled guilty to: purchasing eggs, paying surrogates and taking money to arrange surrogacies

Picard and CFC were fined \$60,000 in total

## Federal Legislation

- ***Assisted Human Reproduction Act, S.C. 2004, chapter 2;***
  - “Consent Regs”: Consent for Use of Human Reproductive Material and In Vitro Embryos Regulation, SOR/2007-137;
  - “Reimbursement Regs” : Reimbursement Related to Assisted Human Reproduction Regulations, SOR/2019-193;
  - “Known Donor Regs” Safety of Sperm and Ova Regulations, SOR/2019-192;
  - Administration and Enforcement (Assisted Human Reproduction Act) Regulations, SOR/2019-194;



## The Consent Regulations: (*Consent for Use of Human Reproductive Material and In Vitro Embryo Regulations*)

- Use of sperm, ova or embryos prohibited without express written consent of the donor, in accordance with the *Regulations*
  - *LT v DT Estate (Re)* 2020 BCCA 328 – husband died suddenly, wife not permitted to extract sperm for use after his death;
- Use of embryos – Part 3:
  - embryo “donor” = person or persons for whose use the embryo was created – may not be person who provided the sperm/egg. Couple with no genetic connection- both are “donor”.
  - BUT –if separated, and only 1 spouse’s materials were used, then ONLY that spouse is the donor
- Posthumous extraction – Part 2

**Potential overlap with family and estates law**

## **Known Donor Regulations: Safety of Sperm and Ova Regulations**

- Federal Regulations came into effect on February 4, 2020 that make it easier to use a known donor (Directed Donation).
- Previously needed to quarantine sperm for 6 months, and only facility was in Ontario.
- Therefore, it was hard to use known donors, and families needed to resort more to sperm banks. Because of Canada's prohibitions on payment, there is a sperm shortage in Canada.
- Now , more flexible where known donors are used. This will assist families in accessing donated sperm in a faster, and more cost-effective manner, at participating fertility clinics.

## **The Expense Regulations: Reimbursement Related to Assisted Human Reproduction Regulations**

Regulations governing the reimbursement of expenses incurred by a surrogate or donor came into force on June 9, 2020:

- No reimbursement is permitted other than reimbursements made in accordance with the regulations of expenses incurred in the course of the donation or in relation to the surrogacy.

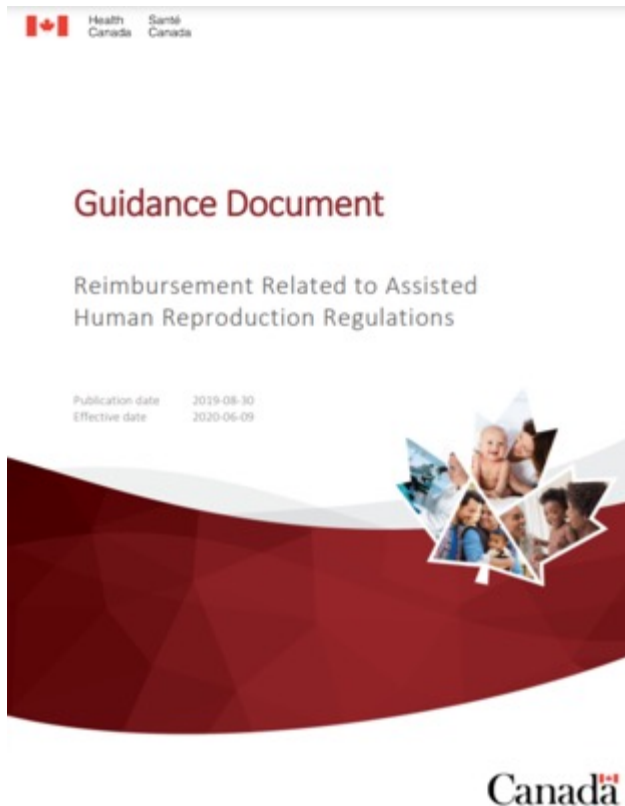
### The Expense Regulations:

- Limit / define what expenses may be reimbursed (different allowable expenses for donors versus surrogates);
- Require a specific process to claim reimbursements, including declarations;
- Require person making payment to keep their records (declaration and receipts) for 6 years;
- Require signatures;
- Intended Parents must retain records for 6 years.



## Guidance Documents

<https://www.canada.ca/en/health-canada/programs/consultation-reimbursement-assisted-human-reproduction/document.html>





## Legal Framework: Provincial

### The BC Family Law Act (FLA)

- Before the BC Family Law Act came into force in 2013, BC legislation assumed all children are conceived through sexual intercourse, and every child has a mother and father.
- FLA provided a comprehensive scheme to determine a child's legal parents, including in situations where assisted reproductive technology (ART) is used.
- The BC FLA was the first province to do so, and has lead the country (and the world) in this area.
- BC (and Ontario followed) established an **administrative regime** to register a child, including for surrogacy.
  - So long as the parties meet the requirements set out in the law, the parties can register as the parents without the need for a court declaration of parentage

## The FLA: legal parentage

- Section 23: A determination of parentage under the Part 3 of the *FLA* is a determination of parentage **for all purposes** in British Columbia;
- Legal parentage is important for many reasons (including but not limited to):
  - Establishes a child's identity, e.g., family name, family relationships, cultural heritage;
  - Determines inheritance rights, e.g., who inherits when a parent dies without a will or ability to challenge a will;
  - Determines who is presumed to be a child's guardian under the *Family Law Act* (with limitations – s. 39);
  - Imposes child support obligations (although persons who are not legal parents, such as step-parents, can also have support obligations);
  - Impact on Indigenous status (*Indian Act*) and band registration;
  - Impact on citizenship rights;
- In the assisted human reproduction context, *intention to parent* now trumps genetic connection to the child in determining who is the legal parent.



## Parentage where no assisted reproduction Section 26 of the FLA

- Parentage where sexual intercourse: biological parents are the child's legal parents.
- Sexual intercourse is a bright line – parentage is presumed based on biological connection.
- Generally the parents of a child conceived by way of sexual intercourse are:
  - the birth mother/parent and the child's biological father/parent.
- NOTE: Section 26 does not apply if an adoption is granted;
  - *Re: British Columbia Birth Registration No. 2004-59-020158*, 2013 BCSC 1262, appeal allowed in part on other issues 2014 BCCA 137

### TAKE AWAY:

**Can't opt out of being a parent where parties had sex (generally)–  
“that's daddy; not a donor”.**



## Parentage if assisted reproduction: FLA General Rules

- Donor is not a parent (donor of genetic materials such as sperm, egg, embryo) (s.24)
- Parents are the birth mother and her partner (s.27)
- Surrogate is not a parent; intended parents are the parents (s.29)
  - Must have pre-conception written agreement & post-birth written surrender
- There can be more than two parents in certain circumstances but must be a written agreement prior to conception (s.30)
  - VSA: IP + egg donor + sperm donor= 4 / birth mother + IPs= 3
- A person can become a parent after their death in certain circumstances and with written consent prior to death (s.28)
- Intention to parent trumps biological or genetic connection



## Orders declaring parentage – Section 31 of the *FLA*

- This section gives the court power to order parentage “if there is a dispute or any uncertainty as to whether a person is or is not a parent under Part 3;
- Declaration can be made in the Supreme Court;
- If such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction, the Provincial Court;

## Some examples of how Section 31 of the *FLA* has been used:

- *Re Family Law Act*, 2016 BCSC 22 (also cited as *D.(D.)*):
  - Uncertainty resulting from law of another jurisdiction (in that case same sex intended parents lived in Quebec and the child was born in B.C. to a B.C. surrogate);
- *Re G. (K.)*, 2016 BCSC 598:
  - Section 31 has been used to recognize a surrogacy where there was no written agreement – the courts recognized the surrogacy based on a verbal agreement;
- *Cabianca v. British Columbia (Registrar General of Vital Statistics)*, 2019 BCSC 2010;
  - A donor of sperm to a same sex couple – two children were conceived. They had a verbal agreement for Child #1 that all three would be parents. They had a written agreement for Child #2 that all three would be parents. The parents made unintentional errors in the birth of both of their children: Child #1 not entering into a written agreement and Child #2 not registering the donor on the birth registration. Requirement for “any uncertainty” relating to parentage should be broadly interpreted to meet the remedial goal of the legislation and should take into account the best interests of the child.
- *RE: British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767: Child born from sexual intercourse within a polyamorous relationship. Court granted parentage declaration permitting 3 parents, under *parens patriae* jurisdiction but not under s. 31 – because no dispute or uncertainty.

## The Importance of Jurisdiction

- The applicable law is the law of the jurisdiction where the baby is born.
  - Some jurisdictions there are restrictions, including limits on surrogacy (ie Quebec surrogacy is not legal) , who can be parents (ie prohibitions on same sex couples), administrative versus court process, and genetic connection requirement.
- If the intended Parents are not Canadian, need to consider:
  - Whether the birth certificate is adequate to prove parentage, or if a declaration from the court is required;
  - If there are extra procedures needed in their home country and if they will require surrogates cooperation;
  - May want to have a lawyer in their home country involved to ensure the Agreement addresses these matters in accordance with their laws and processes.

# Fertility Law Agreements

- In some cases, ART agreements are not necessary, for example, a couple (married or in a marriage like relationship using own genetic materials) or individual obtaining sperm, egg or embryo from a bank:
  - They might want to consider other agreements such as **cohabitation agreements**;
- There are situations that require agreements under the *FLA*:
  - Section 29: surrogacy
  - Section 30: additional parents
- There are situations that do not require an agreement under the *FLA*, but agreement is a very good idea (i.e. Section 27 – donor);
- In many cases, clinics will require agreements;
- Often there will be short timelines that clients are asking to have agreements turned around in due to various factors (cycles, clinic availability etc.);



## What does a fertility law agreement cover?

All fertility law agreements should clearly address the following at minimum and be tailored to the particular circumstances and intentions

- Background facts and role of each party;
- The applicable law, confirm that the parties understand and will comply;
- Confirm the Intended Parent(s) are the only parents of the child; the donor or surrogate is not a parent under any circumstance;
- Consequences to a party if they breach the agreement;
- Facilitate information-sharing and confidentially based on the parties' shared intentions;
- Set out the reimbursements allowed, any agreed upon limits, and the process for claiming expenses;
- Travel restrictions to ensure child born in BC;
- Waive all claims for child support against a donor or surrogate or a claim against their estate after death;
- Provide what happens to remaining donation;
- Waive any right the donor or surrogate may have to be a parent, have decision-making rights or contact;
- Confirm the parties' intention about their future relationship, including with the child;
- Address challenging issues or unexpected but foreseeable situations that may arise- tricky topics
- Confirm whether the parties had independent legal advice.

## Fertility law, family law and estate law intersection

- Do your clients have stored genetic material/embryos?
- Have they agreed what will happen to donated materials or their embryos if they separate?
- Do they have the right to make the decision about what happens after separation based on genetic connection?
- What if one of them dies – can survivor use material/embryos?
- Caution – property rights alone do NOT equal the right to use.
  - Basic Will clause gifting embryos to spouse is not enough
- Does your clients' fertility or family law agreement meet the requirements of the consent regulations? Are your client's intentions protected?

# Consent to use genetic materials after death

*L.T. v. D.T. Estate (Re)*, 2019 BCSC 2130 and *L.T. v. D.T. Estate*, 2020 BCCA 328

**Facts:** Young couple; long term relationship; recent parents to one child; plans for future children. Husband died suddenly and intestate. Couple never discussed storage of their reproductive material. Husband had expressed wishes to have more children to his extended family and friends. Day after Husband's death, Petitioner obtained a court order permitting the extraction and storage of Husband's sperm. Substantive hearing regarding use was held over a year later.

## Outcome:

- Appeal dismissed with “regret, aware of the painful and tragic circumstances confronting Ms. T’s family.”
- *AHRA* is clear that consent must be in writing, according to the Consent Regulations. No exceptions.
- Ownership/property rights NOT = right to use reproductive material
- No posthumous use of human reproductive material permitted without specific written consent
  - Must conform with AHRA consent regulations
  - Simple gift or statement of intention in a Will is NOT enough

## Consent to use genetic materials after death–Agreements

- Consider terms in a cohabitation agreement (or a separate consent) to address client's consent to:
  - Extraction of genetic material after death to allow spouse to use that material for their own reproductive purposes;
  - Address whether the donor agrees to also be a parent of a child born to their partner after their death
- CLEBC's *Wills and Personal Planning Precedents: An Annotated Guide* now has precedents for:
  - Will Clauses
  - Separate documents for consent under Consent Regulations



# Separation Agreements, Contracts, Consent: Embryos

S.H. v. D.H 2019 ONCA 454: before separation the husband and wife signed a contract with the Clinic that if they separated, the wife could decide what to do with the embryos (created from donor sperm and egg). After separation, husband sought to withdraw his consent for her to use the embryos to have a second child herself. On appeal, determined that wife could not use embryo.

Section 10(1)(b) of the *Consent Regulation* requires that the term “donor” include a couple who are spouses at the time that the *in vitro* embryo is created, even where neither person within the couple contributes reproductive material to the embryo.

Section 14(3) of the *Consent Regulations* provides that if the donor is a couple, either spouse may withdraw consent before the embryo is used.

- Together, these provisions mean that, despite having a contract to permit the wife to unilaterally deal with the embryo according to her wishes, the husband had the right to change his mind such that the contract would be rendered void.
- Based on the discussion, the same would be true if both parties were genetically connected to the embryo.
- If, however, only one person was genetically connected to the embryo, section 10(3) deems the genetically contributing former spouse the embryo’s sole donor.
- So, when only one person is genetically connected, we can include terms about those embryos in a separation agreement.
- This case has important implications for people who create embryos without the above knowledge and then separate.

# Separation Agreements, Contracts, Consent

Consider other implications:

- A situation where a woman created embryos in the past with her eggs and husband sperm, rather than freezing her eggs. The parties separate. She is now of an age where her eggs are not viable.
- Embryo created from husband sperm and wife's egg. Upon separation, only the husband has the authority to consent to how those embryos are used.

Families may be relying on the Clinic Forms (contracts) that may be inconsistent with the outcomes under the law.

# Separation Agreements

Where both spouses own genetic materials together– for example they have donor sperm, donor eggs or donor embryos– or they agree that the other person can retain the materials even if they are genetically connected--a separation agreement should include terms to address this:

Like a donor agreement:

- Designate or transfer ownership to only one spouse;
- Confirm that upon “donation” to the sole party, consent can no longer be withdrawn and ownership is determined
- Put limits on what that owning spouse may do with the materials (ie can’t transfer to a third-party without further consent)
- Consider clauses to protect the parties
  - Donor is not a parent, and no child support or estate rights arise;
  - Donor will never seek parental rights or guardianship
  - Put limits on what that owning spouse may do with the materials (ie can’t transfer to a third-party without further consent)

What would happen if parties reconcile:

- What if it is before conception? Do they or do they not consent to be a parent?
- They understand that a step-parent has obligations

# New Relationships and One Person Parenting

One person (intended parent) is seeking to become a parent through assisted reproduction. But they have a partner (or meet someone during the process before getting pregnant). The parties do not want the partner to be the parent of the child.

Consider an agreement to confirm:

- The non-IP does not consent to be a parent. (under s.27 of the FLA they are presumed to be the parent unless there is evidence they did not consent)
- Consider clauses to protect the parties
  - Donor is not a parent, and no child support or estate rights arise;
  - Donor will not seek parental rights or guardianship
- They understand that:
  - a step-parent has obligations respecting child support and
  - contact and guardianship decision are always made in the BIOC of the child and can't contract out of that
  - If they conceive through sex, the assisted reproduction parentage regime does not apply and they are both parents

## Family Law Agreements- Poly Families

- Gap in the law means that without a cohab agreement, poly families are in an unpredictable scenario.
- The importance of cohabitation agreements to address:
  - Property division;
  - Support;
  - What happens if part of the family stays intact– ie only 1 person separates
- Children: the BC Reference case 2021 BCSC 767 established authority to allow for three parent poly families where no assisted reproduction is used.
  - Child support obligations?



## Recognition and Thanks:

This presentation draws in part on work done by many others, including members of Fertility Law BC (Barbara Findlay, Q.C., Monique Shebbeare, Zara Suleman, Catherine Wong, Michelle Kinney, and Lynda Cassels)

We are grateful to all who have shared their work and knowledge in this area. Any errors or misstatements are our own!

## Recent courses/additional resources:

*Family Law 2021: Family is as Family Does - Evolving Family Forms* – presented by the Pacific Business and Law Centre on October 1, 2021. Materials/Rebroadcasts - <https://www.pbli.com/>

*Recent Developments in Fertility and Surrogacy Law in Canada* – Canadian Bar Association, April 27, 2021

*Use of Reproductive Material After Death and Estate Planning Considerations* – Canadian Bar Association, September 27, 2021

*Baby Making: Fertility Law and Assisted Reproductive Technologies 2016* – Continuing Legal Education B.C., April 8, 2016



Questions?

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