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A CAUTIONARY TALE OF CONSENT: WIDOW DENIED USE OF DECEASED HUSBAND'S REPRODUCTIVE MATERIAL

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In the decision of *LT v DT Estate*, 2019 BCSC 2130, the Supreme Court of British Columbia considered whether a wife could extract and use her recently deceased husband's reproductive material to create embryos without his prior written consent.

Ms. T and Mr. T were a young couple who had been married for three years and had recently become parents. Sadly, Mr. T died suddenly and unexpectedly. He did not have a will.

Immediately after Mr. T's death, Ms. T made an urgent application to the court for an order that Mr. T's sperm be extracted from his body, stored, and used to create embryos for Ms. T's reproductive use. There was significant evidence that Mr. T had enjoyed being a parent and wanted more children. Recognizing that the extraction needed to occur within 36 hours of his death, the court ordered that the material be extracted and stored pending a full hearing.

The main issue to be addressed at the full hearing was whether posthumous extraction and use were permitted despite the fact that Mr. T had not consented to either in accordance with the *Assisted Human Reproduction Act* (the "AHRA") and regulations.

The AHRA and regulations state that a person cannot extract reproductive material from a donor's body after death for the purpose of creating an embryo without the donor's prior written consent. Moreover, the donor must have been made aware of certain information prior to giving consent, including the purpose for which their reproductive material would be extracted and their ability to withdraw consent.

At the full hearing, Ms. T made three arguments in favor of her gaining access to and use of the reproductive material.

The first argument was that Mr. T's implied consent was sufficient to fulfill the AHRA requirements. Ms. T pointed to the common-law concept of consent, which permits consent to be implied and oral. She also relied on provincial health legislation, which allows consent to medical treatment to be inferred in some cases.

The court rejected this argument on the grounds that the AHRA unequivocally requires written and informed consent. It reasoned that the broad-based common law understanding of consent could not be applied in the face of legislative language to the contrary. Similarly, provincial health legislation could not assist in interpreting a federal statute explicitly requiring written consent.

The second argument was that a "legislative gap" existed because the AHRA did not contemplate the unexpected death of a potential donor.

LexisNexis

The court rejected the existence of a legislative gap. It found no evidence that the legislature had intended to exempt individuals from the consent requirements in cases of unexpected death. Rather, it appeared that the legislature had intended for the AHRA requirements to apply to all instances of posthumous extraction. This was particularly true, in the court's view, because the vast majority of individuals using assisted reproduction would be of an age at which death is generally unexpected.

The third argument was that Ms. T had property rights in Mr. T's extracted sperm as his intestate heir.

The court rejected this final argument as well. It reasoned that Mr. T's sperm could only arguably be considered property because it had been extracted and stored as a result of the court's interim order. As the order had only been made pending submissions on the main issue, it could not be interpreted as vesting a property interest in Ms. T.

Throughout the decision, the court distinguished the matter at hand from *KLW v Genesis Fertility Centre*, 2016 BCSC 1621. In *Genesis Fertility*, the court found that the deceased donor had provided sufficient consent for the posthumous use of his reproductive material even though he had not consented in writing. Unlike Mr. T, however, the donor in *Genesis Fertility* had consented to the extraction and storage of the reproductive material during his lifetime. Moreover, he had expressed to several people that he wanted his wife to have use of the reproductive material after his death. Therefore, the "extraordinary circumstances" that had been present in *Genesis Fertility* were not present in this case.

The court dismissed the petition and terminated the authorization for the storage of Mr. T's reproductive material. However, the court stayed its order for 30 days to allow Ms. T to file an appeal. Ms. T filed an appeal in January 2020, the result of which is yet to be determined.

LEGISLATION UPDATE

Manitoba

Bill 56, *The Family Maintenance Amendment Act*, received first, second, and third reading on April 15, 2020, and royal assent on April 15, 2020. Bill 56 amends *The Family Maintenance Act*, CCSM c. F20, by allowing maintenance enforcement officials to make more frequent inquiries to determine whether maintenance obligations for adult children remain eligible for enforcement. The Act is also amended to permit each party to receive a copy of material submitted by the other party, with any sensitive information deleted, when a request is made for an administrative suspension of a maintenance order.

Saskatchewan

Bill 175, *The Marriage Amendment Act, 2019*, received third reading on March 3, 2020, royal assent on March 16, 2020, and is effective March 16, 2020. Bill 175 amends to *The Marriage Act, 1995*, SS 1995, c. M-4.1, to allow family members or other interested persons to ask the court to have a marriage nullified where the person getting married did not have the capacity to consent to the marriage. The Act currently only allows the court to nullify a marriage where one of the spouses was a minor at the time of the marriage. The Act does not currently address situations where an adult has an inability to provide valid consent. Bill 175 also makes consequential amendments to *The Wills Act, 1996*, SS 1996, c. W-14.1.

RECENT CASES

Judge Erred in Ordering Spousal Support Where Payee's Income Higher Than Payor's Income

Alberta Court of Appeal, January 16, 2020

The appellant husband and respondent wife married in 2012 and separated in 2016. The parties had two children of the marriage and had shared parenting. In 2013, the husband was injured in an accident and since then, was in receipt of disability income. He also earned undeclared income working for his sister's landscaping company, earned income working

as a distributor for a dog food company, and partnered in another business endeavour with a friend. The wife worked as a registered nurse. Six months post-separation, the husband accepted a global settlement of $300,000 for all damages related to his personal injury claim, netting $198,622. At trial, the judge found that the husband's income from 2016 to 2018 ranged from $29,952 to $58,875. The wife's income ranged from $54,870 to $60,155. The trial judge awarded the wife two years' compensatory spousal support and directed that the parties provide the judge with Spousal Support Advisory Guidelines ("SSAG") calculations. The SSAG calculations yielded a suggested spousal support of $0. The trial judge ordered spousal support of $1,500 per month from June to December 2016, and $800 per month from January 2017 to May 2018. The trial judge also ordered that $99,622 of the husband's settlement proceeds be exempt from inclusion in the calculation of the husband's matrimonial property. The husband appealed the quantum of spousal support and argued that a sum of $125,000 from his personal injury settlement should have been exempted from his matrimonial property.

The appeal was allowed in part. The Court noted that a high degree of deference is afforded to spousal support awards, and, absent an error in principle, a significant misapprehension of the evidence, or unless the award was clearly wrong, there is no basis for appellate intervention. The trial judge did not provide any reasons to explain the basis for the amount of spousal support ordered or the reason why she departed so significantly from the SSAG. Further, as the parties had comparable incomes and, at points, the wife's income was twice that of the husband's income, it was difficult to see how the judge had considered "the condition, means, needs and other circumstances of each spouse", as required under s. 15.2(4) of the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.). The Court concluded that the trial judge erred in awarding any spousal support to the wife for the June 2016 to May 2018 period. The trial judge had found that the evidence was unclear as to what portion of the husband's settlement was attributed to what head of damages. The Court recognized that the trial judge did not explicitly attribute any portion of the net settlement proceeds to general damages for pain and suffering, which is exempted from matrimonial property. This, however, did not amount to a finding that the trial judge misapprehended the facts, erred in law, or that her decision was clearly wrong. As the record was lacking in reliable evidence on the settlement, the husband failed to prove entitlement to a greater exemption.

Williams v. Williams, 2020 CFLG ¶27,619

Mother's Relocation Not Permitted Where Child's Relationship with Father Would Be Disrupted

British Columbia Supreme Court, January 9, 2020

The parties separated in November 2018 and continued living together until March 2019. They had a three-year-old child. In January 2019, they entered into a separation agreement providing for equal parenting time and shared custody. The respondent mother claimed that from March to November 2019, the child was in her care 56 per cent of the time and in the claimant father's care 28 per cent of the time, with the rest of the time spent in daycare. The father claimed he was unable to take care of the child overnight because of the child's daycare start and his employment. The mother had been on medical leave since November 2019 and the child had been spending the time he would normally be in daycare with the mother since then. The mother was pregnant with her new partner's child and was due in February 2020. She proposed a move from MacKenzie to Clinton, where her new partner lived and worked. She proposed a two-week shared rotating parenting schedule, with exchanges in a town at a midway point, a three-hour drive from each town, until September 2021, after which time the child would commence school. The father brought an application under ss. 68 and 69 of the *Family Law Act*, SBC 2011, c. 25 (the "Act"), to prevent the mother from relocating the child.

The application was allowed. The Court found that if the child's sleeping hours were not counted, the child spent substantially equal time with each parent. It found that the circumstances where the mother had the child for more parenting time between March and November 2019 were not sufficient to displace the parties' agreement to share parenting equally. As the parents had substantially equal parenting time, s. 69(5) of the Act was applicable. The Court did not find that the mother's proposal to relocate was made in bad faith under s. 69(6). The mother wanted to move to be closer to her new partner and not be left as a single parent with two children. The Court did not find the mother's proposed parenting plan, which involved the child travelling in a car for six hours every two weeks, was reasonable or sustainable. When the child would start school, his relationship with one parent would be ultimately disrupted. The Court found there was no material difference between MacKenzie and Clinton in terms of economic opportunities. The child's extended family lived in MacKenzie and those relationships would be disrupted if he relocated. The mother's emotional

wellbeing was not a predominant factor. The Court found that it was in the child's best interests for the child to not relocate to Clinton. As the parties had only been separated for nine months, a relocation would put the child's development of strong relationships with both parents at risk and also significantly change the terms of the parenting agreement.

Baldus v. Lillow, 2020 CFLG ¶ 27,622

Children Permitted to Select Form of Parenting Time with Father

British Columbia Supreme Court, January 22, 2020

The claimant father and respondent mother married in 2003 and separated in 2017. They had three sons, aged 16, 12, and 10. Post-separation, the relationship between the father and the children deteriorated. At a case conference in November 2017, the parties agreed that the father would have interim parenting time on alternate Sundays. The father frequently missed parenting time, as the children would have tennis tournaments and other trips arranged by the mother. The father applied for an increase in parenting time. "Hear the Child" reports indicated that the children were reluctant to spend more time with the father. In March 2019, the father was granted alternate Sunday parenting time and phone calls on Tuesdays and Thursdays, and the children were ordered to attend counseling. The father was unable to exercise access in July and August 2019, as the mother took the children away for tennis tournaments. When the father attended for pick-ups in August and September, the children insulted him with profanities and told him to go away. The father did not see the children since then and his phone calls were blocked. The father brought an action seeking a final order ensuring parenting time, including weekly access with the two younger children. The father took the position that the mother engaged in alienating conduct. The mother claimed that the children were afraid of the father due to his temper. The father admitted to making one of the children take a cold shower once as a form of discipline.

The action was allowed in part. The Court found that it was in the two younger children's best interests that they return to a regular parenting schedule with the father. It was clear that the mother had contributed to the current state of affairs, as she had actively obstructed the father's access by taking the children on trips during scheduled parenting time without proper notification. There was also some "objectively reasonable cause" for the children's apprehension of the father. As a result, the children were to have some input into the type of contact they wanted with the father. The Court was unwilling to increase parenting time and instead ordered a gradual restoration of the existing parenting time. The children were permitted to elect the form of parenting time, including for it to only be telephone contact for the first six months. After six months, the father was to resume his regular parenting time on alternating Sundays and by telephone on Tuesdays and Thursdays. The parenting arrangement was reviewable in six months. The mother was to assume responsibility for ensuring that the children were available for the father's parenting time and to encourage the children to rebuild their relationship with the father. The mother was ordered to be present when the father arrived for pick-ups.

N.S. v. C.S., 2020 CFLG ¶ 27,623

Costs of Children's Extracurricular Activities Were Not Section 7 Expenses

British Columbia Supreme Court, January 21, 2020

The claimant mother and respondent father were married in 2007, separated in 2017, and divorced in 2019. They had three children, aged 11, nine, and seven. In April 2019, the parties entered into a comprehensive final separation agreement and filed it with the Court. The agreement provided for shared parenting on a week on/week off basis; child support based on the father's income of $418,000 and the mother's income of $18,000, with the father paying $6,441 per month; special and extraordinary expenses paid in proportion to the parties' respective incomes, with the father paying 82 per cent and the mother 18 per cent; and spousal support for the mother at $5,000 per month. The agreement stated that special or extraordinary expenses are "extraordinary expenses for extracurricular activities", mirroring the definition in s. 7(1)(*f*) of the *Federal Child Support Guidelines*, SOR/97-175 (the "Guidelines"). Pre-separation, the children were involved in various activities, including dance, Acro lessons, track and field, skiing, diving, gymnastics, tennis, and sailing camps. Post-separation, the expenses associated with these activities, totalling $8,720 for 2019, were paid for by the mother. The mother applied for an order that the father reimburse her for 82 per cent of the children's activity costs and pay 82 per cent of future costs. The father took the position that the expenses

were ordinary expenses payable out of the child support, not extraordinary expenses within the meaning of the separation agreement or section 7 of the Guidelines.

The application was dismissed. The Court considered the case law on special or extraordinary expenses ("section 7 expenses"). For a recreational or extracurricular expense to be considered a section 7 expense, it must meet the threshold of being "necessary, reasonable, and affordable". The expense must be over and above what should be considered "ordinary". The Court should next consider if the payee parent can reasonably cover the expense out of income, including the table child support they receive. If yes, the expense will usually not be a section 7 expense. The Court, however, may still find that it is a section 7 expense based on factors such as the amount of the expense in relation to the payee parent's income and the kind and number of activities the children are enrolled in. The onus was on the mother to establish that the activity expenses were section 7 expenses. The Court noted that the mother's net disposable income, after accounting for spousal support and table child support payments, was slightly higher than the father's. The mother did not submit evidence showing that she could not afford the activity payments or that the children were at an exceedingly talented level that turned the expenses from ordinary to extraordinary. The Court found that the mother did not prove that the expenses were anything more than "ordinary expenses related to regular extracurricular activities". The father was not required to contribute to the expenses pursuant to the agreement's provisions on special or extraordinary expenses.

L.A.M. v. S.C.M., 2020 CFLG ¶27,624

Mother Did Not Satisfy Test for Review of Placement Under Temporary Care Order on Status Review

Ontario Court of Justice, January 28, 2020

The respondents were the mother and maternal grandmother. In July 2019, a final order was made pursuant to a child protection application holding that the child was to be placed in the care of the mother and maternal grandmother subject to supervision terms. In August 2019, the child was taken back into the care of the applicant children's aid society (the "CAS") on account of concerns that the mother was breaching the terms of the supervision order by permitting her partner to be present in the home. As a result, an early status review application was commenced. A temporary without prejudice order was made placing the child in the CAS's care. The mother brought a motion requesting the return of the child to the joint care of her and the maternal grandmother. Alternatively, she sought expanded access.

The motion was granted. The Court considered what the test was on interim motions to change a temporary care order made on a status review application. The parties conceded that there was no specific direction in the *Child, Youth and Family Services Act, 2017*, SO 2017, c. 14, Sched. 1, on the applicable test. While a court must find a material change in circumstances where there is a temporary care order on a protection application, there was no binding precedent respecting status review proceedings. The Court did not find that it was appropriate to impose a threshold of "a material change in circumstances" like that required in a motion to change a final order. Requiring parents to show a material change that was not reasonably foreseeable or contemplated before the making of the temporary order would be setting "the bar impossibly high", the Court stated. The Court found that the appropriate test was "a change in circumstances that is sufficiently material to warrant a review of the placement of the child by the Court". The Court was not satisfied that the mother demonstrated a sufficiently material change in her circumstances to justify a review of the child's placement. While the mother claimed she would ensure that her partner was not in the home if the child was returned, this had already been a term in the final order and she had breached that term less than a month after the order was issued. The mother had also cancelled her follow-up mental health appointment, did not complete any of the programs that were part of her supervision terms, and was unavailable to meet with the CAS worker, showing a lack of commitment to working in a cooperative manner with the CAS. The Court found, however, that there was sufficient evidence to warrant a review of the mother's access. The access had been consistent and positive, and the child wished to spend more time with the mother. It was in the child's best interests that access be expanded to include overnight visits on the weekend in the grandmother's home and a mid-week visit after school.

Children's Aid Society of Brant v. A.H., 2020 CFLG ¶27,628

Where Deceased Provided Shelter to Child, Child Was Entitled to Dependant's Relief from Estate

Ontario Superior Court of Justice, January 2, 2020

The respondent was the estate of the late Raymon DeRanney ("RD"), who passed away in December 2017 at the age of 68. RD had never married and had one biological child, aged 37. RD and the applicant Fritzie Deleon ("FD") had a romantic relationship from 1993 to 1999. In 2000, FD gave birth to the applicant Caseylynn Deleon ("CD"). RD remained friendly and supportive with the applicants and invited them to live with him and his daughter in his residence in Toronto. CD lived in the residence for the following 15 years and FD lived there off and on. Starting in 2017, RD arranged for the applicants to live in a bungalow that he rented and sublet to them at below market value rent. The applicants continued to reside there after his death. RD had also provided some financial support to CD by paying for her extracurricular activities and other expenses. He would permit the applicants to use his credit cards from time to time to cover certain expenses, such as car maintenance, fuel, and clothing. RD died intestate, leaving an estate worth approximately $1.5 million. FD brought an application seeking dependant's relief from the estate on the basis that CD was RD's "child" for the purposes of the dependant's relief provisions of the *Succession Law Reform Act*, RSO 1990, c. S.26 (the "Act"). CD was 19 years old and was attending university. FD was employed in retail and was in receipt of Ontario Disability Support payments.

The application was allowed. Under s. 57(1) of the Act, a "dependant" includes the deceased's "child", which in turn includes "a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family". The Court found that most of the "indicia of parenthood", as established in *Hyatt v. Ralph*, 2015 ONSC 580, were not present. RD and FD never lived together as spouses, did not hold themselves out as CD's parents, and did not pool their incomes for CD's expenses. CD referred to RD as her "uncle", and RD described her as either his "niece" or "friend". RD, further, favoured his biological daughter in ways he did not favour CD and made financial provisions for her that went beyond anything given to CD. The Court concluded that there was no co-parenting by RD and FD. The Court considered, however, that RD provided CD with safe and comfortable shelter for 15 years, as well as certain financial provisions. Based on this, the Court found that RD demonstrated a settled intention to treat CD as a member of his family, even if the family was unconventional. CD was, therefore, a "dependant" for the purposes of the Act. In determining the amount and duration of support CD was entitled to, the Court considered that the evidence did not support that RD was paying all of CD's expenses immediately before his death. RD was also planning for his retirement and it was unlikely he would be able to continue to provide financial support to CD. The Court found, however, that RD would have likely made a significant contribution to CD's university education. After deducting $25,000 on account of CD's income and student loans from the four-year university costs of $65,995, the Court arrived at a total of $40,955 as the appropriate payment for support owing from RD's estate to CD as his adult dependant child.

Deleon v. Estate of Raymon DeRanney, 2020 CFLG ¶27,629

No Error in Imputing Income to Payor Father in Absence of Financial Disclosure

Ontario Superior Court of Justice, January 28, 2020

The appellant father and respondent mother commenced a relationship in 2009 and married soon after in a religious ceremony. At the time, the father was also married to his first wife of 34 years and lived with her. The father was the owner of a beverage packaging company and the founder and managing member of a mosque in Toronto. The mother was unemployed and had owned a cleaning business in the past. The father and mother did not live together, but the father paid for the mother's living expenses. The parties' child was born in 2013 and was in the mother's primary care. When the child was six months old, the father unilaterally divorced the mother in a religious ceremony. In 2015, the father applied for sole custody of the child. The mother sought sole custody and child support for the parties' child, as well as support for her four children from a previous marriage on the basis that the father stood *in loco parentis* to them. In January 2019, the trial judge granted the mother sole custody of the child with parenting time for the father, and child support at $3,225 per month for the parties' child, based on an imputed income of $420,000, as well as child support arrears of $103,825. The father appealed, seeking shared custody and that his income be set as $105,000, pursuant to his last T4 statement. The mother cross-appealed, seeking that the father's income be imputed at $865,000.

The appeal and cross-appeal were dismissed. The Court found that the sole custody decision was supported by the evidence. The trial judge had considered that neither parent requested joint custody; the parents never cohabited; since birth, the child had been in the mother's care and was doing well; the father did not have free time to care for the child and had not exercised access in three to four months; the father's first wife was hostile toward the mother; and the father's care plan involved the child being taken care of by his first wife. The trial judge did not err in giving weight to a public verbal altercation between the first wife and the mother. The trial judge had also considered the maximum contact principle and found that the mother was more likely to facilitate a relationship between the child and father. There was no error in the trial judge's decision on custody. The Court found that the evidence supported the imputation of income to the father, based primarily on his ability to maintain his lifestyle. The father had paid $6,450 per month to the mother to support her, also paying for her and her older children to travel internationally. The evidence did not show that, during these years, the father's own standard of living fell. The father lived in a 5,600 square foot home overlooking a golf course and owned a rental property, significant RRSPs, and exotic cars. The father did not explain how he could afford the above on an income of $105,000 and also refused the explain the revenues of his company and how his own salary was determined. As the father refused to provide basic financial disclosure, he could not object to the imputation of income. The trial judge did not err in imputing the quantum he did. It was reasonable for the trial judge to find that half of the $6,450 payments had been for the child, resulting in an order of $3,225 per month in child support.

Abbas v. Albohamra, 2020 CFLG ¶27,634

OTHER NEWS

British Columbia

Early Resolution and Case Management Model Pilot Project

On March 29, the British Columbia legislature passed an order in council to amend the *Provincial Court (Family) Rules*, BC Reg. 417/98, to add a section titled "Early Resolution and Case Management Model". This section sets out rules that require parties to engage in mandatory consensual dispute resolution prior to filing a claim. The section defines "consensual dispute resolution" as mediation with a family law mediator, a collaborative family law process, or facilitated negotiation of a child support or spousal support matter with a child support officer. This pilot project will initially only apply to the Victoria registry.

Nova Scotia

Continuing Legal Education

On August 31, 2020, the Canadian Bar Association Nova Scotia presents an online replay of "ADR and Arbitration During a Pandemic: A Family Law Perspective", chaired by Laura Kanann of MDW Law. The event originally aired on April 27, 2020. For more information or to register, visit: https://www.cbapd.org/details_en.aspx?id=NS_NS20FAM07R.

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