WeirFoulds LLP

Estate Alert – Proposed Amendments to Ontario Legislation in Respect of Parental Recognition

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Bill 137 – An *Act to amend the Children's Law Reform Act*, the Vital Statistics Act *and other Acts with respect to parental recognitio*n, which is also known as *Cy and Ruby's Act (Parental Recognition), 2015* – proposes a number of amendments to the statutes dealing with parental recognition[1]. The proposed amendments (the main ones being the amendments to the *Children's Law Reform Act*[2] ("***CLRA***") deal with various typical factual scenarios involving assisted reproduction that involve donated genetic material from a third party, surrogacy arrangements, or the possibility that the intended parent's own genetic materials may be stored and used at a later time. Not only would the proposed amendments facilitate the parental recognition of same-sex partners who rely on assisted reproduction for conception and birth of the children they intend to parent[3], but they would affect all children conceived or born through assisted reproduction. For example, under Bill 137, a donor providing human reproductive material for someone else's reproductive use would not be considered as the child's parent by reason only of a donation. In addition, section 8.2 would also allow a potential birth parent and a person or persons who intend to be a parent or parents to the child to agree to be parents of the child together. Such parentage agreements would provide a legislative framework for parentage arrangements comprising three or more parents, and importantly, would apply on the birth of a child whether as a result of assisted reproduction or not. At the same time, section 8.3 of Bill 137 deals specifically with situations involving surrogacy arrangements in which the birth parent would not be considered a parent of the child conceived through assisted reproduction, if an agreement to that effect is made between the birth parent and intended parent or parents. Further, section 8.5 of Bill 137 provides for parentage where a child is conceived through assisted reproduction after the death of one of the people who provided the genetic material[4], subject to certain conditions. These conditions include proof that the deceased gave written consent to the use, after his or her death, of his or her human reproductive material or embryo for a specified purpose[5] and gave written consent to be the parent of a child conceived after his or her death. The important aspect of the proposed legislation from the estate planning and estate administration perspective is that it does not contemplate any parallel amendments to the *Succession Law Reform Act*[6] ("***SLRA***"), which governs testate and intestate succession in Ontario. Among other things, under the *SLRA*, it is the "issue" of the deceased person that have intestate succession rights, which the *SLRA* defines by reference to descendants of the deceased, thus implying a genetic lineal connection between the deceased and an heir. In the absence of a genetic connection, an argument can be made that a child born though assisted reproduction where donated genetic material was used does not meet the definition of "issue". Having parentage established despite the absence of a lineal genetic connection between the deceased and his or her child would not eliminate *SLRA*'s embedded requirement. Further, the terms "issue" and "child" as defined in the *SLRA* specifically includes only children and issue that are conceived before and born after death. Although posthumously conceived children are not specifically excluded, the courts have not yet had an opportunity to consider how "conceived before death" could be interpreted in the context of assisted human reproduction. Once again, the recognition of parentage under section 8.5 of Bill 137 would not necessarily expand the scope of the definition of "child" and "issue" under the *SLRA*. It remains to be seen, if Bill 137 passes third reading and comes into force, how its provisions will be interpreted, and whether any amendments to the *SLRA* will be proposed or discussed as a result. In any event, how terms such as "child", "issue", "parent" and "next of kin" are defined and used in the relevant statutes and the common law will have to be carefully considered to ensure that estate planning wishes and intentions are achieved. [1] The full text of Bill 137 can be found at

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3554. The Bill passed the second reading and as of December 10, 2015, was referred to the Standing Committee on Regulations and

Private Bills. [2] R.S.O. 1990, c. C.12 [3] One of the significant proposed amendments affecting the rights of same-sex partners is the replacement of all references to "mother" and "father" by

references to “parent”. [4] Section 2.1(2) of Bill 137 provides that a child is born as a result of assisted reproduction is deemed to have been conceived on the day the human reproductive material or embryo was implanted in the birth parent. [5] This requirement is consistent with the requirements under the Assisted *Human Reproduction Act*, S.C. 2004, c. 2 and the *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137. [6] R.S.O. 1990, c. S. 26.

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