Sperm Donors Beware: Can you Bank on Your Anonymity?

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The Court of Appeal for British Columbia has recently held that the offspring of anonymous sperm donors ("donor offspring") have no constitutionally-protected right to know the identities of their biological fathers. This British Columbia case – *Pratten v. British Columbia (Attorney General)*, 2012 BCCA 480 – is not binding in Ontario, but it should give Ontario sperm donors pause. The plaintiff, Olivia Pratten, has expressed her desire to appeal this decision to the Supreme Court of Canada. If leave is granted, the Supreme Court's decision on the merits may have far-reaching estates planning ramifications for sperm donors here in Ontario.

Background: The Donor Offspring

In 1982, Ms. Pratten was conceived using sperm from an anonymous donor. Wishing to know more about her biological origins and identity, Ms. Pratten launched an action in the Supreme Court of British Columbia seeking declaratory and other relief. In particular, she claimed that when British Columbia enacted the *Adoption Act* for the benefit of adoptees only, it contravened s. 15 (equality) under the *Canadian Charter of Rights and Freedoms* by impermissibly discriminating against donor offspring. She also challenged British Columbia's failure to enact legislation to assist donor offspring in obtaining information about their biological parents. She sought a declaration of positive rights in this regard under s. 7 of the *Charter* (the right to life, liberty and security of the person).

Ms. Pratten, along with other donor offspring, filed affidavit evidence describing their personal experiences, fears and concerns about their limited knowledge of their biological origins. These concerns included inadvertent consanguinity; compromised health on account of incomplete family and medical histories; and struggles with feelings of loss and incompleteness.

Citing the Supreme Court of Canada's decision in *R v. Kapp*, [2008] 2 S.C.R. 483, the British Columbia Court of Appeal ultimately found that the impugned provisions of British Columbia's Adoption Act and its regulations qualify as an ameliorative program within the meaning of s. 15(2) of the *Charter*. The Pratten court found that, historically, if not currently, adoptees have been subject to negative social characterization. It was open to the British Columbia legislature to provide adoptees with the means to access information about their biological origins without any obligation to extend the same benefits to others seeking the same information.

The *Pratten* court also rejected the argument that s. 7 of the Charter encompasses a free-standing right "to know one's past." In drawing this conclusion, the Pratten court cited the Ontario Court of Appeal's decision in *Marchand v. Ontario*, 2007 ONCA 787, leave to appeal refused [2008] 1 S.C.R. ix, whereby it was held that an adoptee had no constitutionally protected right to know the identity of her biological father.

What Does This Mean for Ontario Donors?

Ontario's equivalent legislation is a combination of the *Vital Statistics Act* ("VSA") and the *Child and Family Services Act* ("CFSA"). By virtue of amendments made in 2007, the VSA permits adopted persons over the age of 18 to obtain uncertified copies of their birth certificates and adoption orders, subject to certain exceptions. For example, s. 48.4(3) of the VSA permits a birth parent to file a "no contact" notice. If such a notice is filed, an adopted person may still access uncertified copies of his or her birth certificate and

adoption order so long as he or she gives a written undertaking promising not to contact the birth parent, either directly or indirectly. Also, where an adopted person was adopted prior to September 1, 2008, s. 48.1(5) of the VSA permits a birth parent to file a disclosure veto to prohibit disclosure of a birth certificate and adoption order. Section 153.6 of the CFSA also permits the formation of written "openness agreements" as between adoptive parents and birth parents (among others) to foster relationships between birth parents and an adopted child. These are just a few of the many analogous provisions challenged by Ms. Pratten in British Columbia's courts.

Potential Implications Regarding Estates

The *Pratten* case is an interesting constitutional case. Should it make its way to the Supreme Court of Canada, it has the potential to change not only the privacy and confidentiality interests of altruistic and anonymous sperm donors, but also the way in which they should go about planning their estates. If donor offspring succeed in their court challenge to know more about their biological fathers, this may lead to claims against their fathers as estate beneficiaries; dependant support claims under the *Succession Law Reform Act*; and even dependant claims for tort damages under the *Family Law Act*. These estates issues may be of particular concern to sperm donors who are biological fathers of potentially hundreds of donor offspring in North America and elsewhere.

It remains to be seen whether the Supreme Court of Canada will entertain this case. In the meantime, sperm donors should seek prompt estate planning advice if they have not done so already. Even if the Supreme Court denies leave in *Pratten*, the rapid exchange of information via the internet, blogging, and various other social media outlets carries a serious risk that sperm donors may not be so anonymous in the near future.

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