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Dispute over dead husband's sperm shows need to plan ahead as reproductive technology advances

While the widow provided substantial evidence of her husband's wishes to have more children, the law requires written consent

By Adam N. Black

On occasion, an ethical dilemma makes its way into the family courtroom and emotions inevitably run high for all involved. That is what happened in a recent case before the Court of Appeal for B.C. in which the court was asked to determine a widow's right to use her deceased husband's sperm for the purpose of having a child.

The case involved a husband and wife who were in a long-term relationship and were the parents of one young child. The couple relished being parents and wanted to have more children. On Oct. 2, 2019, the husband unexpectedly died. The next day, the widow contacted a fertility centre to determine if her deceased husband's sperm could be retrieved. According to the fertility centre, collection of the husband's sperm had to take place within 36 hours of his death and a court order was necessary.

The widow proceeded in court on an urgent, after-hours basis. In the court proceeding, the wife sought orders for the removal of the husband's sperm and that she be permitted to use it to create an embryo. Recognizing the time sensitivity, Justice David Masuhara of the Supreme Court of B.C. made an order for the collection of the sperm, which was to be preserved pending a full hearing to determine if the reproductive material could be used.

That hearing proceeded four days later. In support of her position before the court, the widow provided substantial evidence, from numerous sources, about her husband's wishes to have more children and to ensure his existing child would have siblings. While Justice Masuhara accepted that evidence as being correct, he was bound by the provisions of the *Assisted Human Reproduction Act*, a 2004 piece of federal legislation.

According to the AHRA, “no person shall remove human reproductive material from a donor’s body after the donor’s death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.”

Prior to his death, the husband had not provided written consent to the collection and use of his sperm. Against the backdrop of the legislation, Justice Masuhara noted, “our policy makers require an individual to formalize their informed consent in writing if she or he wishes to permit the posthumous removal of their reproductive material.” As a result, the widow’s claim was dismissed.

The widow appealed to the Court of Appeal for B.C., which reached the same result and dismissed the appeal. In a decision released on Nov. 24, Justice David Harris, writing for the court, begins his analysis by acknowledging he is bound by the legislation and that the case before the court is “one of statutory interpretation.” He goes on to note that the relevant provision of the AHRA is “a clear and unequivocal prohibition on removal of reproductive material to create an embryo unless the donor has given written consent for that use in accordance with the regulations.”

Continuing in his analysis, Justice Harris notes the relevant section “does not admit of any exceptions.”

“It applies to all persons,” the judge continues. “It does not carve out an exception for spouses or common-law partners. It does not provide any exception to the requirement of prior written consent. It does not deal with a situation in which a donor’s death is anticipated differently from one in which it is unexpected. There is no provision in the section for the court to order otherwise or to relieve from the prohibition. And, there is no indication of any criteria a court might consider to avoid the universal and uniform application of the prohibition.”

Underscoring the emotions in the case and the impact the decision will have on the widow, her child and other members of the family, Justice Harris dismissed the appeal “with regret, aware of the painful and tragic circumstances confronting (the widow’s) family.”

As the formation of the modern family evolves thanks to technology, the Canadian legislature has responded. According to the principles enshrined in the AHRA, that response includes implementing “appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies.”

The case serves as a warning to couples planning to have a family: they should turn their minds to whether a surviving spouse should be permitted to use the reproductive material of a deceased spouse. If they wish to avail themselves of assisted reproductive technologies, proper planning must be undertaken.

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