Posted on: October 22, 2021

EMBRYOS AND SEPARATION: A CANADIAN PERSPECTIVE

By: RBS

The Government of Canada estimates that roughly one in six couples experience infertility. As such, it is no secret that couples are increasingly turning to Assisted Reproductive Technologies ("ART"), such as *in vitro* fertilization ("IVF") to treat infertility.

A successful IVF cycle can result in multiple embryos, which some individuals choose to freeze for future family planning. Embryo freezing (also known as embryo cryptopreservation) is a procedure that allows embryos to be stored for future use. Given the myriad of issues that couples in pursuit of IVF are forced to contend with, it is not surprising that many fail to consider what would happen to their frozen embryo(s) in the event of a separation or divorce.

This issue was highlighted in mainstream media when actress Sofia Vergara's ex-fiancé sought to use the couple's frozen embryos after they had separated. Her case highlighted the complexities involving embryo ownership and control.

Interestingly, the law in relation to the use of frozen embryos after separation in Canada was unclear until the issue was considered by the Ontario Court of Appeal in *S.H v. D.H* (2019 ONCA 454).

Prior to *S.H. v. D.H*, some Canadian courts recognized reproductive material as property governed by contract law. In *S.H v. D.H*, the Ontario Court of Appeal concluded that neither contract nor property law principles govern.

S.H. v. D.H. involved a couple who during their marriage had contracted with a laboratory in the United States of America to create *in vitro* embryos. The embryos were created with two anonymous donors. One of the viable embryos was implanted in the wife, who became pregnant and gave birth. The other embryo was frozen. The parties subsequently divorced. The former wife sought to have the frozen embryo implanted in her and the former husband opposed the use of the embryo. Although the former husband had previously consented to the former wife's use of the embryo when it was created, he later changed his mind and withdrew his consent. The former husband wrote to the laboratory storing the embryo and withdrew his consent to his former wife's use of the embryo. The laboratory refused to release the frozen embryo to the former wife in the absence of a court order. At trial, the motion judge applied principles of contract and

property and determined that the embryo be released to the former wife. The decision was overturned on appeal. The Ontario Court of Appeal held that the husband was permitted to withdraw his consent in accordance with the governing legislation and regulations and could rely on the protections afforded to him under both the legislation and the criminal law.

In Canada, Parliament has imposed a consent-based model through the federal *Assisted Human Reproduction Act* (the "*AHRA*") and the *Assisted Human Reproduction (Section 8 Consent) Regulations* ("Consent Regulations"). Under the Regulations, a "donor" includes a couple who are spouses at the time the *in vitro* embryo is created, even if neither party contributed 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 an embryo is used.

What's interesting with the *AHRA* statutory scheme is the criminal component involved. Recognizing the fundamental importance ascribed to human autonomy, section 8 of the *AHRA* specifically outlines the requirement of prior "written consent" in accordance with the Regulations. Section 60 of the *AHRA* sets out the offence and punishment under the AHRA, which can range from a fine not exceeding $500,000.00 or to imprisonment not exceeding ten years on indictment, or to a fine not exceeding $250,000.00 or to imprisonment not exceeding four years on summary, or both.

Given the unique criminal component involved with the *AHRA*, it is important for parties to not only know the state of the law, but the severe consequences of non-compliance with the *AHRA*.

For more information about this article, contact Family Law and Estate Litigation.