HOT TOPICS IN ESTATE PLANNING SERIES:

Assisted Human Reproduction and Estate Planning

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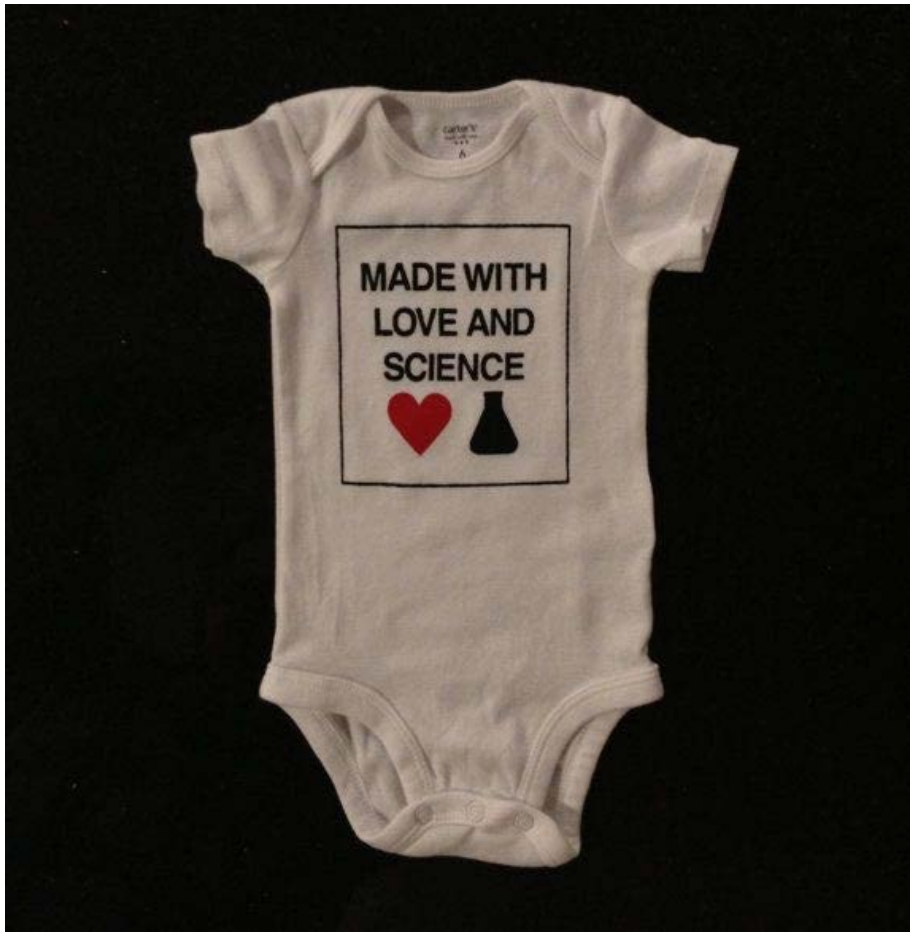
What is assisted human reproduction?

When using that term, to what are you referring?



What is ‘assisted human reproduction’?

- A variety of procedures used to conceive a child without sexual intercourse, ie:
    - Artificial insemination (inserting donated sperm directly into a female’s reproductive organs); or
    - In vitro fertilization (fertilizing an ovum outside of the body and then implanting the embryo into the uterus)
        - In vitro fertilization can occur with the natural and intended couple’s own egg and sperm or with the use of donated sperm, ova, or both.

What is ‘assisted human reproduction’? cont.

- A child conceived with assisted human reproduction can be gestated by a surrogate, who is not intended to be a parent to the child. There are two types of surrogacy:

  - Traditional Surrogacy: the surrogate also donates her own ovum (conception could be through artificial insemination or *in vitro* fertilization)

  - Gestational Surrogacy: the surrogate has no genetic tie to the embryo (conception is through *in vitro* fertilization). The intended parents could be the genetic parents as well, or the embryo or sperm or ovum could have been donated.

What is ‘assisted human reproduction’? cont.

- Both the provincial and federal governments have jurisdiction over certain aspects of assisted reproduction:

  - Federal Legislation: *Assisted Human Reproduction Act* (*AHRA*).
    - Regulates and prohibits several assisted reproduction related practices, but does not define the parents of a child conceived through assisted reproduction.
    - Section 6 of the *AHRA* prohibits commercial surrogacy.
    - Section 7 prohibits the purchase or sale of sperm, ova, and embryos.

  - Provincial Jurisdiction:
    - Family Law including determinations of parentage *The Children’s Law Act (CLA)*
    - Whether surrogacy contracts are enforceable
    - Provinces also have jurisdiction over wills and estates

Assisted Reproduction Technology (ART)

What types of Genetic Materials are Needed?

How and where are they stored?

What type of Arrangement is there Between the storage clinic and the contributor? Or the intended recipient? Or their respective spouses?

ART & Stored Genetic Materials, cont.

Cryopreservation - ART is enhanced by the use of cryopreservation which is a technique of freezing reproductive material for later use. Eggs, sperm and embryos can be frozen.

- Sperm storage:
  - The ‘sperm bank’ in Canada is very limited as donations must be altruistic (*AHRA* prohibits paying for genetic material).
  - As a result, many women seeking a donor will pay for sperm from the United States or elsewhere which can then be shipped to a recognized clinic in Canada for IVF, or they will undergo IVF outside of Canada.
- Egg storage:
  - There is an incredibly limited (often non-existent) ‘egg bank’ in Canada leading to the same issues with seeking donated eggs from abroad.

ART & Stored Genetic Materials, cont.

In Vitro Fertilization (IVF) - A process where ovulation is stimulated using medication, and then the eggs are surgically retrieved from a person's body, and then exposed to sperm in a laboratory. Conception occurs, and then the resulting embryos are transferred into a person's uterus to carry the pregnancy.

- In 2016 there were 15,344 cycles of *in vitro* fertilization initiated in Canada, 2801 of which involved donated eggs.

- Embryo storage:
  - There's an estimated tens of thousands of surplus frozen embryos in fertility clinics across Canada and hundreds of thousands in the US from couples who have used IVF.

ART & Stored Genetic Materials, cont.

The Relationship between the storage facilities (fertility clinics) and the donors is contractual and varies by facility. Most contracts will include:

- Duration of time the materials will be stored;
- The cost per month or per year to store the materials;
- Whether consent of the donor is needed to access the material;
- What happens to the material in case of divorce (ie: leftover embryos from couples using IVF);
- What happens to the material in case of death of the donor
  - Can a sperm / egg / or embryo donation be used posthumously? By who? Any limitations?

Before we even get to birth, what is the status of the genetic material at law?

Is it property? Is it something more? Something less?

Legal Status of Genetic Material, cont.

- Common law position is that human bodies (and biological materials) are not property, but courts have been altering their position due to advances in technologies
  - Court found fertilized embryos were property of the woman as the male's donation of sperm was a gift
    - *CC v AW*, 2005 ABQB 219
  - Courts have found that genetic material is property in the context of intestate succession
    - *KLW v Genesis Fertility Centre*, 2016 BCSC 1621
  - Courts have found that genetic material is property in the context provincial legislation regulating the storage of goods
    - *Lam v University of British Columbia*, 2015 BCCA 2

CC v AW, 2005 ABQB 219

- dispute over 4 fertilized embryos as part of a larger custody and access battle
- the parties were never married – had been romantically involved in the past but never lived together and never committed to a long term relationship – they remained friends after their intimate relationship ended
- AW agreed to help CC become pregnant – donated sperm for in vitro – she became pregnant with twins
- 4 frozen embryos remained in storage in Toronto
- AW refused to consent to the release of the remaining embryos for CC to use in another attempt to become pregnant
- Court held that AW had provided his sperm as an unqualified gift to CC to assist her to conceive children and the remaining fertilized embryos remained CCs property to use as she saw fit

KLW v Genesis Fertility Centre, 2016 BCSC 1621

- Petitioner wanted the fertility centre to release her deceased's husbands sperm to her to create embryos
- Husband died intestate and died prior to giving his written consent to the petitioner's use of the reproductive material for the purposes of creating an embryo as required under s. 8(1) of the *AHRA* – no one had informed the couple of the need for written consent prior to his death
- Court held that the husband had rights of use and ownership in the reproductive material sufficient to make it property
- Court held that following the husband' death, property in the reproductive material vested in the spouse and sole beneficiary of his intestate estate
- Court held that the wife could use the material for the purpose of creating an embryo even though the husband had not given consent in a satisfactory manner according to the AHRA regulations

Lam v University of British Columbia, 2015 BCCA 2

- Lam was the representative in a class action of 400 plaintiffs diagnosed with cancer – prior to radiation the class members stored their sperm in a freezer in a laboratory operated by UBC
- Electricity to the freezer failed during storage and the sperm were destroyed
- Plaintiffs had signed an agreement with the university to store the sperm and pay a deposit and annual storage fees – agreement stated that UBC would be exempt from liability for damage resulting to improper storage or maintenance or freezing
  - Plaintiffs argued UBC couldn't rely on that clause because the *Warehouse Receipt Act* states that "warehousers" cannot restrict by contract their obligation to exercise care and diligence in regards to the goods in their custody – goods defined as all property other than things in action, money and land
- Trial judge held that the sperm were property

What happens to stored genetic material in the event of the breakdown of a marital relationship?

(Sofia Vergara and her ex, Nick Loeb, have two female embryos stored in California and he's sued her to use them post-breakup)

Legal Status of Genetic Material

The cases suggest that stored genetic material is considered family property, however it is important to note that just because one party "gets" the property, doesn't mean the party can actually use the property!

AHRA:

8 (1) *No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.*

(2) *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.*

(3) *No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.*

SH v DH, 2018 ONSC 4506

- Court found an **embryo** was family property for the purposes of a divorce proceeding
- Neither party was genetically related to the embryo – had purchased several embryos from the US (Note: purchasing embryos in Canada is prohibited by the AHRA)
- Couple had one son together from one of the purchased embryos and then separated
- Wife wanted to attempt to conceive another child with the one remaining embryo
- Husband wanted the embryo destroyed
- Court found that the embryo was part of the family's property
- Since the embryo couldn't be sold, the wife was entitled to have it and the husband was entitled to compensation

SH v DH, 2018 ONSC 4506, cont.

- first Canadian decision holding that an embryo is property
- parties had signed agreements with the fertility centre in Ontario and with the centre that created the embryos in Georgia
- important that the embryo wasn't genetically related to either party – not necessarily for the determination that the embryo was property, but in terms of what could subsequently be done with the embryo
  - if it had been, the AHRA's rules regarding the use of one's genetic material would have come into play
- question how the court would have ruled if the embryo would have been created by using only one of the couple's genetic material, or both of the couple's genetic material
  - likely wouldn't change the court's ruling that the embryo was property…BUT the consent provisions of the AHRA would kick in and determine who needs to consent to the use of the embryo
  - so the "property" might be unusable and thus worthless

JCM v ANA, BCSC 2012

- At issue was the ownership of sperm straws in the context of a family law dispute
- Lesbian couple was divorcing
- They had purchased sperm straws during their relationship and had each conceived a child with the sperm
- One of the spouses wanted to be able to use the sperm straws to attempt to impregnate her new partner
- The former spouse disagreed with this proposed use and wanted the court to order the straws be destroyed
- Court found that the sperm straws could be considered property for the purposes of dividing family property between the spouses

JCM v ANA, BCSC 2012, cont.

- Court held that the federal AHRA does not dictate or influence whether the sperm straws were property

  - Para 67: I do agree, however, with the claimant that the U.S. cases demonstrate the importance of balancing the right to procreate with the right to avoid procreation. But there is no need to balance these rights in this case. A.N.A. will not be the biological parent of any child conceived using the sperm straws. She will not have any parental obligations or responsibilities to any child conceived whether the child is conceived by T.L. or J.C.M. A.N.A.'s right to avoid procreation is not being infringed by dividing the sperm straws between the owners as property

Once a child is born through assisted human reproduction, who are the child's parents?

Parentage

Parentage is Determined by the *Children's Law Act (CLA)* and the *Vital Statistics Act (VSA)* in Saskatchewan.

Mother:

- 'the mother of a child', including a woman declared or recognized to be the mother (*CLA*);
- 'the woman from whom a child is delivered' (*VSA*)

Implications: Poses obvious issues when a surrogate delivers the baby. The Surrogate is then presumptively the mother, and a court application is required to declare the intended mother as the mother and to amend the Birth Certificate accordingly.

Parentage, cont.

Father:

- Presumptions of paternity under the *CLA*
  - Cohabiting with the mother at birth or conception;
  - That the mother and father acknowledge in writing he's the father;
  - The man who signs the birth registration (note below); or
  - The man recognized by a court to be the father.

- *VSA* requires biological tie:
  - Father: "means the person who acknowledges himself to be the biological father of a child"

Implications: intended father / spouse of mother technically can't be listed as father on the birth certificate if the couple used a sperm donor

Parentage, cont.

"Other Parent"

- added to the *VSA, 2009* and defined as:
  - "a person other than the mother or father who is cohabiting with the mother or father of the child in a spousal relationship at the time of the child's birth and who intends to participate as a parent in the upbringing of the child."
- Allows same sex couples to both be listed on birth registrations
- In the case of a surrogacy where the intended parents are also the biological parents, the biological mom can be listed as 'other parent':
  - Surrogate would be presumed to be the mother
  - Intended father is biological so can be listed as father
  - Intended mother is cohabiting with the father so meets definition of 'other parent'
- In the case of a heterosexual couple that used a sperm donor, the intended father also meets the definition of 'other parent'

If the initial parent is the birth mother (and not the intended mother), how does one go about changing that on the registration of live birth?

At what point is the child the child of the intended mother when an application is made to amend the birth registration?

What if the child dies while the application is going on? What then?

Amending Parentage

Because the *VSA* makes the woman from whom a child is delivered presumptively the mother, a court application is required to amend the birth certificate.

- So far in Saskatchewan these cases have proceeded by consent:
  - Co-Petition (Surrogate and intended parents as parties);
  - Affidavit of Co-Petitioners (exhibiting the surrogacy agreement);
  - Affidavit of spouse of surrogate (acknowledging s/he has no interest in baby);
  - Certificate of Live Birth; and
  - Consent Order:
    - Declaring the intended mother to be the mother pursuant to the CLA; and
    - Ordering Vital Stats to amend the Birth Certificate accordingly pursuant to the VSA.

Amending Parentage, cont.

- If the intended mother is listed on the birth certificate as “other parent” she is a lawful parent of the child from birth, and the baby would have rights as a Dependant, under Intestacy, or as a ‘grandchild’ defined in a grandparent’s Will, etc.

- If the intended mother is not listed on the birth certificate as “other parent” she becomes the lawful parent at the time the Court Order issues declaring her to be the mother.
  - Note: Often in this case there will be an Interim Custody Agreement signed immediately after birth so that the intended mother has some form of lawful custody (also required for things like applying for a health card, etc.)

Amending Parentage, cont.

- However, the rights to inherit under an intestacy or otherwise would arguably also apply in the event of the death of the surrogate before the birth certificate is amended. This is usually addressed in the surrogacy agreement, but there is no case law (yet) on whether it is possible to contract out of inheritance rights in this way.
- An application to amend a birth certificate and remove the surrogate typically takes 6-8 weeks in Saskatchewan if all goes smoothly. The longest delay is waiting on the initial Certificate of Live Birth from Vital Stats.
- Nothing would prohibit the application from proceeding if the child dies before it is completed.

How does the legal definition of “issue” work in situations where a child is born through assisted human reproduction?

Is that child “issue” of the biological parent, or of the intended parent?

Issue

- Definition of issue in *Intestate Succession Act* is “all lawful lineal descendants”
  - Parentage by law rather than biology
  - Descendants then include:
    - Adopted children
    - Children born with ART (donors, surrogates, etc.)
      - Provided that the necessary declarations and amendments, if needed, are sought under the *CLA* and *VSA*.

- Question remains if a surrogate dies before the birth certificate is amended – if the baby is the surrogate’s ‘lawful lineal descendant’ given that the surrogate is listed as mother on the baby’s birth certificate.

Issue, cont.

"Issue" is not defined in the *Wills Act*.

- More of a drafting issue when preparing Wills
- If using the term "issue" in the Will, need to be aware that it's likely to be interpreted as descendants at law (not biology).
- Some Wills specify a requirement of a biological connection for grandchildren, for example (in an attempt to avoid leaving a gift to step-grandchildren / *in loco parentis* situations).
  - Need to be aware that if you specify biological connection, you may be eliminating descendants from the Will that are conceived with use of a donor

In preparing a Will for a client who has stored genetic material, what (if anything) can be set out in the Will in terms of the ownership or usage of that property following the testator's death? Can conditions on usage be set out? What if they aren't followed?

Posthumous use of genetic material

- A will should include provisions setting out the terms of ownership and usage of genetic material post-mortem
  - Reiterate the consents necessary under the *AHRA* or by reference to the consent form at the clinic storing the genetic material;
  - If not consenting to post-mortem usage, specify in the Will to eliminate any room for argument or interpretation on the clinic's forms, specifically referencing consent to its destruction.
- Canadian clinics that store genetic material have standardized consent forms that comply with the *AHRA Regulations*.
- However – an ever increasing number of Canadians are seeking ART outside of Canada and their genetic materials are stored abroad in which case the Will is the only opportunity to ensure *AHRA* compliance on consent

AHRA Regulations

Consent Given Under Subsection 8(1) of the Act

2 This Part applies in respect of a consent given under subsection 8(1) of the Act to make use of human reproductive material for the purpose of creating an embryo.

3 Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have a document signed by the donor of the material stating that, before consenting to the use of the material, the donor was informed in writing that

(a) subject to paragraph (b), the human reproductive material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,

- **(i)** the donor's own reproductive use,
- **(ii)** following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
- **(iii)** the reproductive use of a third party,

(b) if the human reproductive material is to be removed from the donor's body after the donor's death, the material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,

- **(i)** the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,

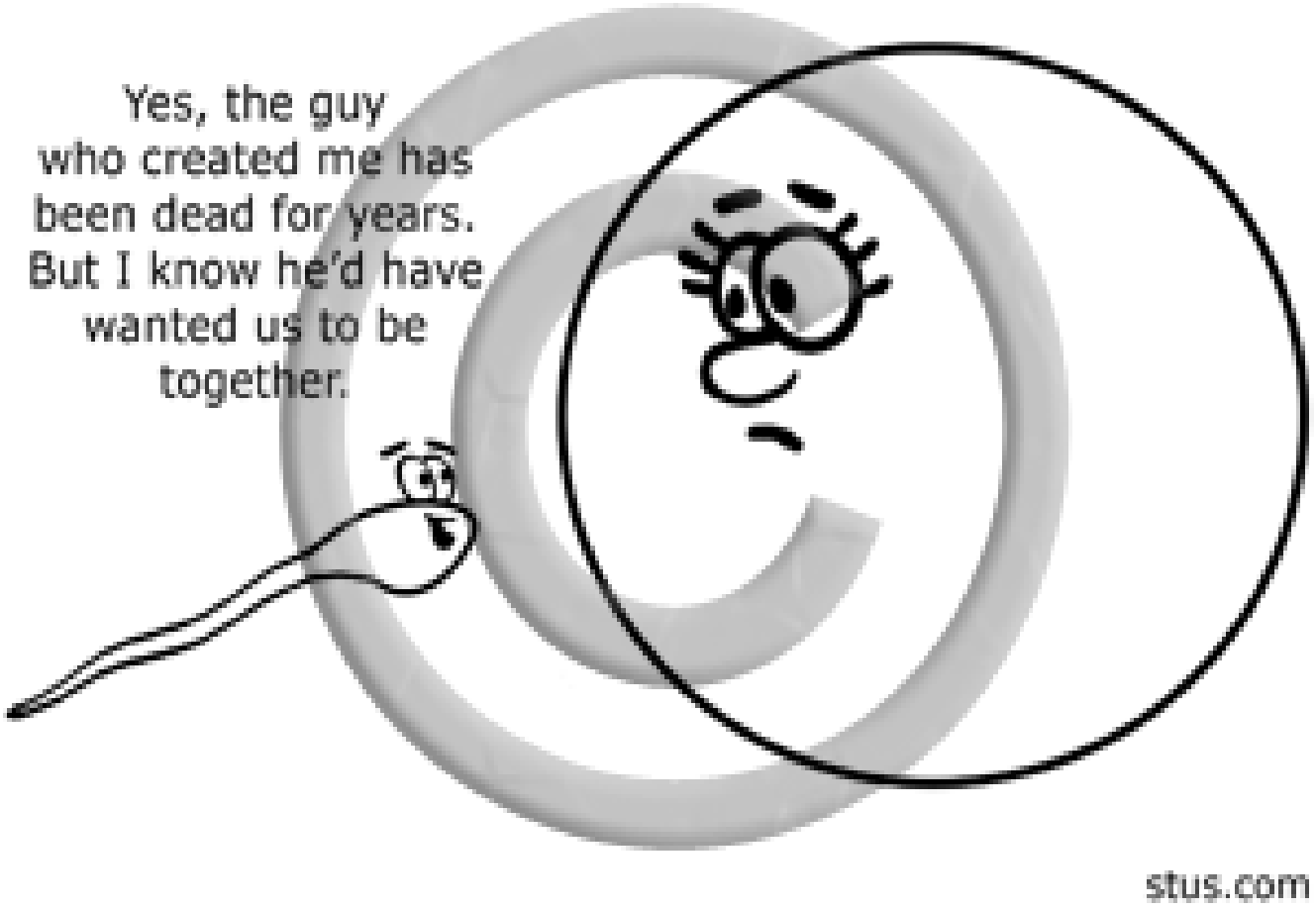
Posthumous use of genetic material, cont.

- Essentially, if dealing with consent to use genetic material in a Will, you should specifically state that the testator consents to the use of (embryo/sperm/egg) stored at (location specifics) by (name of person to use it) for the purposes of (reproductive use of).
- Alternatively, the Will may contain a specific clause indicating that they do NOT consent to the post mortem use of their genetic material.
- The *AHRA* Regulations also deal with how to withdraw consent, how to consent to usage for research, how to consent to donate genetic material post-mortem,

What are the implications of posthumously conceived children under *The Dependants' Relief Act* ?

And the *Intestate Succession Act?*

Are they dependants?



Section 2(1) of *The Dependants' Relief Act, 1996* defines "child" as including an adopted child of a deceased and a child born after the death of a deceased.

- (presumption is that the child may be 'born' after the death of a deceased, but not 'conceived' after the death of a deceased)

The Intestate Succession Act, 1996, which states in s. 14 that descendants and relatives of the intestate, conceived before his or her death, but born after his or her death, inherit as if they had been born in the lifetime of the intestate and had survived him or her.

Rights of posthumously conceived children

Note s. 8 of BC's *Wills, Estates and Succession Act* explicitly deals with posthumous births if conception after death

Posthumous births if conception after death

8.1 (1)A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:

> (a)a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;
>
> (b)the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;
>
> (c)the deceased person is the descendant's parent under Part 3 of the *Family Law Act*.

(2)The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born.

(3)Despite subsection (1) (b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.

For the purposes of *The Health Care Directives and Substitute Health Care Decision Makers Act*, nearest relatives include references to "son and daughter". What is the legal definition of those terms?

How might children born by assisted reproduction be treated thereunder?

Can a Proxy consent to the retrieval of reproductive material?

Advanced Health Care Directives

"Nearest relative" is defined in s.15 as including 'an adult son or daughter'.

- There is no definition of 'son or daughter' and it is presumably a lawful relationship and not a biological one;
- Children born through ART ought to still be considered as the son/daughter of a person requiring treatment under the *Act* (provided any necessary declarations and amendments to birth certificates were obtained)
- Again, the only risk is the case where a surrogate is deemed to be the mother and the intended mother is not listed as 'other parent' and does not seek the necessary amending Order.

Proxies and retrieval of reproductive material

Even though a proxy may make health care decisions with the same effect as a health care decision made by a person with capacity, the *AHRA* consent requirements would still need to be adhered to.

An Advanced Health Care Directive can clearly anticipate and give direction relating to treatment for specific circumstances and could also comply with the *AHRA*.

In other words, you can draft a Health Care Directive which provides specific consent (compliant with the AHRA Regulations) for the retrieval of reproductive material in the event the individual loses capacity.