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The 'ART' of Estate Planning: Assisted Reproductive Technology Issues to Consider

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INTRODUCTION

Most estate planning attorneys are well aware of the issues that may arise with regard to divorce, remarriage, and the myriad compositions of the ''modern family.'' However, the increasing use of assisted reproductive technology (ART) may create new estate planning issues regarding posthumously-conceived children and the use of genetic materials. Delayed parentage and insurance coverage in some states are two factors that have contributed to the increased prevalence of ART. Many families have been built thanks to ART, and as a result, ART may have a profound impact on a client's estate plan.

In very broad terms, ART refers to the broad range of procedures that may be used to assist with the conception of a child by means other than sexual intercourse. According to recent data, one in eight couples have trouble getting pregnant or sustaining a pregnancy.[1] ART is not only used to address infertility, but also may be used to avoid passing on genetic risks, store genetic material for an individual delaying parenthood, and help same-sex couples conceive. The CDC reported that in 2015, the number of infants born as a result of ART cycles started in 2015 was 72,913.[2]

ART can allow individuals who would not otherwise be able to conceive children to have the family of which they have dreamed. However, ART can also create serious ethical and legal dilemmas for the families involved when they have not properly contemplated an individual's estate plan. This article will explore the use of ART from an estate planning perspective and will offer insights for advisors working with clients in a world where ART is rapidly evolving and becoming more and more common.

SUMMARY OF ASSISTED REPRODUCTIVE TECHNOLOGIES

The scope of ART is extremely broad and ever-changing, however, a very brief and general summary of some of the major areas follows.

Internal versus External Fertilization. The two primary categories of ART are internal fertilization, which occurs inside a woman's uterus, and external

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[1] *Fast Facts*, Resolve, https://resolve.org/infertility-101/what-is-infertility/fast-facts/.

[2] Centers for Disease Control and Prevention, *2015 Assisted Reproductive Technology Report* at 3, 63 (Oct. 2017), https://www.cdc.gov/art/pdf/2015-report/ART-2015-National-Summary-Report.pdf (''An ART cycle starts when a woman begins taking fertility drugs or having her ovaries monitored for follicle production. If eggs are produced, the cycle progresses to egg retrieval. Retrieved eggs are combined with sperm to create embryos. If fertilization is successful, at least one embryo is selected for transfer. If implantation occurs, the cycle may progress to clinical pregnancy and possibly live birth. ART cycles include any process in which (1) an ART procedure is performed, (2) a woman has undergone ovarian stimulation or monitoring with the intent of having an ART procedure, or (3) frozen embryos have been thawed with the intent of transferring them to a woman.'').

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fertilization, which occurs outside of the uterus in a laboratory.[3]

Internal Fertilization. Internal fertilization includes: (i) artificial insemination, a procedure whereby sperm is injected into a woman's uterus to facilitate fertilization, and (ii) gamete intrafallopian transfer, a procedure where eggs are removed from a woman's ovary and mixed with sperm, then injected into a woman's fallopian tube for natural fertilization.[4]

External Fertilization. External fertilization is commonly known as in-vitro fertilization, and it involves a woman's eggs being extracted and fertilized with sperm in a laboratory outside of the uterus to produce embryos. The embryos are then placed in the uterus through the cervix.[5]

Cryopreservation. Cryopreservation of genetic material can extend the amount of time a human has to reproduce. Cryopreservation is a process whereby genetic material is frozen for later use, and may be necessary when successful egg retrieval and IVF results in excess eggs and embryos.[6] Cryopreservation is also useful to allow an individual to delay parenthood (such as a soldier going on active duty or a woman with declining fertility) and has become increasingly common as women continue to delay motherhood. Cryopreservation adds a complicated and important wrinkle to the ART world where a child may be conceived years after the death of a biological parent or parents. In at least one case, a baby was born after having been conceived from genetic material reportedly stored for 22 years.[7]

ART AND THE LAW

Regulation of ART is governed by state law, and while the technology has evolved rapidly over the past few decades, states have failed to keep pace with addressing the related legal issues. ART has major implications when it comes to the control and custody of reproductive material at death. The property status of genetic material is still not clear. Further, related issues may arise regarding the inheritance status of a posthumously-conceived child.

Ownership and Control

There is very little legislation addressing the custody and disposition of ''pre-embryos'' (an embryo during the first 14 days of fertilization).[8] Florida has attempted to address this issue by enacting a statute that requires a written contract between a couple and their doctor for the disposition of gametes and pre-embryos in the event of ''a divorce, the death of a spouse, or any other unforeseen circumstance.''[9] Absent any such agreement, the party that provided the eggs or sperm has control over the material, and decision-making authority (i.e., whether to use, donate, or destroy the genetic material) resides with the couple jointly, or with the survivor if one member of the couple dies.[10] Accordingly, Florida views the disposition of pre-embryos as subject to contract law.

Louisiana, on the other hand, has a statute that treats ''viable in vitro fertilized human ovum [as] a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person.''[11] In other words, the state of Louisiana recognizes viable fertilized eggs as people, a seemingly inconsistent concept from the way they are treated under Florida law.

The existing case law is similarly inconsistent. Courts have struggled with classifying genetic material as property,[12] and in turn have come to differing conclusions regarding the disposition of genetic material.

Three-Step Process

In one of the first cases to address the issues of genetic material as property and the disposition of genetic material, the Supreme Court of Tennessee in *Davis v. Davis*, developed a process of balancing the various rights of the parties involved.[13] The court determined that ''pre-embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life.''[14] The court emphasized the importance of having a written agreement in place and set out a three-step process to settle disputes involving pre-embryos.

1. The preferences of the donors should be considered, but if the wishes of the donors cannot be determined or they are in disagreement, then
2. the prior agreement, if one exists, should be carried out, but if there is no prior agreement, then

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[3] Restatement (Third) of Property (Wills & Don. Trans.) §14.8 (2011).

[4] *Id.*

[5] *Id.*

[6] Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 Real Prop. Prob. J. & Tr. J. 55, 62 (1994).

[7] *Healthy Baby Born 22 Years After Father's Sperm Was Frozen,* News Medical Life Sciences (Apr. 15, 2009), https://www.news-medical.net/news/2009/04/15/48357.aspx.

[8] Joshua S. Rubenstein, *Planning for Life After Death: Laws of Succession vs. the New Biology* at 13, 23 Trust and Trustees 40 (Feb. 2017).

[9] Fla. Stat. Ann. §742.17.

[10] *Id.*

[11] La. Stat. Ann. §9:129.

[12] Andrea Corvalan, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 Alb. L.J. Sci. & Tech. 335, 338–39 (1997).

[13] *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, *Stowe v. Davis*, 507 U.S. 911 (1993).

[14] *Id.* at 597.

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3. the interests of the parties should be weighed, with the party wishing to avoid procreation generally prevailing.[15]

Right to Refrain from Procreating

In 2001, the New Jersey Supreme Court held in favor of a wife who sought the destruction of certain cryopreserved pre-embryos in a post-divorce proceeding.[16] The court balanced the interests of the parties involved with particular emphasis on an individual's right to refrain from procreating. Under the facts at hand, there was no agreement in place other than the consent form provided by the in-vitro fertilization clinic, which stated that if the couple divorced they would relinquish control of the genetic material to the clinic, unless otherwise specified in a divorce proceeding.[17] The husband wanted to gain control over the frozen embryos in order to be implanted or to be donated to other infertile couples. The court weighed the wife's interest and fundamental right not to procreate against the husband's wishes, and found in favor of destroying the frozen embryos.[18] The court further stated that up to the point of the use or destruction of pre-embryos, either party should have the right to change his or her mind about the disposition of the genetic material.[19]

A similar result was reached in a Massachusetts case involving an action for divorce, where there had been a consent form signed by the husband that stated the wife could use frozen pre-embryos held in cryopreservation at an in-vitro fertilization clinic in the event the husband and wife separated.[20] A permanent injunction had been granted in favor of the husband prohibiting the wife from using the pre-embryos, and the Supreme Judicial Court of Massachusetts affirmed the injunction based on the notion that an individual should not be compelled to become a parent over his present objection.[21]

Donor's Intent

Other courts have found that the donor's intent should be considered as one of, if not the most, important factor in determining the disposition of genetic material. In *Kievernagel v. Kievernagel*, a case in the California Court of Appeal, a couple trying to conceive took part in a sperm cryopreservation program as part of the in-vitro fertilization process.[22] As part of the process, the husband signed a consent agreement where he initialed a box stating that his sperm sample should be discarded upon his death, rather than initialing next to a box on the form indicating that the sperm should be donated to his wife.[23] After the husband died, the wife petitioned for a distribution of the frozen sperm, while the husband's parents objected.[24] The court found that genetic material is a unique type of property and that the intent of the donor must control — the wife could not demand the genetic material where there was a clear agreement that the material be destroyed upon the husband's death.[25] The court relied in part on *Hecht v. Superior Court of Los Angeles County*, which was a significant California case, due in part, to the fact that it held that cryogenically preserved sperm was a type of property over which the probate court has jurisdiction and that may be bequeathed through a will.[26]

For the most part, genetic material seems to fall into the category of quasi-property. It is not clearly personal property, but certain rights and decision-making authority does largely appear to exist with regard to the genetic material.

Detailed Agreement Is Prudent

Courts differ on how such quasi-property should be disposed of, but it seems that having a detailed agreement in place between the parties involved is the most prudent action. The agreement should set out the parties' intentions for what happens to the genetic material in the event of the couple's separation, divorce, death, or other unforeseen occurrence. Separate counsel for the parties should, at the very least, be considered and discussed with the parties; as with a premarital agreement, the parties may begin on the same page but end up in very different places as circumstances change and time passes. Accordingly, the agreement should be revisited from time to time and as circumstances change. Ensuring that the parties' intent is clearly stated should be a priority, regardless of how a particular state's laws treat genetic material from a property standpoint.

Inheritance by Posthumously-Conceived Children

Legislation and case law regarding the rights of posthumously-conceived children to inherit from a deceased parent's estate also differ dramatically from jurisdiction to jurisdiction.

State Law

Under the Uniform Probate Code, if there is a signed record by a decedent that, considering all the facts and circumstances, evidences the decedent's intent that a posthumously-conceived child be considered the decedent's heir, then that child will have the

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[15] *Id.* at 604 (concluding however, that if no reasonable alternatives to achieve parenthood exist for the party wishing to control the disposition of the pre-embryos, then that factor must be given weight).

[16] *J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707 (2001).

[17] *Id.*

[18] *Id.* at 25–26.

[19] *Id.* at 29.

[20] *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000).

[21] *Id.*

[22] *Kievernagel v. Kievernagel*, 166 Cal. App. 4th 1024, 83 Cal. Rptr. 3d 311 (App. 3d Dist. 2008).

[23] *Id.* at 1026.

[24] *Id.*

[25] *Id.* at 1030-1034.

[26] *Hecht v. Superior Court of Los Angeles County*, 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (App. 2d Dist. 1993).

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legal status of an heir.[27] If no such written record exists, then a posthumously-conceived child may be considered the decedent's heir if the decedent's intent is established by clear and convincing evidence.[28] Additionally, if a posthumously-conceived child is in utero ''not later than 36 months after the individual's death'' then the child will be considered a child of the deceased parent.[29] Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah have adopted the Uniform Probate Code in some form, and each state's version includes the provisions regarding posthumously-conceived children.[30]

The Uniform Parentage Act (which has been adopted at least in part by Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Texas, Utah, Washington, and Wyoming)[31] provides that ''[i]f an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.''[32]

The relevant Florida statute provides that a child conceived posthumously from the eggs or sperm of someone who died before the transfer of the eggs or sperm to a woman's body is only eligible for a claim against a decedent's estate if the decedent provided for the child by his or her will.[33]

Under Alabama law, for a posthumously-conceived child to have the legal status as the child of the decedent, the decedent must have ''consented in a signed record, maintained by the licensed assisting physician, that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.''[34] A similar approach was taken in New Mexico,[35] Texas,[36] Utah,[37] Washington,[38] and Wyoming.[39] California law provides that a posthumously-conceived child will be considered as born during the lifetime of the decedent, but after the execution of all of the decedent's testamentary instruments, if it can be proven by clear and convincing evidence that the decedent left a writing consenting to the use of the genetic material and designating someone to use the material.[40] Further, within four months of the decedent's death, the person so designated to receive the material must receive written notice that the material is available for use of posthumous conception and the child must be in utero within two years of the decedent's death.[41]

Iowa law provides that in order for a posthumously-conceived child to be considered a child of the decedent, the decedent must have signed a writing authorizing the use of the genetic material and the child must be born within two years of the death of the decedent.[42] Additionally, the decedent's other heirs have one year from the birth of the child to challenge the child's right to inherit.[43]

Case Law

Supreme Court: The Supreme Court addressed the issue of whether a posthumously-conceived child could receive Social Security benefits.[44] After the death of her husband, the wife conceived twins using the husband's frozen sperm. The Supreme Court held that if the children were eligible to inherit from the father under the relevant state intestacy statues, then they would be eligible to receive the Social Security benefits.[45]

Massachusetts: In the well-known case *Woodward v. Commissioner of Soc. Sec.*,[46] a wife, through artificial insemination, gave birth to twin daughters two years after the death of her husband. The wife applied for social security benefits for the twins and the Massachusetts Supreme Judicial Court held that posthumously-conceived children may take under intestacy if: (1) a genetic relationship is established between the child and the decedent; (2) the survivor establishes that the decedent affirmatively consented to the posthumous conception and the support of the child; and (3) the proper time limitations are met to commence a claim on behalf of the child.[47]

Ninth Circuit: In *Vernoff v. Astrue*, a wife had her late husband's semen extracted from his body shortly after his death.[48] The wife used in-vitro fertilization with the sperm to conceive a child and made a claim for social security survivor benefits for her child. The

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[27] Unif. Probate Code §2-120(f) (amended 2010).

[28] *Id.*

[29] *Id.* at §2-120(k).

[30] *See* Legal Info. Inst., *Uniform Probate Code Locator*, Cornell Law School, https://www.law.cornell.edu/uniform/probate.

[31] *See* Legal Info. Inst., *Uniform Matrimonial, Family, and Health Laws Locator*, Cornell Law School, http://www.law.cornell.edu/uniform/vol9.html.

[32] Unif. Parentage Act §707, Parental Status of Deceased Individual (2000).

[33] Fla. Stat. Ann. §742.17.

[34] Ala. Code §26-17-707.

[35] N.M. Stat. Ann. §40-11A-707.

[36] Tex. Fam. Code Ann. §160.707.

[37] Utah Code Ann. §78B-15-707.

[38] Wash. Rev. Code §26.26.730.

[39] Wyo. State. Ann. §14-2-907.

[40] Cal. Prob. Code §249.5.

[41] *Id.*

[42] Iowa Code Ann. §633.220A.

[43] *Id.*

[44] *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541 (2012).

[45] *Id.* at 548.

[46] 435 Mass. 536, 760 N.E.2d 257 (2002).

[47] *Id.* at 557.

[48] 568 F.3d 1102 (9th Cir. 2009).

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claim was denied and the U.S. Court of Appeals for the Ninth Circuit affirmed the denial of benefits as the late husband had not consented to the use of his semen and had not ever expressed a desire to have a posthumously-conceived child.[49]

New Jersey: In the case *In re Esate of Kolacy*, twins born 18 months after their father's death through in-vitro fertilization were eligible as heirs under New Jersey intestacy law as to their father's estate.[50] The court made this finding under the theory that a child should inherit from his or her parent, unless doing so would ''unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.''[51]

Arkansas: The Supreme Court of Arkansas ruled in *Finley v. Astrue* that a posthumously-conceived child could not inherit from his father's estate under Arkansas intestacy law where the embryo was created during the father's life and implanted in the mother after the father's death.[52] The court said that under a plain reading of the relevant state statute, a child must be conceived before a decedent's death in order to inherit where there was no will.[53]

As demonstrated above, the varying state statutes and cases present a spectrum of outcomes when it comes to posthumously-conceived children inheriting from a parent's estate, in part due to the complicated legal and ethical issues, including the fact that it would be impractical to allow estates to be open forever. Attempting to weave this topic into an estate planning discussion with clients may be thorny and complicated. The topic may touch on certain deeply-held religious and moral beliefs and can be intricate to navigate during a typical estate planning meeting.

However, the inconsistency of case law and legislation and the unpredictability of outcomes underscore the importance of having honest and open discussions with clients regarding ART issues. Clients should be advised of how the prevailing and relevant state law may or may not allow a posthumously-conceived child or descendant to inherit from an estate or to receive certain benefits. While there may be no way to allow such a child to receive social security benefits in certain states, educating a client about the issues and the various factors involved will serve to help effectuate the client's wishes to the extent possible.

ADVISING CLIENTS

Given the complexities of ART and the fact that the technology will likely continue to advance with time, estate planning attorneys should make sure to keep current on the laws of the jurisdictions in which they practice, as well as the overall trends in the field. Discussions regarding ART should be commenced in each client meeting to alert clients to the potential issues. For most estate planning practitioners who focus on planning for an individual's balance sheet, information about ART cannot be effectively elicited outside of a frank conversation.

Also important to consider is the fact that many estate planning practitioners interact with their clients often as part of a team, which may include wealth planners, insurance advisors, and others. As with all forms of human reproduction, ART is highly personal and estate planning attorneys should be careful to address this topic in a manner that does not cause the client to decline to share certain information or to feel exposed. In other words, it may be a separate conversation from the conversation about the client's wealth.

When confronted with a client who may need to consider and incorporate ART issues into his or her estate plan, an advisor should make the client aware of the applicable state law and where it stands on the various issues. If there is genetic material involved, then the client's wishes and intent should be clearly understood. There should be a written agreement in place between the parties involved that provides for the custody and control of the genetic material in the event of death, divorce, or other unforeseen consequences. A standard form agreement provided by a medical clinic should not be relied upon for this purpose, as they do not contemplate the complex estate planning issues inherent to ART, and separate counsel for the parties should be considered and discussed with the clients. If an agreement is already in place between the parties it should be reviewed to make sure it is as comprehensive as possible and that it still reflects both parties' wishes.

Clients might also consider including statements of their intent and instructions regarding genetic material in their incapacity documents. For example, appointment of health care representatives and living wills may indicate a client's wishes regarding the extraction and use of genetic material for conception while the client is alive and incapacitated.

When drafting estate plans for clients who indicate that they have ART-related issues and even for those clients who do not so indicate, wills and trusts should consider the possibility of posthumously-conceived heirs. For instance, if a client has a dynasty trust meant to last for several generations and the client's grandson is posthumously conceived, the attorney should ensure that the trust agreement is clear as to how that grandson should be treated. This is an especially important conversation to have with clients given the perpetual nature of many trusts. The definitions of ''child'' and ''issue''/''descendant'' may be specifically tailored in the client's estate planning documents to effect his or her wishes.

CONCLUSION

Infertility struggles are personal and private issues for those individuals who may be looking into or actively engaged in ART. The number of individuals engaging with ART and the number of children born through ART continues to grow each year as technolo-

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[49] *Id.* at 1109–12.

[50] 332 N.J. Super. 593, 753 A.2d 1257 (Super. Ct. Ch. Div. 2000).

[51] *Id.* at 602.

[52] 372 Ark. 103, 270 S.W.3d 849 (2008).

[53] *Id.* at 853.

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gies advance and become less expensive and as couples delay parenthood. When meeting with a client to discuss their estate planning goals, it is imperative to discuss ART to avoid unintended consequences, and to ensure that each client's wishes are realized.

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