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Assisted reproductive technology poses new estate-planning questions

Due to the deferral of pregnancy, environmental issues and a host of medical factors, infertility rates are on the rise.

The Centers for Disease Control estimated that as many as 12 percent of U.S. women and their partners experience infertility, and experts posit that this statistic continues to rise. The increased prevalence and effectiveness of Assisted Reproductive Technology, or ART, creates myriad legal issues for individuals and couples to consider.

Unfortunately, because of the expenses associated with ART, clients are often reluctant to meet with an estate-planning attorney to discuss how genetic material will be treated in the event of death or divorce.

However, this increase in infertility coupled with the technological advances of ART has created disputes regarding the estates and the storage and disposition of genetic material, not to mention, post-humous reproduction.

Mindy Berkson is an infertility consultant and founder of Lotus Blossom Consulting. Berkson's mission as a patient advocate is to arm consumers/patients with information and education so they can make the best choices from beginning to birth in surrogacy arrangements.

"I bring together an unbiased multi-disciplinary team of professionals regardless of location to complement the specific needs of my clients and their individual risk adversity," Berkson said. "My clients are often surprised when I mention the necessity for proper estate planning prior to embryo transfer. However, these safeguards truly provide for all parties, including the unborn offspring."

No agreement for genetic material? The courts will decide.

A recent Illinois Appellate Court decision held that agreements between couples regarding genetic material will be presumed binding and enforceable in any dispute between them.

Following the approach used in New York and Texas, the court in *Szafranski v. Dunston*, 2013 IL App (1st) 122975, strictly enforced an informed consent that a couple signed at a fertility clinic.

The court held that absent any express agreements, the court will balance the parties' interests. In its analysis, the court has looked to such factors as the following: individual freedom of the right to procreate (or not), health of the parties and other available alternatives.

Is a surrogacy agreement enough?

Worth noting is that Illinois has developed an administrative procedure for surrogacy agreements through the Gestational Surrogacy Act.

That statute provides certain requirements for surrogacy agreements where couples use a surrogate to carry the embryo to term.

Meg Ledebuhr, attorney and founder of the Berger, Schatz family building practice group, states, "under the act, when a gestational surrogate gives birth in Illinois and the parties complied with the act, parenthood passes immediately to the intended parent(s). Their names are placed on the birth certificate at birth. Importantly, intended parent(s) should consider creating or revising their estate plans at the contract stage of the process, so as to address all potential circumstances."

Ledebuhr further noted that "options for third-party reproduction go beyond gestational surrogacy and include anonymous or known sperm donation, egg donation, embryo donation and co-maternity arrangements."

Because of the array of agreements between multiple parties, it is essential that all agreements signed by a couple using ART be consistent, cohesive and clear in order to protect the couples' individual and collective interests.

THE BUZZ

LINDSEY PAIGE MARKUS

Lindsey Paige Markus, a principal at Chuhak & Tecson P.C., draws on her early career in business, finance and clinically applied neuroscience to communicate with clients and develop creative solutions to fit their estate planning and asset protection needs. In 2012, Lindsey was recognized as one of the 40 Illinois Attorneys Under Forty to Watch and was named an Illinois Super Lawyer Rising Star 2010-2013. She is a collaborative law fellow and is licensed in Illinois and Florida.

The question remains whether a surrogacy agreement is enough.

Imagine an individual or couple who is a party to a surrogacy agreement and dies prior to the child's birth. Many individuals and couples elect to sign estate-planning documents immediately to provide for future children, identify guardians of the person and retain assets in trust for the benefit of a child born pursuant to the surrogacy arrangement.

What happens to genetic material upon death?

It is easy to comprehend that

> *"The question remains whether a surrogacy agreement is enough."*

frozen eggs and sperm would be treated as property.

But many are surprised to learn that courts who have analyzed issues regarding the storage and disposition of genetic material have held that an embryo is property and does not get the constitutional protections of a human.

When electing to use ART, clinics that specialize in these procedures typically present the patient (or couple) with an informed consent form which outlines what should happen to the genetic material upon death.

Typically, the agreement provides the patient with the following three options for dealing with the genetic material: destruction, donation for research and science or donation to another patient.

However, patients who embark on this process do not need to be beholden to these options.

One client who embarked upon the process of freezing her eggs was frustrated with the options provided by the clinic.

Instead, if following her death or disability, a family member or friend wanted the genetic material, she wanted to help the loved one and donate the material to him or her.

With the assistance from counsel, the client hand-wrote a fourth option onto the form, leaving the genetic material in a trust. The genetic material was to be held in trust with her mother as trustee to determine how the genetic material should be donated.

The prevalence of ART also has profound impacts on how wills and trusts are structured and organized.

While many are reluctant to share infertility details with their estate-planning attorney, this information is critical to ensure the client's estate-planning documents are consistent with other agreements signed by the parties.

For example, wills and trusts typically identify beneficiaries as

"all children then living" (at the time of death). An estate-planning attorney can work closely with clients who have engaged in ART to customize an estate plan that clearly defines who is to be considered a "child," which may include children then living and posthumous children.

This helps to ensure a child conceived through ART would not inadvertently be disinherited.

Furthermore, clients who use ART should be sure to consider the estate-planning documents of their families and other loved ones. Namely, other states (and other documents) may define "niece-nephew" or "grandchild" differently than what is intended.

Therefore, clients are advised to reach out to their loved ones to discuss how a child born in the future through ART may be treated.

"The laws regarding third-party reproduction are different from one state to another," Ledebuhr noted.

"The only way to assure a predictable outcome is to follow the applicable statute. Thus, all couples should consult with an attorney who is knowledgeable in the area of reproductive law."

The relationship is over, but the genetic material remains.

Beyond the estate-planning implications of death for couples who engage in this process, the clinic's documentation fails to address who has a right to the property in the event of a separation or divorce.

As such, it is important for couples who use ART to consult with an estate planning-attorney and a fertility law attorney regarding these options. Ledebuhr commented, "especially in the context of assisted reproduction, I cannot overstate the importance of effective legal counsel and their role in drafting detailed and accurate written agreements."

As the use of ART increases, the law will continue to develop. In the meantime, it is essential for individuals and couples to work closely with their estate-planning attorneys to ensure their intentions are properly documented regarding how to deal with genetic material in the event of death or divorce.

Tackling these issues now can help avoid costly litigation and ensure clients' wishes are carried out.

Berkson said, "engaging appropriate estate-planning advice and taking into consideration the larger picture establishes reassurances and peace of mind."

Markus and Ledebuhr will present a Continuing Legal Education seminar on LGBT Family Building from 3 to 6 p.m. March 10 at The Chicago Bar Association, 321 S. Plymouth Court. The seminar is being presented by the CBA's Adoption Law Committee.

Thanks to Chuhak & Tecson P.C. law clerk Evan Blewett for his contribution to this column.