



NATALIA LAW

# Considerations in Embarking in In Vitro Fertilization, Surrogacy, Adoption, and Embryo Donation

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- 12+ years of experience
- Specialize in high profile and complex family law litigation
- Full-service legal representation to LGBTQIA Community
- Notable Court of Appeals and Supreme Court Cases in Michigan
- University of Detroit Mercy Law School
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## Assisted Reproductive Technology (ART)

- In vitro fertilization (IVF) has been used for about 40 years.
- Since the first successful IVF birth, over 1.5 million babies have been born worldwide using assisted reproductive technologies.
- The US fertility industry is estimated at approximately \$1.7 billion dollars, and is projected to grow 9% annually.
- Infertility now includes modern family arrangements and often need advanced estate planning and legal agreements in order to be parents.

# What is Assisted Reproductive Technology

- According to the CDC, ART includes all fertility treatments in which both eggs and embryos are handled.
- Generally, procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman.
- They DO NOT include treatments in which only sperm are handled (artificial insemination).



## Pros and Cons of ART

- Pro– alleviates the massive burden of infertility on a family or individual.
- Con— challenges to public health evidenced by the high rates of multiple delivery, preterm delivery, and low birth-weight delivery.
- Con– Average cost: \$12,000.00, exclusive of medications, genetic testing, cryopreservation, and donor or surrogate services, if any.



# Embryo Cryopreservation

- Benefits of Freezing Embryos:
  - Increased chances of additional pregnancies from a single cycle of ovarian stimulation.
  - Minimizes medical risk and cost to the patient of multiple, stimulated cycles and egg retrievals.
  - Allows for preimplantation genetic testing.
  - Preserves fertility potential prior to necessary medical procedures.



# Embryo Cryopreservation

- Cons of Freezing Embryos:
  - Has led to over 600,000 cryopreserved embryos which require disposition questions.
  - The law is very unclear on embryo maintenance, distribution, and disposition.
  - The preservation and maintenance of frozen embryos is expensive.
    - Average cost at initial freezing is \$2,000 plus a yearly maintenance fee ranging from \$350 to \$1500 and rising.

## Case Study– Gordon and Dr. Crazy Pants

- Gordon was 77 and the musical director a concert choir when he married a 50 year old general practice physician named Dr. Crazy Pants
- Dr. Crazy Pants wanted to have children with Gordon but she was no longer able to
- The pair went through IVF and they successfully had a twins and a third child through the process
- They divorced after five years of happy marriage and disposition of the embryos???

## Key Considerations in Cryopreservation

- Options for the disposition of frozen embryos may be within the ART informed consent document or may be in a separate dispositional agreement.
- Patients generally do not seek legal advice before making disposition choices even if it is recommended.
- Couples generally do not have an agreement between themselves regarding embryo disposition, instead relying on forms provided by the clinic.
- It may be difficult to convince couples to seek legal counseling regarding disposition but it is advisable.

## Key Considerations in Cryopreservation

- Dispositional documents are often completed why couples are completing their medical procedures or left to “discuss at a later time” – leading to rushed or incomplete direction.
- Medical practices use varied documents (sometimes poorly written) as standardized terms and provisions, and are generally not required.
- As many of the forms maintain the characteristics of a contract, they may be crucial in the event of a dispute.

## Insurance Coverage for Infertility

- There are currently 13 states that mandate insurance coverage of fertility treatments. This is all or part of the total cost, depending on the state. These states are:
  - Arkansas, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana\*, New Jersey, New York, Ohio\*, Rhode Island, West Virginia\*
  - \*These states only require HMOs to provide coverage
- Maryland exempts small businesses (50 and under) from providing coverage
- Only California and Texas require insurers to *offer* infertility coverage, but don't require insurers to automatically include in policy.



## Four Basic Choices for the Disposition of Embryos

- Embryos can be given to one member of the couple, which give complete control—implantation, donation for research, or destruction.
  - In this instance, it should be discussed whether there would be paternity issues.
- Donation to another couple or individual for reproductive purposes.
- Give to the clinic for research purposes (i.e. stem cell research).
- Destroy the embryos.

## Case Study Jennifer and Ryan B.

- Dated and lived together 14 years
- Married for only 2
- Had a child through Assisted Reproductive Technology
- Needed to determine treatment of embryos during the divorce proceedings
- Elected to destroy the embryos within 2 years of the divorce

# Embryo Disposition

- Any forms should explicitly provide for:
  - Divorce
  - Separation
  - Death
- Not All Embryos are Treated Equally
  - In Massachusetts, Pennsylvania, Rhode Island, Minnesota, North Dakota, South Carolina and Michigan, Federal and state laws may limit/ prohibit the ability to donate embryos for research.
  - Clinics still look for court orders in the case of divorce, separation, or dispute.

## The Consent Agreements Bind your Clients

- Although your clients probably no longer want to be held by their consent forms...
- Couple held to their prior decision in the original cryopreservation consent and authorization as they signed a provision stating: “We agree that this option selection is binding until such time as it is changed, in writing, by our joint direction.” [Litowitz v. Litowitz, WA 2002]
- The court found an enforceable oral agreement to allow the woman to use the embryos superseded anything in the consent forms. Here, an unmarried couple, did not specify what would happen if they separated, and never finalized agreements after consultation with an attorney before they created embryos prior to the woman’s cancer treatment. [Szafranski v. Dunston, IL 2015]

## Case Study– Samantha & John

- Planned IVF and made appointment for consultation.
- The fertility clinic sent standard consent forms for consultation.
- The standard consent forms contained outrageously written provisions such as:
  - The couple was not permitted to discuss the medical advice, procedures, outcomes with anyone (family, doctors, nutritionists, et cetera).
  - The couple would fall under a non-disclosure clause broadly compelling them to never discuss their IVF or IVF consultation.
    - Would prevent posting baby photos to social media and discuss medical treatment with doctors.

## Key Thoughts about Embryos

- The caselaw in every state is different and sometimes non-existent.
- Louisiana treats an embryos as a person.
- Some states treat embryos as neither person nor property.
- Some states simply follow the contract.
- Some states have held that a husband's interest in avoiding unwanted biological fatherhood is greater than the wife's interest in attempting a pregnancy.
- Some states have held the opposite that the wife's interest in pregnancy was greater.



# Adoption

- Adoption is the policy of severing, at law, the prior, natural family relationships and creating a new and complete substitute relationship after adoption.
- In general, any adult can file a petition for adoption.
  - Single persons
  - Married persons
  - Same-Sex couples. *See Obergefell v Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2071 (2015).
    - \*An individual's spouse does not need to join an adoption petition.
- Children cannot file a petition for adoption.



# Types of Adoption

- **Agency Placement**—a department [Family Independence Agency] places with suitable parent usually after a parental termination proceeding
- **Direct Placement**—birth parent (usually mother) chooses someone suitable to place the child with
- **Stepparent Adoption**—specific form of direct placement, usually involve identifying the biological fathers, and the parental rights need not be terminated but can be by consent or by statute
- **Relative Adoption**—Grandparent, adult sibling, or relative within the fifth degree adopts
- **Guardianship Adoption**—a parent or guardian having legal or physical custody of the child may petition of adoption (guardians may consent)
- **Adult Adoption**— if the individual to be adopted is an adult, the only person who must consent is the adoptee

# Key Considerations for Adoption

- Adoptions are sealed and confidential.
  - Review of adoption records are only given after petition and for good cause only.
- Adoptions can fall apart.
  - Parents who authorize placement may revoke authorization.
  - Intended parents can revoke consent to receive children.
  - A court may deny the petition for placement.
- Stepparent adoptions are good practice with ART.

## Case Study—Jeff and Kate

- Jeff and Kate used IVF and now have three beautiful children
- Jeff and Kate decided they were ready to give another couple the opportunity to have children with the remaining embryos generated during their successful IVF process so they found intended parents in another state
- Jeff and Kate ensured that there would be no legal problems down the road by ensuring the parents engaged in step-parent adoption after any birth

## Get to Know Your Clients

- The initial client interview is the time to ask whether the client has children or grandchildren that *not adopted* or *not biological children*.
- This is most prevalent when dealing with:
  - Same-sex couples
  - Unmarried couples
  - Assisted Reproductive Technology
  - Adoption

## ART and Surrogacy

- Intended Parent– person or people who initiate ART process and who intend to be the legal parents of any child born (may or may not be the egg and/or sperm donors).
- Traditional Surrogate– a woman who conceives using her own egg and the sperm of the intended father. The intent of all parties at the outset is for the intended father and his spouse to be the legal parent of any child born.
- Gestational Carrier– a woman who agrees to have an embryo transferred into her uterus and gestate any resulting child with the intent for the child to be parented by the intended parent(s). A gestational carrier is not the biological mother of the child she carries and delivers.

## ART and Surrogacy

- Egg Donor—a woman who provides the eggs for use by others in ART. Donated eggs may be carried by a gestational surrogate or an intended parent. Most eggs are anonymously donated and the donor is typically compensated.
- Sperm Donor— a man who provides sperm to someone other than his partner to conceive a child by ART. Most sperm is anonymously donated and the donor is typically compensated.
- Embryo Donors—a couple or single person who is in possession of cryopreserved embryos and donates them to the intended parent(s) who will have the embryos gestated by a gestational surrogate or the female intended parent.



## Assisted Reproductive Technology Clients Need Specific Estate Planning

- As assisted reproductive technology evolves, *a person may be the parent to a child born months or years after the person's death.*
- In those instances, it should be discussed with the client whether the child should be considered a descendant.
- Some clients will *want to limit their descendants to those born within 10 months* of the death of the parent that was the client's descendant.
- Some clients will not care when the child is born and will treat him or her as a descendant.

## Origins of the Children

- In instances where only one parent is the biological or adoptive parent and the other parent has not adopted the child, the other parent's will and trust should specifically name the child and include the phrase:
  - "for all purposes of this document, such child and his or her descendants shall be treated as my child and descendants."
- The phrase should be excluded if the non-biological children are intended to be disinherited.



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## Best Practices– Clients and Assisted Reproductive Technology

- Get to know your clients and know whether they are or have engaged in ART
- Encourage them to seek legal advice in determining the disposition of embryos
- Encourage clients to have specific estate planning documents covering biological and non-biological children



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