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 effect 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.

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

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 consid-
ered a “child,” which may include
children then living and posthu-
mos 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 indi-
viduals and couples to work closely
with their estate-planning
attorneys to ensure their inten-
tions 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 appro-
priate 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.

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