

Assisted Reproductive Technology and Estate Planning: When Science Gets Ahead of the Law

Traditionally, Americans and the law have thought of families as mothers, fathers and their children conceived by conventional methods and brought to term in the mother's womb. However, since the [1978 birth of Baby Louise Brown](#) after laboratory fertilization and implantation, individuals and couples have increasingly turned to Assisted Reproductive Technology ("ART") to have children when impaired fertility, anatomical anomalies, or risks of future infertility or death otherwise make this difficult. For these reasons and changes in family social structures, the birth of a child and the creation of a family relationship are no longer limited to instances resulting from human copulation. In addition, children born as a result of changes in social standards (without ART) call to question whether biological parentage should always be the measure of family composition. At the same time, however, like the mindsets of many, the law remains deeply rooted in concepts of family and descendancy that fail to consider these new methods of human gestation and family structures. This paper suggests some considerations about these scientific and social developments and the law's slow response that clients should contemplate in [planning](#) to achieve their hopes for future generations.

The Increasing Number of Non-Traditional Families

ART is the use of laboratory procedures that include the handling of human eggs or embryos to help a woman become pregnant other than by sexual intercourse. ART includes techniques such as in vitro fertilization, egg and embryo cryopreservation for deferred use, egg and embryo donation, and the use of a gestational surrogate other than the ultimate child's actual mother. The U.S. Centers for Disease Control and Prevention ("CDC") estimates that today, approximately 1.7% of all infants born in the United States every year

are conceived using ART. Between 1999 and 2013, the CDC reports that about 2% (30,927) of all ART “cycles” used a gestational carrier, resulting in some 13,380 deliveries and, because of the high incidence of multiple births, 18,400 infants. Additionally, the U.S. Department of Health and Human Services Office of Population Affairs reports that there are now more than 620,000 cryo-preserved embryos in the United States awaiting future use. As the science of ART develops, so too is the likelihood of future increases in the birth of infants as a result of ART and outside traditional family structures. This past November, a Chinese biophysics researcher and former professor, He Jianjui, announced that he had used ART to prevent HIV vulnerability in the first genetically edited babies brought to term. Although this announcement was met with widespread ethical condemnation, it illustrates a potential new use of ART and new questions about the descendency of the ART produced children with genetic alterations.

According to the U.S. Census Bureau in 2011, there were approximately 13.7 million single parents in the United States; and those parents were responsible for raising some 22 million children. Although these single parent families are presumed to be mostly biological in nature, single parent adoption and ART now allow persons to be single parents by choice. In addition, since the [Supreme Court’s 2015 decision](#) granting same-sex couples the constitutional right to marry nationwide, same-sex marriages now allow couples of the same sex anywhere in the U.S. to have children where at least one spouse will not be the biological parent.

Longer Ranged Estate Planning

We have noted in the past about the benefits of estate planning on a multi-generational basis. In particular, such multi-generational planning using life-long [Inheritance Trusts](#) protects inherited assets from future beneficiaries’ potential creditors and estate taxes.

Effective multi-generational planning, however, demands that we be able to identify who the beneficiaries of that planning are intended to be. For decades we have used such terms as “child”, “children”, “descendants” and “issue” in our estate planning documents to define the persons for whom we are planning. ART and new family structures may now be making these terms fuzzy and call to question who a trustmaker intends to benefit. For example, is a baby born to a gestational carrier who brings another couple’s embryo to term a “descendant” or the “issue” of the gestational carrier? How do we know whether a trustmaker intends to include among his descendants children conceived using donated sperm from his biological male offspring who are not married to their mother? In the future, how much genetic engineering will result in children that a trustmaker would not intend to include among his beneficiaries?

Maryland’s Limited Response to ART Children and Non-Traditional Families

To date, legislatures and the courts have lagged in providing answers to these and similar questions. Fortunately, since the 1940s in Maryland, unless a will clearly indicates otherwise, the words, “child”, “descendant”, “heir”, “issue”, or any equivalent term in a will includes a person who is adopted; and an adopted child is treated as a natural child of his adopting parent or parents. Adoption, therefore is one means of clarifying a child’s ancestry unless a testamentary document declares otherwise. Similarly, Maryland law is clear that a child conceived by “artificial insemination” of a married woman with the consent of her husband is the legitimate child of both of them; and a child born to parents who have not participated in a marriage ceremony with each other is considered to be the child of the mother, unless a testamentary document declares otherwise. Less clear is the status of an ART child whose married father has not documented his consent to parentage and whether a person born to parents who have not participated in a marriage ceremony is deemed to be the child of the father. In the latter situation, the person is legally deemed to be child of the

father only if the father is judicially determined to be the father in legal paternity proceedings, has acknowledged himself to be the father in writing, “has openly and notoriously recognized the child to be his child”, or has subsequently married the child’s mother and orally or in writing acknowledged himself to be the father.

In 2012, the Maryland Bar brought to the Legislature’s attention a [developing legal issue](#) concerning the posthumous use of decedent’s genetic material: how long should the decedent’s estate be kept open to determine who his or her legatees or heirs would be? To allow estates to be expeditiously concluded for decedents leaving genetic material for future use, Maryland law was amended to legitimate a child conceived from the genetic material of a decedent if the decedent consented in a written record to be the parent of a posthumously conceived child, if the child is born within 2 years of the decedent’s death, and if, with respect to any trust, the decedent was the creator of the trust and the trust became irrevocable on or after October 1, 2012. Unfortunately, this law is therefore inapplicable to trusts other than those of the decedent leaving genetic material for posthumous use, where the decedent has failed to consent in writing to posthumous use of his or her genetic material, or where a child conceived from the genetic material is born more than two years after the decedent’s death.

The Importance of Declaring your Intent About ART Questions in Your Estate Planning Documents

Given the current status of the Law, determination of questions about how ART and non-traditional family structures affect the interpretation of estate planning documents will rest largely on judicial findings of trustmaker intent at the time his or her documents were created. How is this possible if these issues have never been considered or if a testator or trustmaker leaves no written statement of intent? When the Law provides no default

position on these questions, the need is magnified for consideration of the potential issues involved and effective expression of how you feel they should be resolved. If you disagree with the Law's limited resolutions made to date for these issues, you need to say so in your testamentary documents because the Law's resolution will apply unless you state otherwise.

For over two years, we have included in our pre-initial conference [Estate Planning Questionnaires](#) a page with questions about "[Determining Family Relationships](#)". (My hope was that this page would itself become a statement of intent that could be used as a future reference.) I find, however, that few clients fill in answers on this page in the belief that these issues will never apply to their situations. Where they do complete the form with respect to children conceived by ART, most will indicate that "[c]oncerns about ART children are unlikely to apply in my family. I accept any judgments made in this context by applicable Maryland law." When I explain why I think this is short-sighted (in light of the statistics quoted above and my own family's experiences), most recognize the need for considering these concepts, especially when planning on a multi-generational basis. The concepts involved are so new that most have not come to grips with how these issues should be involved in their particular situations.

You need to know that these issues are far more likely to affect you, your family, and your estate planning than you think. I hope that this paper will spark a sensitivity to these trends that will motivate you to express your intent in your documents about how these issues should be resolved if they affect your family and its membership.