Planning for a Family: What Lawyers Need to Know About Assisted Reproductive Technology

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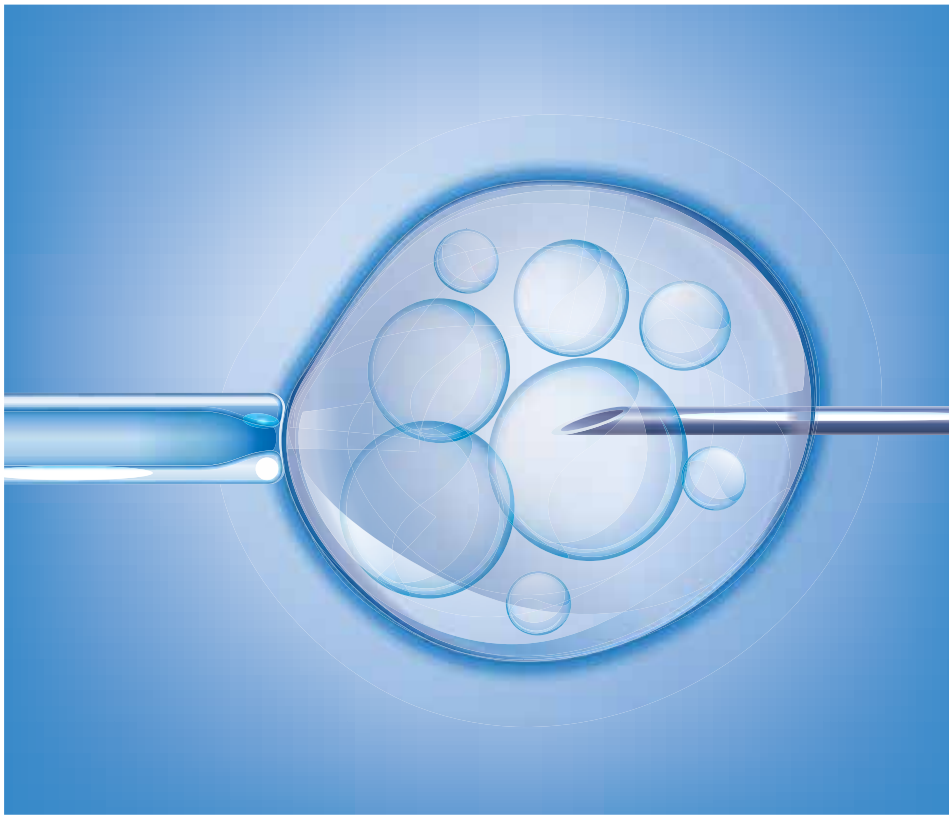
The field of reproductive technology has grown and evolved greatly over the last few decades. More and more often, individuals and couples are turning to reproductive technology to help build a family or preserve their ability to build one in the future. IVF, cryopreserving eggs or sperm, and other facets of this field have become more commonplace. Films like "Baby Mama" demonstrate a broadening understanding of building a family in our popular culture, including the idea that a single woman might choose to become a mother on her own. The television show "Jane the Virgin" unfolds as the protagonist learns that she has accidentally been artificially inseminated at a routine doctor's appointment, resulting in telenovela-style drama.

As social norms and expectations regarding family evolve, the law must catch up. The law surrounding assisted reproductive technology (ART) has not kept pace with the rapidly developing field and society's growing and changing concept of what family means. For this reason, it is important that individuals and couples considering growing their family through ART understand the legal implications. Lila Newberry Bradley, an Atlanta-based attorney who practices in this field, advises that "any couple in the process of planning to have a child needs to consult a lawyer, period."[1] Even for married couples conceiving a child without the use of ART, it is important to either update their wills or have one drafted. Depending on the form of ART, additional legal considerations and the dearth of law in this field make consulting with a legal professional a wise choice. Below are some forms of ART that a young professional should consider and the legal implications of those choices.[2]



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Preserving Eggs or Sperm

There are many reasons that a person might choose to preserve his sperm or her eggs. For example, a woman who is not yet ready to have a family but wants to preserve her eggs for later use, may choose to undergo egg retrieval and have her eggs cryopreserved for a time in her career and life when she is ready to start her family. For some, health concerns may lead to this decision.

It is important that a young professional choosing to preserve his sperm or her eggs contact an estate planning attorney for advice and make his or her intentions clear in a will, stating what should happen to the sperm or eggs in the event of his or her passing. While such considerations may not be top of mind when choosing to cryopreserve genetic material, it is important to make known one's wishes in the event of death.

Sperm or Egg Donation

Sperm or egg donation is a tool to help build families that might be used for many reasons. A single woman may choose to have a child using donor sperm. A same-sex couple might be building their family using donor sperm or eggs. Heterosexual couples might use donor sperm or eggs to address fertility issues. Whatever the reason may be, sperm or egg donation is an important reproductive tool for creating families.

Individuals or couples electing to use donor sperm or eggs should consult an attorney to discuss their legal rights and options, particularly when the donor is known. For example, some couples choose a relative or friend as the donor. This person is likely to be involved in the life of the child who is created. In this instance, it is important that the

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parties set out their intentions in a contract, prior to moving forward. The parent(s) and donor need to be on the same page about their respective rights and responsibilities. An attorney can advise persons growing their family on what to include in such a contract, as well as what might occur if the contract were not enforced.

In Vitro Fertilization (IVF)

The process of IVF involves the creation and transfer of embryos[3] to the uterus of the person who will carry the baby. IVF may involve the sperm and egg of the people choosing to raise the child, or the sperm and/or egg might be donated. For a heterosexual couple using their own sperm and eggs in IVF, the respective rights of the parties are clearer than in other situations. Nonetheless, such a couple should still consider consulting an estate planning attorney. Kristen Rajagopal, an estate planning attorney in Atlanta and owner of Bequest by Kristen Rajagopal LLC, shares the following advice to those undergoing assisted reproduction: "Seek an attorney not just because you should have an estate plan detailing what will happen to any remaining genetic material, but also to state your own personal desires regarding whether children born of that genetic material after your death should inherit from your estate. This is a deeply personal choice, which is not likely determinable through medical consent forms."

Couples should also talk about what they wish to do with any embryos created. Some people feel strongly that embryos are human life, not to be destroyed. Such a couple should discuss what that means for them practically. Do they intend to eventually have all embryos transferred at some point with the possibility that each could result in pregnancy? For those who may not use all of the embryos created, what should happen to any remaining embryos in the event of death of one or both parents? Additionally, when planning a family, it may be difficult to discuss matters such as "what if we get divorced?" Nevertheless, these hard questions are important. With current technology, it is possible to have a child with someone you have not been married to or intimate with in years. Embryos are more and more frequently the topic of divorce settlement discussions. Will they be used by either party after the divorce? If so, what are the expectations of each parents' rights and responsibilities? Who will pay to preserve the embryos? For parties going through a divorce, who have cryopreserved embryos, it is important to consult an attorney.

Georgia has very little statutory law governing ART. This limited law includes O.C.G.A. § 19-7-21, which provides that "[a]ll children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination." This statute has been thought by some to extend to married couples using IVF where donor sperm was used. The Supreme Court of Georgia recently addressed this question in *Patton v. Vanterpool*.[4]

In *Patton*, YLD Leadership Academy alum Richard Sanders argued successfully before the Supreme Court of Georgia on behalf of the ex-husband. In *Patton*, the parties agreed that the wife would undergo IVF during the pendency of their divorce, as she desired a child. Donor egg and sperm were used and the final settlement agreement of the parties, which was incorporated by the court in its final order, stated that there were no children of the marriage and none were anticipated. The wife was pregnant at the time the divorce was finalized, thanks to IVF. The parties were divorced and the wife subsequently gave birth. Thereafter, she filed a paternity and child support action, seeking to declare her former husband the father, pursuant to O.C.G.A. § 19-7-21. The majority of the Court held that "IVF involves implanting a fertilized egg into a female; though each procedure aims for pregnancy, the procedures are distinct, and we conclude that the term 'artificial insemination' does not encompass IVF." Therefore, the Court found that O.C.G.A. § 19-7-21 did not apply to children conceived through IVF.

It is important to note that despite sensationalized local headlines like "IVF babies have no father," the Court answered only the narrow question presented. By contrast with O.C.G.A. § 19-7-21, which addresses only artificial insemination, O.C.G.A. § 19-7-20 addresses the relationship of children born to married couples more broadly. O.C.G.A. § 19-7-20 provides that "[a]ll children born in wedlock or within the usual period of gestation thereafter are legitimate." The difference is that O.C.G.A. § 19-7-21 creates an irrebuttable presumption. Thus, the Supreme Court's holding did not declare that the children had no father. Rather, it denied the former wife's claim to have her ex-husband declared the father under this specific statute.

Another IVF case, *Wilson v. Delgado*, grabbed some headlines last year. In *Wilson*, argued in April 2017, the trial court granted the husband full control over a divorcing couples' remaining embryos.[5] There, the husband's sperm had been used along with donor eggs. The wife appealed asking for "custody" of the embryos. Arguments were heard by the Supreme Court of Georgia, but the case was later dismissed as improvidently granted.[6] These cases are sure to be making more frequent appearances in our higher courts in this developing area of the law.

Surrogacy

Surrogacy is perhaps the most legally complex of all forms of ART addressed herein. It generally presents the same legal considerations as IVF, but with the addition of a surrogate. Depending on the situation, surrogacy might include two future parents, a sperm donor, an egg donor and a surrogate. As with other forms of ART, it is important that all participants are clear on their role and intended future role. Typically, doctors will not assist in ART using a surrogate unless legal contracts are in place defining each party's rights and responsibilities.

Conclusion

Those exploring their options using ART may have arrived at this juncture for many

reasons. Whether planning for the future or looking for other alternatives when unable to conceive without ART, those using ART should consider seeking out counsel. An attorney can help the parties understand the legal implications surrounding their choices and help plan for the future. Ultimately, understanding one's rights as a parent and having the tough conversations about the future, will help to build a strong foundation for growing a family. YLD

Endnotes

1. Lila Newberry Bradley is a member of the State Bar of Georgia, a Fellow of the Academy of Adoption & Assisted Reproduction Attorneys, and a member of the Georgia Council of Adoption Lawyers. We are thankful for her willingness to contribute her expertise to this article.
2. This article is an overview of some forms of ART and some situations which might result in a person or couple choosing ART. The writer is aware that this article touches on only a few such reasons and situations. The American concept of family is growing and expanding in rapidly changing ways and the absence of mention of certain family formulations is in no way meant to imply that those are any less important than those specifically mentioned herein.
3. As this is an overview rather than a detailed analysis, the term embryo is used generally herein. Nuanced arguments have been made and are likely to arise again as to whether the law should differentiate between embryos and pre-embryos, but that is beyond the scope of this article. For those interested, some discussion and analysis of this issue can be found in the seminal case on IVF, arising out of Tennessee, Davis v. Davis, 842 S.W.2d 588 (1992).
4. S17A0767, 2017 Ga. LEXIS 896.
5. S17A0797.
6. For those interested, the argument in this case can be viewed at https://www.gasupreme.us/court-information/oral-arguments-april-17-2017/.