

# Who Are Your Per Stirpes?

presented by

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# In the News

- ▶ Over a million babies
- ▶ <https://www.nbcnews.com/health/health-news/million-babies-have-been-born-u-s-fertility-help-n752506>

# My Life as a Sperm Donor - 44 and counting

- ▶ [https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/?utm\\_term=.47d2eff98de6](https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/?utm_term=.47d2eff98de6)

# Cryo preserved Sperm is good for 28 years?

- ▶ <https://www.necryogenic.com/sperm-banking-faqs.php>

# Cryo preserved Embryos can last 24 years?

- ▶ [https://tonic.vice.com/en\\_us/article/paaggym/how-long-can-frozen-embryos-last](https://tonic.vice.com/en_us/article/paaggym/how-long-can-frozen-embryos-last)

# Why Does this Topic Matter to Me?

- ▶ The notion of a traditional family can no longer be relied upon as a standard
- ▶ The practitioner must re-think how he or she approaches class gifts, duties of an executor, trustee and conservator
- ▶ There are also implications for intestacy transfers and class gifts

# What is Assisted Reproductive Technology (ART)?

- ▶ Centers for Disease Control and Prevention (CDC) tracks data ONLY from reporting clinics
- ▶ Includes all fertility treatments in which both eggs and sperm are handled
- ▶ Generally, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in a lab and returning them to the woman's body or donating them to another woman

# ART Pregnancies in 2019 (preliminary)

- ▶ Last year reporting
- ▶ 77,998 live births (deliveries of one or more living infants) and 83,946 infants
- ▶ Total cycles 330,773
- ▶ Banking cycles 121,086
- ▶ 3 reporting clinics in Kansas and 10 in Missouri
- ▶ Data from 449 reporting clinics in the US
- ▶ According to the CDC over 1% of all infants born in the US every year are conceived using ART
- ▶ As of this writing, I have 22 open files

# What the CDC Does Not Track

- ▶ CDC does not track treatments where only sperm is handled
- ▶ Whether through a health care provider or home transfer
- ▶ CDC does not track procedures where a woman takes medicine only to stimulate egg production without the intent of having her eggs retrieved

# Artificial Insemination



- ▶ Process of introducing sperm into the female reproductive organs by means other than sexual intercourse
- ▶ Husband
- ▶ Known donor
- ▶ Unknown donor
  - ▶ Sperm banks
  - ▶ FDA regulated
  - ▶ Blended donor – mix of husband and known or unknown donor sperm

# In Vitro Fertilization (IVF)



- ▶ Process by which a female egg is fertilized outside the womb by male sperm
- ▶ The resulting embryo will later be transferred into the womb of the intended mother or a surrogate

# Genetic Material for IVF

- ▶ Eggs
- ▶ Sperm Donations

# Cheaper by the Dozen



## ▶ Female Eggs

- ▶ The “donor” is injected with fertility drugs to produce superovulation
- ▶ Eggs are aspirated from the ovary or through trans vaginal aspiration
- ▶ Objective is to produce multiple eggs
- ▶ Eggs can be cryopreserved for later use—the length of storage, while maintaining viability, is unknown
- ▶ Third party donors are usually young, healthy women
- ▶ Some types of eggs fetch premium prices

# A Bit Less Complicated Process

- ▶ Sperm donation
  - ▶ Known donor
  - ▶ Anonymous donor
  - ▶ Buy them from a bank
  - ▶ Sperm can be cryopreserved and still achieve pregnancy for at least 28 years

# Embryos for Use in IVF

- ▶ Fresh embryos
- ▶ Frozen embryos
  - ▶ May be viable after 28 years

# Embryo Donation

- ▶ [http://www.embryoadoption.org/adoption\\_agencies/embryo\\_adoption\\_services\\_matrix.cfm?CFID=2351124&CFTOKEN=8d797491b3e25a3b-2E7384D7-4040-9E6F-F14D5C961CAA1D81](http://www.embryoadoption.org/adoption_agencies/embryo_adoption_services_matrix.cfm?CFID=2351124&CFTOKEN=8d797491b3e25a3b-2E7384D7-4040-9E6F-F14D5C961CAA1D81)
- ▶ <http://www.resolve.org/family-building-options/donor-options/using-donor-embryo.html>
- ▶ What happens when intended parents contract for a gestational carrier to carry an adopted embryo to term?

# Parents

- ▶ Woman who gives birth might or might not be biologically related to the child
- ▶ If married, her husband might or might not be biologically related to the child
  - ▶ Egg donor
  - ▶ Sperm donor
  - ▶ Both egg and sperm donor
  - ▶ Embryo adoption

# Intended parents using a gestational carrier

- ▶ Parent or parents of a child carried by a surrogate under a Gestational Carrier agreement
  - ▶ May be the biological child of the intended parents
  - ▶ The child may be genetically connected to one parent (egg or sperm donor)
  - ▶ The child may have no biological connection to either intended parent

# Intended Parents Using a Traditional Surrogate

- ▶ A parent or parents of a child carried under a Traditional Surrogacy Agreement
- ▶ The intended mother will have no biological connection to the child
- ▶ The traditional surrogate uses her eggs and achieves pregnancy by artificial insemination
- ▶ The intended father may or may not have a biological connection to the child

# Parentage When Using a Surrogate

- ▶ Absent court order, the law presumes that the woman giving birth to the child is the child's mother.
- ▶ Absent court order, if the surrogate is married, the law presumes the surrogate's husband to be the father
- ▶ Thus, parentage for the intended parent(s) must be established by the court
- ▶ Alternatively, an adoption must be filed

# Posthumous Reproduction



- ▶ A posthumous child born of a sperm donor, egg donor, or a donated embryo could make a claim as to the donor(s) estate
- ▶ We have seen SCOTUS rule on this issue in the context of social security

# Astrue v. Capato

- ▶ Before May 21, 2012, there was a split among circuits about whether or not a posthumously conceived child was a child for purposes of the Social Security Act.
- ▶ In *Astrue*, Ms. Capato and her late husband decided to store Mr. Capato's sperm after a diagnosis of esophageal cancer in 1999. The Capatos had a naturally conceived son in 2001 and in March of 2002, Mr. Capato died. Eighteen months after her husband's death, Ms. Capato gave birth to twins.

# Capato Holding

- ▶ In a nutshell, SCOTUS held that a child conceived and born after a parent's death could not solely rely on a genetic connection to the deceased parent to qualify for survivor's benefits.
- ▶ Rather, they must either demonstrate that they would be eligible to inherit from their late parent under state law or satisfy one of the statutory alternatives to that requirement under the SSA.
- ▶ Still turns on each individual state law, thereby continuing the uncertainty of eligibility on a state-by-state basis.

# Class Gifts or Beneficiaries



- ▶ In light of the science, how does one define “my children,” “my grandchildren,” “my issue”?
- ▶ What is the intent to exclude persons not related by blood, biology or genetics?

# Example

- ▶ Testator establishes a testamentary trust that is to be administered for the benefit of his children at his death. Upon the death of his last child, the trust is to be distributed to the “...heirs of my children.”
- ▶ The last of testator's heirs died last week; the Trustee needs advice from you about distribution of the trust.
- ▶ Assume ART children and/or those born by artificial insemination are involved.

# Questions Raised by the Example

- ▶ What state law will govern the definition of heir?
- ▶ Testator's domicile? That of the deceased child?
- ▶ When should heir be defined?
- ▶ How does a court construe the intent of the Testator?
- ▶ Are children born through ART descendants of the ancestor of their parent?
- ▶ Who is the parent of the child?

# Litigation over Embryo disposition

- ▶ Mostly in the divorce context
  - ▶ *McQueen v. Gadbury*, 507 SW3d 127 (MO)
- ▶ But also found in decedents' estates
- ▶ Clinic consent forms
- ▶ Analysis by Court
  - ▶ Best interest generally rejected
  - ▶ Some jurisdictions enforce under a contractual analysis
- ▶ Use

# Litigation over Embryo disposition Continued

- ▶ Property analysis courts generally hesitant
  - ▶ Trend is toward a constitutional analysis—right to not procreate
  - ▶ Balance of whether a party's fundamental right not to procreate is more or less significant than the other parties right to procreate
  - ▶ Contract approach—Arizona
- ▶ Use
  - ▶ Post nuptial disposition provisions
    - ▶ Donate
    - ▶ Destroy
  - ▶ Address in testamentary instruments

# Parent/Child Relationship



- ▶ At its essence, this new technology causes us to rethink what a parent/child relationship is today
  - ▶ Artificial insemination
  - ▶ Embryo transfer
  - ▶ The use of traditional surrogates
  - ▶ The use of gestational surrogate
  - ▶ Posthumous children

# Issue

- ▶ One must also consider what “issue” means now

# Uniform Laws

- ▶ Restatement (Third) of Property provides for an intent test holding that the child born through ART is treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity. Section 14.8.

# Uniform Laws Continued



- ▶ The Restatement (Third) of Property, Wills and Other Donative Transfers requires one to determine the decedent's intent and requires that the child be born within a "reasonable" time after the decedent's death so as not to delay the distribution of the estate, "unduly".

Section 2.5 cmt.1 (1999)

# Uniform Parentage Act (UPA)

- ▶ The 2002 version of the UPA does have provisions for gestational carrier agreements.
- ▶ Neither Kansas nor Missouri has adopted the latest version of the UPA

# Uniform Probate Code (UPC)

- ▶ Has been amended to provide for ARTs children for intestacy and class gifts
- ▶ Neither Missouri or Kansas has adopted the UPC

# What To Do, What To Do

- ▶ No governing law on this in Kansas or Missouri
- ▶ No uniform laws around the US or the world for that matter
- ▶ The practitioner must explore the client's intent—not just for the client herself but her intent that might relate to her children, grandchildren or great-grandchildren and then draft accordingly
- ▶ Conflict of law issues should be discussed

# For the Client Looking at Alternative Reproduction

- ▶ Testamentary intent should be determined
- ▶ Because this area of law is in a state of flux, specific steps for protecting the child(ren) should be considered
- ▶ If your client plans to donate gametes or embryos for future use, see that there are explicit instructions to the facility
  - ▶ Use after death
  - ▶ Destruction
  - ▶ Donation
  - ▶ Purpose of use

# Posthumous Planning



- ▶ Use of gametes
- ▶ In the event of death, disposition of the gametes, e.g. research, donation, destruction
- ▶ How long the gametes will be stored
- ▶ Should someone be named to entrust the gametes to such as an executor, power of attorney, etc.?
- ▶ Explicitly address how children conceived post-mortem are to be treated