

ART, ADOPTION AND ESTATE PLANNING

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Rachael K. Pirner
Triplett Woolf Garretson, LLC
Wichita, Kansas
rkpirner@twgfirm.com

I. Introduction

Fertility clinics in the U.S. report and verify data on the assisted reproductive technology (ART) cycles started and carried out in their clinics, and the outcomes of these cycles, during each calendar year. ART includes all fertility treatments in which either eggs or embryos are handled. The main type of ART is in vitro fertilization (IVF). IVF involves extracting a woman's eggs, fertilizing the eggs in the laboratory, and then transferring the resulting embryos into a woman's uterus through the cervix.

These ART data are a rich source of information that can give potential ART users an idea of their average chances of success per ART cycle or ART transfer. Average chances, however, do not necessarily apply to an individual or couple. ART success rates vary in the context of patient and treatment characteristics, such as age, infertility diagnosis, number of embryos transferred, type of ART procedure, use of techniques such as ICSI, and history of previous births, miscarriages, and ART cycles. People considering ART should consult a physician to discuss their treatment options.

Based on CDC's 2021 Fertility Clinic Success Rates Report, approximately 238,126 patients had 413,776 ART cycles performed at 453 reporting clinics in the United States during 2021, resulting in 91,906 live births (deliveries of one or more living infants) and

97,128 live born infants. Of the 413,776 ART cycles performed in 2021, 167,689 were egg or embryo banking cycles in which all resulting eggs or embryos were frozen for future use. Although the use of ART is still relatively rare as compared to the potential demand, its use has more than doubled over the past decade. Approximately 2.3% of all infants born in the United States every year are conceived using ART.

Centers For Disease Control – Art Success Rates

Clients planning for children through the use of “ART” face a process. Intended parents will have to contribute reproductive material or obtain donated material at a Reproductive Endocrinology Clinic that will undoubtedly require that certain consents to be signed. If embryos are created, intended parents may select a surrogate or they may gestate the embryo. Once the child is born, intended parents will need to grapple with that child’s legal status, and in some cases, they need to obtain pre-birth orders and/or initiate adoption proceedings. Many times clients undergo multiple ART attempts, and cryopreserved genetic material maybe remaining after the family is complete, the disposition of which must be considered.

II. Reviewing Estate Plans for Intended Parents

Upon initiating ART through the use of a gestational carrier, numerous updates need to be made to the intended parents’ estate plans:

1. Will / Trust:
 - a. Add intended child(ren) as beneficiary(ies)
 - b. Add guardianship provisions for minor child(ren)
 - c. Add surrogacy contract provisions

2. Financial Power of Attorney

- a. Add authority to carry out surrogacy contract terms
- 3. Healthcare Power of Attorney
 - a. Add provisions for minor child(ren)

III. Gestational Carrier's estate plan

- 1. Will / Trust:
 - a. Ensure "children" defined to exclude children carried pursuant to surrogacy contract
- 2. Financial Power of Attorney
 - a. Give agent the right to represent gestational carrier for purposes of amending / enforce surrogacy agreement
- 3. Healthcare Power of Attorney
 - a. May consider giving intended parents limited control over non-life threatening pregnancy decisions
- 4. Consider the need for life insurance

IV. Definitions of Descendants

As both modern technology and the concept of "family" evolve, estate plans must evolve too. One of the most difficult aspects of an estate plan with children born through ART is defining descendants. On one hand, the definition should be broad enough to capture children that intended parents bring into the family through a variety of methods. On the other hand, caution should be exercised so that the definition protects against benefitting individuals who are not considered part of the family.

SAMPLE 1:

The term “descendants” includes persons whose parent/child status arose by virtue of one or more of the following events:

1. natural childbirth, regardless of whether person giving birth contributed genetic material, unless person giving birth was a gestational or genetic surrogate under a written contract;
2. any child(ren) my selected gestational carrier may be gestating pursuant to any current gestational carrier agreement into which I have entered;
3. legal adoption, including second parent, step-parent, confirmatory, adult, joint, and post-mortem adoption;
4. Court judgment of parentage or pre-birth order;
5. Voluntary acknowledgement of parentage;
6. parent/child status granted by state law to children during a domestic partnership, civil union, or marriage; and
7. birth of a child from testator’s gamete where either:
 - a. the embryo is in utero no later than 36 months after the individual’s death or
 - b. the child is born not later than 45 months after the individual’s death.

All children or descendants by any of the above methods are children or descendants for the purpose of this instrument.

SAMPLE 2:

References to “children” and “descendants” shall include children and descendants now in existence or born after the execution of this Agreement. One’s children and other descendants shall be determined according to applicable state or local law, except to the extent modified by this Article or by other specific provisions of this Agreement.

1. A child adopted before he or she attains eighteen (18) years of age (but not after attaining that age) shall be treated under this Agreement as a child of his or her adopting parents and as a descendant of their ancestors.
2. A biological child shall not be treated as a child or descendant of any biological parent of the child or as a descendant of the ancestors of such biological parent if the child has been surrendered for adoption with the consent of such biological parent and the child’s adoptive parent substitutes for the consenting parent under applicable state or local law.

3. A child born outside a marriage and those claiming through that person shall be deemed to be descendants of (i) the natural mother and her ancestors, and (ii) if the natural father acknowledges paternity or paternity is established in a court of competent jurisdiction during the natural father's lifetime, the natural father and his ancestors, in each case unless a decree of adoption terminates such natural parent's parental rights.

4. Adoptions and marriages that are recognized under this Agreement shall not affect prior distributions or other interests that have previously vested in possession, but they shall enable a person to receive distributions from or remainder or other interests in a trust still in existence. The descendants of a person who is treated as a child or descendant under this Article shall also be treated as descendants of such person's ancestors. The descendants of a person who is treated as not being a child or descendant under this Article shall also be treated as not being descendants of such person's ancestors.

5. Upon the written declaration of any descendant of the Settlor and subject to any restrictions contained in such writing, a posthumously conceived child by means of assisted reproduction whereby such descendant provided genetic material to the resulting child shall be considered a child of such descendant and a descendant of the descendant's ancestors.

6. A child born as a result of artificial insemination, in vitro fertilization or other medical intervention shall be treated under this Agreement as a child of (i) the woman (other than a woman who was contractually serving as a surrogate or gestational carrier) who gave birth to such child (the "birth mother"); (ii) the person or couple who initiated the medical procedure with the intention of ultimately becoming the legal parent or parents of the resulting child (each, an "intended parent"); and (iii) the birth mother's or intended parent's spouse at the time of conception or implantation of the embryo that resulted in the child at issue, unless there is clear and convincing evidence that the birth mother's or intended parent's spouse withheld consent to the medical intervention and did not subsequently voluntarily acknowledge parentage. In the event of any question whether (i) a birth mother's or intended parent's spouse withheld consent to a medical intervention for purposes of this subparagraph, or (ii) parentage has been voluntarily acknowledged for purposes of this subparagraph, the determination by the Trustees (other than the birth mother or either intended parent) shall be binding on all persons interested in any trust under this Agreement and on all persons claiming to be so interested.

Consider how these definitions might impact the following examples:

- A child born through ART where the non-birthing parent was genetically related to the child but was forced to legally adopt the child
- An adult child who adopts her romantic partner in an effort to have the partner includable in a class of beneficiaries for inheritance purposes

- A child conceived five years after the death of the biological father and intended parent using sperm that the father had donated to his wife, the other intended parent, before his death.
- A sperm donor, who has several biological children with whom he shares no relationship
- A sperm donor, who later meets one of his biological children and forms a paternal relationship with the child

V. Post-Mortem Issues

If the estate plan has not been properly prepared, the death of an intended parent can lead to significant legal challenges in at least two areas.

First, inheritance issues could arise where the children produced from ART are not clearly defined as part of the beneficial class. Where the intended parent is not alive to clarify his or her intent, will a strict reading of the estate plan (or applicable intestacy statute) apply, or will evidence of the intended parent's likely intentions be permitted?

Second, did the intended parent leave any cryogenically stored genetic material behind (eggs, sperm, embryos)? If so, what was the intended use and what are the terms governing its storage and disposal? How would a conflict between the intent as set forth in the storage agreement and the intent as set forth in a later estate planning document (e.g., Will) be resolved? What if the surviving intended parent challenges the disposition instructions of the deceased intended parent?

VI. Conclusion

The intersection of ART and estate planning is a complicated one, and must be navigated with caution.