ART 101

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With offices in Charleston, South Carolina, Stephanie focuses her practice on the complex area of Assisted Reproductive Technology (ART) and related legal issues impacting future families. In addition to her South Carolina Bar membership, Stephanie is Vice Chair for the ART Division under the American Bar Association’s (ABA) Family Law Section. Her professional memberships also include the Academy of Adoption and Assisted Reproduction Attorneys (AAAA), the American Society for Reproductive Medicine (ASRM), Resolve, and the Society for Ethics in Egg Donation and Surrogacy (SEEDS). She is also the co-author of Developing a Successful Assisted Reproduction Technology Law Practice, written with colleague Richard B. Vaughn, which is published by the American Bar Association. Within her home state, she is a frequent contributor to the South Carolina Bar’s educational video series, sharing information with her colleagues on ART and parentage as it changes within her state and across the country.

As part of her practice, Stephanie represents domestic and international clients seeking to build their families through surrogacy and/or gamete donation. Consequently, she is also called upon to represent gestational carriers who have offered their services. With greater frequency, Stephanie helps clients navigate issues related to parentage when their needs transcend to traditional family law matters of parentage, divorce, custody, and visitation.

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ART 101

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ART 101: Fundamental ART Issues for Family Lawyers

A. Research

1. Research the Law in Your Jurisdiction

“Research is what I’m doing when I don’t know what I am doing.” – Wernher Von Baun

Begin by researching any statutes on the books in the state where you will be practicing—the statutes are where you’ll find any existing hard-and-fast rules concerning third-party reproduction. You may find that all that is on the books in your state are egg or sperm donor statutes. In other states, such as California, you may find an extensive set of statutes; or you may find a more piecemeal set of laws where, as is the case in Florida, a few very specific statutes provide direction in a few areas. It is important for you to gain a solid understanding of how the law addresses clients’ needs in your state. An excellent starting point for your research is Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science, Third Edition by Maureen McBrien and Bruce Hale, a 50-state overview of Assisted Reproduction Technology law.

In some cases, ART attorneys must rely on custom and practice rather than black-letter law; in jurisdictions where there is an absence of laws governing specific situations, lawyers and judges are required to work together to figure out what procedures can be adapted to fit the situation. In these instances, you must reach out to those in-the-know in your state. Don’t assume that what was true six months ago is true today. And, unless you are constantly practicing, you must do the research and have these conversations for every case you work on.

The legwork is well worth the effort—you are building a framework of knowledge of ART law in your jurisdiction, a foundation that will serve you well for your practice in years to come.

2. The Intake – Ask & Verify

“Research is formalized curiosity. It’s poking and prying with a purpose.” -- Zora Neale Hurston

As with all cases, you will gather the most critical facts about your clients’ situation during the client intake meeting. In today’s modern world, it is imperative for the family law attorney to look past the most pressing issues conveyed by your client and truly understand the
underlying issues that may impact the trajectory of their case. Many family law attorneys enjoy their practice because family court rules are finite and predictable based on the facts of the case. However, with the introduction of family building by way of assisted reproduction, the landscape is changing and the outcomes are often unpredictable based on the facts of the case.

First and foremost, ask your clients during the intake worksheet whether or not they have engaged in the use of assisted reproduction. You may casually list the following questions to break the ice and uncover the unique complexities of your divorce client’s case:

- Have you and/or your spouse previously engaged the services of a fertility clinic?
- If so, which clinic did you consult?
- What type of services did you receive?
- Do you have any remaining eggs/sperm/embryos currently in storage?

The introductory questions can lead you to a more in-depth discussion during the consultation.

While the use of fertility services alone may not be a cause for concern, the discovery of stored embryos should automatically result in a mental checklist of immediate steps that should be taken. First, the law concerning rights to unused embryos between spouses is becoming increasingly debated. However, to date all family courts have agreed that embryos are marital property and part of the parties’ marital estate. Therefore, it behooves a savvy family law practitioner to place the fertility clinic on notice that a divorce action is pending, that the embryos must remain in storage, and that the ownership of the embryos will be decided by the family court.

It is important to mention that no court has awarded custody of sperm or unfertilized eggs to anyone other than the individual from which they came. Therefore, storage of individually stored material remains personal property and not subject to apportionment by the family court. However, the majority of individuals seeking ART services complete the fertilization of all retrieved eggs to be used in IVF services, with the remaining placed in cryopreservation storage for future family building options. It is the point when the individual gametes fuse (fertilization) that they transform from personal property to joint or marital property.

3. Disposition Forms

Next, you should ask your client to obtain and provide a copy of the embryo disposition forms signed by the parties at the time of services. Embryo disposition forms have changed over time in form, content, and procedural execution. Each of these elements have impacted embryo dispute litigation. Therefore, it is a crucial part of your case evaluation.

Embryo disposition forms typically address how embryos are to be handled in situations such as death of one or both of the spouses, separation/divorce, and non-payment of storage fees. Typical options include transfer of rights to the remaining spouse, a mutual agreement for disposition upon separation/divorce, and notice that the embryos may be destroyed if non-payment exceeds a certain time limit. The earlier versions required the signature of both spouses, but either did not require a witness or notarization, or such requirements were loosely
applied. As a result, there are incidences of wives signing the disposition forms on behalf of their husbands and granting themselves exclusive legal rights to embryos upon separation/divorce. For example, in *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000), each time eggs were retrieved from the wife, the husband signed a blank consent form. The wife then filled in the form, stating that the embryos should be returned to her for implantation if the parties separated. Later, during the divorce action, the court refused to enforce the consent forms for many reasons, including the lack of mutual consent between the parties as a result of the wife’s manipulation of the forms:

The donors’ conduct in connection with the execution of the consent forms also creates doubt whether the consent form at issue here represents the clear intentions of both donors. The probate judge found that, prior to the signing of the first consent form, the wife called the IVF clinic to inquire about the section of the form regarding disposition “upon separation”: that section of the preprinted form that asked the donors to specify either "donated" or "destroyed" or "both." A clinic representative told her that "she could cross out any of the language on the form and fill in her own [language] to fit her wishes." Further, although the wife used language in each subsequent form similar to the language used in the first form that she and her husband signed together, the consent form at issue here was signed in blank by the husband, before the wife filled in the language indicating that she would use the pre-embryos for implantation on separation. We therefore cannot conclude that the consent form represents the true intention of the husband for the disposition of the pre-embryos.

*Id.* at 159.

After cases such as the above came to light, most clinics changed their procedural requirements, making notarized signatures mandatory or requiring the signature of two (2) clinic staff members to witness each individual signature on the completed form. Therefore, obtaining a copy of the embryo disposition form is imperative to your case evaluation based on the time of signing, authentication of signatures, and intent of the parties, as well as binding statutes or legal precedent in your jurisdiction.

Finally, once you have reviewed the embryo disposition form for authenticity and intent, you must then decide whether you seek to use the form as a “sword” or a “shield.” Why is this question so important? Regardless of the intent of the parties at the time of signing, a court may decide ownership of the embryos based on their own analysis of the facts. In the absence of binding precedent, the most common tests applied in determining the fate of martial embryos include:

- **Balancing the Interests** – When there is no controlling embryo disposition agreement between the parties, the court should balance the interests of the parties and find that the right to avoid conception should prevail absent exigent circumstances of the opposing party. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).
• **Prior Written Agreement** – When the progenitors of embryos freely enter into an agreement regarding embryo disposition, the court should uphold the agreement. *Kass v. Kass*. 696 N.E.2d 174 (N.Y. 1998).

• **Contemporaneous Mutual Consent** - Regardless of a pre-existing embryo disposition agreement between the parties, a court may find that such an agreement is valid “subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryos.” *In re Marriage of Whitten*, 672 N.W.2d 768 (2003)

• **Exigent Circumstances** – When embryo litigation ensues, if a party can show that the embryos represent their only opportunity to have a biological child due to exigent circumstances, such as infertility due to cancer treatment, the right to procreate will outweigh the opposing parties’ right to avoid procreation. *Reber v. Reiss*, 42 A.3d 1131 (2012).

In the absence of statute or binding case law and depending upon your client’s position and desired outcome, it pays to conduct careful review of the embryo disposition forms, unveil evidence of any subsequent agreements between the parties, and to note the medical history of the parties, which may impact the outcome.

**B. Issues Not to be Overlooked**

“One can have only as much preparation as he has foresight.” — Jim Butcher, Changes

1. **Same Sex Couples**

   Medical consent forms can have a huge impact on custody disputes between same sex couples. For years, same sex couples who engaged in family building services were denied joint legal parental recognition without court intervention, often conducted via a step parent or second parent adoption. Prior to *Obergefell*, same sex couples did not enjoy the marital privilege of parental recognition for children born of their union. As a result, it was typical for only one parent to be listed on the birth certificate, absent an adoption order. If the couple decided to forego obtaining legal parentage rights through the court, problems ensued if and when their union dissolved. The lack of recognized joint legal parentage often resulted in the non-genetic parent being able to walk away from the relationship without financial obligation to the child and without custodial rights. As a result, there is a rise in custody litigation among same sex couples that are highly fact intensive. In deciding parental rights and responsibilities, courts conduct careful analysis of the parties’ marital status, the executed medical consent forms, and the conduct of the parties.

   For example, in *D.M.T. v. T.M.H.*, 129 So.3d 320 (2013), the Florida Supreme Court addressed parentage in a lesbian relationship applying the concept of “biology plus action.” In that case, the court held that “an unwed biological father has an inchoate interest that develops into a fundamental right to be a parent, protected by the Florida Constitution and United States Constitution, when he demonstrates a commitment to raising the child by assuming parental
responsibilities. It is not the biological relationship per se, but rather ‘the assumption of the parental responsibilities’ which is of constitutional significance.” Id. at 328 (citing Matter of Adoption of Doe, 543 So.2d 741, 748 (Fla. 1989)(emphasis added). In deciding to acknowledge the maternity of the egg provider, T.M.H., the court held that regardless of signing an “Egg Donor” consent form with the clinic, her subsequent conduct in receiving joint counseling for parenthood, holding the child out to the public as her own, and actively parenting the child for years gave rise to a protected right of parentage. The court expressly stated that “a biological connection gives rise to an inchoate right to be a parent that may develop into a protected fundamental constitutional right based on the actions of the parent.” Id. at 338 (citing Baby E.A.W., 658 So.2d at 966-67)(emphasis added). With this foundational reasoning, the court held,

In this case, the biological connection between mother and daughter is not in dispute. See D.M.T., 79 So. 3d at 789. Additionally, T.M.H. and her former partner D.M.T. demonstrated an intent to jointly raise the child through their actions before and after the child’s birth, and T.M.H. actively participated as a parent for the first several years of the child’s life. Importantly for constitutional purposes, T.M.H. also assumed full parental responsibilities until her contact with her child was suddenly cut off.

Id.

California has also addressed same sex parentage in the case of K.M. v. E.G., 119 P.3d 673 (2005). In K.M., lesbian partners engaged in cross egg fertilization with the use of anonymous donor sperm. K.M. agreed to donate her eggs to E.G. E.G. accepted with the condition that she be acknowledged as the legal mother. She stated she would not even think about K.M. adopting the children, “for at least five years until she felt the relationship was stable and would endure.” Id. K.M. signed the standard egg donor consent forms at the clinic, effectively relinquishing her parental rights. However, after birth of the twin children, the ladies actively parented the children, holding them out as their own and embracing each other’s families for the children. They continued to co-parent for six (6) years until the relationship ended and E.G. moved to Massachusetts with the twins. A custody dispute ensued.

The California Supreme Court evaluated the claim of parentage by K.M. under California Family Code Section 7613, which is modeled under the Uniform Parentage Act, and held that E.G.’s genetic connection constitutes “evidence of a mother and child relationship.” Id. at 71. Under Section 7613(b), “the donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” Id. (emphasis added). After an analysis of the facts in light of section 7613, the court concluded that, “A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights.” Id. at 72. Key factors in the court’s reasoning appear to be evidence of the parties’ legal status as registered “domestic partners” and their express joint intent to raise the child in their home at the time of the donation. The court viewed their relationship as akin to marriage, along with their
express intent, and therefore afforded K.M. the status of parent, regardless of the signed donor consent forms.

Finally, Nevada has also addressed the issue of same sex parentage in *St. Mary v. Damon*, 309 P.3d 1027, 129 Nev. Adv. Op 68 (Nev. 2013). The *St. Mary* case provides a great example for how same sex couples should navigate parentage when engaging in third party reproduction. They provide the most evidence of “intent to parent,” in comparison with the aforementioned cases.

St. Mary and Damon were romantically involved as a same sex couple and decided to have a child together, created from donor sperm. Damon provided the egg and St. Mary gestated the child. The parties executed a co-parenting agreement which set forth that they sought to “jointly and equally share parental responsibility, with both of [them] providing support and guidance.” *Id.* at 1030. The agreement also provided that if their relationship ended, they would each work to ensure that the other maintained a close relationship with the child, share the duties of raising the child, and make a “good faith effort to jointly make all major decisions affecting” the child. *Id.* Once the child was born in June of 2008, only St. Mary was listed on the birth certificate. St. Mary signed an affidavit declaring Damon the biological mother and Damon filed an ex parte action in 2009 to amend the birth certificate to add her name. *Id.* As a result, both women were listed on the child’s birth certificate thereafter. *Id.*

When the relationship ended the same year, St. Mary filed an action for custody, visitation, and child support. *Id.* The court determined that both women were the legal mothers of the child based on St. Mary’s right as a birth mother and Damon’s right created by biology *plus* evidence of their joint intent to raise the child together. Consequently, the court held their co-parenting agreement enforceable and consistent with “Nevada’s policy of encouraging parents to enter into parenting agreements that resolve matters pertaining to the child’s best interests.” *Id.* at 1036.

2. *Posthumous Reproduction*

Ideally, the medical consent forms that intended parents sign at the clinic when starting the fertilization process should clarify what the parties want to happen to stored frozen embryos in the event of death. Certainly, if there were a divorce, the divorce decree should address the disposition of unused embryos along with all the other things considered in a divorce. The same is true with estate planning: the client should let estate planning attorneys know about the existence of any cryopreserved embryos. Attorneys should review other subsequent family matters, such as posthumous reproduction, with clients: What happens if one partner dies? Does the partner want stored embryos to be used? If so, what responsibility does the client have to make the embryos remain viable and usable? The law regarding posthumous use of embryos varies from state to state. The parties’ wishes should be made clear in writing, including time limitations, if applicable.

If a child results from posthumous ART, state law governing the estate planning, inheritance, taxes and Social Security benefits varies. For instance, Social Security, although it is a federal program, it is administered by the state; federal administration of benefits has to comply with
local laws on whether or not the resulting child is entitled to benefits. Therefore, the Social Security Administration looks at the intestacy laws of the state where the child was born to determine if the child is eligible to receive survivor benefits. *Astrue v. Capato*, 566 U.S. 541 (2012).

In *Astrue*, the mother delivered twins as a result of IVF eighteen (18) months after her husband died of cancer. She then applied for Social Security survivors benefits for the children. Her claim was initially denied by Social Security and the District Court affirmed. The court determined that the twins could only qualify for benefits if they could inherit from the father under state intestacy law. The father was domiciled in Florida at the time of death and under Florida law, posthumously conceived children do not qualify for inheritance through intestacy laws. The Third Circuit reversed, concluding that the Social Security Act 42 U.S.C. §416(e), defines a child to mean “the child or legally adopted child of an [insured] individual.” “The undisputed biological children of an insured and his widow qualify for survivors benefits without regard to state intestacy law. However, the Supreme Court affirmed the District Court’s ruling, holding that the Social Security Administration’s reading “is better attuned to the statute’s text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime.”

Therefore, when advising family law clients regarding their family building options and estate planning, it is important to have a baseline understanding of your jurisdiction’s rules for posthumous reproduction. If no such statutes or case law exist, they should be referred to an estate planning attorney to make provisions accordingly.

In conclusion, assisted reproduction can have a considerable impact on traditional family law matters ranging from custody, to child support, inheritance rights and survivorship benefits. Therefore, you will serve your clients well by uncovering their prior fertility services, reviewing the related medical consent forms, and staying apprised of the laws in your state.
ART Law – A Colorful Backdrop to Today’s Modern Family Issues

One of the things that makes assisted reproductive technology law so exciting and rewarding is that, in addition to the positive attributes of family formation (helping people have babies), at this early stage of its evolution, few things are set in stone. Assisted Reproduction Technology (“ART”) law is ever-changing; you can’t just get into the field and expect to receive a black-letter outline of what you’re supposed to do. One reason is that the technology is relatively new and continually advancing. Procedures and successful outcomes that were unimaginable a decade ago are best practices and common occurrences today. Social norms are likewise evolving along with the technology, as more and more people create families by means of ART. As media coverage of ART increases, all of us become more familiar and comfortable with the concept. Likewise, as societal attitudes and technology evolve, so do case law and legislation—usually a step behind… but always running to catch up. Ultimately, the crossover between ART law and family law is likewise ever evolving and to be a successful family law attorney, one must be mindful of the impact of Third Party Reproduction upon parental rights.

As more individuals and couples turn to assisted reproduction in their quests to become parents, family law attorneys will be called upon more frequently to address issues related to assisted reproduction law. Common examples include fights between divorcing couples over who gets the frozen embryos, and parentage disputes within a couple that used donated eggs or sperm to become parents (leaving only one of them genetically related to their child). Yet, assisted reproduction law remains a mystery to many family law attorneys. This paper attempts to provide some basic information for family law attorneys that will assist them in addressing assisted reproduction issues as they arise in their cases. Through this paper, attorneys will, among other things:

1. Learn multiple methods for family building which incorporate assisted reproduction.
2. Identify key issues that affect legal parentage rights based upon the methods used, use of donor material, and marital status of the intended parent(s).
3. Identify paths to legal parentage through the family court.
4. Understand how medical consent forms can affect custodial rights during divorce litigation.
5. Identify tests used by family courts to determine ownership rights to unused embryos.
What is “assisted reproduction”?

“Assisted Reproduction” is defined in the ABA Model Act Governing Assisted Reproduction [2019], means a method of causing pregnancy through means other than by sexual intercourse. In the foregoing context, the term includes, but is not limited to:

(a) Intrauterine or intracervical insemination;
(b) Donation of eggs or sperm;
(c) Donation of Embryos;
(d) In vitro fertilization (“IVF”) and Embryo Transfer; and
(e) Intracytoplasmic sperm injection.

In simpler terms, assisted reproduction involves an intended parent or parents engaging in some form of reproduction other than sexual intercourse, often but not always assisted by a physician using medical technology and sometimes requiring the assistance of a third party such as a sperm donor, egg donor, embryo donor or surrogate. As a result, when parties enter into assisted reproduction arrangements, particularly with third parties, this most likely will involve executing written contracts, and it may also involve or require court proceedings to establish or confirm the legal parent-child relationship of any child or children resulting from the assisted reproduction.

Medical Consent Forms and Estate Planning Considerations

Prior to engaging in assisted reproduction involving medical procedures, medical consent forms should also be signed at the physician’s office documenting that the parties were informed as to the relevant medications and procedures as well as the risks, benefits, and alternatives to such medications and procedures prior to commencing any medications and/or procedures. As attorneys, you may be called upon by clients to help review these documents on their behalf because many assisted reproduction medical consent forms contain legal provisions: a) relieving the physicians of liability for any harm caused; and b) addressing parental rights as well as who has authority with regard to future use and disposition of any sperm, eggs or embryos remaining (usually in cryopreservation) after the completion of the assisted reproduction procedures.

In addition to medical consent forms, as a consequence of assisted reproduction, intended parents with frozen gametes (eggs, sperm or embryos) remaining in cryopreservation for future use should consider the frozen genetic material as part of the intended parents’ estate, requiring by necessity that there be proper estate planning documents or other written agreements in place addressing what can be done with the frozen gametes and by whom. By their nature, third party assisted reproduction arrangements (those using surrogates and/or egg, sperm and embryo donors) also involve several family and estate planning matters to consider, and the contracts your clients enter into with these third parties may contain provisions relevant to estate planning or even require that certain estate planning documents be executed, such as guardianship designations and advanced healthcare directives.

Sperm Donation:

Sperm donation, because it is relatively simple and also relatively inexpensive, is probably the most common form of assisted reproduction. The rules applying to sperm donation vary from state to state and even differ slightly in the ABA Model Act Governing Assisted Reproduction [2019] (“ABA Model Act”), various versions of the Uniform Parentage Act (“UPA”), and the Uniform Probate Code (“UPC”). Generally, these model laws and sperm donor statutes across the U.S. are all in agreement that when a man
provides sperm for use by someone other than his wife and has no intent to become a parent, he is a “donor” and is not a legal parent of any resulting child.

Recent updates in some states as well as in the ABA Model Act and the UPA have been passed, making these provisions of law both gender-neutral and marriage-neutral, allowing a second intended parent to consent to the donation and thereby also acquire parental rights to the resulting child conceived through sperm donation by his/her spouse. Earlier versions of these model acts and updated sperm donor statutes only provided protection to husbands consenting to their wives’ insemination with donated sperm, and required that the sperm donation be overseen by a physician.

Some of the newer versions of these sperm donor statutes eliminate the requirement that the donation of sperm be to a physician or sperm bank (acknowledging that assisted reproduction with intrauterine insemination via sperm donation will sometimes take place at home). Under these newer statutes, a donor of semen is treated in law as if he were not the natural father of a child resulting from the sperm donations as long as (a) the sperm was donated to a physician or sperm bank or (b) the sperm was donated pursuant to a written assisted reproduction agreement signed by both donor and recipient prior to conception; or (c) the court finds clear and convincing evidence that – although there was no physician involved and no written agreement – the parties mutually intended the man to be a sperm donor and not a father.

Note that the sperm must be provided for purposes of assisted reproduction. Whether or not a physician is involved, and whether or not there is a written contract, if the sperm is provided by way of sexual intercourse the “donor” will be treated in law as the natural father of the child.

When anonymous sperm donors donate to a licensed physician or sperm bank and intended recipients contract with the sperm bank or physician to purchase sperm from an anonymous sperm donor, the lines are pretty clear and the protections to the donor are fairly strong.

The question of how courts should differentiate between who is truly just a known sperm donors and who is a legally responsible father – and what role medical personnel and procedures should play in that distinction – is being debated around the country in courts and in the evolution of statutes addressing sperm donation, but practitioners can conclude from rulings in states across the country that for the protection and support of the resulting children, the courts tend to apply the statutes strictly when asked to determine a man’s status as a sperm donor or a father. In other words, known sperm donors can sometimes pursue (or be pursued for) parental and financial responsibility for the resulting child if the agreement between the parties and applicable statutes are not followed carefully, so care should be taken in counseling clients considering sperm donation.

**Egg Donation:**

Although some states will apply a gender-neutral reading to their sperm donor statutes as a way of addressing egg donation, egg donation cannot be treated identically to sperm donation, because of the necessity of medical participation in egg donation. In other words, if a man and woman wish to create a child together through artificial insemination – using the man’s sperm but without sexual intercourse – and both be that child’s legal parents, they can accomplish this by doing the insemination at home without physician involvement and without a signed reproduction agreement specifying otherwise. Egg retrieval, however, must be done in a doctor’s office.

As an example, effective January 1, 2016, Family Code § 7613 states that: “[t]he donor of ova for use in assisted reproduction by a woman other than the donor's spouse or nonmarital partner is treated
in law as if she were not the natural parent of a child thereby conceived unless the court finds satisfactory
evidence that the donor and the woman intended for the donor to be a parent.” (Family Code § 7613(c)).
In other words, a woman providing eggs for use by another will be treated as an egg donor and not a parent
unless (a) the eggs are being provided to her own spouse or intimate partner (in the case of lesbian couples
engaging in “co-maternity”) or (b) there is satisfactory evidence that the woman providing the eggs and the
recipient of the eggs both intended the woman to be a parent.

Therefore, women donating eggs for use by another person for reproductive purposes should
enter into a signed egg donation agreement to clarify that she is just a donor and not a parent and that the
intended parent is the presumptive parent of any child resulting from the egg donation. As this involves a
medical procedure, medical consent forms should also be signed at the physician’s office documenting that
the parties were informed as to the medications and procedures as well as the risks, benefits, and alternatives
to such medications procedures prior to commencing medications and/or the egg retrieval procedures.

**Surrogacy:**

The first test tube baby was born in the late 1970s and shortly thereafter, the first successful
surrogacy cases followed in the 1980s.

There are two kinds of surrogacy: gestational surrogacy and traditional surrogacy. With
traditional surrogacy, now referred to as genetic surrogacy in the ABA Model Act and the UPA, the woman
carrying the child also is the child’s genetic mother (in other words, the child is conceived through artificial
insemination of the “surrogate” rather than through IVF and embryo transfer procedures). A genetic
surrogacy typically involves a woman agreeing to carry a child for an individual or couple unable to carry
a child themselves. There often is no doctor involved, and sometimes no written agreement of any kind.
Many traditional surrogates are family members – for example, a sister carrying a baby for her infertile
sibling. The pregnancy is brought about by simple sperm donation and insemination, often at home without
medical assistance. Thus, as with sperm donation, this form of assisted reproduction may occur with no
professionals involved. It is a far less costly option for people unable to conceive without assistance, and it
involves far less medical intervention, making it preferable to many families – and to many potential
surrogates – from both a financial and a health perspective. However, absent clear statutory or case law
guidance, people engaging in genetic surrogacy in many states do so at their own peril.

With gestational surrogacy, the woman carrying the child is not genetically related to the child,
When surrogacy first started occurring, genetic surrogacy was by far the more prevalent approach, but with
the advancement of reproductive technology, as success rates with egg retrievals increased, egg donation
also increased in frequency and gestational surrogacy has become the more prevalent form of surrogacy as
compared to genetic surrogacy.

Likewise, a number of legal complications arose as courts in the 1980s attempted to reconcile
and apply laws that were first promulgated when birth mothers were always the child's biological mother
to situations in which the birth mother is not a biological mother. The general trend, however, is that most
States will recognize the intended parents as the legal parents regardless of the type of surrogacy, the genetic
connection between the intended parent or parents and any resulting child, and regardless of what method
of assisted reproduction is utilized.

Still, the law regarding surrogacy can be considered unsettled, and the practice remains largely
unregulated. Many states are hesitant to enact legislation because, given the rapid advances in reproductive
science, there will always be an exception to the rule, making it more appropriate for the courts to address
each scenario on a case-by-case basis. Surrogacy is also a controversial subject in which many politicians
are reluctant to become involved. The trend, as reflected in Court decisions and recently implemented statutes is toward honoring the intent of the parties with regard to parentage when they entered into an assisted reproduction agreement. Even in jurisdictions where surrogacy agreements are unenforceable, intended parents have had success in getting their names listed as parents on the child's birth certificate where the carrier is in agreement with the requested relief.

There are many states where surrogacy takes place and is allowed simply because the law does not prohibit or restrict it, and surrogacy takes place in those states successfully. There are also states that have statutory law (legislation) referencing but not expressly governing surrogacy. And some states address only genetic surrogacy (usually prohibiting it) and may allow or simply not address gestational surrogacy. However, there are states with fully comprehensive surrogacy legislation.

**States with statutory law expressly governing surrogacy:**

Arkansas, California, Florida, Illinois, Kentucky (traditional surrogacy prohibited), Louisiana (only altruistic surrogacy is allowed there), Maine, Nevada, New Hampshire, New Jersey, North Dakota (gestational surrogacy allowed, but traditional surrogacy prohibited), Texas, Utah, Vermont, Virginia, Washington and Washington, DC.

**States with statutory law referencing but not expressly governing surrogacy:**

Alabama, Delaware, Iowa, Oregon, New Mexico and West Virginia.

**States that have case law governing surrogacy:**

Connecticut, Maryland, Massachusetts, Ohio, Oregon, Tennessee, and Wisconsin.

**States that have no law governing surrogacy:**


**States that statutorily prohibit surrogacy:**

Michigan, New York.

**States that statutorily prohibit surrogacy contracts but still grant parental rights to one or both intended parents:**

Arizona, Indiana, Nebraska.

But note, as this paper was being written: there were surrogacy friendly bills under consideration in CT, IN, OK, MA, MI, NY, and VA.

**Assisted Reproduction Contracts:**
Because the law of assisted reproduction is for the most part still unsettled, contracts in this area may be governed in whole or part by statutes, or not addressed by a statute at all. Given these uncertainties, ART contracts should contain a severability clause so that if one clause is found void or unenforceable, the balance of the contract can remain in effect. The parties to these arrangements should execute these contracts prior commencing medications or medical procedures, and it is considered best practice to have the parties to these arrangements complete medical and/or mental health consultations and/or evaluations to determine whether they fully understand what they are about to embark upon, and, regarding medical evaluations, to determine whether they are able to move forward. As noted above, in some states, legislation may exist which dictates some the required content in these contracts or the manner in which they are to be executed. Attorneys in this area must ensure compliance with these statutory provisions, because failure to comply may invalidate the agreement or hinder the parties’ ability to achieve their goals.

**Embryo Donation:**

Just about every time a couple or a single person goes through IVF in order to have a child, embryos are created. This is true whether the couple is married or unmarried, same-sex or different-sex, or a single person trying to become a parent through assisted reproduction. In the vast majority of IVF cases, excess embryos are created which are not immediately used. Fertility clinics across the United States are reporting a steady increase in IVF cycles, which means more embryos are being created each year. US Department of Health and Human Services data suggest that more than 600,000 frozen embryos are currently in storage in the United States. (See http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption, last visited 08/29/16.) These are just the numbers actually reported to the CDC by reporting fertility clinics; professionals in the field believe the true number is upwards of four million. (See Dave Snow, Alana Cattapan & Francoise Baylis, Letter to the Editor, 33 Nat'l Biotechnology 909 (2015).) Frozen (cryopreserved) embryos can survive and be viable for a very long time. There is at least one case in the U.S. of a child being born in 2017 following the transfer of embryos that had been frozen and stored in 1992….for 24 years.

It follows that embryo donation may be one answer to the growing number of embryos remaining in cryopreservation. Those entering into an embryo donation arrangement should have mental health counseling prior to making such decisions and they will need legal counsel and written agreements, as well as medical consent forms, to document the donation and to define the rights, risks and obligations of the parties. Although there is little statutory or case law guidance on embryo donation, there is broad professional consensus on one point - that it is unethical – and possibly illegal – to request monetary compensation for embryos, because this is too close to buying and selling children.

**Establishing Parental Rights:**

The process for establishing parental rights for intended parents involved in surrogacy will vary depending on the state where the birth occurs. Some states require that Intended Parents obtain a court order; and in the states requiring a court order, the attorney may be allowed to file the parentage petition and obtain a parentage order prior to the birth (“pre-birth order”), or the attorney may be required to wait until after the birth to get the parentage order.

Some states have a combination of a pre- and post-birth process, where there is a preliminary filing and/or preliminary order, but the attorney is required to file a post-birth “notice of birth” with the court before intended parents can get the final order (e.g., Texas and Utah).

In other states (e.g., Illinois), although a petition to the court and court order is allowed, the parentage process set up by statute in Illinois is purely administrative; no court order is required, and the
attorney works directly with the Department of Public Health, with whom one files surrogacy parentage forms acknowledging the intended parents as the legal parents and requiring the intended parents to be listed on the birth certificate of the resulting child or children.

In summary, what the attorney files in support of their clients’ parentage petition will vary depending on the state, and often it will vary county by county within the state. It’s obviously crucial that the attorney find out what the process is and the paperwork required, plan accordingly and start early. One must conduct research to know the expectations of their clients, the governing statutes or case law (or local customs and practice if there are no laws spelling out what the attorney should do), and make sure to know all of this before the parties are matched and moving forward.

Consequently, attorneys should not be afraid to meet with their family court judges. Advocating for clients may mean making an appointments to see the judge on during chambers week or on their lunch break, if need be. Good communications with the family law court can result in meaningful discussions of ART science and the law, existing statutes and case law, and how to best help families.

Making the effort to get to know the family court judges will also help an attorney earn their respect, and to become familiar with the direction of the court. The point is not to discuss any specific case, but to have a conversation about the law, policies, process, required documents, etc. Judges will appreciate the outreach, because family law can be a collaborative area of law. Intended parents, surrogates and donors and the court all want the same thing—the best possible outcome for the child and family.

Likewise, have a similar conversation with the personnel at the Vital Records office. Find out what they need—court orders, documents, what they can and can’t do regarding single parents, same-sex parents—all of which are constantly in flux in family law. For example, Ohio allows parties to select what identifier they want for their spot on the birth certificate—mother, father or parent; California has a similar law in place now. Arizona, on the other hand, uses the terms Parent 1/Parent 2 on all forms.

### Pressing Questions for the Family Law Attorney

**Assisted Reproduction After Death, Separation or Divorce?**

One final area of concern for family law attorneys involves what to do with cryopreserved embryos upon death, separation or divorce; i.e., who gets them, and, more significantly, can the person who gets the embryos actually use them to have a child? Likewise, can gametes be harvested and/or frozen upon death and used to have a child after the progenitor has passed? If so, who will the parent(s) be and will the child be considered a legal heir of the decedent?

**What to do with Cryopreserved Embryos Upon Death?**

Whether fresh eggs or sperm can be withdrawn from the body after death (usually in a situation of an unexpected death), and whether frozen embryos or other frozen gametes can be used after death for procreative purposes, are the issues at the center of a topic referred to as **posthumous reproduction**.

A predominant theme in relation to children conceived posthumously is that the decedent gamete provider must have consented in writing, or such consent to posthumous conception must be clearly established by other evidence. Absent that consent, it seems that most posthumously conceived children would probably be denied the right to be considered a child of the decedent for inheritance and other
purposes. The consent issue gets interesting in cases where sperm is extracted right after a person’s death (a process known as sperm harvesting). What if the couple had talked about having a child, death was unexpected, and the partner still wanted to fulfill the dream of having genetic children with the decedent? What will suffice as “consent” of the decedent? In such a scenario, the reproductive rights of both the decedent and the surviving partner are at issue. Without a doubt, more litigation will be spawned in this area, as more and more rights are implicated by the possibility of posthumous reproduction, especially those of preexisting family members, such as older siblings.

*What to do with Cryopreserved Embryos Following Separation or Divorce?*

One other growing area of litigation arising out of assisted reproduction is what to do with embryos created by a couple prior to a divorce or dissolution? Who gets to use them? If they agree, then attorneys can write this into the separation agreement. If they don’t agree, then turning to “the law” may not provide the clearest answer, at least in the current state of the jurisprudence on this issue.

As a precursor, one big problem is that the lawyers involved in a dissolution may not even have known about the embryos when the case was filed. Infertility is a profoundly private experience for many people. Clients will sometimes not tell their attorneys about unused frozen embryos unless they are specifically asked about them. So, divorce attorneys should be including questions about assisted reproduction and remaining, unused embryos in their intake. (As noted above, many of these same questions should be considered by estate planning attorneys as well and expanded to include all possible frozen gametes in storage, not just embryos).

No federal regulations or statutes govern the disposition of frozen embryos created through assisted reproduction technology (“ART”), and the states follow a patchwork of legislative and judicial approaches to the various issues arising from the use and disposition of frozen embryos.

The collective effect of these statutes may, arguably, suggest that control and decision-making with regard to one’s reproductive material belongs to each person individually.

There have been just over a dozen cases decided by appellate courts in the United States in which a court was asked what to do with cryopreserved embryos when a divorcing couple could not agree on who would keep and/or use the embryos.

In each of these cases, one person wanted to use the embryos to conceive children and the other did not. For 24 years, the clear trend in these cases was for courts to find a way to prevent embryos from being used to conceive children against the wishes of one of the parties. However, two recent cases have presented compelling circumstances in which the courts have held in favor of a woman wanting to use the embryos against the wishes of her former male partner. Are these cases governed by principles of contract? Principles of equity? Constitutional law? Public policy concerns? All of the above?

For guidance through case law, one must look at the approaches taken in other jurisdictions, starting with Tennessee in the *Davis v. Davis* case, the first case to address the disposition of frozen embryos upon divorce. In 1992, the Supreme Court of Tennessee held that in the absence of an express agreement between the parties, frozen embryos should be awarded based on a balancing of the parties’ relative interests. (*Davis v. Davis* (1992) 842 S.W.2d 588, 604.) “Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the pre-embryos in question.” (*Id.* at 600-601) The *Davis* court found that each of the parties in *Davis* had an equal constitutional right to procreative autonomy governing their interest in the embryos. (*Id.* at 597) The court held that the embryos were not persons, but that they were property entitled
to a special respect as the result of their potential for life. (Id. at 604) Finally, the Tennessee Supreme Court opined that if there is an express agreement governing the disposition of the embryos in the event of a divorce, a court should give effect to the parties’ intent as expressed in that agreement. (Id. at 604)

When intended parents go through IVF treatment and create their embryos, they signed documents with their fertility clinic, created by the fertility clinic for use in every IVF case, and principally designed to address their rights and obligations vis-à-vis the clinic. These forms were not constructed specifically to address or define their rights and obligations toward each other. They therefore provided minimal guidance to the court.

Twenty-seven years later, clinic consent forms now usually have at least section or document giving the parties choices as to what to do with frozen embryos in the event the parties divorce. Typically, the forms instruct IVF patients to choose which box to check from four or five specific choices including: 1) the wife/woman/patient determines what happens to the embryos; 2) the husband/man/partner determines what happens to the embryos; 3) the embryos will be donated for research; or 4) the embryos will be disposed of by the clinic. Sometimes the choices are more creative, such as dividing vials of embryos between the parties or requiring both parties to agree on the disposition of the embryos at the time of the disposition. However, this portion of the medical consent forms tends to be embedded in a lengthy informed consent document. Even now, with some publicity about embryo disposition, it would be very unusual for a couple to have an attorney look at the clinic consent forms, and virtually unheard of for each of the progenitors to be represented by separate counsel who could explain to them the potential lifelong implications of the boxes they are quickly checking in the informed consents. Therefore, the relevance of the clinic forms in later litigation remains a controversial issue.

The Davis case has become the seminal case in the jurisprudence of embryo disposition. Davis is quoted, although not necessarily followed, in virtually every subsequent case involving disputes over frozen embryos. For twenty years, every case decided by a court of record, using varying legal theories, prevented the person wishing to use frozen embryos from doing so against the wishes of a (former) spouse or partner who does not want to have a child born against his or her wishes. Since Davis, courts have used, essentially, three different models to reach this same result.

**Enforcement of the “contract”:** Four cases, from four different states (TX, OR, NY, WA), have held that unambiguous provisions in IVF consent forms should be enforced as written. The consent forms in two of these cases provided that embryos should be destroyed in the event of separation or divorce. (Roman v. Roman, 193 S.W.3d 40, 55 (Tex.App. 2006); In re Marriage of Dahl, 194 P.3d 834, 840 (Or. 2008).) The form in another case provided that, in the event the parties were unable to agree on the disposition of the embryos, they would be donated for research to an institution to be determined by the IVF program. (Kass v. Kass, 696 N.E.2d 174, 182 (N.Y. 1998).)

The fourth case, Litowitz v. Litowitz from the Supreme Court of Washington, contained an interesting twist – the embryos were created from the husband’s sperm and donated eggs. (Litowitz v. Litowitz, 48 P.3d 261 (Wash.banc 2002).) The Washington Supreme Court held that the wife had an equal right to determine the fate of the embryos, despite her lack of genetic connection (ld. at 267.), but ultimately relied on the written documents signed at the clinic and upheld the provisions of the informed consents providing that if the couple didn’t give specific direction to the IVF program within five years, the embryos would “be thawed out and not allowed to undergo further development” and preventing either of the Leibowitz’s from unilaterally using them to bear a child. (ld. at 270.) The lesson of these cases is that unambiguous language in the medical consent forms likely will be enforced, to the extent that language prevents one of the parties from using the embryos (to conceive a child) against the wishes of the other party.
Public Policy and Other Considerations. A handful of states are bucking the trend of deciding embryo disputes based on the intentions memorialized in the clinic documents, either because – in the cases they have considered – there were no written agreements to enforce, or because they have found other considerations more important (NJ, MA, and IA). The New Jersey Supreme Court followed the central analysis of the Davis case from Tennessee, but placed more emphasis on constitutional rights than on informed consents, holding that in the absence of a clear and binding agreement, the court would not violate the wife’s fundamental right not to procreate by forcing her to become a genetic parent against her will. (J.B. v. M.B. and C.C., 783 A.2d 707, 717 (N.J. 2001).) In a relative outlier case, the Massachusetts Supreme Judicial Court held that a contract specifying that any unused embryos be given to the wife for use in the event of “separation” was unenforceable. That court held, “[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.” (A.Z. v. B.Z., 725 N.E.2d 1051, 1057-1058 (Mass. 2000).)

The Iowa Supreme Court used a different analysis to reach the same result as Massachusetts. (In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).) The court held that it was against public policy to enforce a prior agreement between a couple that no longer agreed about their future family and reproductive choices. (Id. at 782.) The court invoked the principle of “contemporaneous mutual consent,” holding that cryopreserved embryos would be stored indefinitely until the parties reached an agreement about what to do with them. (Id. at 774) The court rejected the wife’s “best interest of the child” argument, holding that the best interest standard is intended to assure a child already born the opportunity for the best physical and emotional development. (Id. at 775.) Although the New Jersey Supreme Court previously had endorsed the “contemporaneous mutual consent” principle in dicta, (J.B. v. M.B., 783 A.2d at 719), Iowa is unique in relying on this principle as the basis for reaching a final decision.

Cases Allowing Use of Frozen Embryos. In two recent cases in PA and IL, intermediate appellate courts have ruled that a woman can use frozen embryos to have children against the explicit wishes of the man whose gametes were used to create the embryos. (Reber v. Reiss, 42 A.2d 1131 (Pa. Super. 2012); Szafranski v. Dunston, 34 N.E.2d 1132 (Ill. App. 2015).)

In Reber, the court found that the balancing of interests test was the appropriate test, and further found a compelling circumstance that did not exist in all of the previously reported appellate decisions: after treatment for cancer, the ex-wife had no further ability to procreate biologically without the use of the disputed embryos, which had been created prior to the treatment. (Reber, supra, 42 A.2d at 1136-1137.)

The Szafranski case also presented a similarly compelling circumstance. The ex-girlfriend in that case received a cancer diagnosis and the treatment was likely to render her infertile. She and her boyfriend agreed to go through IVF together for the specific purpose of creating embryos to allow the girlfriend to attempt to have children after treatment. The Illinois appellate court held that they had entered into an enforceable oral agreement, and that her interest in the use of the embryos was greater than his interest in preventing their use. (Szafranski, supra, 34 N.E.2d at 1152-1153, 1162.)

Do these two cases represent a trend away from the previous precedents establishing that courts will not force a person to become a genetic parent against their wishes? Or are they limited to their special circumstances? In both Reber and Szafranski, the women wanted to use embryos created specifically because the couples foresaw that the women soon would have no other means of achieving biological parenthood. In both cases, there was no signed agreement to unambiguously provide for what would happen to the embryos in the event the parties didn’t agree in the future, which presumably gave the courts more leeway to adopt an equitable approach.
**Persons or Property?** Louisiana and New Mexico both have statutes explicitly providing that embryos are persons, and requiring that all embryos be transferred or stored until they are donated to another family. (L.S.A. – R.S. §§ 9:121 et. seq.; N.M.S.A. §§ 24-9A-1 et. seq.) Whether these statutes are constitutional under *Roe v. Wade* and its progeny is unclear but, as of this writing, no reported court case has held that an embryo is a person.

*Davis* held that embryos were property deserving of special respect. The New York Court of Appeals and the Supreme Court of Arizona both held that frozen embryos are not persons for constitutional purposes. (*Kass*, 696 N.E.2d at 182; *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. 2005).) In at least two cases, couples who underwent IVF and whose embryos were lost or destroyed sued the fertility clinic for wrongful death and the courts in both cases ultimately dismissed the actions by finding the embryos were not "persons" for purposes of each state's wrongful death statute. *Jeter*, and *Miller v. American Infertility Group of Illinois*, S.C., 897 N. E.2d 837 (Ill. App. Ct. 2008). A federal district court in Virginia has held that frozen embryos are “property,” subject to an action for recovery under a bailment theory. (*York v. Jones*, 717 F. Supp. 421 (E.D.Va. 1989).)

If courts begin to find that frozen embryos are persons, this presumably would require implementation of a “best interests” standard and the entire line of cases beginning with *Davis* might be called into question.

**Current Cases.** The issues swirling around embryo disposition cases continue to play out in the media. In a very recent San Francisco case, Dr. Mimi Lee sought to use frozen embryos she had created with her husband, Stephen Findley prior to the breakdown of their marriage. Dr. Lee had been diagnosed with cancer prior to the IVF procedure and, at age 46, even if not infertile from her cancer treatment she is unlikely to be able to have children using her remaining eggs. The Superior Court of San Francisco nonetheless ruled in favor of the ex-husband and held that the embryos would have to be thawed and destroyed, as provided in the parties’ IVF agreement, which, as required by California Health and Safety Code Section 125315, requires reproductive healthcare providers to give ART participants a consent form with options for disposition of the reproductive material upon the occurrence of certain contingencies. (*Findley v. Lee*, #FDI-13-780539, California Superior Court, County of San Francisco.) Specifically, the court held that while Lee might have a right to procreate in other circumstances not before the court, she did not have a right to procreate with Findley. That decision was not appealed and is now a final judgment.

The actress Sofia Vergara and her former fiancé created embryos when they were together, for the purpose of having children together. They split up, and Ms. Vergara’s former fiancé sued in Superior Court in California seeking the right to use the two remaining (female) embryos, claiming that he was coerced into agreeing to discard the embryos in the event of the dissolution of their relationship. Distinguishable from *Findley*, the medical consent forms signed in this case did not have an option for what to do with the embryos in the event of the dissolution of their relationship; the forms only covered what to do in the event of their death. Nick Loeb, her ex-fiancé, originally filed the lawsuit in California but withdrew before refiling in Louisiana, likely because it’s renowned for being a pro-life state. It’s also where the businessman has allegedly set up trust funds for the two female embryos, which he has already named Isabella and Emma. The case was apparently still pending as of March 1, 2018 when this paper was prepared.

The most recent appellate rulings in this area come from the Missouri Court of Appeals, and from the Colorado Supreme Court.

In the Missouri Court of Appeals for the Eastern District, in *McQueen v. Gadberry*, No. ED103138 (Mo. Ct. App. Nov. 15, 2016), the Court upheld a trial court's decision characterizing frozen
embryos as a special category of property and, citing Witten, prohibiting either party from using, transferring or destroying the frozen embryos without the written consent of the other party (http://www.courts.mo.gov/file.jsp?id=107496). Notably, the Court held that frozen embryos are not children, for purposes of Missouri's dissolution of marriage statutes. This case is different than all other litigated frozen embryo disposition disputes cases because Missouri has legislation (Section 1.205, RSMo.) that says life begins at conception and that an embryo is an unborn child entitled to the same rights and privileges as any other resident or citizen of the state. (Id.) The Court ruled that the public policy set forth in that set of statutes could not be applied to a dissolution of marriage action without violating fundamental constitutional rights. (Id.)

The Supreme Court of Colorado, in the case In Re Marriage of Rooks, the court held that courts should seek to balance the parties’ respective interests in receipt of the pre-embryos. In balancing those interests, courts should consider the intended use of the party seeking to preserve the pre-embryos; a party’s demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties’ reasons for undertaking in vitro fertilization in the first place; the emotional, financial, or logistical hardship for the person seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce process; and other considerations relevant to the parties’ specific situation. 2018 CO 85, No. 16SC906.

Some lessons to be gleaned from the cases discussed above are: (1) If an agreement has been signed which prevents one party from using the embryos without the consent of the other party, that agreement most likely will be enforced. (2) If the IVF agreement provides that one party may use the embryos without the consent of the other party, that might be enforced - but it might not. It will likely depend on the particular circumstances of the case and the jurisdiction. (3) If there is no unambiguous written agreement, the interests of the parties will be balanced. (4) If the person who wants to use the embryos has other reasonable means of having biological children, that person is unlikely to be allowed to use the cryopreserved embryos against the wishes of the other person. In the absence of clear statutory authority, it is unpredictable whether a court will rely on public policy grounds, constitutional grounds, contract principles or equitable principles to determine the fate of the parties and the embryos.

A very notable deviation from the lessons of the evolving jurisprudence in this area is the Arizona Parental Right to Embryo law, effective April 2018, which states (among other things) that if a couple creates embryos together and they later split up and/or disagree as to who may use any remaining embryos they might have in storage, then the person wishing to procreate with remaining embryos should be allowed to do so, over the objection of the other progenitor. It remains to be seen whether this law will hold up against a constitutional challenge.

One thing is certain: under the current state of the law, it is impossible to provide clear guidance to a family law client wishing to use embryos that were created during a now-ended marriage. This is an issue that cries out for responsible legislation. The millions of couples undergoing fertility treatments (as well as the physicians and other health care professionals providing these treatments) deserve clarity on this important issue, rather than having to rely on guesswork and thereby risk years of litigation should they end up disagreeing about later use of their genetic material.

**Conclusion:**

Although assisted reproduction law has evolved by leaps and bounds compared to where we were when the first test tube baby was born, many aspects of the law of assisted reproduction remain unclear.
Family law practitioners are well-advised to gain some basic familiarity with this area of law; and, as with so many other areas of family law, also are well-advised to consult an experienced assisted reproduction attorney when things become complicated, as they so often do in this new frontier.