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ART Parentage, Divorce, and the Marital Presumption

Parentage of children conceived using assisted reproductive technology (ART) is established with reference to preconception intent to be a parent rather than traditional legal assumptions based solely on genetics and gestation. The implications of this conceptual paradigm shift are far-reaching, creating new and complex legal conundrums for family law practitioners around the country.

One such issue is whether/how longstanding legal presumptions such as those arising out of the marital relationship are reconciled with new reproductive possibilities enabled by science. Specifically, does the marital presumption apply to ART parentage and, if so, does it serve the same purpose in this context or frustrate it—or both? How does ART shape the definition of "child of the marriage" for purposes of inheritance, or custody and support in the event of divorce? What role does divorce play in an ART parentage analysis? Is the analysis the same as to children conceived during a marriage versus embryos created during a marriage? What becomes of stored embryos in the event of divorce?

The law in this area is developing and varies by state. However, family law practitioners who grapple with these issues are best guided by reference to trends in decisional law and legislation that elevate written spousal consent as the primarily determinative factor. Such written consent is often found, in the first instance, in the fertility clinic forms that patients sign prior to undergoing assisted reproduction, so it is wise to consider those forms and use them as a starting point of any ART parentage analysis in a divorce context.

This article examines application of the marital presumption to ART parentage law and in divorce actions in which ART parentage and embryo disposition issues arise.

The "Marital Presumption"

The marital presumption (also referred to as the "presumption of legitimacy"), presumes that a child born during a marriage is the legitimate child of both spouses, i.e., both spouses are the legal parents of the child. Its etiology dates to the late 1700s and finds roots in addressing a number of societal policy considerations—primary among them, protecting children's rights to inheritance and financial support and preventing children from becoming wards of the state. As of today, most states have specifically codified this legal presumption and enacted statutory regimes that support local public policy strongly favoring the legitimacy of children.

The presumption that a child born in-wedlock is "legitimate" is a rebuttable one. At common law, it was rebutted by the rigid evidentiary standard of clear and convincing proof that the husband was either impotent or did not have access to the wife at the time of conception. In more recent years, the presumption has eroded, and the ability to rebut it has increased, particularly with the development of accurate DNA testing.

As it pertains to parentage of children conceived using assisted reproduction, the marital presumption was first used at common law in donor artificial insemination (AID) cases to determine paternal duties. It was applied by replacing husband's *presumed access* during the time of conception with his *presumed consent* to establish paternity of any resulting child with all attendant obligations.

In modern times, many states have likewise adopted

legislation that conditions parentage of an AID-conceived child in a marital context upon a husband's valid consent to use of the procedure, in most cases also requiring that a husband's consent is in writing. Such legislative mandates achieve certainty by addressing the unintended consequence of presumed parentage of an unknowing, non-consenting, non-biological spouse, and diminish problems of legal proof by imposing an irrebuttable presumption of parentage when all statutory requirements are met.

With marriage equality, gender-neutral application of AI statutes marks the further evolution of the marital presumption to same sex unions. And in recent years, some states have further modernized their AI laws by extending the marital presumption to children conceived in-wedlock using other forms of assisted reproductive technology including IVF.

ART Parentage and Divorce: Practical Challenges of the Marital Presumption in ART Parentage

Notwithstanding the sound application of the marital presumption to ART parentage in many circumstances, imposing the archaic legal construct on modern life may be at times ill-fitting, particularly in a divorce context where courts or litigants have leveraged the presumption to achieve results that undermine the intent-based parentage construct. This often arises in disputes between spouses as to whether a spouse's consent to ART was properly given, and/or whether the consent of a spouse, once given, is presumed to be effective at the time when pregnancy occurs, or if and how it may be revoked or rescinded. *See*, e.g., *Laura WW v. Peter WW*, 51 A.D.3d 211 (3d Dept. 2008); *Okoli v. Okoli*, 81 Mass. App. Ct. 371 (2012); *KS v. KG*, 182 N.J. Super. 102 (1981); *Yulia C. v. Angelo C.*, 32 N.Y.S.3d 860 (Sup. Ct. New York, Kings County, 2016); *In re O.G.M.*, 988 S.W.2d 473 (Tex. App. 1999); *Marriage of Witbeck–Wildhagen*, 281 Ill. App. 3d 502 (1996); *K.B. v. N.B.*, 811 S.W.2d 634 (Ct. Appls. Tex. 1991); *S.C. v. R.C.*, 1991 WC 198136 (Wisconsin 1991); *In re Baby Doe*, 291 S.C. 389 (1987); *Lane v. Lane*, 121 N.M. 414 (Ct. Appls. N.M. 1996).

Limiting a spouse's ability to challenge parentage of an ART conceived child also presents practical complications when it serves to foreclose or delay a spouse's access to assisted reproduction notwithstanding that the couple is separated or divorcing. For example, some statutory schemes limit a spouse's dispute of parentage of a child created by assisted reproduction during the marriage unless (1) a court finds by clear and convincing evidence that one spouse used assisted reproduction without the knowledge and consent of the other spouse, or (2) the spouses are living separate and apart for some minimum period of time or pursuant to a judgment or agreement of separation.

Problems arise because some spouses may live separately without formal legal sanction; some cannot successfully negotiate a separation agreement and spend years in marital litigation; and (in states with grounds divorce), some do not have valid legal grounds for a fault divorce or fault separation. This is compounded because many reputable fertility clinics will not treat a patient who is married without his or her spouse's participation, even if the patient and spouse are in the midst of a divorce proceeding. Such policies may be sound insofar as they protect the clinics but can pose obstacles for intended parents particularly where acrimonious divorcing spouses exploit the knowledge of the other's intention to pursue ART and use it as leverage in a divorce.

Embryo Disposition and Divorce

Many thousands of individuals have created embryos through IVF with a former spouse. Those embryos remain frozen and preserved notwithstanding the couple's separation or divorce. Disputes arise when one spouse wishes to use the embryos to have a child after the dissolution of the marriage, and the other spouse does not want to be a parent and/or does not want to have support obligations. As discussed above, where the embryos are created during a marriage with both spouses' consent, application of the marital presumption risks that a child conceived therefrom may be found to be the legal child of both spouses even after divorce and even where a divorcing spouse objects.

The starting point for any analysis of what happens to stored embryos on divorce is an examination of pre-conception consent and directive forms completed at the fertility clinic prior to undergoing IVF. These forms require patients to designate how they want their cryopreserved embryos treated in the event of divorce, separation, or death. The dispositional options generally include instructions to destroy and discard; donate to research; donate to another individual or couple for reproductive use; or grant sole control to one party who may then use the embryos for procreative purposes. Some clinic forms also include an election option to dispose of embryos as per the terms of a divorce settlement agreement or decree.

The legal and ethical considerations when disputes arise in this context are vast, including whether one party's interest in becoming a genetic parent outweighs another's interest in avoiding forced parentage, or vice versa. Should clinic forms—which are signed when a couple is happily pursuing joint procreation—be binding after intervening changes in circumstances such as a divorce that alter the parties' original intent? Does it make sense to rely on these forms to determine legal parentage? Should they be treated as binding contracts between former spouses notwithstanding that they're technically agreements as between the progenitors, on the one hand, and the IVF clinic itself, on the other?

Absent extensive case law and statutory guidance on the topic, family law attorneys are left with the uncertainty of varying and oftentimes conflicting decisions from courts that have been called on to resolve these and related issues in the context of divorce proceedings. Some decisional trends, however, have emerged. First, clinic forms are generally afforded great deference as evidence of the parties' intent

and are often enforced. Second, embryos are generally treated as a "special class" rather than as persons or property. Thus, traditional "best interest" analyses as applied in custody determinations are ill-fitting, and equitable distribution principles don't apply to them. Third, forced parenthood is usually disfavored, and thus the party who objects to the use of the embryos to achieve a pregnancy generally prevails over the former spouse who seeks to use them to become a parent.

Courts have employed one of three distinct analytical frameworks in reaching these results. In New York, courts apply a purely contractual approach, which strictly enforces the elections made in the clinic forms (e.g., *Kass v. Kass*, 91 N.Y.2d 554 (1998)), while courts in other states implement a contemporaneous mutual consent model (e.g., *In re Marriage of Witten*, 672 N.W.2d 768 (2003)) or a balancing of interests analysis (e.g., *Reber v. Reiss*, 42 A.3d 1131 (2012).

New Models for Rebutting the Marital Presumption

Faced with the circuitous yet realistic conundrums presented herein that arise from application of the marital presumption to ART parentage issues, courts, legislatures, and ART attorneys continue to struggle to find ways to circumvent some of the unintended consequences.

For example, attorneys may negotiate postnuptial agreements of "non-consent" akin to donor agreements in which spouses opt out of the marital presumption and acknowledge that its application would not reflect their mutual intent.

Another example is a legislative fix presented in New York's new Child Parent Security Act as it relates to embryos created during a marriage. Section 581-306 of the law allows spouses with joint dispositional control of embryos to enter into an agreement distinct from the clinic form, which will be effective on divorce, transferring legal rights and control of the embryos to only one of them and declaring that the other won't be a legal parent of any child born from the embryos (and is thus absolved of all attendant parental support obligations) *unless* they sign a writing, prior to embryo transfer, stating that they want to be a parent. By declaring the transferring individual not an intended parent, the transferring spouse becomes the equivalent of a donor under the statute and thus avoids and releases all present and future parental and inheritance rights and obligations to a resulting child and former spouse.

The enforceability and practical application of legal maneuvering to rebut and address unintended consequences of the marital presumption remains to be seen. FA

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