Lisa Milot presents “Planning for the Disposition of Frozen Eggs, Sperm and Embryos and Excluding Children Born from these Materials in Estate Plans”
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The Atlanta Bar Association’s Estate Planning and Probate Section was delighted to welcome University of Georgia School of Law Associate Professor Lisa Milot as our speaker at the January 14, 2015 section breakfast, where she discussed the various aspects of planning for the disposition of frozen eggs, sperm, and embryos and how children resulting from frozen materials can be included in estate planning.

The various technologies Professor Milot discussed fall under the general title of Assisted Reproductive Technology, or “ART.” ART includes a range of methods used to circumvent human infertility, including in vitro fertilization (IVF), embryo transfer (ET), gamete intrafallopian transfer (GIFT), artificial insemination (AI), manipulative procedures involving gametes (eggs and sperm) and embryos (a fertilized egg that has undergone cell division, but is less than 8 weeks from conception), and treatment to induce ovulation or spermatogenesis when used in conjunction with the above methods. (NHMRC Ethical Guidelines on Assisted Reproductive Technology, 1996.) ART is often used in conjunction with a surrogacy agreement, which is an arrangement whereby a woman agrees to become, or attempts to become, pregnant and bear a child for another person or persons. Surrogacy can be either gestational, meaning that no genetic material is coming from the surrogate mother, or traditional, where the egg comes from the surrogate mother. Advances in ART have also allowed for pre-implantation screening of zygotes (fertilized eggs) in order to eliminate the inheritance of unwanted genetic diseases or traits.

A relatively higher number of births are taking place in more recent years as a result of the use of frozen eggs, in particular. This increase is due in large part to deliberate reproductive delay on the part of young women concerned about career advancement, or who lack reproductive partners. This new reality has been reflected in corporate America, where some companies, including Apple and Facebook, are now offering egg-freezing services as a benefit of employment.

Although recent statistics reveal that nearly two percent of all births in the United States occur with the aid of some form of ART, the Georgia legislature and Georgia courts have offered little guidance to the legal community.

Need for legal assistance:
ART-related clients can come in the form of donors, surrogates, intended parents, and estates, but there are generally three ART-related issues with which potential ART clients need legal assistance:

1) Surrogacy agreements;
2) Clinic contracts between donors and intended parents regarding in vitro fertilization; and
3) Cryopreservation contracts between clinics and intended parents.

The laws of twenty-one states, including Georgia, are completely silent regarding surrogacy contracts. In such states, enforceability depends on regular contract law, although general non-binding guidance can be found in the Uniform Parentage Act (UPA), a legislative act created in 2002 by the National Conference of Commissioners of Uniform State Laws. The UPA serves to provide a uniform legal framework for establishing paternity of minor children born to married and unmarried couples.

With respect to surrogacy agreements, a gestational surrogacy (none of the genetic material comes from the surrogate) offers a legally safer option for the intended parents than traditional surrogacy (the egg comes from the surrogate), as it strengthens the intended parents’ claim to the resulting child. Enforceability of such agreements varies from state to state, and often depends on how the surrogacy agreement is drafted as it relates to payments to the surrogate. Drafting attorneys should take care that any payment to the surrogate should be only for compensation for services rendered, and/or for reimbursement of living expenses incurred, and that no payment should be made for the child or for any donated genetic material. The intended parents should seek the surrogate’s release of any rights to the child not only in conjunction with the gestation, but also with respect to any post-birth parental rights to the child. Intended parents should also take care to include guardianship provisions in the contract which cover the period of gestation.

Clinic contracts between donors and intended parents participating in IVF often involve the donation of eggs, whereby a female donor is supplied with hormone therapy that increases her egg production. The eggs are then harvested from the donor, fertilized in a laboratory, and ultimately implanted in the intended female parent. In such cases, the payment terms of the agreement should be drafted to describe any payments as compensation for services, not as payment for the genetic material being donated. Usually, a progressive payment schedule is set up in such agreements, which often contain many declarations of uncertainty, due to the variability of outcomes. Until recently, there was no precedent regarding the tax status of such payments. However, in Perez v. Commissioner, 144 T.C. 4,

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1 It’s worth noting that O.C.G.A. [sec] 16-12-160 prohibits the purchase or sale of any human body or part thereof, or of any human fetus or part thereof, but makes an exception for gifts or donations of human bodies or any part thereof or any procedure connected therewith as provided in the Georgia Revised Uniform Anatomical Gift Act (O.C.G.A. § 44-5-140 et seq.) and for the payment of a fee in connection with such gift or donation, if the payment is made to a procurement organization, as such is defined in O.C.G.A. § 44-5-141.
(January 22, 2015), the Tax Court decided that such compensation to egg donors is, indeed, taxable income.

Cryopreservation is used to freeze and preserve human eggs for later use in IVF. Most clinics that provide this service have forms that cover some but not all circumstances that might occur between the intended parents. When an unmarried couple enters into such a contract, clinics generally require that there be a legal agreement in place between the intended parents, setting forth what will happen to the frozen materials if the couple parts ways. Such agreements are generally not required of married couples, as such issues can be addressed in a divorce decree, and are sometimes addressed in prenuptial or postnuptial agreements.

**Estate Planning Considerations:**

Four factors that affect estate planning when working with would-be ART parents are death, divorce, incapacity, and the birth of other children to the couple. Clinic agreements generally do not cover what happens in these four situations, so it is up to the would-be parents to create a contract governing such contingencies. Courts generally try to uphold whatever agreement the intended parents have with each other. Prenuptial and postnuptial agreements may be used to address what happens to reproductive material being held in storage or what happens to an embryo in the event the couple splits.

O.C.G.A. [sec] 19-8-41 et seq., also known as the “Option of Adoption Act,” treats life as beginning at conception, and allows the legal custodian of a human embryo to transfer rights to the embryo through a written contract to intended parents. Once the parties enter into the contract, any child resulting from the embryo is considered a child of the intended parents. The law also allows for a judge to issue an order of adoption before the child is born. While gametes and embryos generally are not considered probate property that can be disposed of in a Will, a client who has stored reproductive material may provide for the disposition of that material upon his or her death or permanent incapacity in an Advance Directive for Health Care. Where a decedent leaves instructions as to the post-death disposition of frozen gametes, courts have often upheld such disposition, even in the face of a contest of such disposition. Where a decedent fails to express any intent regarding disposition of frozen gametes, some courts have allowed interested parties to claim the decedent’s gametes.²

It was clear from Professor Milot’s presentation that ART has opened up new possibilities with respect to estate planning that legislators and courts have yet to fully address, and it will be interesting to see how this nascent body of law develops as reproductive technologies continue to advance. The Estate Planning Section thanks Professor Milot for her excellent presentation.

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² In 2009, a Texas mother won the right in court to harvest her deceased son’s sperm to use in later surrogacy (*In re Evans*). Also in 2009, the New York Supreme Court granted a fiancée’s request to harvest her deceased fiancé’s sperm for posthumous conception (*In re Quintana*).