Time to Get Smart About ART

How Reproductive Technology Affects Your Planning

By Christopher LeClair and Laura Jeltema

Without question, *Obergefell v Hodges* changed what it meant to be an LGBTQIA+ couple in love by providing a legal foundation for the couple to start a family.[1] However, *Obergefell* only addresses marriage and its ancillary benefits and not the effects of LGBTQIA+ couples growing their families, and in particular, having children through artificial reproductive technology (ART). ART enables reproductively incompatible couples the opportunity and means to have children who may be genetically related to at least one of the intended parents. It is a vital tool for LGBTQIA+ families who seek to have children outside of the adoptive framework; however, many novel legal issues arise when using ART to build a family.

First, it is essential to understand how using ART substantially affects both parent and child and requires consideration of many new issues when undergoing family and estate planning. Take parentage issues, for example. Because of restrictive surrogacy laws, male same-sex couples are not able to use traditional surrogacy in Michigan, and furthermore, if they are able to find an altruistic surrogate, they are not afforded the

At a Glance

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same parental presumption that may apply to female same-sex married couples. Another consideration is the property-based implications of reproductive materials, especially the disposition of unused materials upon death or divorce. Or what about the (surprisingly not-so-novel) concept of posthumous conception, in which the living partner of a decedent elects to have a child after the decedent's death? This article covers these concepts and offers best practices to consider with respect to ART and estate planning. It is never too early to get smart about ART.

Male same-sex couples and ART

In Michigan, male same-sex couples face additional hurdles when seeking to use ART as compared to female same-sex or heterosexual couples, including surrogacy and legal parentage issues. The Surrogate Parenting Act outlaws paid surrogacy, significantly limiting the availability of surrogates.[2] Additionally, all surrogate contracts (paid or unpaid) are rendered void and unenforceable, significantly hindering family planning when using a surrogate.[3] Thus, male same-sex couples must find surrogates out of state or choose altruistic surrogacy, which can cause additional legal concerns, such as establishing legal parentage.

While there are various ways to establish parentage in Michigan, for our purposes we focus on the presumption of parentage that is established when married couples use ART. Under Michigan law, when the wife in a heterosexual couple conceives a child using ART, the husband is presumed to be the father of that child as long as he consented to such.[4] Michigan's Public Health Code states that "a child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife."[5] Under *Pavan v Smith*, this presumption likely also applies to the married female spouse of the conceiving mother.[6]

In *Pavan*, the Supreme Court considered the role of *Obergefell* in relation to an Arkansas statute that required the mother's male spouse to appear on a child's birth certificate but excluded the requirement when applied to a mother's female spouse.[7] The Court held that such differential treatment violates *Obergefell*'s commitment to provide same-sex couples the same "constellation of benefits that the States have linked to marriage."[8] The Court's rationale in *Pavan* likely indicates that the parental presumption afforded under Michigan's statute must apply to same-sex couples as well because the presumption is certainly among the "constellation of benefits" that Michigan has linked to marriage, and it would be unconstitutional to apply this only to heterosexual married couples.

However, this presumption applies only to the spouse of the *conceiving mother*. Under Michigan law, there is no parental presumption that accompanies fathers in a male same-sex couple because there is no *conceiving mother* in that marriage. In fact, in a situation in which a male same-sex couple were to use ART, the biological father possesses no presumption of parentage and must use the legal system to ensure parental rights.

To ensure the parental rights of two married men, the biological father would first need to establish paternity through an acknowledgement of paternity or an order of filiation following paternity action in circuit court.[9] The acknowledgement of paternity requires filing an affidavit of parentage between the birth mother and intended father that represents the mutual agreement to name the intended father as the legal father. This requires the full, continued cooperation of the conceiving mother because, as explained above, no enforceable surrogate contract may preemptively terminate the rights of the conceiving mother.[10]

By contrast, a paternity action in court requires the adjudication of parentage in which the court will consider such things as DNA paternity testing. Once the biological father has established paternity, he and his spouse can petition for stepparent adoption, allowing both men to be considered the legal father. However, this requires terminating the parental rights of the surrogate mother, which can be a drawn-out legal process if she does not consent.[11]

For a male same-sex married couple in Michigan, it can be difficult (if not impossible) to plan in advance of the birth of the child in a way that ensures that both fathers will be considered the legal father immediately following the birth. Even for female same-sex married couples in Michigan, it has not yet been affirmatively established whether the non-conceiving parent will be afforded the parental presumption. From an estate planning standpoint, therefore, until parental rights become official, it is critical to address wishes in an estate plan and not rely on the laws of intestacy or broad definitions such as "child" or "descendant" under Michigan law. An estate planning document that bequeaths property to a "child" or "descendent" without careful attention to how the terms are defined will not necessarily be deemed to apply to a child conceived through ART unless all legal parentage issues have been resolved.

Legal right to reproductive material

As LGBTQIA+ couples must invariably resort to ART to reproduce, a valid concern arises regarding what happens to unused, extraneous reproductive materials upon death or divorce. The first step in this analysis is understanding how the law classifies gametes (sperm and eggs) and embryos.

The few courts that have handled disputes surrounding the disposition of frozen gametes have generally considered them to be a unique type of property in which the genetic contributor has an ownership interest, which ultimately requires that his or her intent regarding disposition should control. For example, in *Hecht v Superior Court*, the California Court of Appeals held that the decedent "had an interest, in the nature of ownership, to the extent that he had decision making authority as to the sperm within the scope of policy set by law."[12] The sperm was considered property of the estate, and thus the executor of the estate had a duty to preserve this asset.[13] Additionally, in *Hall v Fertility Institute of New Orleans*, the Louisiana Court of Appeals affirmed that the decedent's frozen sperm was his property, and the proper analysis for the trial court was whether the decedent was competent and not under undue influence when devising his reproductive materials to his girlfriend.[14]

Embryos, as opposed to gametes, have the potential to develop into a living, breathing human, and courts have been inconsistent in their treatment. In the context of divorce proceedings, courts generally take one of three approaches: the contractual approach, in which courts will enforce binding contracts that establish the clear intent of the parties; the balancing approach, in which courts weigh the best interests of both parties; or the contemporaneous mutual consent approach, in which decisions regarding disposition must be agreed upon by both parties.[15]

In Michigan, courts have not explicitly endorsed one approach over the other, but insights can be drawn from dicta. In *Karungi v Ejalu*, the court expended great effort to detail the contractual nature of the agreement between the two parties and the intent that embryos be considered "joint property" even though the concurring opinion made it clear that the holding was related to a different trial court error.[16] While such dicta is certainly not binding on future decisions, it is nonetheless persuasive on Michigan trial courts and provides insight into how the Court of Appeals might decide a future case regarding ownership of reproductive materials. In an apparent endorsement of a different approach, in an unpublished opinion from 2012, the same court held in *Stratford v Stratford* that when there is no agreement between the parties, it is appropriate for the court to consider balancing the parties' interests in the embryo.[17]

To best ensure that unused reproductive materials are disposed of as desired, it is critical to enter into an agreement that individually binds each party and the fertility clinic. While most fertility clinics provide forms by which both parties can indicate their wishes for disposition, it may be wise to draft an additional contract between parties. When presented with an unambiguous contract, Michigan courts might be inclined to follow the agreement. Additionally, estate planning documents such as a healthcare power of attorney can provide further clarity with respect to disposition of unused reproductive materials.

Posthumous conception

While not an issue unique to LGBTQIA+ married couples, posthumous conception is another consideration when using ART. Posthumous conception occurs when a child is *conceived* after the death of one or both biological parents. Estate planning questions arise when a child is conceived posthumously, such as whether the child can inherit via intestacy or whether the child is considered a "child" for gift purposes under a will. While other jurisdictions have begun to address these questions, Michigan's legislature has remained silent. There is, however, a single opinion from the Michigan Supreme Court holding that posthumously conceived twins could not inherit through their biological father under Michigan's intestacy laws.[18]

The perfection of cryopreservation technologies has made posthumous conception possible. Englishwoman Diane Blood broke ground when she used the cryopreserved reproductive materials of her husband, who had passed away three years earlier.[19] Blood was permitted to conceive a child with her deceased husband after the English Courts of Appeal ruled it was "her human right to travel to a different country" to use her husband's sperm.[20]

States are split on how to address posthumous conception and have enacted laws either providing parameters in which a posthumously conceived child can inherit or banning inheritance outright. States like Georgia,[21] Idaho,[22] and South Dakota[23] make it explicitly clear that a child must be conceived *before* death to have inheritance rights. However, other states offer varying legal frameworks for inheritance provided that, in addition to conception within statutory time limits, there is written consent for the use of genetic material for posthumous conception (New York)[24] or proof of intent for posthumous conception can be established through clear and convincing evidence (Washington).[25]

Though Michigan has no statutes directly addressing the inheritance rights of posthumously conceived children, an individual is eligible to inherit via intestacy if he or she survives the decedent by 120 hours or was in gestation at the time of the decedent's death and lives 120 hours or more after birth.[26] In the sole Michigan case addressing this matter, the state Supreme Court affirmed that posthumously conceived children could not inherit via state intestacy law, reasoning first, that the right to inheritance vests at the time of a decedent's death, and second, that the children were ineligible to inherit by virtue of being born during their parents' marriage, because a marriage legally terminates upon the death of a spouse.[27]

Two uniform acts provide guidance that Michigan's legislature might consider if and when it addresses posthumous conception. The Uniform Parentage Act of 2017 allows the establishment of parentage over a posthumously conceived child when, in addition to a time limitation for conception,

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the decedent consented in a record that if assisted reproduction were to occur after death, he or she would be the parent, *or* the intent to be a parent of a posthumously conceived child is established by clear and convincing evidence.[28] Additionally, the Uniform Probate Code allows the establishment of a parent-child relationship when there is clear and convincing evidence of intent to be treated as a parent of the child, *or* if the birth mother is the surviving spouse, such intent is presumed.[29]

Until Michigan's legislature addresses posthumous conception, courts may follow the opinion in *In Re Certified Question from U.S. District Court for Western Michigan* and disallow inheritance rights based on the premise that rights to intestate inheritance vest at the time of a decedent's death. It remains unclear whether Michigan courts will apply this ruling to situations outside of intestacy—for example, when a gift is made to "children." With a carefully crafted estate plan that explicitly provides for posthumously conceived children and makes clear the testator's intention to provide for all children or descendants regardless of when they are conceived, probate courts may be inclined to follow the testator's wishes even though Michigan has no statutory defaults providing inheritance rights to these children.

Be smART

It is vital to understand what is at stake when electing to conceive a child through artificial reproductive technology. Even for those not yet planning to have children, it is nonetheless important to understand the various legal concerns that might arise because of ART. Carefully expressing intent and

philosophy will provide needed guidance on these issues. The following is a list of practical considerations:

- **Focus on properly defining "child"/"descendant" in an estate plan**. It is often insufficient to rely on Michigan law to ensure an intended child is properly taken care of through an estate. This includes updating beneficiary designations for retirement plans and life insurance, as the definition of "child" or "descendant" may differ from what was intended.
- **Provide clear direction as to the disposition of reproductive materials**. Make sure wishes are explicitly stated and that the estate plan considers the possibility of posthumous conception, if desired. Include directions regarding stored genetic material in powers of attorney; testamentary documents should provide for disposition of material upon death.
- **Closely review all fertility clinic contracts**. It is vital that these documents address whether unused reproductive materials are to be discarded or donated.
- **Address the disposition of reproductive materials in side contracts between both parties**. It should be clear what will happen with reproductive materials in the event of death or divorce.
- **Speak to family members about using ART**. It may be necessary to update estate plans to make sure children and grandchildren are sufficiently included and referenced properly. ■

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ENDNOTES

1. *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015).
2. MCL 722.857.
3. MCL 722.855.
4. MCL 333.2824(6).
5. *Id.*
6. *Pavan v Smith*, 137 S Ct 2075; 198 L Ed 2d 636 (2017).
7. *Id.* at 2076.
8. *Id.* at 2077.
9. Swift et al, *Divorce and Parental Rights for Same-Sex Couples* (ICLE, 2018).
10. MCL 722.1003 and *What Every Parent Should Know About Establishing Paternity*, Office of Child Support, MDHHS (2017), available at <https://www.michigan.gov/documents/dhs/DHS-PUB-0780_211984_7.pdf> [https://perma.cc/YAN2-U9Z5]. All websites in this article were accessed October 22, 2019.
11. *Divorce and Parental Rights*.
12. *Hecht v Superior Court of Los Angeles County*, 16 Cal App 4th 836, 846; 20 Cal Rptr 2d 275 (1993).
13. *Id.*
14. *Hall v Fertility Inst of New Orleans*, 647 So2d 1348, 1351; 94–1135 (La App 4 Cir, 12/15/94).
15. *Szafranski v Dunston*, 2013 IL App (1st) 122975; 993 NE2d 502 (2013).
16. *Karungi v Ejalu*, unpublished per curiam opinion of the Court of Appeals, issued September 26, 2017 (Docket No. 337152), pp 2–3.
17. *Stratford v Stratford*, unpublished per curiam opinion of the Court of Appeals, issued February 16, 2012 (Docket No. 300925), p 2.
18. *In re Certified Question from US Dist Court for Western Dist Michigan*, 493 Mich 70, 76; 825 NW2d 566 (2012).
19. *Blood Claims IVF Paternity Victory*, BBC (February 28, 2003) <http://news.bbc.co.uk/2/hi/health/2807707.stm> [https://perma.cc/6QVZ-P8DA] and *Diane Blood has human rights success*, BioNews (March 3, 2003) <https://www.bionews.org.uk/page_88876> [https://perma.cc/AFY2-Z7D2].
20. *Diane Blood has human rights success*. (Blood subsequently traveled to Belgium where the law permitted the use of sperm extracted in such a situation.)
21. OCGA § 53-2-1(b)(1).
22. Idaho Code Ann § 15-2-108.
23. SDCL § 29A-2-108.
24. EPTL § 4-1.3.
25. RCW § 26.26A.635.
26. MCL 700.2104 and MCL 700.2108.
27. *In re Certified Question from US Dist Court for Western Dist Michigan*, 493 Mich at 78.
28. Uniform Parentage Act § 708 (2017).
29. Uniform Probate Code § 2-120 (2010).