The "ART" *in Estate Planning*

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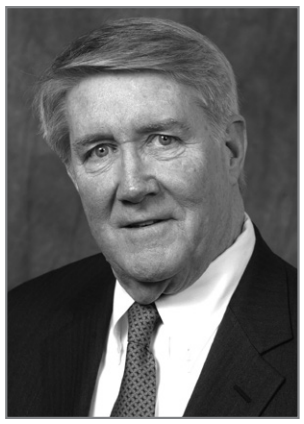
There's a new "ART" to estate planning!

Until recently, no one connected Assisted Reproductive Technology ("ART") to the world of estate planning. It was only 35 years ago that the world's first "test tube baby" was born in England. But between 2000 and 2010, the number of children born in the United States using ART grew more than tenfold, to over 61,500 annually, representing approximately 1% of all live births in the U.S. As public awareness increases and reproductive technology steadily improves, this trend certainly will continue.



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Because laws in Florida and virtually all other states have not kept pace with technological advances, it is incumbent upon consumers, guided by their estate planning professionals, to understand the basics of ART, and then to express their desires clearly in their estate planning documents.

As an example, what if your married son, a career soldier, is killed in action overseas? In contemplation of this possibility before his deployment, your son and his wife decided to freeze his sperm, and your daughter-in-law uses the sperm to conceive your grandchild two years after your son's death. You have a large life insurance trust under which your "descendants" will share equally after your death. In Florida, your ART grandchild would not be considered a "descendant," or "issue" of yours, because under F.S. 732.106, your ART grandchild was not conceived at the time of your son's death, but two years afterward.

Or suppose a son of yours is gay. With his family's support and encouragement, he has been in a relationship with his longtime partner (in a marriage or not), and the couple decides they want a child. The sperm of your son's partner is matched with the egg of surrogate mother, and the surrogate mother gives birth to a child, who is raised by your son and his partner.

In the first example, the ART child is in your bloodline, but will not be a "descendant" because of the time limitation in the statute. In the second example, the ART child is not in your bloodline and will not be a "descendant," unless legally adopted by your son. In both of these cases, you would probably want the opposite of what the law provides, and you could do so in your own documents. But what about documents created by your deceased parents? And suppose you never get around to updating your own documents?

Should Florida law be expanded to keep up with the realities of today's changing mores and exploding technology? In addition to F.S. 736.106, Florida has other statutes dealing with issues related to ART children, including "claims" by ART children against estates, rights to genetic material, and obligations of those involved in the ART process. But the statutes are unclear at best, and confusing at worst.

Because statutes are unclear, confusing and oftentimes conflicting, the Courts have been called upon to decide ART issues — many of them in the Social Security benefit context, or the Family Law context, like support issues.

In one such case involving a Florida couple, the Supreme Court of the United States denied Social Security survivorship benefits to two ART children, twins, who were born about 18 months after their father died of cancer. A natural child of the same couple received benefits. The Court said it had no choice because federal law said that to receive benefits, a child had to be entitled to inherit under the laws of the state where the family resided; and under F.S. 732.106, the twins did not qualify. If the family had lived in California or Colorado, the result probably would have been different.

The Florida Bar Real Property, Probate and Trust Law Section last year established a subcommittee to look into this issue. Chaired by Larry Miller, Esq., of Boca Raton, the Committee is exploring various proposals that would expand the legal rights of ART children.

But no matter what the "default" provisions of the laws provide, now or in the future, you have the opportunity to override those provisions by clearly expressing your desires in your Will, Trust or other documents. The topic of ART should be on the checklist of items you discuss with your estate planning team during the early stages of the planning process. ■

Michael P. Stafford of New York is an out-of-state representative to the Executive Council of The Florida Bar's Real Property, Probate and Trust Law Section, and a member of the ARTS Committee. He has served on the Board of Governors of The Florida Bar, and the Board of Directors of The Florida Bar Foundation.