

*DIABLO VALLEY ESTATE PLANNING
COUNCIL*

**THE NEW BIOLOGY: WHAT
DO ESTATE PLANNERS NEED
TO KNOW ABOUT ASSISTED
REPRODUCTION**

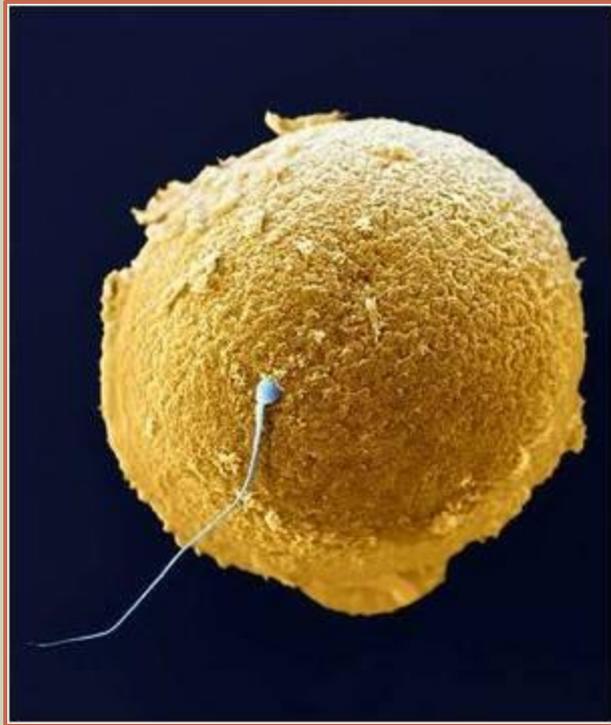
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APPROACH

- Assisted reproductive technology (ART)
- Snapshot of legal framework for ART use
- Family law and uncertainty
- Posthumous disposition and control of reproductive materials

Assisted reproductive technology (ART):
manipulation of gametes (sperm and
eggs) outside the body to enable pregnancy.



Examples

- **Assisted insemination (AI)**
and **intrauterine
insemination (IUI)**
- **In vitro fertilization (IVF)**

ART: USE OF THIRD PARTIES

- Sperm 'donors'
- Egg 'donors'
- Embryo donors
- Surrogates

ART: THIRD PARTY REPRODUCTION

AID: Assisted insemination with donor sperm

IVF with sperm, eggs, or both, provided by other(s)

IVF with donated embryos

Traditional surrogacy: Surrogate carries pregnancy, gives birth, and provides egg(s); intended father's sperm

Gestational surrogacy: Surrogate carries pregnancy, gives birth; gametes from intended parent(s) and/or third parties.

ART: CRYOPRESERVATION AND POSTHUMOUS RETRIEVAL

Cryopreservation

- Sperm
- Eggs (recent)
- In vitro embryos

Posthumous retrieval

- Sperm
- Eggs (theoretical)
- Ovarian & testicular tissue (theoretical)

“Approximately 68% of individuals consented to the use of surplus embryos for embryologist training and improvement of assisted reproductive techniques, and 56% consented to the use of surplus embryos in a research project; **73.5% of men and 61.8% of women agreed to leave their cryopreserved embryos to their partners for reproductive use in the event of their death.**”

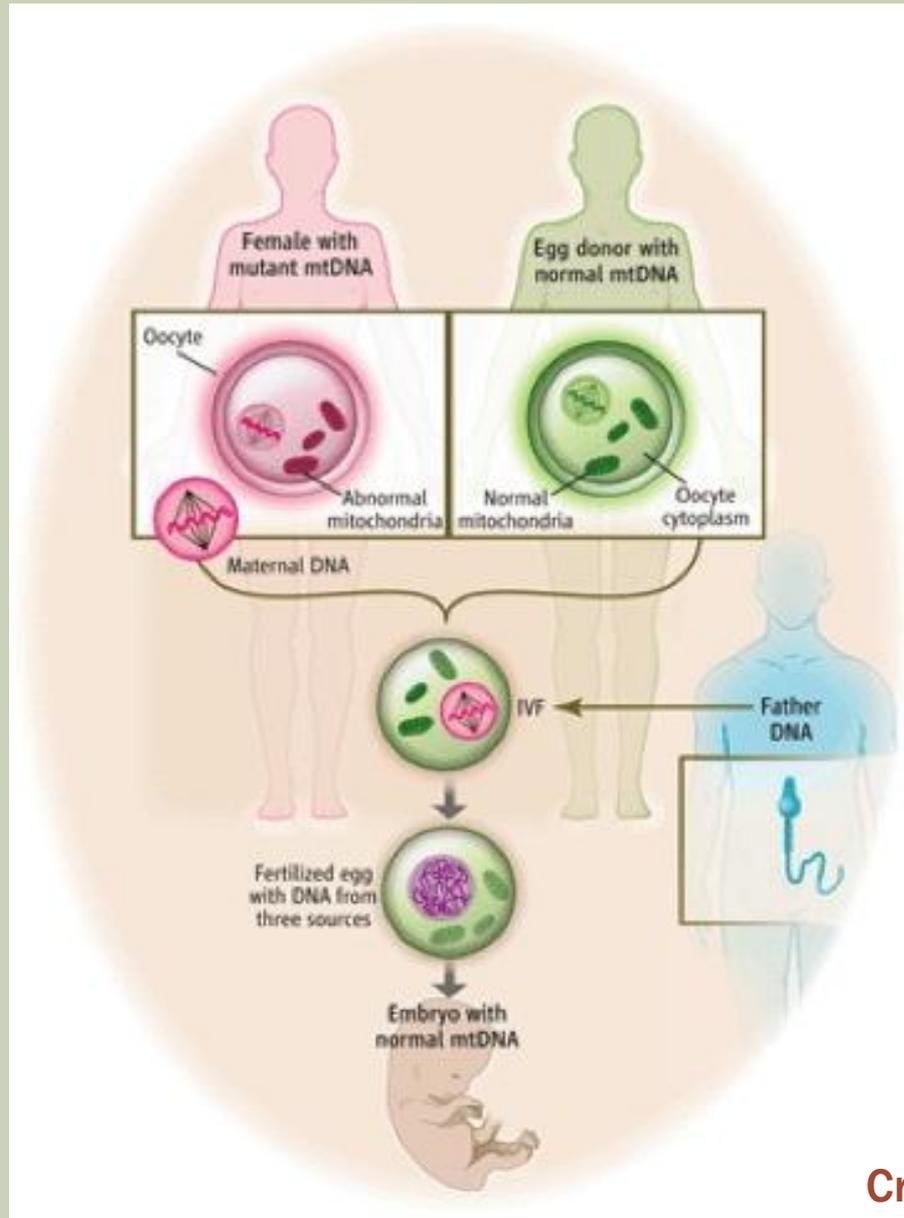
Côté S. et al., *Posthumous reproduction with surplus in vitro fertilization embryos: a study exploring users' choices*, Fertil. Steril. 214 Sept. 10.

<http://www.ncbi.nlm.nih.gov/pubmed/25217872>

ART: EMERGING TECHNOLOGIES

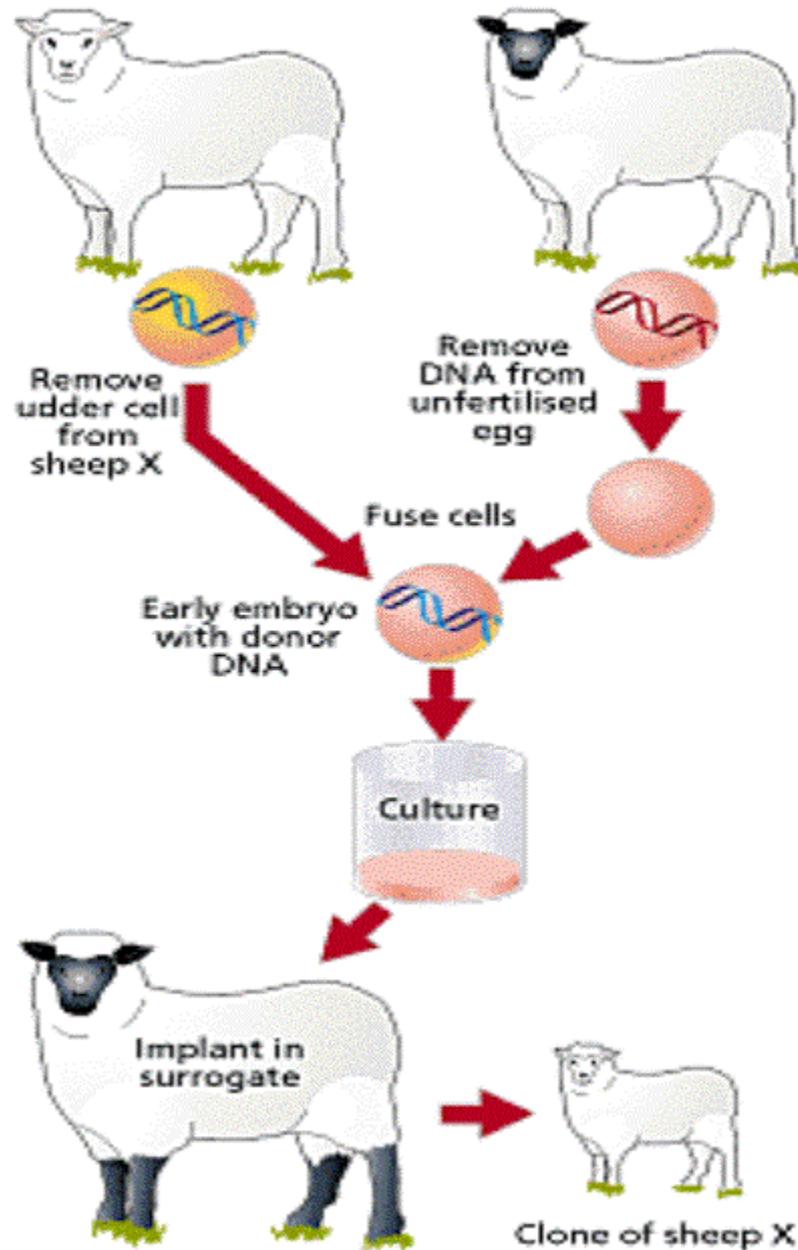
- Mitochondrial replacement (3-parent IVF)
- Somatic cell nuclear transfer (cloning)
- Stem cells >> gametes
- Ovarian tissue cryopreservation, transplant
- Testicular tissue cryopreservation, transplant

MITOCHONDRIAL REPLACEMENT



Credit K. Sutliff, Science.

Somatic Cell Nuclear Transfer





Adult mice grown from oocytes, or immature eggs, which were made from induced pluripotent stem cells. *Image: Mitinori Saitou and Katsuhiko Hayashi*

THE FERTILITY INDUSTRY

Medical service entities: clinics, embryology labs, genetic testing labs, sperm banks, embryo banks, egg banks, etc.

Non-medical entities: surrogacy agencies, egg donation agencies, medical tourism agencies, pharmaceutical & medical device industries, professional organizations, patient support organizations, lawyers, credit agencies, insurance companies, etc.

THE FERTILITY INDUSTRY

“In 2004, more than one million Americans underwent some form of fertility therapy treatment, participating in what had become a nearly \$3 billion industry.”

(Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Harvard Business School Press 2006)).

ART use has doubled over the past decade.

<http://www.cdc.gov/art/>

SNAPSHOT OF ART REGULATION

Federal

- 1992 Fertility Clinic Success Rate and Certification Act
- FDA regulations – embryology labs, gamete testing

State

- Indirect regulation: Family law/parentage, probate law.
- Direct regulation: mix of ad hoc judicial decisions and statutes which vary greatly from state to state.

SNAPSHOT OF ART REGULATION

**Probate
Law**

**Family
Law**

**ART
Use**



PARENTAGE

Main point: Legal uncertainty arising from ART use is not uncommon.

- **Example: Surrogacy**
- **Example: AID (assisted insemination with donor sperm)**
- **SB 274 (Approved by Governor October 4, 2013)**

PARENTAGE

Family Code §7613(b)

“The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”

PARENTAGE

Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986) The man who provided the semen was the child's legal father because the semen was not provided to a licensed physician. Instead, he provided the semen to the woman who self-inseminated.

POSTHUMOUS CONTROL AND DISPOSITION

- Frozen embryos
- Posthumous retrieval

POSTHUMOUS DISPOSITION AND CONTROL

Hecht v. Superior Court, 16 Cal. App. 4th 836 (Cal. App. 1993)

“We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of Probate Code section 62. Accordingly, the probate court had jurisdiction with respect to the vials of sperm.”

ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (FEBRUARY 2008)

Section 205. Collection of Gametes or Embryos from Preserved Tissue or From Deceased or Incompetent Individuals

“1. Gametes or embryos shall not be collected from deceased or incompetent individuals or from preserved tissues unless consent in a record was executed prior to death or incompetency by the individual from whom the gametes or embryos are to be collected or the individual’s authorized fiduciary who has express authorization from the principal to so consent.”