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PASTERNAK & FIDIS REPORTER

The Fate of Frozen Embryos When a Couple Divorces

By Mary Katherine Hayburn

John and Rita were married for five years when John was diagnosed with cancer. The couple then arranged to harvest and store embryos, using Rita's eggs and John's sperm, in case John's cancer treatment rendered him sterile. The cancer treatment is successful, but John becomes sterile. The marriage then fails. John wants to keep the frozen embryos and have them implanted in a surrogate. He desperately wants a biological child and sees this as his only opportunity. Rita no longer wants to parent a child with John, and she does not want to have a biological child with whom she has no relationship.

Mike and Steve are married in a state where same-sex partners can legally marry. They plan to begin a family. Each donates his sperm which is then fertilized with eggs from an anonymous donor. The frozen embryos are stored while they search for the right gestational carrier. During this time, the marriage deteriorates. Mike wants to donate the embryos, but Steve wants to continue with his plan to conceive a child.

The scenarios set forth above are some of the situations that may arise when couples use assisted reproductive technology ("ART"). ART is a broad term that includes artificial insemination, egg donation, implantation of frozen embryos, and use of a surrogate or gestational carrier. (The chart on page 4 illustrates some of the ways an embryo can be created.) These technological advances have provided new opportunities for child-bearing for those who cannot otherwise have a child. However, the law, particularly family law, has not been able to keep pace with the rapid development of reproductive technology. This can lead to many situations in which the rights and obligations of participants in ART are unclear.

There is no federal law governing ART. Many states have not enacted legislation related to ART, and there is little case law on the subject. In the scenarios set forth above, what happens to the embryos in a divorce? Can one party keep them over the objection of the other? Could a court treat them like property and divide them between the parties? If one party chooses to have the embryos implanted after the divorce, would the other be obligated to pay child support? Would it make a difference if the embryos are not comprised of the genetic material of the objecting party? These are some of the many questions that ART raises. There are presently few answers.

The decision to use ART is generally not made lightly. Parties should use the same care and consideration in deciding what should happen to the genetic material if their circumstances change. Such decisions should not be left to the courts. Through proper planning, intended parents can define each party's rights and obligations

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Policing the Background Check

By Nathan S. Brill

Leaner enterprises are relying on fewer employees to accomplish more in the aftermath of the Great Recession. Calculated expansion and the replacement of essential personnel characterize the weak recovery's limited job market. Companies are bringing on new employees only where they are confident existing demand mitigates the financial risk of an investment in human capital and the new hire will rapidly learn the position and execute his or her duties competently, with minimal supervision and negligible employer-provided training.

This approach to hiring is not without risk. In response, employers are implementing more comprehensive background reviews in an effort to assure that the employer's trust and investment is well placed. However, the weak job market is not a license to blindly implement an in-depth screening regime. In fact, a new enforcement landscape is taking form, making this an opportune moment to review some of the issues to be considered before implementing a background check policy.

This article will provide an overview of the considerations when conducting credit checks, criminal background checks and social media searches. It does not discuss other forms of background investigations, such as lie detector tests, medical tests, or personal references.

Regulation on Credit Reports

Employers frequently turn to credit reports to evaluate the suitability or trustworthiness of job applicants. The federal Fair Credit Reporting Act (FCRA) and accompanying regulations govern credit checks on prospective and current employees. Some federal agencies have opined that FCRA also applies to the retention or hiring of certain independent contractors. FCRA sets forth the type of information a credit reporting agency may disclose, how far into the past the agency can report, and the purpose for which the recipient may use reported information. FCRA also provides job applicants and current employees procedural safeguards where an employer seeks to use a credit report as the basis for an adverse decision.

Any entity wishing to obtain a "regulated consumer report," colloquially known as a credit report, must have a permissible purpose. Companies may obtain a regulated report for employment purposes, including hiring and promotion decisions, provided the employee or prospective employee gives written consent. Written consent may only be obtained after the employer provides specific written disclosures. A best practice is for the employer to obtain a job applicant's consent that covers the entire span of any future employment.

If the employer takes an adverse action based on a credit report, the employer must send the job applicant or employee a pre-adverse action notice with a copy of the underlying credit report and a statement of consumer rights. Adverse action includes failure to hire, discharge, and denial of promotion. The employer must provide the employee or applicant an opportunity to dispute the report and inform him or her how to contact the credit reporting agency. Even where the adverse decision is made for reasons other than the credit report, the employer may wish to undertake these

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Business, Real Estate and Litigation Group associate **Nathan Brill** was selected as a fellow in the inaugural Montgomery County Bar Association Leadership Development Academy. The Leadership Academy is a program designed to identify a talented group of attorneys with leadership ability and provide an opportunity to foster and enhance the participants' skills as future leaders of the Bar Association.

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Powers of Appointment: A Powerful Estate Planning Tool

By Stephanie T. Perry

What is a Power of Appointment?

A power of appointment is a power given to a person (oftentimes under a trust) which enables the person to designate who will receive property or an interest in property. The person who creates the power of appointment is the donor; the holder of the power is the powerholder; and the possible recipients of the property are the permissible appointees.

A power of appointment may be general or limited. A general power of appointment is a power that the powerholder may exercise in favor of himself, his estate, his creditors or the creditors of his estate. A nongeneral power of appointment is commonly referred to as a limited (or special) power of appointment and may be exercised in favor of anyone other than the powerholder, his estate, his creditors or the creditors of his estate.

If Bob creates a trust under his will for the benefit of his wife, Susan, and gives Susan a power of appointment which may be exercised in favor of Bob and Susan's children, Tom and Mary, and their descendants, but not in favor of Susan, her estate, her creditors or the creditors of her estate, Bob is the donor; Susan is the powerholder and she has a limited power of appointment over the trust; and, Tom and Mary and their descendants are the permissible appointees.

Advantages and Disadvantages of Powers of Appointment

One of the most common reasons to include a power of appointment in your estate planning is to provide flexibility. When you create a will or an irrevocable trust, once it becomes effective, the document cannot be changed. But, what if circumstances change? What if your will leaves assets outright to a beneficiary who becomes disabled and can't manage her own finances? What if tax laws change? Through the use of a power of appointment, the powerholder can change the terms of a trust, the beneficiaries, the method of receiving property (e.g., outright or in trust), or trustee. Powers of appointment create an opportunity to make changes to an estate plan after taking future circumstances into consideration.

Let's say Bob leaves his entire estate, $10 million, in trust for Susan and the trust provides that at Susan's death, the trust's remaining assets will be distributed outright to Tom and Mary, provided they have reached age 25. After Bob's death, Susan decides that $5 million is a lot of money for Tom and Mary to receive outright at age 25; she would rather their inheritance be held in trust for them until they reach age 40. If Bob gives Susan a power of appointment over the trust, Susan can exercise that power to provide that the assets remaining in the trust at her death will be held in trust for Tom and Mary until they reach age 40 (rather than distributed outright to them at age 25).

The most common reason not to include powers of appointment in your estate plan is because the donor must give up control over the disposition of the assets. If you give someone a power of appointment, then that person (the powerholder), not you, will control the ultimate disposition of the assets. Giving up control may not appeal to you and in some cases may not be a good idea. For example, Bob and Susan divorce, Bob gets remarried to Ann, and at Bob's death he leaves his entire estate in trust for Ann. Bob wants to ensure that at Ann's death, the remaining trust property will be distributed equally to Tom and Mary. In that case, Bob should not give Ann a power of appointment if he does not want Ann to control how the remaining trust property is distributed at her death.

There are also technical reasons why a power of appointment may be disadvantageous. For example, assets subject to a general power of appointment will be included in the estate of the powerholder; under some circumstances, that could create unfavorable tax consequences. Also, if a limited power of appointment is exercised improperly, it could become a general power of appointment.

If flexibility in your estate plan is important to you, you should discuss powers of appointment with your attorney to determine whether and what type of power of appointment may be appropriate for your circumstances.

Are You a Powerholder?

You may have a power of appointment under someone else's estate planning documents. It is not uncommon for one family member to give another family member a power of appointment. If you are (or think you are) a powerholder, you should discuss your power of appointment with your attorney to determine whether you should exercise your power of appointment and the consequences of doing (or not doing) so.

Partner **Anne W. Coventry** has been selected as the new author of *Maryland Estate Planning and Probate Laws Annotated*, a Thomson-West publication that is considered an indispensable reference for practitioners engaged in estate planning and probate matters. Ms. Coventry will provide editorial oversight and commentaries for the book assisted by associate **Stephanie Perry** who will be responsible for research and annotations. Ms. Coventry succeeds Managing Partner **Nancy Fax** as editor and author of this authoritative text.

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related to ART before the process begins. The simplest means to do so is to prepare a clear and unambiguous agreement that provides for a wide variety of circumstances.

This is the approach recommended by the American Bar Association. In 2008, the ABA's Section of Family Law passed a Model Act Governing Assisted Reproductive Technology ("Model Act"). The Model Act requires intended parents to enter into a binding agreement prior to the creation of embryos. The agreement should set forth (1) the intended use and disposition of the embryos; (2) the use and disposition of the embryos in the event of divorce, death or incapacity; and (3) the terms and conditions under which the embryos will be considered abandoned. The Model Act also recommends incorporating into the agreement a provision that, in the event that one party no longer wishes to use the stored embryos in accordance with their intended use, the other may not transfer them into the body of any woman.

The medical provider or storage facility may assist intended parents by requiring parties to execute necessary planning documents before beginning ART. At least one court in Maryland has enforced an agreement with a medical storage facility that provided for the disposition of frozen embryos in the event of divorce. In *Mbah v. Anong* (CAD11-11394), the Circuit Court for Prince George's County, Maryland, enforced a contract that gave the parties' frozen embryos to the wife in the event of divorce, holding the contract enforceable over the strenuous objection of the husband who wanted the material destroyed. Courts in New York and Alabama have also enforced agreements related to the disposition of genetic material. A clear, written agreement, signed at the onset of ART procedures, can go a long way towards avoiding a dispute in the event of a divorce.

However, the law is in flux. Even a clear, written agreement may not be dispositive in all states. A couple may enter into an agreement with respect to the disposition of embryos in the event of divorce. Later, when that same couple is in the midst of divorcing, one party may have changed his or her mind. In Maryland, the objecting party may be out of luck. In other jurisdictions, courts have found that current lack of consent should supersede any prior contract due to the nature of ART as the means to create a child. In *J.B. v. M.B.,* 783 A.2d 707 (N.J. 2001), the New Jersey court found that, while an agreement between intended parents should generally be upheld, when one party withdraws his or her consent to ART, then it would be contrary to the public policy of the state to enforce such an agreement. It is unclear how other jurisdictions would rule on the same issue.

The ABA also considered circumstances in which a child was conceived and born through ART long after the relationship of the intended parents ended. Specifically, the Model Act provides that if the intended parents divorce prior to the implantation of the embryos, then the former spouse would not be considered a legal parent to a child conceived and born after the dissolution absent an express agreement to the contrary. Similarly, if one party withdraws his or her consent prior to the implantation of the embryos, then he or she will not be considered a legal parent to that child. A non-parent would not be obligated to pay child support but also would not have any parental rights to custody of the child.

Most states have not enacted statutes mirroring the Model Act or otherwise provided for the disposition of genetic material at dissolution of marriage. Should frozen embryos be treated like the furniture and divided up? Should parties be held to their contract (if they have one) even when one no longer wants to be a parent? Or should judges treat the parties' rights to these potential children under different standards? Courts are ill-equipped to make such decisions, but will do so when parties become unable to solve the problem themselves. Results are likely to vary among the states and will remain unpredictable for some time to come.

Possible Scenarios in which ART Can Be Used to Create Embryos

Parties	***Possible Genetic Contributors***
Husband and Wife	Husband and Wife
	Husband and Egg Donor
	Wife and Sperm Donor
	Egg Donor and Sperm Donor
Husband1 and Husband2	Husband1, Husband2 and Egg Donor
	Husband1 and Egg Donor
	Husband2 and Egg Donor
	Sperm Donor and Egg Donor
Wife1 and Wife2	Wife1, Wife2 and Sperm Donor
	Wife1 and Sperm Donor
	Wife2 and Sperm Donor
	Egg Donor and Sperm Donor

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steps as a precaution against a lawsuit contending the credit report was, in fact, the motivating factor.

Outsourcing the entire background check process is one strategy to reduce the employer's risk of non-compliance. An employer still has a duty to take reasonable steps to ensure the third party provider complies with FCRA. Applicants also tend to be more comfortable knowing a third party is conducting the investigation; an outside party reduces the opportunity for office politics to influence the investigation and limits the dissemination of confidential information.

An employer may not use a credit check to further employment discrimination. An employer's decisions must be uniform; the employer cannot decline to hire an applicant for a bad credit score in one instance, but offer employment for the same position to someone with an equally low score weeks later. The investigation policy must also be reasonably calculated to further legitimate business interests. For example, closer scrutiny is appropriate where the employee will have access to confidential financial information, trade secrets or corporate or customer funds. Seeking and obtaining credit reports for positions where the employee will not have access to sensitive material may be found to have an unjustified discriminatory effect.

Maryland Job Applicant Fairness Act

Maryland employers must also comply with the Job Applicant Fairness Act (JAFA), which took effect on October 1, 2011 and regulates the employer's use of credit related information. The Maryland Commission of Labor and Industry is authorized to assess civil penalties for violations of JAFA.

Generally, a Maryland employer may only use a credit history or credit report to deny employment to an applicant, discharge an employee, or determine compensation and other terms of employment when: (1) the applicant has received an offer of employment; (2) the employer has a bona fide purpose for requesting or using the information in the report that is (a) substantially job related and (b) disclosed in writing to the applicant or employee. Job related purposes include (i) the employee or applicant is a manager, (ii) has access to personal information, (iii) has a fiduciary responsibility to the employer, (iv) has an expense account, (v) has access to trade secrets or confidential business information. [Md. Code Ann., Labor and Empl. Art. § 3-711.] JAFA contains exemptions for certain employers, including those required to inquire about an applicant's credit history under federal or state law and certain financial institutions. Maryland employers should note two significant differences between FCRA and JAFA. First, in Maryland the credit report may only be used *after* an offer of employment has been made. Second, JAFA expressly provides specific job functions where a credit report is appropriate.

Recent Developments in Federal Enforcement

Employers should expect increased scrutiny in their pre-employment review practices. In addition to Maryland's relatively recent enactment of JAFA, the Consumer Financial Protection Bureau (CFPB) inherited FCRA oversight from the Federal Trade Commission. In late 2012, the CFPB began issuing bulletins and warning letters to credit reporting agencies, advising that violators could be subject to enforcement actions. The CFPB also announced that credit reporting will be an area of focus and that the bureau has begun accepting consumer complaints. The CFPB's assumption of oversight is expected to result in an uptick in enforcement. Employers may take some solace that, for now, it appears the CFPB's first area of interest will be the reporting agencies themselves and not employers.

Despite a restrictive regulatory regime, it remains a best practice to conduct background checks where a current or prospective employee's responsibilities justify obtaining the information. The employer should document its search efforts both to demonstrate compliance with applicable laws and to proactively prepare for any negligent hiring claims.

Criminal Background Checks

Many employers also conduct criminal background checks on job applicants. There is no federal law directly governing the use of criminal records; rather, other civil rights laws inform their acquisition and use. On April 25, 2012, the Equal Employment Opportunity Commission issued *Employment Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*. It recommends that employers not inquire about criminal convictions because of the disparate impact on minorities, but, if they do, to limit the inquiry to convictions that are job related and only where a business purpose requires it. A bill has been introduced in the House of Representatives seeking to ban pre-employment criminal conviction inquiries. While there has been no significant movement on this bill, employers should be mindful that this is a dynamic area of the law.

Employers are advised against asking about prior arrests that did not result in convictions or inquiring about other judicial action that falls short of a conviction, such as probation before judgment. A blanket prohibition on hiring applicants for any criminal conviction may be discriminatory. Rather, there must be a correlation between the disqualifying conviction and the employee's duties. Moreover, the employer's inquiry must be justified by a legitimate business necessity. The employer must also be consistent in its application of a criminal background screening policy. For example, if a conviction for narcotics possession is a disqualifier for a particular job opportunity, it must be a disqualifier for all persons applying for that opening.

Some local jurisdictions have laws

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governing the release and use of criminal records. Maryland's arrest records statute prohibits employers from discharging or refusing to hire an individual who declines to disclose certain criminal convictions and charges that have been expunged. Similarly, an applicant need not give information about an expunged event, even when asked about a criminal charge that did not result in a conviction or a conviction that the governor pardoned. A failure to disclose an expunged conviction may not be the sole reason for a discharge or refusal to hire.

The District of Columbia prohibits an employer from requiring the job applicant or employee to pay to get criminal records. District of Columbia law also limits records to convictions and forfeitures of collateral that have occurred within ten years. Virginia similarly requires the employer to pay for the criminal record report and obtain the consent of the employee or prospective employee. Virginia employers are prohibited from requiring an applicant to disclose an arrest or criminal charge that has been expunged and the applicant need not answer questions concerning arrests or criminal charges that did not result in a conviction.

Using Social Media to Research a Prospective Hire

Regulators and plaintiffs' attorneys are shifting their attention to employers' use of social media. Approximately 78 percent of American adults used the internet in 2011 and 69 percent of online adults use social networking. Hiring managers who formally or informally review an applicant's LinkedIn, Facebook, Twitter or other social media must be mindful of potential discriminatory effects. For now, Maryland is the only local jurisdiction with laws expressly on topic, but clever plaintiffs' attorneys are adapting other laws to apply to social media.

In 2012, Maryland became the first state to ban employers from inquiring as to an employee's or applicant's social media and log-in information; the employer may not take or threaten adverse action based on an employee's or applicant's refusal to provide a user name and password to social media accounts. Maryland law does permit an employer to request this information based on credible information regarding the person's compliance with securities or financial laws, or regulatory requirements. This exemption is designed to permit a financial services company to review an employee's personal brokerage accounts. The law does not have a similar exception to investigate other misconduct.

Even where there are no laws specific to social media, an applicant may have an invasion of privacy claim if an employer improperly obtains and uses social media information. This enters an unclear area of the law of privacy; does a person have a reasonable expectation of privacy on his or her social media accounts that are not entirely public but are accessible through other means, such as through a colleague's account who attended the same college? What about discovering information available through a search engine's cache?

Background checks through social media are also rife with discrimination issues. For example, the employer may inadvertently learn an applicant's family status, gender, disability, race, age, veteran status, or other protected classification, through reviewing social media sites. If an employer decides to review a job applicant's social media in-house, the employer should act consistently across all applicants and, have a person other than the hiring manager conduct the search and report only specific, non-protected information to the decision maker.

Conclusion

Companies should periodically evaluate whether their hiring practices are designed to recruit capable and trustworthy employees, while reducing the risk for government scrutiny or a civil suit. With the CFPB taking on a more proactive enforcement role, states enacting new laws, and the job market remaining tepid, employers should expect heightened attention to potentially unlawful hiring practices. A periodic review with qualified counsel can prevent or mitigate potential problems before they become bigger and more expensive to resolve.

Three Pasternak & Fidis Partners Names Among the Area's 25 Best Divorce Lawyers

The November/December issue of *Bethesda* magazine names three Pasternak & Fidis partners among the top 25 divorce lawyers in the area. P & F, described as a "venerable downtown Bethesda law practice" is the only firm to have three individuals on the list. According to the article, "Split Decisions" **Linda Ravdin** has a "well deserved reputation for writing ironclad prenups," **Anne "Jan" White** is "particularly skilled in tax issues," and **Vicki Viramontes-LaFree** is the "one to call when pension issues are complicating a settlement."

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P & F News

Partner **Roger Hayden** recently made a presentation at the Maryland Land Title Association Convention. The American Land Title Association is introducing new standards and criteria for Best Practices to be followed by settlement agents and attorneys. Among the criteria are required employee background checks. Mr. Hayden provided an overview of the law on this topic. He has practiced in the areas of employment law and real estate, title and title insurance for over 30 years. In addition to representing clients, he also acts as an expert consultant and witness with respect to title insurance matters.

The Collaborative Dispute Resolution Professionals (CDRP) has appointed Business, Real Estate and Litigation Group partner **Roger Hayden** for a second time as Chair of the Civil Committee. Collaborative law is an interest-based process designed to resolve legal disputes on a mutually agreed basis to avoid litigation and address the concerns of all parties. It can be used to resolve disagreements in family businesses, wills and trusts, employment and divorce.

The Estate Planning and Administration Group is pleased to announce that **Elizabeth Williams-Walsh** has joined the firm as a probate paralegal. Ms. Williams-Walsh is a recent transplant from upstate New York where she was a paralegal for a law practice that specializes in estate planning and elder law. She is a graduate of Dutchess Community College.

Several Pasternak & Fidis partners have been named to the 20th Edition (2014) of *The Best Lawyers in America*. Selection to *Best Lawyers* is based on a peer-review survey of more than three million evaluations by top attorneys. No fee or purchase is involved for reviewers or nominated attorneys so listing in this publication is considered a singular honor. For the 2014 Edition **Nancy Fax** and **Marcia Fidis** are named for Trusts and Estate Law; **N. Alfred Pasternak** is named for Tax Law; **Linda Ravdin**, **Anne (Jan) White** and **Vicki Viramontes-LaFree** are named for Family Law; **Anne (Jan) White** is named for Collaborative Law: Family; and **Vicki Viramontes-LaFree** is named for Family Law Mediation.

On July 26, 2013, Divorce and Family Law Group partner **Linda J. Ravdin** was a speaker at the 40th Annual Midwest-Midsouth Estate Planning Institute, in Lexington, Kentucky. The topic of her presentation was "What Estate Planners Need to Know about Premarital Agreements and Divorce." Ms. Ravdin is the author of *Premarital Agreements: Drafting and Negotiation* published by the American Bar Association. She served for two years as an advisor from the ABA Family Law Section on the Drafting Committee on Premarital and Marital Agreements of the Uniform Law Commission.

The Divorce and Family Law Group is pleased to announce the addition of **Mary Katherine Hayburn** as an associate. Before joining Pasternak & Fidis, Ms. Hayburn was in private practice in Montgomery County, Maryland for six years. She received her law degree from the American University Washington College of Law and her B.A. from the University of Pennsylvania. Ms. Hayburn's practice focuses on all aspects of domestic relations law, including mediation, analysis of financial documents, litigation, settlement negotiations and premarital agreements.

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