

Fifty-Something and Pregnant:

How ART Has Extended Fertility—and Generated New Legal Concerns for Parents and Children

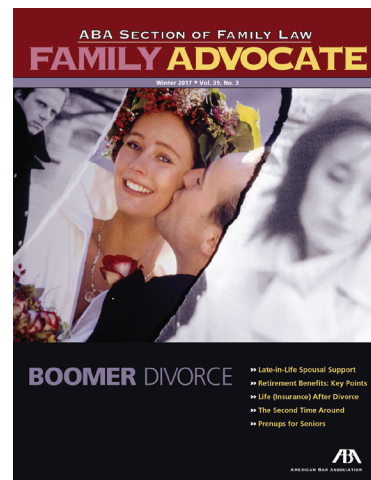
BY JUDITH A. HOECHST

While many baby boomers have retired or are looking forward to retirement and the leisure time that comes with it, certain subsets of age fifty-plus singles and couples are buying cribs and waking up for midnight feedings. They are often first-time parents who are eagerly embracing the next two decades of raising children. Some women in these subsets have made the choice to delay childbearing in order to achieve career or financial goals or to travel or because they haven't found an acceptable partner. Older couples in second marriages may wish to have children together. In other cases, some women or couples have experienced the devastating loss of a child and would like to have another child.

With the prolonged life expectancy of today, a woman may not feel it's unreasonable to become pregnant and raise a child, even if she is in menopause. In the United States, a woman who has reached the age of fifty in good health has at least another twenty-five to thirty years of life expectancy—enough time to raise a child to adulthood. Advances in reproductive technology and expanding definitions of family are permitting them to do so.

The average age of menopause in the United States is fifty-two. The majority of postmenopausal births are the result of ova donation and in vitro fertilization (IVF). While some births are attributed to prior embryo freezing, in the future they will also be attributed to ova freezing. According to the Centers for Disease Control, in 2013, thirteen babies on average were born every week in America to women age fifty and older. Births in women ages fifty to fifty-four thus rose more than 165% from the year 2000 (255 births) to 2013 (677 births). Janet Jackson gave birth to her first child at age fifty, actress Laura Linney gave birth a few days before her fiftieth birthday, and Elizabeth Edwards, wife of the former U.S. senator and vice presidential nominee John Edwards, gave birth at age fifty-one. Annie Leibovitz, the American portrait photographer, gave birth to her daughter at age fifty-two. None have disclosed whether they conceived naturally or used embryo freezing, egg donation, or some other means to conceive.

While some applaud those seeking to achieve parenthood at an advanced age for realizing their dreams, skeptics question their wisdom. Societal attitudes have been slow to catch up with reproductive medicine advances. Those who are critical may find it unacceptable for women to bypass their natural child-bearing years and wonder about the life span of new mothers having children in their fifties. Will these mothers live long enough to raise their children to adulthood? The loss of a parent is one of the most profound, negative impacts in the life of a child and carries with it the potential for significant adverse effects lasting a lifetime, including depression and substance abuse. Skeptics wonder if such new mothers have the requisite physical



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and mental stamina to raise young children. Will such parents feel isolated from other parents who are a decade or more younger at school functions and athletic events? Will their children recognize this difference and feel isolated? Will mothers look like grandmothers, rather than mothers?

Having parents of advanced age may cause children to grow up without grandparents, to experience a significant generation gap, and to become caretakers for aging parents at a young age. On the other hand, older parents are typically more stable and mature and have more life experience than younger ones. They have more time, more emotional and material resources to give their children, and better coping skills and patience raising them. Older parents credit their age and experience with making them more patient and appreciative of parenthood. Should the use of reproductive and medical technology that extends a woman's reproductive years beyond menopause be unreasonably withheld so as to deny her motherhood?

The U.S. Constitution recognizes the right to procreate as a fundamental right deserving of special protection. A double standard and inequality exists between men and women: while older men may seek reproductive services to father children and are typically not denied despite advanced age and age-inherent risks of certain birth defects, women may be denied the use of donated ova, donated embryos, and/or reproductive services solely because of their age, despite the fact that using donor ova can significantly reduce their newborns' risks of genetic birth defects.

Some fertility clinics and surrogacy matching agencies will not work with prospective mothers beyond a certain age due to organizational policies and procedures. The American Society of Reproductive Medicine (ASRM) states that it "is ethically permissible for programs to decline to provide treatment to women of advanced reproductive age based on concerns over the health and well-being of the patient and offspring." If women age fifty or older are well-screened and cared for during and after delivery, however, their health after giving birth to children using donated ova and the health of their newborns may be as good as that of younger recipients.

Nonetheless, Dr. Richard P. Porreco, MD, who has an active practice in high-risk obstetrics that extends throughout the Rocky Mountain region and who was interviewed for this article, acknowledges that there are significant increased medical risks for mothers of advanced maternal age. These risks include gestational diabetes and hypertension (both diabetes and high blood pressure may continue for the remainder of their lives), as well as stillbirth, preterm delivery, fetal growth restriction, and multiple births. "Preeclampsia and eclampsia complications weigh heavily on the mature woman in pregnancy, especially at age forty-five and beyond, where donor ova are almost universally required," he said. "This is compounded additionally by other chronic medical illnesses more common in this age group. The physiologic changes associated with pregnancy seem more burdensome and debilitating in this age group, based on personal observation over many years caring for these women."

Thus, it is more than reasonable for reproductive care for a mother age fifty-plus to include a referral to a maternal-fetal medicine specialist, as well as to a social worker experienced in third-party reproduction counseling. Reproductive physicians are attempting to balance the rights of their patients with the best interests and rights of children to be loved by and raised by their parents into adulthood. The ASRM ethics opinion states that providing donor oocytes or embryos to women over fifty-five years of age, even when they have no underlying medical problems, should be discouraged in view of concerns related to longevity and the need for adequate psycho-social supports for raising a child to adulthood. Andrea Bryman, a licensed

marriage and family therapist specializing in mental health assessments of egg donors and surrogates in Westlake Village, California, advises, "Older parents are encouraged to create a care plan for their minor children in the event of a disabling illness or death. While all parents should consider a care plan in the event of an unforeseen illness or untimely death, it is more critical as a parent ages. This care plan may even include guardianship by older siblings who could be old enough to parent minor children."

As attorneys, how do we assist and advise our clients who are having children at age fifty? The client-centered approach, commonly taught in law school clinics, contends that a client understands his or her unique situation better than the lawyer. It is the lawyer's job to help the client implement his or her wishes, even if it involves means and outcomes that are not aligned with what the lawyer believes to be ideal, provided the lawyer acts within the bounds of the law and legal ethics. Ultimately however, for practitioners, whether to provide legal services to these families comes down to a lawyer's sense of personal ethics and lawyering style.

Regardless of your personal beliefs, certain best practices should be observed when working with intended parents who are in their fifties. Clear and concise estate planning prior to an embryo transfer is an important safeguard for parents of any age and their unborn offspring. Parents may be reluctant, however, to spend money on estate planning when they have spent so much on reproductive medical care and IVF. Estate planning at the time of contract formation, including surrogacy and genetic donation contracts to address all potential circumstances and safeguard individual and collective interests, can help avoid litigation after death or at the time of divorce and ensure that clients' intentions are protected.

Estate planning documents should provide for future children, identify guardians, and retain assets in trust to benefit children born pursuant to third-party arrangements. Genetic material is designated "property" under the law. Wills and trusts should be structured accordingly and should be consistent with signed third-party reproductive contracts. An estate plan should clearly identify who is considered a "child," including children then living, children in utero, and posthumous children. Such identification protects children born through assisted reproduction technologies from inadvertent disinheritance. Clients using third-party reproduction, regardless of age, should always consult an attorney specialized in reproductive law and an estate planning attorney knowledgeable in reproductive law and genetic material issues.

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