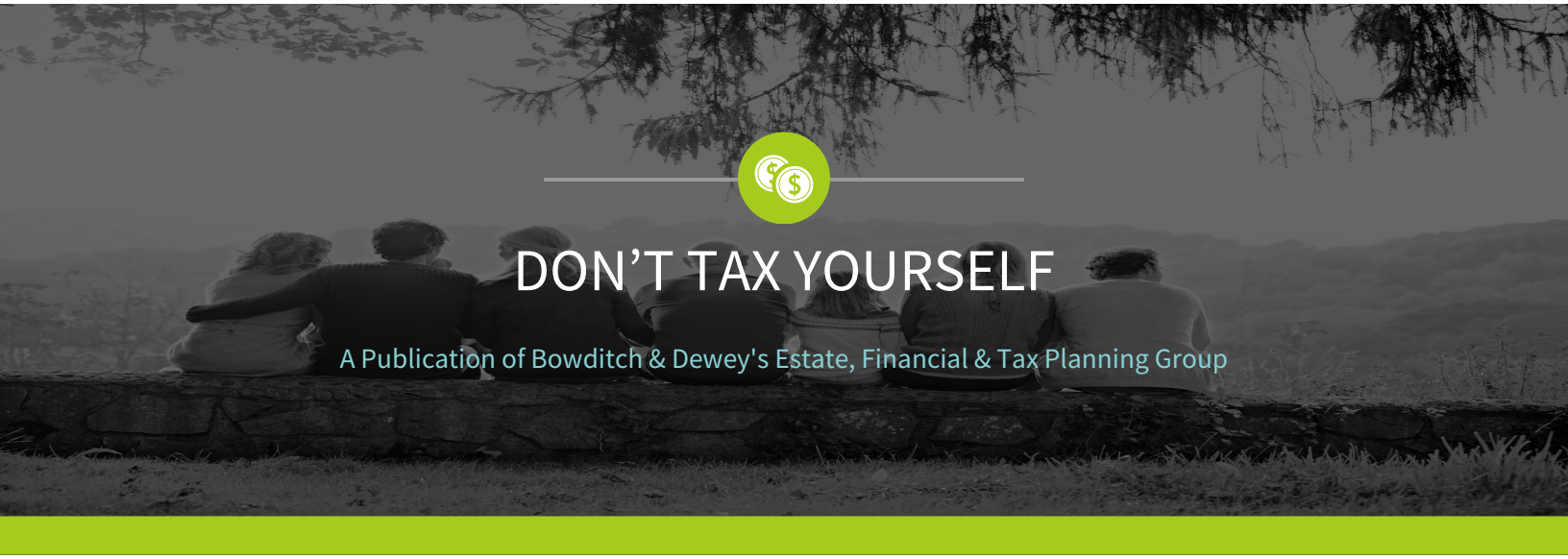

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Estate Planning Considerations for Individuals Using IVF with Cryopreserved Embryos

BY BOWDITCH & DEWEY • MAY 20, 2025

The use of Assisted Reproductive Technologies ("ART") is becoming more and more common, and those utilizing ART may have additional considerations when creating or updating their estate plan. This blog will focus specifically on estate planning considerations for individuals using In-Vitro Fertilization ("IVF") who have, or plan to have, cryopreserved embryos stored with a clinic or at a storage facility.

Individuals who have done IVF treatments are likely to have signed agreements and/or consent forms with a clinic or storage facility that address the disposition of their embryos. Such agreements may or may not be enforceable in this evolving area of law. Therefore, individuals will want to inform their estate planning attorney of the existence of those documents and provide copies, so their estate planning attorney can review and confirm the paperwork aligns with their estate planning goals. The estate planning attorney can work with the individuals to create or update their estate plan to reflect their wishes for the embryos in the event the individual passes away or is incapacitated. The same may be true for those with cryopreserved eggs rather than embryos.

What happens if the living owner of embryos becomes temporarily or permanently incapacitated? It would be prudent to ensure the owner's Attorney-in-fact ("AIF") named in their Durable Power of Attorney has specific authority to carry-out the owner's wishes and that the owner's wishes are clear. This may include limited authority only to permit the AIF to make the storage payments to ensure the embryos remain preserved for a period of time. Or, it could include broad authority for the AIF to alter, or even terminate, a storage contract if the storage fees became uneconomical, or for some other reason. All scenarios, considerations and preferences can be discussed with an estate planning attorney and drafted into the Durable Power of Attorney (and potentially also the Health Care Proxy and HIPAA Forms) as part of the owner's overall estate plan.

It also makes sense to plan for the disposition of the embryos in the event of the death of the owner. The science has outpaced the law on this topic, and the law still lacks clarity as to whether embryos can be disposed of in the same manner as other "property" in a will.

While different states have varying views on whether embryos are considered property, Massachusetts case law and statutes generally indicate that embryos may be treated as property, and that documents contemplating the disposition of embryos are permitted. In the context of divorce, Massachusetts courts have elected to treat cryopreserved embryos as property subject to division, and permit the use of agreements that plan for disposition of unused embryos. The state statutes also permit the donation of embryos to another person and the donation of embryos for general research purposes, which also implies that the state accepts the treatment of embryos as "property."

We recommend individuals who are undergoing IVF consider updating their estate plan with provisions for their embryos, and ensure the plan aligns with any agreement and consent forms signed with the clinic or facility.

Please note that this post is limited in scope to planning for embryos that are in storage and there may be additional planning considerations and estate planning provisions for those using IVF, surrogacy and other reproductive technologies.

One of our estate planning attorneys can help to determine an individual's goals and add the appropriate provisions to their estate planning documents.