

Frozen Embryos, Divorce, and Needed Legislation: On the Horizon or Has It Arrived?

Although the first reported child born from a "cryopreserved embryo" (commonly referred to as a frozen embryo) surfaced in 1984, it was not until 1992, amazingly, that the legal world first considered what should happen with those unused frozen embryos when the would-be parents proceed to dissolve their marriage. Since then, a handful of appellate divorce decisions across the country have addressed the issue of the fate of frozen embryos when the couple divorces. Those decisions, however, offer little uniformity for future cases.

As a general matter, when couples seek infertility treatment, multiple embryos are created, resulting in frozen, unused embryos for future use and implantation. The decision to create multiple embryos is supported by sound medical practice in order to increase the couple's chances of additional attempts at pregnancy. However, it also undoubtedly creates a future disposition problem that most couples choose not to address prior to commencing the infertility treatment, unless required by the storage facility to do so. As of 2008, *USA Today* reports there are approximately 500,000 frozen, stored embryos in the U.S.¹ Often, the couple successfully uses some, but not all, of those frozen embryos to create the family they originally intended. If they ultimately decide not to have more children, the last thing on the couple's radar is when and how to dispose of the unused frozen embryos.

A recent study, which looked at how fertility patients view their beliefs and available disposition preferences,

coined the phrase "embryo disposition decision" as being a situation the couple will inevitably have to face.² A couple's failure to address this issue will ultimately end up before a court to decide in the event their marriage ends in divorce. In 2005, there were 134,260 reported assisted reproductive technology (ART)³ procedures performed in the U.S., which produced 52,041 children, as compared to only 14,507 children and 64,681 ART procedures in 1996.⁴ We can only assume that the use of ART procedures will continue to increase as medical advances make these procedures more readily available to couples struggling with infertility.⁵

Current Florida Law

Florida law provides that the donor of either an egg, sperm, or preembryo⁶ relinquishes all maternal or paternal rights with regard to the resulting child.⁷ Accordingly, the issue of parentage, or lack thereof, is clear. Florida law further recognizes gestational surrogacy agreements as enforceable contracts. In the context of ART procedures and since 1993, Florida legislative intent was to provide for the status of certain children born from donated eggs or preembryos; the relinquishment of rights by the donor of eggs, sperm, or preembryos; the disposition of eggs, sperm, and preembryos under specified conditions; and the requirement of a written contract before engaging in gestational surrogacy.⁸

F.S. §742.17 requires a written agreement between the couple seeking infertility treatment and their physician "that provides the disposition

of the commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance."⁹ It would follow then that such written agreements should be upheld and enforced by the court in the event of the couple's divorce, despite an alleged change in circumstances by one of the parties from the time the agreement was first entered. To do otherwise would make the requirement for a written preembryo agreement meaningless or a legal fiction. If there is no written agreement, then F.S. Ch. 742 provides that the "remaining eggs or sperm shall remain under the control of the party that provides the egg or sperm."¹⁰ Although decision-making authority over the disposition of the preembryo "shall reside jointly with the couple,"¹¹ in the event there is no written agreement, this decision is ultimately passed down for the court to determine when the couple disagrees on how to dispose of their frozen embryos.¹²

When couples engage in the everyday negotiation of a prenuptial agreement, the parties and their attorneys are required to anticipate a multitude of future "what ifs?" and reconcile the agreed-upon outcome of support, property, and other issues arising from their union in the event of separation, divorce, or death. The decision to enter into a prenuptial agreement is entirely voluntary and not legally required. In 2007, Florida adopted the Uniform Premarital Agreement Act in an effort to establish some uniformity relating to the enforcement and validity of prenuptial agreements and thereby reduce litigation.¹³

Florida law is clear that the concept of prenuptial and marital settlement agreements does not offend public policy.¹⁴ Likewise, if couples choose to create frozen embryos through the use of AET, they should consider entering into a pre-frozen embryo agreement prior to the medical procedure, addressing what would occur to the frozen embryos in the event of divorce or other circumstances. Despite having a statute on point, Florida law provides neither guidance nor resolution as to whether a party's right not to procreate will outweigh the other party's desire to procreate in the context of a divorce proceeding if there is no written agreement and the parties disagree on disposition of their frozen embryos.¹⁵

The ABA Model Act

In early 2008, the ABA's House of Delegates formally approved the Model Act Governing Assisted Reproductive Technology.¹⁶ Not surprisingly, the ABA struggled for well over a decade to draft and ultimately adopt

the act.¹⁷ The act is significant in that it strongly encourages "intended parents"¹⁸ to enter into a written agreement prior to embryo creation and set forth the following: a) the intended use of the embryos; b) what happens to the embryos in the event of divorce, death, or incapacity; and c) when the embryos will be deemed "abandoned." The act also clarifies which intended parent may control the embryos in the event of divorce, illness, or death.¹⁹ The act further suggests a mechanism to withdraw consent to the terms of the preembryo agreement to dispose of or transfer the embryos. It establishes a default provision regarding abandonment of the frozen embryos which is deemed to occur five years after the embryos are created. However, if there is no agreement between the parties, the storage facility then must obtain an order issued by a court of competent jurisdiction relating to disposition of the embryos. Similar to Florida law, the act provides that unless the party consents to the transfer of the embryo

before the date dissolving their marriage, the resulting child after the divorce will not be deemed the child of the former spouse and the former spouse will not be deemed a parent.

Case Law

Courts are expected to choose between denying one spouse the right to conceive a child versus denying the other spouse the right to say he/she no longer wishes to parent additional children. Should it matter that at some point in time both parties desired to have children together and be parents as evidenced by the fact that they voluntarily engaged in creating the embryos in the first place? Should the law allow and recognize that parties have a right to change their mind and withdraw their initial consent relating to disposition of the embryos? Is the right to procreate equal to the right not to procreate? These are challenging and controversial issues dealing with the most fundamental right of childbearing.

Some courts have concluded that the spouse wanting the frozen embryos destroyed in the event of divorce should ultimately prevail with or without a written preembryo agreement regarding their disposition. Both New York²⁰ and Texas have enforced the parties' preembryo agreements in instances where the couple had agreed to either destroy or donate the frozen embryos, holding that their agreements were controlling. In *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006), a husband and wife entered into a written embryo agreement prior to beginning in vitro fertilization (IVF).²¹

Both agreed, in writing, that the embryos would be discarded in the event of divorce. The court found that the embryo agreement was a valid, enforceable, and controlling contract which set forth the parties' voluntary intent directing the fate of the embryos in the event of their future divorce. The Texas First District held that it was not against public policy to permit couples to enter into preembryo contracts which dispose of the embryos in the event of a divorce, and such agreements will be enforced.²²

In contrast to *Roman*, the husband

and wife in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), did not have a written agreement as to the disposition of their seven unused frozen embryos.²⁰ When the wife filed for divorce, she sought the right to donate the embryos and the husband sought to have them destroyed. The Tennessee Supreme Court ruled in favor of the husband, reasoning that a person's right not to bear children outweighed the other person's desire to have children under state and federal constitutional right to privacy. Significantly, the court in *Davis* held that disputes relating to the disposition of frozen embryos should first be determined by the terms of the written agreement between the couple. Absent such agreement, the court must balance each party's fundamental right to bear children or not bear children, and consideration of whether one party has other means available (outside of the frozen embryos) to do so. In this case, the fact that the wife sought to donate the embryos and not use them

herself tilted the balance even further in favor of the husband's superior interest not to bear children.

The Massachusetts Supreme Court in *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000), found the parties' preembryo agreement²⁴ unenforceable partly because there had been a substantial change in circumstances from the time the parties initially executed the agreement, but primarily because it violated state public policy to allow the former wife to implant embryos against the express will of the former husband. Once again the theme that a party's right not to procreate outweighs a party's right to have more children appears to be a determining factor.²⁵ These controversial issues arising from ART procedures transcend marital and family law and spill over into inheritance claims and probate law.²⁶

As this area of the law continues to develop, states such as West Virginia are currently considering legislation which would not only prohibit the

destruction of the frozen embryos, but prohibit them from being moved outside the state.²⁷ Indiana reportedly had proposed legislation to approve adoption of abandoned frozen embryos and would make it a misdemeanor crime to destroy an abandoned embryo. Colorado, Georgia, Montana, and West Virginia are struggling with the concept of the legal status of the frozen embryos between property and a living being.²⁸ It is evident that marital and family law attorneys must be aware of the many complex issues raised by artificial reproductive technology.

Conclusion

Foremost, this article raises awareness of one narrow, controversial issue resulting from available reproductive technology that produces unused frozen embryos by couples anxiously wanting to have children and share the joys of parenthood. We can expect that these issues will become more common for courts to address in the

future. Intended parents striving to have families and judges alike would benefit from legislative guidance to help resolve the difficult issue over disposition of unused frozen embryos in the event of divorce.

Assuming preembryo agreements become mandated under state laws, we nevertheless will need to deal with the staggering number of existing frozen embryos where the parties have no such written agreements in place. The fact that a couple has a preembryo agreement also does not guarantee that one party may not later seek to contest the agreement as to disposition of the embryos or that a court will ultimately uphold the agreement in the event of a divorce. Should states attempt to bring about uniformity and regulate IVF facilities to require all married couples to enter into preembryo agreements providing for disposition of the embryos in event of divorce? Is it medically feasible for couples to modify their IVF procedures to avoid creating excess embryos in the first place? There exists uncertainty in the law in this rapidly developing, evolving area. However, it would appear that for now, family law attorneys should consider recommending that client/couples seeking IVF or other fertility treatments carefully prepare preembryo contracts expressing their intent concerning disposition of their frozen embryos in the event of divorce. In Florida, it is a statutory requirement.¹

¹ *Consumer Health News*, USA TODAY, (2008), available at www.healthscout.com/news/68/6020334/main.html.

² V. Provost, G. Peanings, P. De Sutter, J. Gerris, A. Van de Valde, E. De Lissnyder, M. Dhont, *Infertility Patients' Beliefs About Their Embryos and Their Disposition Preferences*, *HUM. REPROD.* (2009).

³ FLA. STAT. §742.13 (1) defines "assisted reproductive technology" as those procreative procedures which involve the laboratory handling of human eggs or preembryos, including, but not limited to, in vitro fertilization embryo transfer, gamete intrafallopian transfer, pronuclear stage transfer, tubal embryo transfer, and zygote intrafallopian transfer.

⁴ U.S. Center for Disease Control & Prevention (CDC), This represents a 48 percent increase in procedures performed between 1996 and 2005.

⁵ J. Petruzza & A. Styer, *Assisted Reproductive Technology*, <http://medscape.com/article/263907-overview>.

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As of 2008, approximately 13-14 percent of reproductive-aged couples are affected by infertility.

⁶ FLA. STAT. §742.13 (12) defines "preembryo" as the product of fertilization of an egg by a sperm until the appearance of the embryonic axis.

⁷ FLA. STAT. §742.14 (referring to donors other than the commissioning couple or a father who has executed a preplanned adoption agreement under §63.212).

⁸ Florida S.B. 2082 (1998), Senate staff analysis and economic impact statement.

⁹ FLA. STAT. §742.17.

¹⁰ FLA. STAT. §742.17(1).

¹¹ FLA. STAT. §742.17(2).

¹² Presently, there are no appellate decisions interpreting FLA. STAT. §742.17 regarding disposition of frozen embryos.

¹³ FLA. STAT. §61.079.

¹⁴ *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962). Florida further recognizes a person's fundamental right to self-determine decisions pertaining to his or her health and medical decisions and recognizes living wills, advance directives, and designation of health care surrogates. FLA. STAT. §765.102, §765.202.

¹⁵ In *Vitakis v. Valchine*, 987 So.2d 171, (Fla. 4th D.C.A. 2007) (the court merely enforced the parties' mediated settlement agreement in which the former wife agreed to let the former husband dispose of their frozen embryos and in which she agreed to turn over the embryos to the former husband).

¹⁶ *American Bar Association Model Act Governing Assisted Reproductive Technology February 2008*, 43 *FAMILY L. Q.* 171 (2008).

¹⁷ The ABA commenced the project in 1998 and concluded it in 2006. Charles P. Kindrogan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 *FAMILY L. Q.* 203 (2006).

¹⁸ The Model Act, §102(20) defines "intended parent" as a person, married or

unmarried, who manifests the intent as provided in this act to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.

¹⁹ The Model Act, §501(3)(b). The act also sets forth guidelines and standards for informed consent, gestational agreements, and other related provisions.

²⁰ *Kass v. Kass*, 698 N.E.2d 174 (N.Y. 1998) (In a divorce case, the court enforced the parties' contract to donate their frozen embryos for research as determined by the storage facility).

²¹ In vitro fertilization (IVF) in Florida means that the transfer of an in vitro fertilized preembryo into a woman's uterus.

²² *Roman*, 183 S.W.3d 40 (Tex. App. 2006). Upon filing for divorce, the wife obtained a court order awarding her exclusive use and possession of the embryos. The lower court reasoned that the embryos were property subject to division, however, the First District reversed. The Texas Supreme Court denied review of the appellate decision.

²³ *Davis*, 842 S.W.2d 568 (Tex. 1992). Although the couple had discussed between themselves and with their physician the possibility of donating the frozen embryos, they never made a decision as to their disposition in the event of death or divorce.

²⁴ *Id.* The parties' preembryo agreement did not provide who would make the ultimate decision regarding disposition of the frozen embryos in the event of a divorce.

²⁵ See *J.B. v. M.B. and C.C.*, 783 A.2d 707 (N.J. 2001). Regardless of whether there was an enforceable preembryo agreement, it was against state public policy to enforce an agreement against a party who had reconsidered his or her prior decision relating to disposition of frozen embryos. Accordingly, the frozen embryos were ordered destroyed.

²⁶ See *Finley v. Astrue*, 270 S.W. 849 (Ark. 2008) (A child created as an embryo through IVF but implanted into the mother's womb after the death of the father cannot inherit from the father under Arkansas intestacy laws as a surviving child).

²⁷ *Embryo Legislation, by State*, LOS ANGELES TIMES (October 6, 2008), available at <http://articles.latimes.com/2008/oct/06/health/hc-embryos1ates6>.

²⁸ *Id.*

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