

The Family Lawyer's Guide to Embryo Litigation

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Family law attorneys are seeing more and more cases involving cryopreserved embryos. Here is a typical scenario: Jack and Diane, a married couple battling infertility, create embryos through a process of *in vitro* fertilization (IVF) of Diane's eggs with Jack's sperm. These embryos are cryopreserved and stored. The stress of dealing with infertility takes a toll on the marriage, and the couple ultimately decides to divorce. Who gets the embryos? And, more significantly, can the person who gets the embryos actually use them to have a child? If so, who will the parent(s) be?

Infertility is a profoundly private experience for many people and the lawyers representing Jack and Diane in their dissolution may not even have known about the embryos when the case was filed. Clients often will not tell their attorneys about unused frozen embryos unless they are specifically asked about them. But addressing the disposition of frozen embryos may be the most challenging issue in an otherwise reasonably amicable divorce. If a couple cannot reach a decision themselves, what is the court going to do with these embryos?

- Are they property?
- Are they persons?
- Is there another category?
- Is the issue eventually going to be moot?
- How long can the embryos be stored and still be capable of producing a child?
- And if a child results, who will be the child's parent(s)?

When a couple or a single person goes through IVF in order to have a child, it is very common for more embryos to be created than are needed to accomplish the initial pregnancy. Fertility clinics across the United States are reporting a steady increase in IVF cycles, which means more embryos are being created each year. The US Department of Health and Human Services states that the latest data suggest that more than 600,000 embryos are currently in storage in the United States. (See <http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption>, last visited August 29, 2016.) And these are only the numbers actually reported to the CDC by reporting fertility clinics; professionals in the field believe the true number is upwards

of four million. (See Dave Snow, Alana Cattapan & Françoise Baylis, Letter to the Editor, 33 Nat'l Biotechnology 909 (2015).)

Frozen (cryopreserved) embryos can survive and be viable for a very long time. There is at least one case in the U.S. of a child being born following the transfer of embryos that had been frozen and stored for 20 years. (Donna Dowling-Lacey, et al., “Live Birth from a Frozen–thawed Pronuclear Stage Embryo almost 20 years after its Cryopreservation,” 95 Fertility and Sterility 1120 (Mar. 2011).) No federal regulations or statutes govern the disposition of frozen embryos, and the states follow a patchwork of legislative and judicial approaches to the various issues arising from the use and disposition of frozen embryos.

As of this writing, there have been fewer than a dozen appellate cases across the United States in which a court was asked what to do with cryopreserved embryos when the couple could not agree. In each of these cases, one person wanted to use the embryos to conceive children and the other did not. For 24 years, the clear trend in these cases was for courts to find a way to prevent embryos from being used to conceive children against the wishes of one of the parties. However, two recent cases have presented compelling circumstances in which the courts have held in favor of a woman wanting to use the embryos against the wishes of her former male partner. Are these cases governed by principles of contract? Principles of equity? Constitutional law? Public policy concerns? All of the above?

The first case to address embryo disposition upon divorce originated in Tennessee. (*Davis v. Davis*, 842 S.W.2d 588 (1992).) In 1992, the Supreme Court of Tennessee held that in the absence of an express agreement between the parties, frozen embryos should be awarded based on a balancing of the parties’ relative interests. “Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the pre-embryos in question.” (*Davis*, at 600-601) The *Davis* court found that each of the parties in that case had an equal constitutional right to procreational autonomy governing their interest in the embryos. (*Id.* at 597.) It held that the embryos were not “persons,” but that instead they were property entitled to a special respect as the result of their *potential* for life. (*Id.* at 604.) Finally, the Tennessee Supreme Court opined that if there is an express agreement governing the disposition of the embryos in the event of a divorce, a court should give effect to the parties’ intent as expressed in that agreement. (*Id.* at 604.)

When Jack and Diane Davis went through IVF treatment and created their embryos, they signed documents with their fertility clinic, created by the fertility clinic for use in every IVF case, and principally designed to address Jack's and Diane's rights and obligations vis-à-vis the clinic. These forms were *not* constructed specifically to address or define Diane's and Jack's rights and obligations toward *each other*. They therefore provided minimal guidance to the court.

Clinics have learned their lesson since *Davis* and clinic consent forms now usually have at least one page giving the parties choices as to what to do with frozen embryos in the event the parties divorce. Typically, the forms instruct IVF patients to choose which box to check from four or five specific choices including: 1) the wife/woman/patient determines what happens to the embryos; 2) the husband/man/partner determines what happens to the embryos; 3) the embryos will be donated for research; or 4) the embryos will be disposed of by the clinic. Sometimes the choices are more creative, such as dividing vials of embryos between the parties or requiring both parties to agree on the disposition of the embryos at the time of the disposition. However, this page tends to be embedded in a lengthy informed consent document, patients are not required to obtain legal advice before filling out the document and anyway, if Diane and Jack are typical, they barely paid attention to the consent forms they signed – all they were thinking about was their efforts to become parents.

Even now, with some publicity about embryo disposition, it would be very unusual for a couple like Jack and Diane Davis to have an attorney look at the clinic consent forms, and virtually unheard of for either to be represented by separate counsel who could explain to them the potential lifelong implications of the boxes they are checking in the informed consents while waiting to see their physician. Therefore, the relevance of the clinic forms in later litigation remains a controversial issue.

Davis has become the seminal case in the jurisprudence of embryo disposition. It is quoted, although not necessarily followed, in virtually every subsequent case involving disputes over frozen embryos. And for 20 years, every subsequent case decided by a court of record, although using varying legal theories, prevented the person wishing to use frozen embryos from doing so against the wishes of a (former) spouse or partner who does not want to have a child born against his or her wishes. Since *Davis*, courts have used, essentially, three different models to reach this same result.

Enforcement of the “contract”: Four cases, from four different states, have held that unambiguous provisions in IVF consent forms should be enforced as written. The consent forms in two of these cases provided that embryos should be destroyed in the event of separation or divorce. (*Roman v. Roman*, 193 S.W.3d 40, 55 (Tex.App. 2006); *In re Marriage of Dahl*, 194 P.3d 834, 840 (Or. 2008).) The forms in another case provided that in the event the parties were unable to agree on the disposition of the embryos, they would be donated for research to an institution to be determined by the IVF program. (*Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998).)

The fourth case, *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002), contained an interesting twist: the embryos were created from the husband’s sperm and donated eggs, with no genetic contribution from the wife. The Washington Supreme Court held that the wife nevertheless had an equal right to determine the fate of the embryos (*Id.* at 267), and ultimately relied on the written documents signed at the clinic and upheld the provisions of the informed consents providing that if the couple didn’t give specific direction to the IVF program within five years, the embryos would “be thawed out and not allowed to undergo further development.” The documents prevented either of the Litowitzs from unilaterally using the embryos to bear a child. (*Id.* at 270.)

The lesson of these cases is that unambiguous language in the medical consent forms generally will be enforced to the extent that language prevents one of the parties from using the embryos to conceive a child against the other party’s wishes.

Public Policy and Other Considerations. A handful of states are bucking the trend of deciding embryo disputes based on the intentions memorialized in the clinic documents, either because there were no written agreements to enforce, or because they have found other considerations more important. The New Jersey Supreme Court followed the central analysis of the *Davis* case, but placed more emphasis on constitutional rights than on informed consents, holding that in the absence of a clear and binding agreement, the court would not violate the wife’s fundamental right *not* to procreate by forcing her to become a genetic parent against her will. (*J.B. v. M.B. and C.C.*, 783 A.2d 707, 717 (N.J. 2001).) In a relative outlier case, the Massachusetts Supreme Judicial Court held that a contract specifying that any unused embryos be given to the wife for use in the event of “separation” was unenforceable. That court held, “[a]s

a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.” (*A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-1058 (Mass. 2000).)

The Iowa Supreme Court used yet a different analysis to reach the same result as Massachusetts. In *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003), it held that it was against public policy to enforce a prior agreement between a couple that no longer agreed about their future family and reproductive choices. (*Id.* at 782.) The court invoked the principle of “contemporaneous mutual consent,” holding that cryopreserved embryos would be stored indefinitely until the parties reached an agreement about what to do with them. (*Id.* at 774.) It rejected the wife’s “best interest of the child” argument, holding that the best interest standard is intended to assure a *child already born* the opportunity for the best physical and emotional development. (*Id.* at 775.) Although the New Jersey Supreme Court previously had endorsed the “contemporaneous mutual consent” principle in dicta (*J.B. v. M.B.*, 783 A.2d at 719), Iowa is unique in relying on this principle as the basis for reaching a final decision.

Cases Allowing Use of Frozen Embryos. In two recent cases, intermediate appellate courts have ruled that a woman can use frozen embryos to have children against the explicit wishes of the man whose gametes were used to create the embryos. (*Reber v. Reiss*, 42 A.2d 1131 (Pa. Super. 2012); *Szafrański v. Dunston*, 34 N.E.2d 1132 (Ill. App. 2015).) In *Reber*, the Pennsylvania Superior Court applied a “balancing of interests” test and found a compelling circumstance that did not exist in any of the previously reported appellate decisions: after treatment for cancer, the ex-wife had no further ability to procreate biologically without the use of the disputed embryos, which had been created prior to the treatment. (*Reber, supra*, 42 A.2d at 1136-1137.)

The *Szafrański* case presented a similarly compelling circumstance. The ex-girlfriend in that case received a cancer diagnosis and the treatment was likely to render her infertile. She and her boyfriend agreed to go through IVF together for the specific purpose of creating embryos to allow the girlfriend to attempt to have children after treatment. The Illinois First District appellate court held that the couple had entered into an enforceable oral agreement and that the girlfriend’s interest in the use of the embryos was greater than the boyfriend’s interest in preventing their use. (*Szafrański*, 34 N.E.2d at 1152-1153, 1162.)

Do these two cases represent a trend away from the previous precedent establishing that courts will not force a person to become a genetic parent against their wishes? Or are they

limited to their special circumstances? In both *Reber* and *Szafranski*, the women wanted to use embryos created specifically because the couples foresaw that the women soon would have no other means of achieving biological parenthood due to cancer diagnoses. In both cases, there was no signed agreement to unambiguously provide for what would happen to the embryos in the event the parties didn't agree in the future, which presumably gave the courts more leeway to adopt an equitable approach.

Persons or Property? Louisiana and New Mexico both have statutes explicitly providing that embryos are “persons” and requiring that all embryos be transferred or stored until they are donated to another family. (Louisiana Stats. Annot., R.S. §§9:121 et. seq.; New Mexico Stats. Annot. §§24-9A-1 et. seq.) Whether these statutes are constitutional under *Roe v. Wade* and its progeny is unclear but, as of this writing, no reported court case has held that an embryo is a “person.” If courts begin to find that frozen embryos are “persons,” this presumably would require implementation of a best interest standard and the entire line of cases beginning with *Davis* might be called into question.

This issue was specifically raised and addressed in the most recent embryo decision, *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. App. 2016). *McQueen* involved a marital dissolution in the state of Missouri – a state which has a statute declaring that: “(1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being....” (Section 1.205 RSMo 2000.) Section 1.205.3 states the term “unborn children,” as used in the statute, “shall include all unborn ... children or the offspring of human beings from the moment of conception until birth at every stage of biological development.” (*Id.*) Missouri law elsewhere specifies that an “unborn child” includes “the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus....” (188.015 RSMo Supp. 2012, emphasis added.) Despite these statutes, the Missouri Court of Appeals concluded that under the circumstances of the *McQueen* case (where the ex-wife wanted to use frozen pre-embryos to procreate over objections of the ex-husband, despite having no fertility issues that would prevent her from having other children without her ex-husband's involvement), application of the Missouri statutes to allow Ms. Gadberry to use the embryos for procreation over *McQueen*'s objection would violate the United State Constitution.

In reaching this conclusion, the Missouri court quoted *Davis*: “the right of procreational autonomy is composed of two rights of equal significance – the right to procreate and the right to avoid procreation. . . . The equivalence of and inherent tension between these two interests are nowhere more evident than in the context of [pre-embryos created via IVF].” (*McQueen*, 507 S.W.3d at 144, quoting from *Davis*.) As stated by the *McQueen* court, “when weighed against the interests of McQueen and Gadberry and the responsibilities inherent in parenthood, the General Assembly’s declarations in section 1.205 relating to the potential life of the frozen pre-embryos are not sufficient to justify any infringement upon the freedom and privacy of Gadberry and McQueen to make their own intimate decisions.” The Court of Appeals therefore upheld the trial court’s decision refusing to classify the embryos as children and instead treating them as “special property,” jointly owned by Gadberry and McQueen and subject only to their *joint* decisions on disposition.

Davis and *McQueen* held that embryos were *property*, albeit deserving of special respect. The New York Court of Appeals and the Supreme Court of Arizona both held that frozen embryos are not “persons” for constitutional purposes. (*Kass*, 696 N.E.2d at 182; *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. 2005).) In at least two cases, couples who underwent IVF and whose embryos were lost or destroyed sued the fertility clinics for wrongful death and the courts in both cases ultimately dismissed the actions by finding the embryos were not “persons” for purposes of each state’s wrongful death statute. (*Jeter*; *Miller v. American Infertility Group of Illinois, S.C.*, 897 N. E.2d 837 (Ill. App. Ct. 2008).) A federal district court in Virginia has held that frozen embryos are “property,” subject to an action for recovery under a bailment theory. (*York v. Jones*, 717 F. Supp. 421 (E.D.Va. 1989).) So far, no court has found that cryopreserved embryos are “persons” – but as these arguments continue to be raised in different jurisdictions, and especially with the composition of the United States Supreme Court in flux, this issue will remain a “live” issue until ultimately resolved at the Supreme Court level.

Current Cases. The issues swirling around embryo disposition cases continue to play out in the media. In a very recent San Francisco case, Dr. Mimi Lee sought to use frozen embryos she had created with her husband, Stephen Findley, prior to the breakdown of their marriage. Dr. Lee had been diagnosed with cancer prior to the IVF procedure and, at age 46, even if not infertile from her cancer treatment she is unlikely to be able to have children using her remaining eggs. The Superior Court of San Francisco nonetheless ruled in favor of Mr.

Findley and held that the embryos would have to be thawed and destroyed as provided in the parties' IVF agreement which was executed at the fertility clinic in compliance with California Health and Safety Code Section 125315, a statute requiring reproductive healthcare providers to give ART participants a consent form with options for disposition of the reproductive material upon the occurrence of certain contingencies. (*Findley v. Lee*, #FDI-13-780539, California Superior Court, County of San Francisco.) The *Findley* court held that while Lee might have a right to procreate in other circumstances not before the court, she did not have a right to procreate with Findley. That decision was not appealed and is now a final judgment.

The actress Sofia Vergara and her former fiancé created embryos when they were together for the purpose of having children together. They split up, and Ms. Vergara's former fiancé sued in Superior Court in California seeking the right to use the embryos, claiming that he was coerced into agreeing to discard the embryos in the event of the dissolution of their relationship. Distinguishable from *Findley*, the consent forms signed in this case did not have an option for what to do with the embryos in the event of the dissolution of their relationship; the forms only covered what to do in the event of their death. That case is pending.

<http://people.com/celebrity/sofia-vergara-files-suit-blocking-ex-nick-loeb-using-frozen-pre-embryos/>, last visited 4/17/2017.

What are lawyers for people like Jack and Diane Davis supposed to tell our clients, other than that nothing is certain? Some lessons to be gleaned from the cases discussed above are: (1) If an agreement has been signed that prevents one party from using the embryos without the other party's consent, the court most likely will enforce it; (2) If the IVF agreement provides that one party may use the embryos without the other party's consent, a court *might* enforce it, but it might not, depending on the particular circumstances of the case and the established law of the jurisdiction; (3) If there is no unambiguous written agreement, the court is likely to balance the parties' respective interests; and (4) If the person who wants to use the embryos has other reasonable means of having biological children, that person is unlikely to be allowed to use the cryopreserved embryos against the other person's wishes.

Conclusion

In the absence of clear statutory authority, it is impossible to predict whether a court will rely on public policy grounds, constitutional grounds, contract principles or equitable principles to determine the fate of the parties and the embryos. However, one thing is certain: under the

current state of the law, it is impossible to provide clear guidance to a family law client wishing to use embryos that were created during a now-ended marriage. This is an issue that cries out for responsible legislation. The many couples undergoing fertility treatments as well as the physicians and other health care professionals providing these treatments deserve clarity on this important issue, rather than having to rely on guesswork and thereby risk years of litigation. And family law attorneys – as well as estate planning attorneys – would be well-advised to be proactive in asking prospective clients about whether they have embryos in storage or expect to engage in fertility treatments that would include creating embryos together. As with so many other things, prevention is the best cure, and if attorneys can help clients craft clear and specific directives, whether in assisted reproduction contracts or in estate plans or in pre-nuptial agreements or otherwise, to avoid the emotionally and financially costly prospect of a court battle fought on shifting terrain, we will be doing our clients and communities a great service.

