MCLE Article: The Family Lawyer's Guide to Assisted Reproduction Law in 2016

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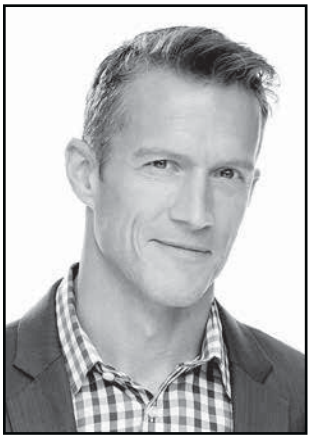

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(Check the end of this article for information on how to access 1 hour of Legal Specialization in Family Law and 1 hour of general self-study credits.)

Assisted reproduction law is such a rapidly changing field that it is hard to keep up. Every year sees substantial changes, and 2016 was no exception. This article updates an article run in FLN in 2015 and includes significant legislative changes enacted since then. These changes broadened the statutory definition of "sperm donor," created a new statutory definition of "egg donor;" expanded California's jurisdiction in surrogacy cases and clarified what information needs to be provided to the court when Intended Parents use anonymous egg or sperm donors. The article also addresses the new frontier of embryo litigation.

What is "assisted reproduction"?

"Assisted reproduction" is defined in the California Family Code as "conception by any means other than sexual intercourse." (Cal. Fam. Code § 7606 (a).) Assisted reproduction methods include egg donation, sperm donation, embryo donation, and surrogacy. However, instead of having one statutory scheme to cover all the various types of assisted reproduction, our Family Code addresses each one separately, if at all.

Jurisdiction

When addressing jurisdictional issues, it is critical to remember that our courts must have both *personal* and *subject matter* jurisdiction. The jurisdictional provisions for California's Uniform Parentage Act ("UPA") can be found in Family Code section 7620. Legislation was enacted in 2016 that will provide greater clarity regarding when California courts have jurisdiction to address conflicts over assisted reproduction matters and when they do not. Effective January 2017, Family Code section 7620(a) will provide *personal jurisdiction* over any person "who has sexual intercourse or causes conception with the intent to become a legal parent by assisted reproduction in this state, or who enters into an assisted reproduction agreement for gestational carriers in this state, … as to an action brought under [our UPA] with respect to a child who may have been conceived by that act of intercourse or assisted reproduction, or who may have been conceived as a result of that assisted reproduction agreement." This subsection will provide *subject matter jurisdiction* over all gestational

surrogacy cases where (1) the intended parents or surrogate reside (or resided at the time of contracting) in California, (2) the medical procedures leading to conception (IVF and/or embryo transfer) were carried out in California, or (3) the child is born in California.

Standing

The Family Code has at least two important procedural statutes that address standing, i.e., who can bring a case to establish (or, presumably, disestablish) parentage in cases involving assisted reproduction. Family Code section 7630(f) provides that "[a] party to an assisted reproduction agreement may bring an action at any time to establish a parent and child relationship consistent with the intent expressed in that assisted reproduction agreement." An "assisted reproduction agreement" is defined in Family Code section 7606(b) as "a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract." Under these two statutes, any person who enters into a written agreement (e.g., a sperm donation contract) that sets out the parties' intentions as to who will be a parent and who will not will have standing to petition the court to obtain an order of parentage or non-parentage consistent with the intentions memorialized in the agreement.

Sperm Donation

Sperm donation, because it is relatively simple and also relatively inexpensive, is probably the most common form of assisted reproduction. The rules applying to sperm donation can be found in Family Code section 7613. Pursuant to section 7613(a), "[i]f a woman conceives through assisted reproduction with semen … donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived. The other intended parent's consent shall be in writing and signed by the other intended parent and the woman conceiving through assisted reproduction." This version of Family Code section 7613(a), which went into effect in 2016, significantly expands the protections available to non-genetic intended parents using donated sperm to conceive. Prior to 2014, Family Code section 7613(a) only provided protection to husbands consenting to their wives' insemination with donated sperm, and required that the sperm donation be overseen by a physician. The newest version of 7613 is both gender-neutral and marriage-neutral, only requiring that "another intended parent"—male or female, married or unmarried—sign a written consent to the assisted reproduction procedure.

Per Family Code section 7541(e)(2), DNA test results are not admissible to either prove or disprove paternity in cases falling under Family Code section 7613(a). The rights and responsibilities of sperm donors are set forth in Family Code section 7613(b) which, until 2016, stated that "(t)he donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction of a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child." Effective January 1, 2016, this provision has been expanded to eliminate the requirement that the donation of sperm be to a physician or sperm bank. Now, a donor of semen is treated in law as if he were not the natural father of a child resulting from the sperm donations as long as (a) the sperm was donated to a physician or sperm bank or (b) the sperm was donated pursuant to a written assisted reproduction agreement signed by both donor and recipient prior to conception or (c) the court finds clear and convincing evidence that the parties mutually intended the man to be a sperm donor and not a father although there was no physician involved and no written agreement. Note that the sperm must be provided *for purposes of assisted reproduction.* Whether or not a physician is involved, and whether or not there is a written contract, if the sperm is provided by way of sexual intercourse the "donor" will be treated in law as the natural father of the child.

The questions of how courts should differentiate between sperm donors and fathers, and what role medical personnel and procedures should play in that distinction, are being debated in California and around the country. A recent Virginia case held that a man who donated sperm directly to a woman for purposes of a home insemination was a father and not a sperm donor because the woman used a turkey baster for the insemination and a turkey baster is not a "medical device" as required by Virginia's assisted reproduction statute. According to that court, had the woman used a needleless syringe to insert the sperm rather than a turkey baster, the man would have been a sperm donor, but because she used a kitchen instrument rather than a medical instrument, the man was a father with all the rights and obligations associated with that designation.

The American Bar Association published a Model Act Governing Assisted Reproductive Technology in February 2008, which was intended to be consistent with the 2000 and 2002 versions of the Uniform Parentage Act and that does away with the requirement that a medical provider be involved. Under the Model Act, a sperm donor or egg donor is simply a person who provides their gametes for use in assisted reproduction without the intent to be a parent. Under the Model Act, intent to be a parent generally would be demonstrated through a written agreement. However, the "[f]ailure of an individual to sign a consent …, before or after birth of the child, does not preclude a finding of parentage if the woman and the intended parent, during the first two years of the child's life, resided together in the same household with the child and openly held out the child as their own." Model Act, section 604. California's current version of Family Code §7613 is largely consistent with this Model Act.

There are three key California cases interpreting our sperm donation statute: *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386 (1986), *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319 (2005), and *Jason P. v. Dannielle S.*, 226 Cal. App. 4th 167 (2014). In *Jhordan C.*, the First District held that a man who provided his sperm directly to the recipient for purposes of home insemination was a legal father and not a sperm donor regardless of the parties' intentions, because at that time the statute required "donated" sperm to be provided to a licensed physician. In an equally narrow reading of Family Code section 7613(b), in *Steven S.* the Second District held that a man who provided his sperm through a physician was a "sperm donor" and not a "father" because he provided the sperm to a licensed physician for use in insemination of a woman other than his wife, even though he had been the woman's boyfriend and they also had been trying to conceive through sexual intercourse prior to the time of the insemination.

Most recently, in *Jason P.*, the Second District held that even if a man is a statutory sperm donor pursuant to Family Code section 7613, if he receives the child into his home and openly holds the child out as his own child, he has standing to pursue paternity under Family Code section 7611(d), although he would *not* be able to use DNA evidence to prove his paternity, as per Family Code section 7541(e)(2), as noted above. Practitioners can conclude from these cases that California courts will apply Family Code section 7613 strictly when asked to determine a man's status as a sperm donor or a father, relying exclusively on the circumstances of the donation as that statute dictates, unless the man goes on to parent the child—in which case he may pursue (or be pursued through) a parentage action under an entirely different theory.

Egg Donation

In 2016, our Family Code finally acknowledged egg donation and incorporated it into the provisions of Family Code section 7613. Egg donation cannot be treated identically to sperm donation because of the necessity of medical participation in egg donation. In other words, if a man and woman wish to create a child together through artificial insemination—using the man's sperm but without sexual intercourse—and both be that child's legal parents, they can accomplish this by doing the insemination at home without physician involvement and without a signed reproduction agreement specifying otherwise. But egg donation *must* be done in a doctor's office, with lots of signed medical consent forms, and therefore the fact that a physician is involved cannot be determinative of whether the woman providing the eggs is legally a "donor" or a "parent."

Effective January 1, 2016, Family Code section 7613(c) states: "The donor of ova for use in assisted reproduction by a woman other than the donor's spouse or nonmarital partner is treated in law as if she were not the natural parent of a child thereby conceived unless the court finds satisfactory evidence that the donor and the woman intended for the donor to be a parent." In other words, a woman providing eggs for use by another will be treated as an "egg donor" and not a "parent" *unless* (a) the eggs are being provided to her own spouse (or intimate partner in the case of lesbian couples engaging in "co-maternity") *or* (b) there is satisfactory evidence that the woman providing the eggs and the recipient of the eggs *both* intended the woman to be a parent.

The only published California case of any import that explicitly addresses egg donation is *K.M. v. E.G.*, 37 Cal. 4th 130 (2005), a "co-maternity" case. In *K.M.*, a lesbian couple sought medical assistance to conceive a child using the eggs of one of the women (K.M.), with the plan that the other woman (E.G.) would carry and give birth to the child. E.G. ultimately gave birth to twins—the genetic offspring of K.M.—and the two women raised the children together in the home they shared for approximately five years. Upon the break-up of the adult relationship, E.G. alleged that K.M. was legally an "egg donor" and not a "parent." Although K.M. had signed an egg donor consent form at

the fertility clinic prior to the egg retrieval procedure, the California Supreme Court ultimately held that both women were parents because K.M. "provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home." *Id.* at 139. This decision is consistent with, and laid the groundwork for, the *Jason P.* decision discussed above and now is codified in Family Code section 7613(c).

Embryo Donation

California law remains largely silent when it comes to embryo donation. The only statutory guidance we currently have about donating embryos is provided by Family Code section 7630(f), i.e. that if the donor(s) and the recipient(s) have a written agreement between them that clarifies their intended roles, any party has standing to request an order from the court consistent with the intentions expressed in the agreement. There is broad professional consensus that it is unethical, and possibly illegal, to request monetary compensation for embryos, because this is too close to buying and selling children. However, with an estimated half a million embryos currently in storage around the country, this is an area that needs further development, and we can expect to see cases and legislation addressing embryo donation over the next few years.

Surrogacy

There are two kinds of surrogacy: "traditional" surrogacy and "gestational" surrogacy. With traditional surrogacy, the woman carrying the child also is the child's genetic mother; the child is conceived through artificial insemination of the surrogate rather than through IVF and embryo transfer procedures. With gestational surrogacy, the woman carrying the child is not genetically related to the child.

There is clear statutory and case law authority in California regarding gestational surrogacy. The two key cases are *Johnson v. Calvert*, 5 Cal. 4th 84 (1993) and *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410 (1998). In *Johnson*, our Supreme Court found that gestation and genetics are equally valid ways to establish maternity under the Uniform Parentage Act and that where those two methods point in different parentage directions, the "tie breaker" will be the intention at the time of conception. Thus, where it was documented that at the time of conception Ms. Calvert (the genetic mother) intended to be a mother and Ms. Johnson (the gestational mother/surrogate) did not, Ms. Calvert was the legal mother of the child. The court also found that surrogacy contracts do not violate California public policy.

In *Buzzanca*, the Fourth District encountered a case where neither the husband nor the wife, who together had caused the conception of the child through egg donation, sperm donation, and *in vitro* fertilization, was genetically related to the child. Despite the lack of a genetic connection between them and the child, the court concluded that the Buzzancas were the child's *legal* parents, holding that when a married couple, unable to procreate on their own, causes the conception of a child by use of medical technology with the intent to parent the child, they will be held to the status of legal parents regardless of genetics. This case has been cited broadly for the proposition that parentage in assisted reproduction cases is tied almost entirely to intentions, with genetics being largely irrelevant.

More recently, effective January 2013, our Legislature has created a statutory scheme for gestational surrogacy, found in Family Code section 7960, et seq. Section 7960(f)(2), defines a "gestational carrier" as "a woman who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement [as defined in Family Code section 7606]." Section 7962 sets forth the requirements for a valid assisted reproduction agreement for gestational surrogacy, which include identifying the origins of the gametes (i.e., the eggs and sperm), the identities of all parties (the gestational carrier, her partner or spouse, and the intended parent or parents), and how the medical expenses of both the surrogate and the child will be paid. Section 7962 also requires that the gestational surrogacy agreement be notarized. At section 7962(f)(2), it provides that

> [u]pon petition of any party to a properly executed assisted reproduction agreement for gestational carriers, the court shall issue a judgment or order establishing a parent-child relationship, whether pursuant to Section 7630 or otherwise. The judgment or order may be issued before or after the child's or children's birth subject to the limitations of Section 7633 [which provides that a judgment of parentage issued prior to birth is stayed pending birth of the child]. Subject to proof of compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent

of, and has no parental rights or duties with respect to, the child or children.

Thus, as of today, California law regarding *gestational* surrogacy is quite clear. In contrast, California law addressing *traditional* surrogacy, to the extent there is any, remains murky. A "traditional surrogate" is defined, in Family Code section 7960(f)(1), as "a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents." It is interesting that the statute refers to the traditional surrogate as a "gamete donor," in that typically in the case of traditional surrogacy the "donated" gametes are the "surrogate's" own eggs that never leave her body. This is not the typical scenario for a "donation;" a "traditional surrogacy" typically involves a woman agreeing to carry a child for an individual or couple unable to carry a child themselves. There often is no doctor involved and sometimes no written agreement of any kind. Many traditional surrogates are family members, for example, a sister carrying a baby for her infertile sibling. The pregnancy is brought about by simple sperm donation and insemination, often at home without medical assistance. Thus, as with sperm donation, this form of assisted reproduction may occur with no professionals involved.

While section 7960 gives us a definition of what constitutes a "traditional surrogate," that is the *only* mention of traditional surrogacy in the Family Code. No guidance is provided for what would make a traditional surrogacy valid. Presumably, traditional surrogacy qualifies as "assisted reproduction" as defined in section 7606(a) because it is a form of non-sexual reproduction. Also, if there is a written agreement between the parties that spells out who the intended parents are, the agreement also should qualify as an "assisted reproduction agreement" as defined in section 7606(b). However, beyond that the courts are left to figure out for themselves whether traditional surrogacy exists and, if so, what it consists of.

The only significant published case on traditional surrogacy is *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218 (1994), which was published more than twenty years ago when assisted reproduction law was far less developed than it is today. In *Moschetta*, a husband and his infertile wife contracted with a woman to carry a child for them. The woman was inseminated with the husband's sperm. The plan was to establish the husband's paternity before the baby was born and then have the woman consent after birth to an adoption by the wife. When the couple broke up during the pregnancy, the woman refused to give the baby to the husband and he sued to have the surrogacy contract enforced. The court of appeal held that *Johnson v. Calvert* did not apply because there was no "tie" to break, given that the woman was both the child's genetic *and* gestational mother. Per the Fourth District, enforcing a pre-birth contract to give up one's own baby would go against California public policy relating both to parentage and adoption. Therefore, it concluded that the woman was the mother and the husband was the father, and it remanded the case to the trial court to enter custody and support orders.

As previously noted, *Moschetta* was decided more than twenty years ago. Much has changed since then, and traditional surrogacy may well be a legally viable option given the current statutory and case law frameworks for assisted reproduction. It is a far less costly option for people unable to conceive without assistance and it involves far less medical intervention, making it preferable to many families—and to many potential surrogates—from both a financial and a health perspective. However, absent clear guidance from our legislature or our courts, people engaging in traditional surrogacy in California currently do so at their own peril.

What to do with Cryopreserved Embryos Upon Separation or Divorce?

One final area of concern for family law attorneys involves 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 will sometimes not tell their attorneys about unused frozen embryos unless they are specifically asked about them. But 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)?

Just about every time a couple or a single person goes through IVF in order to have a child, embryos are created. This is true whether the couple is married or unmarried, same-sex or different genders or a single person trying to become a parent through assisted reproduction. In the vast majority of IVF cases, excess embryos are created that are not immediately used. 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 frozen 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 & Francoise 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 twenty years. See Dowling-Lacey, Donna 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 created through assisted reproduction technology ("ART"), and the states follow a patchwork of legislative and judicial approaches to the various issues arising from the use and disposition of frozen embryos.

California remains largely silent when it comes to providing a framework for attorneys and the courts to resolve these issues. California Health and Safety Code section 125315 requires reproductive healthcare providers to give ART participants a consent form with options for the disposition of the reproductive material upon the occurrence of certain contingencies, while California Penal Code section 367g makes it a felony to use or implant sperm, eggs, or embryos except as expressly provided in a signed writing by the provider of the genetic material. The collective effect of these statutes arguably suggests that control and decision-making regarding one's reproductive material belongs to each person individually.

As of this writing, there have been fewer than a dozen cases decided by appellate courts in 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 twenty-four 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?

For guidance through the case law, one must look at the approaches taken in other jurisdictions, starting with Tennessee in *Davis v. Davis*, 842 S.W.2d 588 (1992), the first case to address the disposition of frozen embryos upon divorce. 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 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 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 and anyway, if Diane and Jack are typical, they barely paid attention to the consent forms they signed.

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 quickly checking in the informed consents. 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. For twenty years, every case decided by a court of record, 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 (Tx. 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 but with no genetic contribution from the wife. The Washington Supreme Court held that the wife had an equal right to determine the fate of the embryos in spite of her lack of genetic connection (*Id.* at 267), but 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." It prevented either of the Litowitzes from unilaterally using them to bear a child. *Id.* at 270. The lesson of these cases is that unambiguous language in the medical consent forms likely 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 in the cases they have considered 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 from Tennessee, 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 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); *Szafranski v. Dunston*, 34 N.E.2d 1132 (Ill. App. 2015). In *Reber*, the Pennsylvania Superior Court found that the "balancing of interests" test appropriate and also 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 *Szafranski* case also 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 they had entered into an enforceable oral agreement and that her interest in the use of the embryos was greater than his interest in preventing their use. *Szafranski*, 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. 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. Ann., R.S. §§9:121 et. seq.; New Mexico Stats. Ann. §§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 interests standard and the entire line of cases beginning with *Davis* might be called into question.

Davis 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 clinic 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).

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 forty-six, 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, as required by California Health and Safety Code Section 125315, requires 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. It 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://www.dailymail.co.uk/news/article-3294080/Sof-Vergara-Nick-Loeb-battling-frozen-embryos.html, last visited 08/29/16.

The most recent appellate ruling in this area comes from the Missouri Court of Appeals for the Eastern District. In *McQueen v. Gadberry*, No. ED103138 (Mo. Ct. App. Nov. 15, 2016), the court upheld a trial court's decision characterizing the frozen embryos as a special category of property and, citing *Witten*, prohibiting either party from using, transferring or destroying them without the other party's written consent. See link to full opinion at: http://www.courts.mo.gov/file.jsp?id=107496. Notably, the court held that frozen embryos are not "children" for purposes of Missouri's dissolution of marriage statutes. This case is different than all other litigated frozen embryo disposition disputes cases because Missouri has legislation, section 1.205, R.S. Mo., that says life begins at conception and that an embryo is an unborn child entitled to the same rights and privileges as any other resident or citizen of the state. *Id.* The court of appeals ruled that the public policy set forth in that set of statutes could not be applied to a marital dissolution action without violating fundamental constitutional rights. *Id.*

What are the 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 will most likely 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. It will likely depend on the particular circumstances of the case and the jurisdiction; (3) If there is no unambiguous written agreement, the court will 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 millions of 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 should they end up disagreeing about later use of their genetic material.

California is far ahead of many other states when it comes to assisted reproduction law; yet even here, many aspects of the law of assisted reproduction remain unclear. Family law practitioners are well-advised to gain some basic familiarity with this area of law, and, as with so many other areas of family law, also are well-advised to consult an experienced assisted reproduction attorney when things become complicated, as they so often do in this new frontier.