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The Frozen Embryo Debate Isn't Over

The Connecticut Supreme Court has left for another day a number of thorny questions regarding the preservation of frozen embryos.

By **Eric M. Higgins** | November 07, 2019 at 04:40 PM

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What happens to frozen embryos before they are able to become babies is still a matter that promises to undergo further judicial review.

In 1978, Louise Brown, the "test tube baby," was born in England, the first baby conceived by the process of in vitro fertilization. Then, in 1984, Zoe Leyland was born in Australia, the first baby from a frozen embryo. Today, some estimate that more than 1 million frozen embryos are in storage.

IVF and other assisted reproductive technologies have revolutionized parenthood, and have been a blessing to many. But these marvelous scientific advancements have come with unprecedented and profound legal and ethical issues, with the science always ahead of the law. ART legislation has been spotty. Courts are often left to grapple with the issues on a case-by-case basis. This area cries out for comprehensive legislation.

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In Connecticut, ART legislation is limited, and there is no statute governing the disposition of frozen embryos in the event of a divorce. When you add to this legal vacuum the fact that nearly half of first marriages (and even more second marriages) end in divorce, the vast number of frozen embryos currently in storage and the unique and hotly disputed moral status of frozen embryos, you have the makings of a case that would stretch King Solomon himself.

On Nov. 5, the Connecticut Supreme Court released its decision in just such a case: *Bilbao v. Goodwin*. Jessica Bilbao and Timothy Goodwin married in 2011. Shortly thereafter they underwent IVF. Several embryos resulted that were frozen. They signed clinic consent forms, which included a section indicating that in the event of divorce the embryos would be thawed and discarded.

They divorced in 2017. At the trial in their divorce case, Bilbao argued in favor of disposing the embryos as agreed, while Goodwin argued in favor of preserving them. The judge ruled that the clinic consent form was not a binding contract, treated the embryos as property, and awarded them to Goodwin.

The Supreme Court reversed. It concluded the clinic form was a binding contract. The court left for another day a number of other thorny questions: whether a contract that requires preservation of the embryos should similarly be enforced; whether the courts should enforce an agreement where there was an abuse of trust in connection with signing, or unforeseen circumstances had arisen since the agreement was signed; and what should happen where there is no agreement. More litigation is on the way.

The Supreme Court's analysis is sound as a matter of contract law. After all, Goodwin admitted he signed and understood the clinic consent form, although he testified that he had changed his mind. Changing your mind usually is not a defense to enforcement of a contract. Yet the decision to apply basic contract law to the fate of a human embryo—as if it were a couch, a frying pan or a checking account—is unsettling.

In a comprehensive review of the issue in the Journal of the American Association of Matrimonial Lawyers, Deborah L. Forman, then professor of law at Whittier Law School, concluded that clinic consent forms are unsuited for resolving embryo disposition disputes at the time of a divorce. The documents often are poorly drafted, unclear and internally inconsistent. They are lengthy and replete with dense, technical language. They cover many issues, including medical risks, financial responsibility for the procedures, limitations of liability, embryo storage terms and storage fees. When people sign documents committing themselves to proceed with IVF and embryo storage, emotions can be intense. The torrent of information can be overwhelming, causing information overload that can inhibit fully considered decisions. And this assumes people even read the documents.

The issue presented in *Bilbao* is just one of many legal issues presented by the emerging field of ART.

Rather than leaving the courts to fend for themselves, the Connecticut Legislature should enact comprehensive ART legislation. It need not re-create the wheel. In January 2019, the American Bar Association adopted an updated Model Act Governing Assisted Reproduction. Its purpose is to provide the states with model

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legislation that they can adopt to bring ART law current with legal, social and medical advancements and to promote uniformity in court decisions. The model act covers many aspects of ART law, including informed consent standards, mental health evaluation and counseling, privacy and confidentiality, embryo transfer and disposition, parentage of children born from ART and surrogacy.

With respect to the issue presented in *Bilbao*, the model act "sides" against the Supreme Court's decision in *Bilbao*. It provides that either party to an embryo storage or disposition agreement may withdraw his or her consent to the agreement at any time before the embryo is transferred to a uterus.

The courts today are ill-equipped to resolve these disputes on a case-by-case basis. Litigants need greater predictability and uniformity in the law and its application. The Legislature should obtain the views of doctors, scientists, fertility clinic operators, bioethicists, social scientists, ART lawyers, the community of parents and would-be parents and other stakeholders, and then enact comprehensive ART legislation. This would make Connecticut a leader in this important field, and free courts to do what they do best: apply the law as enacted by the Legislature with constitutional review as necessary.

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