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New Haven Register

Opinion

Opinion: Law must catch up to science on assisted reproduction

By Eric M. Higgins
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Photo: Associated Press A scientist works during an IVF process.

More than 40 years have passed since Louise Brown, the “test tube baby,” was born in England, the first baby conceived by in vitro fertilization. Since then, more than one million babies have been born through the use of IVF and other assisted reproductive technologies in the United States alone. The Connecticut Department of Public Health reports that Connecticut ranks fourth in the country in its per-capita use of assisted reproductive technology.

Assisted reproduction has revolutionized parenthood — a blessing to many who otherwise could not have had children. But these marvelous scientific advancements have birthed profound legal and ethical issues, with the science always running ahead of the law. Legislation in this area is sparse. Courts are often left to grapple with the issues on a case-by-case basis, with little or no legislative or common law guidance. This area cries out for comprehensive legislation.

To take just one example, Connecticut, like most states, has little legislation governing assisted-reproductive technologies, and there is no statute governing the disposition of frozen embryos in the event that the intended parents disagree about what to do with them. When you add to this legal vacuum the fact that nearly half of first 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 challenge King Solomon himself.

This month, 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, which were frozen. The couple signed clinic consent forms which included a section indicating that in the event of divorce, their frozen embryos would be discarded.

They divorced in 2017. Bilbao wanted to dispose of the embryos. Goodwin, who had changed his mind in the intervening years, wanted them preserved. The Supreme Court ruled that the parties' election in the clinic form to have the embryos destroyed upon divorce was binding. But the court left for another day a number of other thorny questions: whether the courts should enforce an agreement where unforeseen circumstances have arisen since the agreement was signed, and what should happen where the intended parents did not have an agreement as to what to do. More litigation is on the way.

The Supreme Court's analysis is sound as a matter of contract law. Changing your mind doesn't get you out of contract. Yet the application of basic contract law to the disposition of a human embryo — as though it were a commodity — is unsettling.

In a comprehensive review in the Journal of the American Association of Matrimonial Lawyers, Deborah L. Forman, then professor of law at Whittier Law School, argued the embryo disposition choices that people agree upon in clinic consent forms should not be written in stone. People should be permitted to change their minds. When people sign documents committing themselves to proceed with IVF and embryo storage, the last thing on their minds is divorce. It is unrealistic to expect them to decide what should happen to the embryos they are about to create in the event of divorce.

Further, the documents often are poorly drafted, unclear and internally inconsistent. They are lengthy and filled 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. The torrent of information can be overwhelming, causing information overload that can inhibit fully considered decisions. And this assumes people even read the documents.

Bilbao v. Goodwin involved just one of countless new legal and ethical issues presented by the emerging field of assisted reproduction that the courts will be asked to navigate with little guidance or precedent. The Connecticut Legislature should fill this void with comprehensive legislation.

The Legislature would not have to re-create the wheel. In January, the American Bar Association adopted an updated Model Act Governing Assisted Reproduction. The Model Act covers many aspects of assisted reproduction 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.

On the narrow issue of whether the embryo disposition choices that parties make when they sign the clinic consent forms should bind them later, the Model Act sides with Professor Forman and against the Supreme Court's decision in Bilbao v. Goodwin. The act provides that a party to an embryo storage or disposition agreement may withdraw his or her consent to the agreement at any time before embryo transfer to a uterus.

It is time that the law caught up to the science of assisted reproduction. The Legislature should hold hearings to obtain the views of doctors, scientists, fertility clinic operators, bioethicists, public health officials, social scientists, lawyers, the community of parents and would-be parents, and other stakeholders, and then enact comprehensive legislation. This would make Connecticut a leader in this important field, and free our courts to do what they do best: apply the law as enacted by the legislature with constitutional review as necessary.

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