

Opinion: Questions arise in divorce cases tied to frozen embryos. Can someone be made a parent against their will?

By Kevin C. Brown
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For more than four decades, Assisted Reproductive Technologies (ART), specifically, In Vitro Fertilization (IVF), have more than delivered on their promise to individuals and couples facing fertility challenges. Some might even characterize proliferation of these procedures, refinements in technology, and increases in successful outcomes, as modern-day miracles. Countless people have this technology to thank for making them parents to genetically related children.

As with every profound technological advancement, public policies, legislation, and the courts all trail behind and take time to catch up. The discourse needed to reconcile the complex legal, moral, and ethical questions raised by new technology can be chaotic and inefficient, as each incremental step raises new questions.

For IVF, this is underscored by the Alabama Supreme Court's February decision, which held frozen embryos as human life, comparable to a person or child.

The Alabama ruling is the first time (at the state level) a court has applied human and individual rights to frozen embryos. And while the Alabama ruling was narrow, the idea of personhood before birth in the context of IVF has opened the door to a range of questions that courts and legislatures will have to address, that now includes: "When human life begins?" — as in the abortion debate.

Specifically, the Alabama ruling held that intended parents may pursue wrongful death claims against a clinic following a storage facility accident and the clinic's inadvertent destruction of frozen embryos. The ruling did not address other issues such as the legality of the IVF procedure itself or consensual disposition of embryos. Notwithstanding, the ruling raises new concerns about the future for ART and IVF and the accessibility of service as the door is now open to legal liability arising from the discarding or destruction of embryos. There are concerns that this ruling could trigger a broader anti-abortion effort to recognize a fetus in the womb, or even a frozen embryo, as a person under *federal* constitutional law.

Prior to the Alabama ruling, state-specific legal tests centered around disputes in the context of divorce or the death of a spouse and the right to access to one's frozen embryos for implantation or destruction.

State court rulings have varied and centered around the tenets of contract law and property rights. Courts have struggled to consider an embryo as "property" and been reluctant to rule a frozen embryo equivalent to human life. Court determinations largely have been rooted around three approaches:

Contractual Approach: Decisions based on documents signed by the parties at the time the embryos are created or reference to any other written agreement regarding the embryos. Is the IVF storage agreement valid and enforceable?

Balancing Approach: Courts balance the parties' interests in using or disposing of the frozen embryos, most often when there are extreme circumstances or no preexisting agreement in place. Are there any extraordinary factors that favor the balance of interests toward one party or the other?

Contemporaneous Mutual Consent Approach: Courts presume an equality between the parties and allow either party to change his or her mind, despite any previous agreement and therefore make no determination as to ownership or

disposition. Under this approach, the status quo is maintained until both parties' consent to a disposition.

The absence of legislation in Connecticut offers no guidance. However, the Connecticut Supreme Court has leaned toward a spouse's right *not* to procreate and ruled that the frozen embryos can be destroyed. The court specifically cautioned that it was making no determination concerning a contract that, if enforced, would result in a person becoming a parent against his or her will.

Similarly, the New York Court of Appeals ruled more than 25 years ago in a case where the parties had signed an agreement providing that in the absence of a different mutual determination, their embryos would be donated to research. The New York court held that the parties' agreement governed.

So, where does this leave us?

Parties in divorce disputes with interests tied to frozen embryos are left with a conundrum — real life questions with either partial legal answers or no answers at all. Parties' rights will differ depending in which state they reside. Cases in which one party wishes to implant frozen embryos to become a parent against the other party's wishes, absent a prior agreement to destroy or donate the embryos, will face a long, inefficient, and expensive road to resolve their disputes.

This is just the beginning. Many other questions await further determination by the courts and state legislatures. Can someone be made a parent against their will? If so, what custody rights would the opposing party have to the genetic child? Or, what obligation would he or she have to financially support the child?

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