THE PRE-EMBRYO QUANDARY: HOW TO ELIMINATE DISPUTES THAT COMMONLY ARISE AFTER COUPLES COMMENCE IVF

Debra B. Walker[*]
Shalyn L. Caulley[**]

In June 2015, the Illinois Appellate Court ruled that Karla Dunston could use the pre-embryos created by her former boyfriend, Jacob Szafranski, against his objection. In 2010, the parties entered into an agreement to undergo in vitro fertilization ("IVF") together. This was necessary after Karla was diagnosed with lymphoma, and was expected to lose fertility after completing chemotherapy. After the pre-embryos were created, their relationship ended and Jacob no longer wanted her to use the pre-embryos. The court held that Karla could use the pre-embryos to have a child because the parties entered into an oral contract when they agreed to create pre-embryos that Karla could use to have a biological child. The court also noted that even if the parties did not have a binding contract, Karla would still prevail because her interests outweighed Jacob's since the pre-embryos were her last and only opportunity to have a biological child.

Pre-embryo disputes of this nature have been steadily increasing as more couples have resorted to IVF to have children. Only ten states have court rulings on how to handle pre-embryo disputes after they arise. The rulings can be organized into three categories with courts either (1) enforcing prior contracts, (2) ignoring prior agreements and instead balancing the parties' interests, or (3) ruling that the parties themselves must reach an agreement or pay for the pre-embryos to be frozen indefinitely. Thus, couples undergoing IVF in the other forty states experience uncertainty as to the fate of their pre-embryos in the event of a future disagreement. This Article recommends that Congress pass legislation requiring all couples initiating IVF to enter into a contract that would remain binding if a dispute were to arise later.

* Cook County Circuit Court Judge assigned to the Domestic Relations Division. Judge Walker was previously a partner at Clausen Miller P.C. J.D., 1987, University of Illinois College of Law. B.A., Accounting, 1982, University of Illinois.

** J.D. Candidate, 2017, University of Illinois College of Law. B.A., Bradley University. Many thanks to Judge Walker for this wonderful opportunity and to the editors and members of the *University of Illinois Law Review* for all of the support over the past year.

This solution would allow parties to proactively choose what will happen to their pre-embryos and eliminate the need for courts to intervene in these familial disputes.

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I. INTRODUCTION

Reproductive endocrinologists estimate that currently there may be as many as a million "leftover" frozen pre-embryos being stored in the United States from couples who went through in vitro fertilization ("IVF") in an effort to conceive a child.[1] Although some countries have strict regulations that limit how many embryos may be transferred at once, or how long they may be frozen, the United States has left the field of IVF largely unregulated.[2] This is problematic because IVF is a growing trend in the United States for many reasons, including couples waiting longer to start a family and losing fertility as a result, IVF procedures becoming more medically successful, and the fact that IVF has gained more acceptance over time.[3]

As is standard for all medical procedures, couples who undergo IVF have to sign an informed consent form created by the medical facility which explains the procedure's benefits and risks before treatment begins.[4] While some IVF consent forms delve into legal issues such as parental rights, the boilerplate provisions generally cannot resolve the complex legal issues that may arise after a couple completes the procedure.[5] Currently, one of the biggest legal issues surrounding IVF is who

1. Ellie Kincaid, *An Increasingly Common Medical Procedure is Raising Ethical Questions We're Not Prepared to Deal with,* BUS. INSIDER (June 19, 2015), http://www.businessinsider.in/An-increasingly-common-medical-procedure-is-raising-ethical-questions-were-not-prepared-to-deal-with/articleshow/47740491.cms.

2. Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. Times (June 17, 2015), http://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html.

3. Jen Christensen, *Record Number of Women Using IVF to Get Pregnan*t, CNN (Feb. 18, 2014), http://www.cnn.com/2014/02/17/health/record-ivf-use/.

4. Catherine Tucker, *Ethical and Legal Issues Arising from the Informed Consent Process in Fertility Treatments*, 9 ABA HEALTH, no. 7, 2013, *available at* http://www.americanbar.org/content/newsletter/publications/aba_health_esource_home/aba_health_law_esource_1303_tucker.html.

5. *Id.*

gains custody of any leftover pre-embryos and gets to decide their ultimate fate if the parties cannot reach a mutual agreement.[6]

Part II of this article discusses the IVF procedure and how courts are resolving disputes regarding who gets custody of pre-embryos. Part III further explains and analyzes the different standards courts are using to determine who gains custody of pre-embryos. Finally, Part IV recommends that Congress pass a 'Pre-Embryo Remainder and Disposition Act' that requiring couples to enter into a contract prior to initiating IVF.

II. BACKGROUND

In 1978, Louise Brown made history as the world's first baby conceived through IVF[7]; since then more than five million babies have been conceived using IVF technology.[8] "Typically, the IVF procedure begins with hormonal stimulation of a woman's ovaries to produce multiple eggs," which are removed, placed in a glass dish, and fertilized with sperm.[9] This procedure creates the pre-embryos, which are cryopreserved in liquid nitrogen for later use.[10] IVF doctors face the difficult challenge of finding "a balance between retrieving enough eggs to give a couple a reasonable chance of obtaining a pregnancy and running the risk of potentially creating so many embryos that many are destined to remain unused by the couple [who] created them."[11]

Couples who undergo IVF are often so focused on the goal of creating a child that they fail to consider what they will do with any remaining pre-embryos if they complete their family before they are all implanted, or in the event they split up.[12] In a survey of fifty-eight couples, researchers from the University of California "found that [seventy-eight] percent were undecided about the fate of their stored embryos."[13]

There are four options from which couples with remaining pre-embryos can choose: (1) keep them frozen for later use or indefinitely, (2) discard them by letting them thaw, (3) donate them to another recipi-

6. Lewin, *supra* note 2.

7. Barbara Atkinson, *In-Vitro Fertilization Raises Custody Rights and Family Law Questions*, SEO LAW FIRM (Oct. 12, 2012), http://www.legalnewsarchive.com/2012/10/in-vitro-fertilization-raises-custody-rights-and-family-law-questions/.

8. Bonnie Rochman, *5 Million Babies Born Through IVF in Past 35 Years, Researchers Say*, NBC NEWS (Oct. 14, 2013, 4:54 PM), http://www.nbcnews.com/health/5-million-babies-born-through-ivf-past-35-years-researchers-8C11390532.

9. Kass v. Kass, 696 N.E.2d 174, 175 (N.Y. 1998).

10. *Id.*

11. Karen Synesiou, *The Dilemma of Remaining Frozen Embryos*, CTR. FOR SURROGATE PARENTING, INC., http://www.creatingfamilies.com/intended-parents/?Id=169 (last visited June 13, 2016).

12. See Laura Beil, *What Happens to Extra Embryos After IVF?*, CNN (Sept. 1, 2009), http://www.cnn.com/2009/HEALTH/09/01/extra.ivf.embryos/index.html?iref=24hours ("She was asked in the beginning about the matter of surplus embryos, but how could she think about those she might not want when her thoughts were consumed by the children she longed for?"). Lewin, *supra* note 2 ("'But if I ask what they'll do with [leftover embryos], they often [say] . . . I'll think about that tomorrow.'").

13. Beil, *supra* note 12.

ent for implantation, or (4) donate them to research.[14] Unfortunately, many couples cannot agree on which option is best for many reasons, including religious beliefs, ideas of when life begins, and willingness to live with having a biological child raised by another family.[15] Since the 1990s, disputes involving couples who cannot reach a mutual agreement over the fate of their leftover pre-embryos have increasingly been taken to the courts.[16]

Currently, only ten states have court rulings on how disputes over pre-embryos will be resolved. The rulings can be broken up into roughly three different categories, with courts either (1) enforcing prior agreements the parties entered into, (2) ignoring prior agreements and balancing the parties' interests, or (3) ruling that the parties themselves must either reach an agreement or pay for the pre-embryos to continue to be frozen.[17]

III. ANALYSIS

Until either the Supreme Court sets a clear standard determining the custody of pre-embryos, or Congress passes regulations that govern custody of pre-embryos, state courts will continue to struggle to determine how to resolve these disputes. This section further analyzes the three approaches state courts use to award custody of pre-embryos and the rationale behind these decisions.

A. Contractual Approach

The most common approach to resolve disputes over pre-embryos is to "honor the parties' own mutually expressed intent as set forth in their prior agreements," because it "properly allows them, rather than the courts, to make their own reproductive choices while also providing a measure of certainty necessary to proper family planning."[18] In *Szafranski*, the Illinois Appellate Court found that "honoring such agreements will promote serious discussions between the parties prior to participating in in vitro fertilization regarding their desires, intentions, and concerns."[19]

14. Synesiou, *supra* note 11.

15. *Id.*

16. Barbara Herman, *Sofia Vergara–Nick Loeb Frozen Embryo Custody Case Raises Legal Questions*, INT'L BUS. TIMES (Apr. 16, 2015, 3:35 PM), http://www.ibtimes.com/sofia-vergara-nick-loeb-frozen-embryo-custody-case-raises-legal-questions-1885106.

17. Szafranski v. Dunston, 993 N.E.2d 502, 514 (Ill. App. Ct. 2013); *In re* Marriage of Witten, 672 N.W.2d 768, 781 (Iowa 2003); A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2015); Reber v. Reiss, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012); *In re* Marriage of Dahl & Angle, 194 P.3d 834, 840 (Or. Ct. App. 2008); *In re* Marriage of Litowitz, 48 P.3d 261, 268 (Wash. 2002); Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).

18. *Szafranski*, 993 N.E.2d at 507, 514–15.

19. *Id.* at 515.

Other courts, however, have held that it would be against public policy to enforce prior agreements between parties because "on matters of such fundamental personal importance, individuals are entitled to make decisions consistent with their *contemporaneous* wishes, values and beliefs."[20] In *Witten*, the court declined to enforce any prior agreements regarding pre-embryos because "whether embryos are viewed as having life or simply as having the potential for life, this characteristic or potential renders embryos fundamentally distinct from the chattels, real estate, and money that are the subject of antenuptial agreements."[21]

B. Balance of Interest

Under the balance-of-interest approach, the "court consider[s] the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions," and then grants custody to the parent who appears to have a stronger interest.[22] "Ordinarily the party choosing not to become a parent will prevail,"[23] but "courts applying the balancing approach have noted that a party's inability to have a child weighs in his or her favor."[24]

The Supreme Court of New Jersey is the only court that allows either party to change their "mind about disposition up to the point of use or destruction of any stored pre-embryos."[25] New Jersey courts will balance the parties' interests even if there was a prior contract.[26] Several courts, however, defer to the prior agreements of the parties, and will use the balancing approach absent a binding contract.[27]

C. Contemporaneous Mutual Consent

The contemporaneous mutual consent model proposes that "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo."[28] "If one of the partners rescinds an advance disposition decision and the other does not, the mutual consent principle would not be satisfied and the previously agreed-upon disposition decision could not be carried out."[29] In the event parties cannot reach this mutual agreement, then they must leave the embryos in

20. *Witten*, 672 N.W.2d at 777 (emphasis added) (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88 (1999)); *see also A.Z.*, 725 N.E.2d at 1057–58 ("As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.").

21. *Witten*, 672 N.W.2d at 781.

22. *Szafranski*, 993 N.E.2d at 513 (citing *Davis*, 842 S.W.2d at 598, 603).

23. J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001).

24. *Szafranksi*, 993 N.E.2d at 514.

25. *J.B.*, 783 A.2d at 719.

26. *Id.*

27. *Szafranski*, 993 N.E.2d at 513–14.

28. *In re* Marriage of Witten, 672 N.W.2d 768, 778 (Iowa 2003).

29. *Id.*

a frozen state, because "by preserving the status quo, it makes it possible for the partners to reach an agreement at a later time."[30]

While the contemporaneous mutual consent "approach benefits from ease of application and at least the appearance of respecting the rights of the parties involved, the Superior Court of Pennsylvania has aptly noted: 'this approach strikes us as being totally unrealistic. If the parties could reach an agreement, they would not be in court.'"[31] Currently, "Iowa is the only state to have expressly adopted the contemporaneous mutual consent approach."[32]

IV. RECOMMENDATION

Couples who undergo IVF in the forty states that have yet to determine what standard will apply in disputes over pre-embryos are highly unprotected. In order to establish uniformity and predictability, Congress should pass a Pre-Embryo Resolution and Disposition Act. The Act would require couples who want to initiate IVF to execute a contract that clearly states both (1) the rights of each party to use the pre-embryos, and (2) what will happen in the event the couple cannot reach an agreement about what to do with any unused pre-embryos.

In the section that covers the rights of each party to use the pre-embryos, the couple would be responsible for deciding how the pre-embryos may be used between the parties. For example, they could stipulate that neither party could use the pre-embryos unless both agree contemporaneously. Alternatively, the parties could stipulate that one or both of them has unlimited access to the pre-embryos for their own use.

In regards to the disposition of pre-embryos, the couple could choose from two options, either agreeing to give one party sole decision-making power over the pre-embryos, or specifically stating which disposition method they have agreed upon. If the couple decides to select the method of disposition, then they could choose between (1) letting them thaw, (2) donating them to another couple for implantation, or (3) donating them to research. The Act should only allow pre-embryos to be frozen for a maximum period of ten years, and thus would not allow couples to choose to keep them frozen indefinitely.

30. *Id.*

31. *Szanfranski*, 993 N.E.2d at 511 (citing Reber v. Reiss, 42 A.3d 1131, 1135 n.5 (Pa. Super. Ct. 2012)).

32. *Id.*

V. CONCLUSION

Congress should pass a Pre-Embryo Resolution and Disposition Act because when couples begin IVF, they are often too focused on creating a child to think about many of the issues that may arise later.[33] Since the Act would require couples to execute a contract *prior* to undergoing IVF, it will allow them, instead of the courts, to make the difficult but crucial choices early on, leaving them in control of the fate of their pre-embryos.

33. *See* Lewin, *supra* note 2.