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Law and Ethics Meet: When Couples Fight Over Their Frozen Embryos

Bioethics and Law Forum

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When couples are unable to achieve coital pregnancy, they often turn to assisted reproductive technologies.[1] A popular assisted reproductive technology is in vitro fertilization (IVF). During the IVF process, physicians often fertilize several eggs and create cryopreserved, or frozen, human embryos for subsequent transfer to the woman's womb to achieve pregnancy. Successful egg retrievals yield a range of 1 to 20 eggs, and the number cryopreserved depends on successful fertilization and development before the freezing stage. Couples often do not use all of their frozen embryos in their effort to have a child. It is estimated that there are currently more than 100 000 frozen human embryos in storage in the United States alone. What should be done with all of these leftover embryos is an unresolved issue in this country. A related and more complicated problem arises when couples who have previously undergone IVF and have frozen embryos in storage later fight over the disposition of their frozen embryos.

Currently, disposition of frozen embryos is left up to fertility clinics and couples themselves to decide. Although mandated by law in only 1 state,[2] almost all fertility clinics have couples sign preprocedural agreements to decide the fate of their future excess frozen embryos before they begin the IVF process. Thus couples are forced to state in advance their wishes regarding embryo disposition in the event of separation or divorce, death of one or both gamete donors, or menopause of the female gamete donor. Typically, couples can destroy the embryos, donate them to science or to another couple, give one of the gamete donors control over the embryos, or choose to keep them frozen in storage. Whether courts will consider these preprocedural agreements binding legal contracts remains to be seen. As will be described below, some courts do bind couples to the terms of their preprocedural contracts, whereas other courts invalidate the agreements on the basis of changed circumstances, such as divorce or other children.

British[3] and Australian[4] laws require, with few exceptions, that all frozen embryos be destroyed 5 years after their creation. In the summer of 1996, 5 years after the British law was enacted, over 3300 frozen human embryos were destroyed. No similar law exists in the United States. In the United States, the stockpile continues to grow, and frozen embryos continue to age. At first glance, there seems to be no good reason to keep all of these frozen embryos for years after their creation, after death of the gamete donors, or upon the woman's entering menopause.

The disposition of spare frozen human embryos raises controversial ethical issues. Pro-life advocates typically claim that human life begins at conception, and thus the destruction of human embryos should be viewed as akin to murder. They assert that all embryos have the right to be implanted and should be given the opportunity to grow and develop. Conversely, pro-choice advocates generally claim that destruction of frozen embryos is an ethically acceptable practice and that gamete donors should not be forced to become genetic parents against their will. These advocates of disposal claim that a 24-hour-old embryo ''is not yet at a stage of development where it is capable of potential personhood or moral attributes'' and therefore can be destroyed.[5] Furthermore, they claim that any rights the 4-celled embryo frozen in a vial might have are subordinate to the right of the gamete donors to choose its disposition.

Professional Organization Statements

Some professional organizations have considered these issues—such as the status of the frozen human embryo and

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[1] For a more detailed discussion regarding embryo disposition, see the following 2 references: Forster H. The legal and ethical debate surrounding the storage and destruction of frozen human embryos: a reaction to the mass disposal in Britain and the lack of law in the United States. *Washington Univ Law Q.* 1998;76:759–780; and Forster H, Donley C, Slomka J. Comment on ABA's proposed frozen embryo disposition policy. *Fertil Steril.* 1999;71:994–995.

[2] Florida is the only state with a law that requires couples to indicate their choices for disposition before they create frozen embryos. See Fla Stat Ann §742.17 (West 1995). There are currently bills in New York and New Jersey that would require couples undergoing IVF to sign forms at the clinic, expressly stating their wishes for embryo disposition in the event of death or divorce.

[3] Human Fertilization and Embryology Act, ch 37 (1990, England).

[4] Infertility (Medical Procedures) Act, Act No. 10, 163, §§ 10–18 (1984, Victorian Acts).

[5] Moysa M. Public input sought on frozen embryo dilemma: officials want to know how long to keep embryos in storage. *Ottawa Citizen.* Aug 2, 1996:A4.

what should happen when the gamete donors later disagree about the fate of their embryos—and have offered policy statements. First, the American Medical Association (AMA) ethics guidelines state that frozen embryos may be allowed to thaw and deteriorate.[6] The AMA based their recommendation on the ''cultural and legal traditions'' of our country.[7]

The American Bar Association's (ABA) Section on Family Law proposed a frozen embryo disposition policy in 1998.[8] The policy suggests that if the marriage has dissolved, the couple is in disagreement about the fate of the embryos, and there is no preprocedural agreement, then ''the party wishing to proceed in good faith and in a reasonable time, with gestation to term, and to assume parental rights and responsibilities should have possession and control of all the frozen embryos.'' This proposed policy has not been adopted by the ABA. In fact, this policy is contradictory to the court decisions described below, and it is contrary to the emerging legal and ethical consensus regarding embryo disposition.

The American Society for Reproductive Medicine (ASRM) developed an ''Ethics Report and Statement on the Disposition of Abandoned Embryos.''[9] The ASRM recommends that all fertility clinics ''require each couple contemplating embryo storage to give written instructions concerning disposition of embryos in the case of death, divorce, separation, failure to pay storage charges, inability to agree on disposition in the future, or lack of contact with the program.''[10]

The ASRM also states that ''as an ethical matter, a program should be free to dispose of embryos after a passage of time that reasonably suggests that the couple has abandoned the embryos.''[11] Furthermore, couples who did not fill out preprocedural agreements, have not been in contact with the program for a substantial period of time, and have not provided current contact information ''cannot reasonably claim injury if the program treats the embryos as abandoned and disposes of them.''[12]

The influential New York Task Force on Life and the Law specifically discussed the issue of when couples disagree about what should happen to their embryos in their report titled ''Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy.''[13] The report indicates that although gamete bank regulations should require specific instructions regarding disposition, no embryo should be implanted, destroyed, or used in research over the objection of an individual with decision-making authority. Read literally, this statement suggests that preprocedural agreements should not be upheld when the gamete donors later disagree about what to do with their embryos, and it even suggests that some embryos may be kept frozen indefinitely.

Court Battles

There is very little legal instruction, in the form of case law or statutes, to guide parties or courts in resolving disputes over cryopreserved embryos. However, court battles between gamete donors are becoming more common. Three state supreme courts, those in Tennessee, New York, and now Massachusetts, have ruled in cases where gamete donors argued over the fate of their frozen embryos. Lower state courts have ruled on similar cases in Illinois, Michigan, Texas, Alabama, and New Jersey.

The most influential precedent is the Tennessee case of *Davis v Davis.*[14] In this case, the court was asked to decide whether a divorced woman could use the frozen embryos that she and her former husband had created to either become pregnant herself or donate them to another couple. The Davises had not signed a preprocedural agreement. Mrs Davis initially wanted to use the embryos herself, and she later decided to donate the embryos to an infertile couple over her ex-husband's objection. First, the court stated that embryos are not ''persons'' under state or federal law, but the embryos are entitled to special respect because of their potential for human life. Next, the court stated that previous agreements should be presumed valid and enforceable. However, without an agreement, as in this case, the court looked to an individual's privacy rights. The court explained that the right of procreational autonomy comprises 2 corollary rights: the right to bear children and the right not to bear children. The Tennessee Supreme Court held that the ex-husband who sought custody of the embryos to destroy them has a greater interest in the embryos than his ex-wife, since Mr Davis was vehemently opposed to fathering a child who would not live with both of his or her genetic par-

[6] American Medical Association, Council on Ethical and Judicial Affairs. *American Medical Association, Code of Medical Ethics: Current Opinions With Annotations.* New York, NY: American Medical Association; 1999: opinion 2.141.

[7] Ibid.

[8] American Bar Association Section of Family Law. *Report With Recommendations. Report No. 106.* February 1998.

[9] Ethics Committee of the American Society for Reproductive Medicine. Ethical considerations at 1S. American Society for Reproductive Medicine Ethics Report and Statement. Disposition of abandoned embryos; adopted July 20, 1996; Birmingham, Ala.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] New York State Task Force on Life and the Law. *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy.* New York, NY: New York State Task Force on Life and the Law; 1998.

[14] *Davis v Davis,* 842 SW2d 588 (Tenn 1992).

ents. The court then set forth a formula for other courts to follow when deciding embryo disposition disputes.[15]

Next, the case of *Kass v Kass*[16] was decided by the New York Court of Appeals in 1998. The court of appeals affirmed a decision that had overturned the initial trial court ruling[17] and held that the parties' preprocedural agreement providing for donation of unwanted embryos to the IVF program was enforceable. In the Kass case, the couple had signed a preprocedural agreement, which stated that the embryos would be donated for research in the event of a divorce. Mrs Kass later changed her mind and wanted to use the embryos. The court of appeals determined that the parties had clearly expressed their intent to donate the embryos to the IVF program for research in the event of a disagreement and that such an agreement was enforceable. The court also stated that the ''disposition of these [embryos] does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are the [embryos] recognized as 'persons' for constitutional purposes.''[18] Because the court of appeals decided the case on the basis of contract law, larger issues related to male and female procreative rights on which the trial court focused were not further addressed or discussed.

The most recent state supreme court ruling is the Massachusetts case of *A.Z. v B.Z.*[19] In this February 2000 case, a divorced couple battled over the fate of their 4 frozen embryos. The ex-wife, B.Z., wanted to try one last time to become pregnant, whereas her ex-husband, A.Z., decided that he did not want to have more children with his former wife. This case is unique because the couple signed several consent forms that stated that if the couple separated, the embryos belonged to the wife. The ex-husband contends that his ex-wife altered the documents after he signed them and wrote into the preprocedural agreement that the embryos should revert to her if they divorced. The family court judge ruled that the couple's circumstances had changed since the consent forms were signed and therefore should not govern their current situation. Because the couple had divorced and because they had other children, the judge determined that their prior wishes in the form of a preprocedural agreement should not be enforced. The lower family court ruling was recently upheld without a written opinion from the Massachusetts Supreme Court.

Conclusion

Legal consensus on the issue of frozen embryo disposition is emerging very slowly. Generally, the following guidelines are becoming the standards by which courts are making decisions. First, embryos are generally not considered children or property but rather ''special entities'' that deserve special respect because of their potential to become human life. Second, whenever possible, the preprocedural agreement should be considered a binding contract if couples cannot reach an agreement about the fate of their embryos. Third, in the absence of a preprocedural agreement, the control over the embryos should be given to the party that does not wish to procreate, unless the other party has no other means of becoming a parent. Furthermore, the special rights afforded women with growing fetuses in their bodies do not extend to frozen embryos. When the embryo exists frozen in a tank, the rights of both gamete donors should be considered equal.

As more and more couples enter courtrooms to argue over embryo disposition, judges will be forced to consider the limits of procreational autonomy and the status of the frozen human embryo. Whether courts uphold or invalidate preprocedural agreements and whether the balance of the interests continues to weigh in favor of the party who does not wish to procreate remains to be seen. Furthermore, whether legislatures will pass laws to regulate embryo disposition is yet to be determined. While the law struggles with the issue of what to do with cryopreserved embryos when couples disagree, embryo disposition remains a deeply personal and very controversial issue.

[15] Under *Davis v Davis,* the court developed the following formula: first, the court should look at the current wishes of the gamete donors. If there is a dispute, then their prior agreement should be followed. If there is no prior agreement, the interests of the parties in using or not using the embryos should be weighed, with the party wishing to avoid procreation usually prevailing. If the party wishing to use the embryos has no reasonable possibility of achieving parenthood by other means than use of the embryos, then the argument in favor of using the embryos should prevail. If the party seeking custody of the embryos intends to donate them to another couple, the objecting party has a greater interest and should prevail.

[16] *Kass v Kass,* 696 NE2d 174 (NY 1998).

[17] In *Kass v Kass,* the trial court ruling was quite interesting. The trial court stated that a husband's rights and control over the procreative process ends with ejaculation. Because the woman physically bears the child and is more directly and immediately affected by the pregnancy, the balance of their competing interests weighs in her favor. The court concluded that there is no constitutional right to avoid procreation and that a woman has the exclusive right to determine the fate of the embryos. See *Kass v Kass,* 1995 WL 110368 (NY Sup Ct Jan 18, 1995).

[18] Ibid.

[19] Ellement J. SJC rules in embryo case: man wins bid to bar their use by ex-wife. *Boston Globe.* Feb 10, 2000:BI.

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