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EXPERT OPINION

Which Parent Gets Custody of the Embryos?

An overview of the disposition of frozen embryos created through the IVF process upon termination of the prospective parents' relationship. The article offers a legal analysis under the framework of New York law and presents a brief summarization of judicial approaches utilized throughout the nation that New York's courts may turn to when faced with the issue in the absence of a contract governing the disposition of frozen embryos. The authors conclude with recommendations to assist practitioners in handling matters in this burgeoning area of law, and one which involves a question of first impression in the state of New York.

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By Hon. Sondra M. Miller (dec.), Andrea B. Friedman and Emily C. Prudente | August 13, 2024 at 10:00 AM



[Author's Note: It is with great sadness that the authors announce the passing of Judge Sondra Miller on August 7.]

During a four-way conference in a divorce matter, opposing counsel slides an updated statement of net worth across the table for your review. At first glance, nothing stands out, until you reach the expenses where a line item catches your eye: "Upstate Fertility Center Cryopreservation." Curious, you inquire about the nature of this expense, and learn it's incurred from storing the parties' frozen embryos from an IVF cycle. Your mind starts spinning over all the potential issues associated with the embryos. Most significantly, you cannot shake the question of what is their fate if the parties do not have a contract directing their disposition. Experience tells you that the chances of the parties' wishes aligning at this point in time are slim. You have a firm grasp on the relevant law in New York State, but realize this may be unprecedented territory. How should you advise your client and what are your crucial next steps?

In recent years, nearly 92,000 infants born each year in the U.S. were conceived via assisted reproductive technology (ART) (Centers for Disease Control and Prevention, *2021 Fertility Clinic Success Rates Report*, available at: <https://www.cdc.gov/art/artdata/index.html> [last reviewed January 8, 2024]). In vitro fertilization (IVF) accounts for more than 99% of ART and involves the implantation of frozen embryos (Dept. of Health and Human Safety, *Fact Sheet: In Vitro Fertilization [IVF] Use Across the United States*, available at: <https://www.hhs.gov> hyperlink; then follow "About HHS" hyperlink; then follow "News" hyperlink [last revised March 19, 2024]).

The burgeoning popularity of IVF reflects a valued advancement in reproductive medicine for couples seeking to become biological parents (progenitors) (see *IVF-assisted Pregnancies Constitute 2.5% of All Births in 2022*, <https://www.asrm.org/news-and-events/asrm-news/press-releasesbulletins/ivf-assisted-pregnancies-constitute/>). But what happens to embryos when prospective parents disagree on the disposition of the embryos upon termination of their relationship?

Property, Person, or Embryo?

IVF embryos are complex structures. Where custody of embryos is at issue, a court's determination of whether frozen embryos are persons, property, or whether they hold an intermediate status, will significantly impact disposition outcomes (Morgan Parker, *Comment, The Disposition of Frozen Embryos at Divorce*, 33 J. Am. Acad. Matrim. Law, 645, 651-652 [2021]); notably, see *LePage v. Ctr. for Reprod. Med., P.C.*, 2024 Ala. LEXIS 60, discussed herein. *Is the New York Court of Appeal's decision in Kass v. Kass 91 NY2d 554, (1998) (classifying embryos as property) still good law in the wake of Dobbs v. Jackson Women's Health Org., 597 US 215 (2022)?*

In *Kass*, the Court relied upon *Roe v. Wade*, 410 US 113 (1973) in concluding that frozen embryos are not recognized as "persons" for constitutional purposes (*Kass*, 91 NY2d at 564). *Roe* was later overturned and decision-making authority regarding the classification of frozen embryos as persons or property was returned to the states (*Dobbs*, 597 US at 302).

Thus, *Kass*' implicit reasoning that embryos are property likely withholds scrutiny in the wake of *Dobbs*. It is the suggestion of these authors that the classification of embryos requires special respect under the law as neither persons nor property.

The unique characteristics of frozen embryos suggest that they are neither persons nor property; their inherent qualities render them a novel legal puzzle piece that does not conform to this now-outdated binary classification. The fact that their existence results from combining the genetic material and DNA of *both* progenitors, creates, in the gamete-donor, legal interests and rights regarding decision-making. As such, frozen embryos are deserving of special respect and a new characterization under the law (*Kass v. Kass*, 235 AD2d 150, 174 [2d Dept. 1997] [Miller, J. dissenting]): "Embryos."

In New York, there is no legal requirement for prospective parents to enter a contract governing disposition of their embryos. Reliance cannot be placed on fertility clinics or current law to address this issue. Couples who choose to undergo IVF treatment engage the services of fertility specialists who combine the couple's separate genetic material from their individual gametes (an egg and sperm) to create a single-celled fertilized egg (zygote).

Through cell division and differentiation, the zygote transforms into an embryo – a unique collection of cells holding the unrealized potential to become human life (we simplified a bit). But, medical experts are generally not equipped to provide legal advice and protections. In the absence of a contract, then, upon the breakdown of a couple's relationship, the courts may become the ultimate arbiter of the embryos' future. How New York courts will rule on these disputes and what legal analysis they will apply is an unanswered question.

Absence of a written agreement places the future path and use of these embryos in limbo. The best way to avoid having a court making these decisions is for the couple, at the very start of the IVF process, to commit, in writing, the future path of their frozen embryos. The New York Legislature enacted Family Court Act §581-306, which offers some guidance to practitioners and the judiciary as to the disposition of frozen embryos and the requirements for a binding contract. (Family Ct Act §581-306 [a]).

The most recent Court of Appeals' decision that touches on this intensely personal and private issue was handed down in 1998 at a time when ART and IVF were far less prevalent than today (see *Kass*, 91 NY2d at 556).

Some couples require a gamete donor as part of the IVF process. Most gamete donors prefer to remain anonymous and they should have the legal right to do so. Accordingly, they would be well-served by the inclusion of written acknowledgements in the contracts between donors and the facility overseeing their donations, leaving no ambiguity as to their rights and obligations as they pertain to an embryo resulting from donated gametes. These donors must also have the right to remain anonymous (*A note on surrogacy*: New York law does not permit a surrogate to have a genetic, or biological, relation to an implanted embryo [Family Ct Act § 581-402]).

A written contract should contemplate the use and non-use of the couple's embryos should they separate, divorce, die or stop IVF. The contract must also consider the reality that either or both progenitors could have a change of mind as to how, when, or if the frozen embryo should be used (Parker, *supra*, at 650). The New York State Court of Appeals in *Kass* reasoned that parties "should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing" (*Kass*, 91 NY2d at 565).

The Three Judicial Approaches

Nationwide, state courts have turned to other jurisdictions for guidance. A review of how courts throughout the country have ruled on these issues reveals three primary judicial approaches: the contractual approach, the balancing approach, and the contemporaneous mutual consent approach.

The contractual approach is the approach most commonly applied (Parker, *supra*, at 653). It requires the existence of a duly executed, enforceable contract addressing the disposition of embryos prior to the relationship breakdown.

Courts turn to the contract's terms to direct disposition of the cryopreserved embryos in accordance with the parties' expressed wishes. However, if the agreement does not provide for what will happen if a party has a change in circumstances, such as future illness or incapacitation, the parties may be "locked in" to their prior expressed preferences. [Practitioners and drafters, beware!]

The balancing approach takes a different tact. Here, the court balances parties' interests in the embryos by weighing their respective interests in procreating against the other's desire to avoid becoming a biological parent now that the relationship is ending.

Additional factors courts consider include the intended use of the embryos, the ability of each respective parent to reproduce through other means, each party's reasons for pursuing IVF, emotional consequences, and bad faith (for example, one party weaponizing control of the subject embryos during a divorce action) (Parker, *supra*, at 659, n 119; see also *Bilbao v. Goodwin*, 333 Conn. 599, 610 [2019]). Courts tend to implement this approach in the absence of a contract, or where a contract's terms regarding disposition are "so ambiguous as to [render it] unenforceable" (*In re Marriage of Rooks*, 429 P.3d 579, 586 [Colo. 2018]). These authors suggest that in the absence of a contract, the balancing approach makes the most sense in a court of equity.

The final approach contemplates a contemporaneous mutual consent. This approach requires both parties reach an agreement for disposition of the embryos. In theory it contemplates what the other approaches do not: disposition in accordance with the parties' wishes *at the time* of relationship breakdown. Such an approach is helpful if one or both of the parties have a change of heart from the time that the embryos were frozen years' prior. However, in practice, if the parties could agree, they likely would not be litigating in court. 5

The future of ART and IVF is ripe for discussion now, especially in light of attempts to further restrict a woman's ability to control her own healthcare. In a recent case before the U.S. Supreme Court, justices in the majority appear to welcome additional legal impediments to abortions (see *FDA v. Alliance for Hippocratic Medicine*, 602 US 367 [2024]).

Legislators in multiple states have recently set forth bills to grant legal "personhood" to frozen embryos (Lisa Ikemoto, *Op-Ed: How IVF could be derailed by abortion restrictions*, L.A. Times, July 7, 2022, available at <https://www.latimes.com/opinion/story/2022-07-07/ivf-roe-vs-wade-abortion>).

On Feb. 16, 2024, the Alabama Supreme Court issued its decision in *LePage*, ruling that frozen embryos are considered children, thus, those that destroy frozen embryos can be held legally responsible. In response, many IVF providers became fearful of exposure to possible criminal prosecution, including crimes as serious as wrongful death, by immediately ceasing treatment (Amanda Zablocki, Ehiguina L. Borha, Gianfranco Spinelli, *IVF Caught in the Crosshairs: The Aftermath of the LePage Decision*, <https://natlawreview.com/article/ivf-caught-crosshairs-aftermath-lepage-decision>).

In the aftermath of *LePage*, the state's Legislature leapt into action and approximately three weeks later, IVF providers were sheltered from prosecution for such crimes (*Id.*). In the wake of *Dobbs*, certain state legislatures are harnessing this anti-abortion sentiment, seeing it as an opportunity to further restrict women's reproductive rights and to put IVF processes before the United States Supreme Court—a phenomenon not seen in the intervening period between when *Roe* was handed down 51 years ago and the *Dobbs* decision. 6

Practitioners Need To Empower Themselves

Given the heightened attention surrounding IVF, it is crucial that the courts issue guidance. Further, it is important for prospective parents utilizing IVF to consult legal counsel at the outset to protect their rights.

Before undertaking the IVF process, parents should be encouraged to execute a contract detailing the disposition of their frozen embryos (*see Kass*, 91 NY2d at 565). Such an agreement minimizes uncertainty surrounding disposition of the couple's embryos in the event of their separation, death, or cessation of treatment (*Parker, supra*, at 650).

Additional considerations should include contingencies for incapacitation, aging, and the birth and/or adoption of other children by the parties. Such contingencies and contract provisions are deeply personal (*Kass*, at 565-566). And, never underestimate the value of a pre-nuptial agreement.

In the absence of precedent and legislation in New York and across the country, there is a veritable legal "black hole" of contractual, constitutional, and property matters. Practitioners and courts are forced to navigate these issues with little to no guidance.

Until a case makes its way to the New York State Court of Appeals, there is no definitive answer as to how a court must or may determine the final disposition of parties' embryos in the absence of a duly-executed contract governing their disposition. Therefore, practitioners should stay vigilant to new developments and changing landscape of this area to best serve clients and be prepared to offer the court guidance in the event of litigation.

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