

# DISPUTES OVER FROZEN EMBRYOS

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Proposition 26 states that under the Mississippi Bill of Rights, “[t]he term ‘person’ or ‘persons’ shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof.”<sup>1</sup> Should the proposition pass, Mississippi judges may face lawsuits between two individuals over the disposition, ownership, or use of a third “person”—a frozen embryo—for which there simply is no modern precedent.<sup>2</sup> This article attempts to outline the range of possible outcomes.

## I. DISPUTES OVER EXCESS EMBRYOS

Disputes over embryos produced through in vitro fertilization are a relatively new issue in family law. The in vitro process, nothing short of miraculous to infertile couples,<sup>3</sup> often results in the creation of excess embryos that are cryopreserved, or frozen.<sup>4</sup> These frozen embryos have become the subject of legal battles when a couple divorces or separates. Often, one party prefers that the embryos be destroyed or permanently stored, while the other

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<sup>1</sup> Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), *available at* <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.

<sup>2</sup> The only similar enactment is statutory law in Louisiana that declares that a fertilized egg is “a juridical person” that may not be destroyed. LA. REV. STAT. ANN. § 9.124 (2011). No cases were found interpreting the statute.

<sup>3</sup> Through IVF, an embryo is produced by combining an egg and sperm in a laboratory setting. The resulting embryo is then implanted into a woman’s uterus. The procedure may be accomplished with the gametes (egg and sperm) of the intended parents or by using donor eggs and/or sperm. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE § 3.1 (2d ed. 2010).

<sup>4</sup> Estimates of the number of stored embryos in the United States differ. A 2003 report estimated that number to be at least 400,000 in the United States. KINDREGAN & MCBRIEN, *supra* note 3, § 4.1, at 121 n.1.

asks to have one or more implanted to give birth to a child. To date, no Mississippi appellate case has addressed this issue.

Courts in other states have struggled to balance the rights between the spouses and to define, or avoid defining, the subject of the dispute—the embryo. Most courts have avoided labeling the embryo as either property or person. Generally, courts have ruled against the party seeking to implant the embryo. These decisions are based on (1) a balancing test, or (2) a requirement of contemporaneous consent to any use of the embryo. The non-person status of the embryo is a crucial element underlying these decisions.

If an embryo is defined as a person, Mississippi chancellors hearing these disputes will step into unchartered territory,<sup>5</sup> with little guidance,<sup>6</sup> to determine the outcome. This article attempts to outline the range of possible outcomes.

## II. CURRENT LAW

### A. *Status of the Embryo*

In one of the first, and most influential, cases to address this topic, the Tennessee Supreme Court in *Davis v. Davis* described the embryo as “not, strictly speaking, either ‘persons’ or ‘property,’ but occupy[ing] an interim category [which] entitles them to special respect because of their potential for human life.”<sup>7</sup> At least one court has treated the embryo as personal property for the purpose of a divorce action.<sup>8</sup> However, most courts have agreed with *Davis*, holding that the embryo is entitled to special consideration, but not affording them the rights and liberties granted to living beings.<sup>9</sup>

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<sup>5</sup> Louisiana statutes declare that “the in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients . . . .” LA. REV. STAT. ANN. § 9.130 (2011).

<sup>6</sup> Mississippi law does not address the consequences of any of the forms of assisted reproduction, including artificial insemination, which is legislatively addressed in many states.

<sup>7</sup> *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

<sup>8</sup> *In re Marriage of Dahl*, 194 P.3d 834, 840-41 (Or. Ct. App. 2008) (contractual right to dispose of embryos is a personal property right; enforcing contract between parties).

<sup>9</sup> KINDREGAN & MCBRIEN, *supra* note 3, § 4.4.

The embryo's non-person status is important in the courts' analyses of competing claims. In *Davis*, the Tennessee Supreme Court carefully examined both Tennessee and federal law for indications that the embryo was entitled to status as a person.<sup>10</sup> Finding none, the court elected to balance the procreational rights of the parties alone.<sup>11</sup> The court declined to consider the embryo's rights, because Tennessee laws "contain no statement of public policy which reveals an interest that could justify infringing on [the parties'] decisional authority over the preembryos to which they have contributed."<sup>12</sup> The court stated that the embryo, at this stage of development, was not entitled to legal protection that would alter the court's analysis of rights between the divorcing couple.<sup>13</sup> Similarly, the Oregon Court of Appeals rejected a husband's claim that he should be awarded embryos to implant.<sup>14</sup> The court noted that he did not identify any affirmative state policy favoring protection of the embryos, which "would be found in legislative enactments, administrative rules, regulations, and the state and federal constitutions."<sup>15</sup>

### *B. Non-Procreation vs. Procreation*

Most decisions have favored the party who preferred to destroy or preserve the embryo over the party who sought to implant.<sup>16</sup> In *Davis*, the husband preferred that the couple's embryos be destroyed at divorce, while his wife opted to give birth to them.<sup>17</sup> The trial court found that the embryos were human beings from the moment of fertilization, characterized them as "children in vitro" and awarded custody to the mother.<sup>18</sup> The court held that it was in the best interest of the children to be born

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<sup>10</sup> *Davis*, 842 S.W.2d at 590.

<sup>11</sup> *Id.* at 591.

<sup>12</sup> *Id.* at 602.

<sup>13</sup> *Id.* ("[T]he state's interest in the potential life of these preembryos is not sufficient to justify any infringement upon the freedom of these individuals to make their own decisions . . .").

<sup>14</sup> *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008).

<sup>15</sup> *Id.* at 841 ("Husband fails to . . . identify any affirmative state policy favoring his preferred disposition of the embryos.").

<sup>16</sup> No case was found in which the court ordered that the embryos be released to a party seeking implantation.

<sup>17</sup> *Davis*, 842 S.W.2d at 589.

<sup>18</sup> *Id.* at 594 (discussing the trial court's determination).

rather than destroyed.<sup>19</sup> The Tennessee Supreme Court reversed.<sup>20</sup> In the absence of an IVF contract between the parties, the supreme court proceeded to balance the procreational rights of the parties.<sup>21</sup> The court found the husband's right not to procreate more compelling than the wife's right to procreate.<sup>22</sup> However, the court noted that if the wife was infertile and the embryos represented her only chance to have children in the future, the decision might be different.<sup>23</sup>

Other courts have also balanced the competing concerns in favor of the party who chooses *not* to produce a child. The Massachusetts Supreme Court emphasized the public policy against forcing a person to enter into a familial relationship: “[R]espect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.”<sup>24</sup> In a New Jersey case, a divorcing husband who wanted embryos implanted argued that his constitutional right to procreate outweighed his wife's right not to procreate, when combined with the state's interest in protecting potential life.<sup>25</sup> The court held to the contrary:

M.B.'s right to procreate is not lost if he is denied an opportunity to use or donate the preembryos. . . . In contrast, J.B.'s right not to procreate may be lost through attempted use or through donation of the preembryos. Implantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions.<sup>26</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> The court noted that if the trial judge's characterization of the embryo as a “person” stood, the decision “would [undoubtedly] have had the effect of outlawing IVF programs in the state of Tennessee.” *Id.* at 595.

<sup>21</sup> *Id.* at 591.

<sup>22</sup> *Id.* at 604.

<sup>23</sup> *Id.*

<sup>24</sup> *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (“[There exists] a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired.”).

<sup>25</sup> *J.B. v. M.B.*, 783 A.2d 707, 712 (N.J. 2001).

<sup>26</sup> *Id.* at 717.

Some courts have reached the same result by holding that, no matter what the parties' IVF contract provides, frozen embryos may not be used *or* destroyed unless both parties consent at the time of disposition—effectively requiring that they remain frozen until both can agree.<sup>27</sup>

A few courts have enforced contracts as written, in one case enforcing a couple's agreement to donate embryos for research,<sup>28</sup> in another upholding an agreement that they would be destroyed after five years,<sup>29</sup> and in another enforcing their agreement that the embryos would be destroyed in the event of divorce.<sup>30</sup> Exemplifying this approach, the Texas Court of Appeals stated, "We believe that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties."<sup>31</sup>

### III. PROPOSITION 26

Proposition 26 provides that, under the Mississippi Bill of Rights, the term person "shall include *every human being from the moment of fertilization*, cloning or the functional equivalent."<sup>32</sup> If the Proposition passes, Section 14 of the Bill of Rights would then provide, "No person [embryo] shall be deprived of life, liberty, or property except by due process of law."<sup>33</sup> Section 24 would provide that "All courts shall be open; and every person [embryo] for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."<sup>34</sup>

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<sup>27</sup> *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003) ("If a stalemate results, the status quo would be maintained.").

<sup>28</sup> *Kass v. Kass*, 696 N.E.2d 174, 179-80 n.4 (N.Y. 1998) (noting, however, that in some cases "changed circumstances" might make a contract unenforceable).

<sup>29</sup> *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

<sup>30</sup> *Roman v. Roman*, 193 S.W.3d 40, 49 (Tex. App. 2006).

<sup>31</sup> *Id.*

<sup>32</sup> Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), available at <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.

<sup>33</sup> MISS. CONST. art. III, § 14.

<sup>34</sup> MISS. CONST. art. III, § 24.

Proposition 26 does not specifically instruct judges how to decide a dispute over unused embryos, but it does provide a clear statement of public policy regarding the status of embryos that is unlikely to be ignored in embryo disputes.

For example, a Mississippi court, faced with litigation between a woman who wants to implant an embryo and her husband, who chooses not to implant, might take any of several approaches: (1) The court might characterize the embryo as a person for purposes of the divorce dispute, based on the express public policy of the state set out in the amended Bill of Rights, and treat the action as a custody dispute; (2) the court might characterize the embryo as a person for purposes of the dispute and balance the rights of the parties and the embryo without applying custody law; or (3) the court might decline to define the embryo as a child, or to balance the embryos' rights with the parties', and simply address whether the proceeding in some way violates the Bill of Rights.

#### *A. Embryo as Person*

A reading of the embryo dispute cases shows that the courts often search for any indication of state or federal public policy treating embryos as a person. Finding none, the embryo has generally been excluded from the court's weighing of rights. Passage of Proposition 26 would establish a strong Mississippi policy in favor of protecting an embryo, a policy courts would be likely to recognize as compelling in a frozen embryo dispute. If the court finds that public policy requires that the embryo be provided the rights of a person in the litigation, the court could address the claims within the framework of custody law. Or, the court might include the embryo in the balancing of interests. In either case, the outcome would probably lead to a decision on behalf of the party seeking implantation.

##### 1. Custody Action Framework

Ordinarily, when parents litigate custody of a child, the child is not a named party to the action. Rather, custody between the parents is decided by the court based on the best interests of the

child.<sup>35</sup> However, if the case involves allegations of abuse, the court must appoint a guardian ad litem to represent the child's best interest. And in difficult cases not involving abuse, courts have discretion to appoint a guardian to protect the child's best interest.<sup>36</sup>

If a court analogizes embryo-person disputes to custody battles, the court may choose to appoint a guardian ad litem to represent the interests of the embryo, since one of the parties will be seeking to destroy or permanently preserve the embryo. And, if the court follows the traditional best-interests analysis, the likely outcome is a decision for implantation. It is difficult to conceive of the best interest analysis producing a decision that cryopreservation is a better option than potential life.

The trial court in *Davis* adopted the custody model, after finding that life began at fertilization.<sup>37</sup> And Louisiana provides by statute that, in the event of a dispute between any parties regarding a fertilized egg, "the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum."<sup>38</sup>

## 2. Balancing of Rights

In lieu of a custody model, a court could balance the constitutional rights of the parents and the embryo. In a balancing analysis, a decision for implantation also seems likely. The embryo-person's interest in life and liberty, combined with one parent's desire to bring the embryo to life, will probably outweigh the other parent's desire not to have another child in the world.

## 3. Child Support Obligations

Under either of these scenarios, an even more difficult question arises: If the embryo is implanted at the request of one parent and a child is born, is the objecting parent required to provide support for the resulting child? It is a basic rule of

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<sup>35</sup> See *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

<sup>36</sup> MISS. CODE ANN. § 97-5-42 (2006).

<sup>37</sup> *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992) (discussing the trial court's determination).

<sup>38</sup> LA. REV. STAT. ANN. § 9.131 (2011).

paternity and child support that a father's objection to the birth of a child does not relieve him of a duty to support the child, even if the mother deceived him about using birth control. If a custody-based analysis or balancing test leads to the birth of a child, courts may follow the traditional "strict liability" rule of support, requiring parental support even if the parent objected to the child's birth.

Courts could also look to the intended parent doctrine used in IVF disputes between surrogates and the parties who initiated IVF. Under this doctrine, the parties who were the child's intended parents are liable for support, even if they are not the child's genetic parents (for example, if a couple commissioned the birth of a child using donor egg and sperm, carried by a surrogate, they would still be liable for support).<sup>39</sup> This doctrine could be used to argue for, or against, support by the objecting parent. The objecting parent would argue that he only intended to become the parent of those embryos that he agreed to implant. His wife's choice to implant on her own might relieve him of that obligation. Similarly, a man is generally assumed to be the father of a child produced through his wife's artificial insemination only if he agreed to the insemination.<sup>40</sup>

On the other hand, the creation of person status for embryos could alter the intended parent doctrine. The parent seeking to implant could argue that the objecting parent intended to create the embryo, and therefore became the "parent" of that person (at conception, as defined by Proposition 26) with an obligation of support. Both arguments seem plausible.

### *B. Embryo's Rights Under Section 14 of the Mississippi Code*

Arguably, a court could take the position that the passage of Proposition 26 redefines person under the Bill of Rights, but has no effect on Mississippi statutes. Thus, the embryo would not be

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<sup>39</sup> See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (intended mother prevailed over surrogate birth mother); *J.F. v. D.B.*, 879 N.E.2d 740, 741-42 (Ohio 2007).

<sup>40</sup> See *Hill v. Hulet*, 881 P.2d 460 (Colo. App. 1994); *State ex rel. H. v. P.*, 457 N.Y.S.2d 488 (N.Y. App. Div. 1982); *Brooks v. Fair*, 532 N.E.2d 208 (Ohio Ct. App. 1988) (against public policy for ex-wife to disestablish ex-husband's paternity of child conceived by artificial insemination to which they both agreed).

defined as a “child,” nor would the court necessarily balance the rights of the embryo with the parties to the litigation. This author believes that a court is unlikely to ignore the strong statement of policy in Proposition 26, at least for the purposes of this dispute. Even if that were the case, however, the court would have to determine whether a particular outcome violates Section 14.

A full discussion of the due process and equal protection rights of the embryo is beyond the scope of this article. But it is important to note that if Proposition 26 passes, under Section 14 of the Bill of Rights, a frozen embryo may not be deprived of life or liberty without due process of law. A court hearing one of these cases would need to consider whether court resolution of the dispute qualifies as state action and, if it does, whether a decision not to implant an embryo is a denial of due process. It is difficult to imagine a court deciding to destroy an embryo defined as a person under the Bill of Rights, even if judicial action is not considered state action in this context. However, a court might determine that allowing the embryo to remain frozen deprives the embryo of nothing—it simply leaves the embryo in its existing state. Or, the court might decide that the embryo’s right to liberty requires that it be given the opportunity to experience life fully, rather than remain frozen.

It is also possible that the Mississippi Supreme Court would construe Section 14 of the Mississippi Constitution to include an equal protection guarantee.<sup>41</sup> Then, the court would also have to determine whether denying an embryo the protections afforded children in custody disputes would violate equal protection.

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<sup>41</sup> Each of the state courts to address this issue have found that the state’s constitution included a guarantee of equal protection. See Christopher R. Green, *A Textual Analysis of the Possible Impact of Measure 26 on the Mississippi Bill of Rights*, 81 MISS. L.J. SUPRA 39 (2011). While the Mississippi Supreme Court has not explicitly addressed the issue, the court appears to have assumed such an obligation. In *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), the Mississippi Supreme Court refers to state equal protection and appears to address the equal protection argument on the merits, using a rational basis test. The decision seems to assume that state equal protection exists, without analyzing the constitutional provisions or directly addressing the issue.

## CONCLUSION

The passage of Proposition 26 will not alter Mississippi IVF law, because Mississippi currently has no decisions involving frozen embryos. When the issue does arise, however, the likely outcome is that one party will be allowed to implant embryos over the objection of the other. Whether the objecting party would then be required to support the resulting children is less clear, but certainly a possibility.