

ASSISTED REPRODUCTION TECHNOLOGY AND THE STATUS OF THE EMBRYO

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INTRODUCTION

Assisted Reproduction Technology (ART) refers to a number of advanced techniques used by physicians to aid infertile couples in achieving pregnancy. One such technique involves treatment by In Vitro Fertilization (IVF), whereby a woman's egg(s) are fertilized in a laboratory setting to produce one or more embryos, which may then be implanted into the woman's uterus to hopefully achieve pregnancy and the birth of a child. The IVF process often produces excess embryos, which may be cryopreserved, or frozen, for later use by the couple.

If Initiative 26 passes, these embryos, whether in the petri dish, in the woman's uterus, or in the frozen state, will all be deemed persons by the Mississippi Constitution, and will therefore be entitled to all rights afforded to Mississippi residents by the state's Bill of Rights. In light of the fact that no Mississippi statute or case law addressing the status of the embryo or limiting the rights afforded to the embryo currently exists, the broad definition of "person"¹ would open the door to many legal questions regarding disposal, donation, and adoption of the embryos, the embryo's right to inherit as an heir of a deceased parent, and custodial rights in the event of the parents' divorce.

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¹ Proposed Initiative 26 would amend the Mississippi Constitution to define "person" as "every human being from the moment of fertilization, cloning or the functional equivalent thereof." Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), *available at* <http://www.sos.ms.gov/page.aspx?s=7&s1=1&s2=50>.

Given the profound lack of guidance, the analysis of these issues becomes an exercise in speculation, but by applying accepted legal principles to each of these scenarios, it is possible to deduce one or more likely outcomes to each situation.²

I. DISPOSAL RIGHTS

The right of the parents or clinics to dispose of frozen embryos would essentially be eliminated if the embryos are deemed people. Mississippi Code § 97-3-19 states: “The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases . . . (d) When done with deliberate design to effect the death of an unborn child.”³ This statute would arguably impose criminal liability upon the parents who created the embryo if they chose to discontinue storage of the embryo after their family is complete. The clinic performing the act of disposal may also face criminal liability for murder or accessory to murder.

In most states that have addressed the issue of embryo disposal the parents are generally allowed the right to dispose of the embryo at such time as they deem appropriate, as long as both parties are in agreement.⁴ The American Bar Association Model Act authorizes and encourages written agreements between the parties with regard to disposal, but provides that a party may change his or her prior written instructions by notifying the other parent and the clinic.⁵ Louisiana is the only state that has

² Whether the definition of “person” as defined by the Mississippi Constitution after passage of Initiative 26 will replace or supersede the meaning of “person” as defined by state statute remains unsettled. For purposes of this Article, it is generally assumed that the definition of person as defined by Initiative 26 will be applicable throughout Mississippi statutes.

³ MISS. CODE ANN. § 97-3-19 (2006).

⁴ See *In re Marriage of Dahl*, 194 P.3d 834, 840-41 (Or. Ct. App. 2008) (enforcing contractual rights between parties, the court held each party had a personal property right to dispose of the embryos); see also *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (holding a contract is enforceable “subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo” (quoting *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001))); *Davis v. Davis*, 842 S.W.2d 588, 597-98 (Tenn. 1992) (acknowledging the validity of contracts in determining rights to embryos although no contract existed between the parties).

⁵ AM. BAR ASS’N MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 201-02 (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

elevated the status of the embryo to that of a semi-human⁶ via statute, thereby disallowing by statute the intentional destruction of the embryos.⁷

In the event Initiative 26 should pass, the issue of disposal rights must be addressed by the legislature. Perpetual freezing of embryos would create additional issues such as disputes among future generations as to who enjoys parental rights to the embryos produced by their ancestors, or in the alternative, at which point the embryos may be deemed “abandoned” by the parents who produced them, and may therefore be offered to another couple for adoption. A determination of abandonment, however, must be made by a court prior to any exchange of parental rights to the embryo in order to allow the clinic authority to transfer the embryo to another couple. The couple seeking to adopt the embryo, rather than the clinic, would likely bear the legal expense in seeking a court determination of abandonment. If the court should deem the embryo has been abandoned, the couple will likely be required to adopt the embryo prior to transfer of the embryo to the uterus in hopes of achieving pregnancy.⁸ In addition, if the parents should lose contact with the clinic for any reason, the financial burden of perpetual freezing will fall upon the clinic, which is forced into a quasi-guardianship situation with a duty to maintain the embryos indefinitely. These issues will inevitably find their way into the court system or will need to be addressed by the legislature after passage of Initiative 26.

II. EMBRYO DONATION

Some couples who have successfully undergone fertility treatment may feel their family is complete, and may decide to donate their remaining frozen embryos to another infertile couple for their use in attempting to achieve a pregnancy. Because an embryo is not defined as a person beginning at fertilization, cloning, or the functional equivalent thereof under any state law,

⁶ LA. REV. STAT. ANN. § 9:130 (2008) (“[The] in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients . . .”).

⁷ LA. REV. STAT. ANN. §§ 9:129 to :130 (2008).

⁸ Absent authority to the contrary, relinquishment and establishment of parental rights in children/people must be performed in accordance with the statutes governing adoption in Mississippi.

the general national practice allows for contractual transfer of parental right via written consent rather than by formal adoption.⁹ However, the definition of person proposed by Initiative 26 would arguably elevate the embryo to the status of a living child, in which case the donation of any embryo from one couple to another couple in Mississippi would likely require a formal adoption proceeding establishing parental rights in the adoptive parents and relinquishing parental rights in the donating parents.¹⁰ Since the rate of pregnancy which results from IVF treatment is generally less than thirty percent,¹¹ the requirement of an adoption proceeding is an expensive endeavor for the parties when there is no guarantee of a successful pregnancy. Further, if multiple attempts to achieve pregnancy are unsuccessful, multiple adoption proceedings may be necessary. Not only must the financial and emotional strain on the adoptive couple be considered in this case, but the additional caseload would be burdensome on the Mississippi court system as well.

III. INHERITANCE RIGHTS

Although it seems counterintuitive to contemplate the right of an embryo/unborn child to inherit as a legal heir of a deceased parent, whether by virtue of the parent's Last Will and Testament or under the laws of descent and distribution of Mississippi,¹² due to the absence of statutory authority to the contrary in Mississippi, this possibility must be explored. If, hypothetically, during a probate proceeding, the court should deem the embryo a child of the deceased parent for purposes of inheritance and if such embryo/child is not specifically disinherited by the decedent's

⁹ *But see* GA. CODE ANN. § 19-8-40 (2010) (enacted by the Georgia Legislature, the Option of Adoption Act provides a framework for an expedited adoption proceeding to establish parental rights prior to the transfer of the embryo to the adoptive woman's uterus).

¹⁰ *See generally* MISS. CODE ANN. §§ 93-17-1 to -31 (2004 & Supp. 2011) (Mississippi adoption statutes).

¹¹ *See* NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 6 (2008). The 1992 Fertility Clinic Success Rate and Certification Act requires that the Centers for Disease Control publish an annual ART success rate report. 42 U.S.C. § 263a-1 (2006).

¹² *See generally* MISS. CODE ANN. §§ 91-1-1 to -31 (2004 & Supp. 2011).

Last Will and Testament, logic dictates that a guardianship or trust must be established to maintain the property (especially in the case of real property) on behalf of the embryo until the age of majority (which will never occur if the embryo remains frozen) or the termination of the trust (which is contingent upon the Rule Against Perpetuities).

Alternatively, as a post-mortem solution to the conveyance of property to an embryo, if the will names a guardian of minor children, the guardian may disclaim the embryo's share on behalf of the embryo, which in turn would re-distribute the embryo's share among the living heirs.¹³ However, a "qualified disclaimer" must be filed within nine months of the testator's death.¹⁴ Therefore, if the existence of frozen embryos is unknown, or if the estate attorney is unaware of this issue during the probate process, the period during which a disclaimer may be filed may lapse. In addition, since the guardian is performing an act that may be against the best interests of the child, it could be argued that a guardian ad litem should be appointed to represent the interests of the embryo child.

IV. DIVORCE

Courts across the country have given great weight to written agreements signed by the parties specifically indicating their wishes with regard to embryo disposition in the event of divorce.¹⁵ At the time the parties consent to preservation of their embryo(s) by the clinic, they commonly execute an additional document which specifies their wishes with regard to disposition of the embryo(s) should they undergo a divorce. In the event the parties' wishes at the time of divorce conflict with their wishes reflected by the prior written agreement, the courts generally weigh the

¹³ I.R.C. § 2518 (2006).

¹⁴ *Id.*

¹⁵ *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (holding that a contract is enforceable "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo." (quoting *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001))); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. 2006).

agreement of the parties against their interests at the time of divorce.¹⁶

Since the embryo would arguably be considered a person in Mississippi after the passage of Initiative 26 under the statutes governing divorce, the issue becomes one of custody rather than ownership. The final resolution as to who is entitled to the embryo must then be addressed by the final divorce decree rather than by written agreement of the parents. Presumably, a best-interest analysis must be performed by the court as in the case of custody disputes, which generally favors the wife.¹⁷ If the wife is awarded the embryo, further consideration must be made as to whether the wife has the authority to utilize the embryo to have the child or children of her ex-husband after the divorce. The overwhelming authority around the country supports the right of a spouse *not* to procreate against his or her will unless the spouse specifically consents to the use of the embryos after the divorce. Therefore, it is unlikely that the custodial spouse will be able to utilize the embryos even though he or she may be awarded the embryos in the divorce proceeding. Assuming these facts, the custodial spouse would then assume the responsibility of payment of storage fees on behalf of the embryo for an uncertain and possibly indefinite period of time, while being denied the ability to either dispose of such embryo or transfer the embryo to produce a pregnancy.

CONCLUSION

If Initiative 26 passes on November 8, frozen embryos will be viewed in a way that is distinct from any other state in the nation. These issues exemplify a sample of the complicated scenarios which chancellors and legislators will be required to address if in fact the people should so decide.

¹⁶ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000) (holding that even if husband consented to allow his ex-wife to implant the embryos after their divorce, a change in circumstances made the agreement unenforceable as husband could not be forced to procreate against his will); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (determining that if one of the parties changed his or her mind about their agreement, the court would balance the parties' interests, usually allowing the party wanting not to procreate to prevail).

¹⁷ *See Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).