

Who Owns Frozen Embryos?

Introduction

Science and medical technology of the 20th and 21st centuries have broken and pushed the boundaries of natural law, and in doing so, have provided countless opportunities for family development and human creation. For many decades, women hoping to conceive a child with medical assistance have undergone in vitro fertilization (called "IVF"), a process where the woman's eggs are fertilized outside of her body and then transferred to her uterus. When more embryos are produced during IVF than can be safely implanted, the remaining embryos can be frozen through cryo-preservation. Freezing of fertilized embryos has created issues as to who owns them, particularly if a divorce or a disagreement arises between the couple about whether to implant, destroy or donate the embryos. When deciding ownership of the frozen embryos, from an ethical standpoint, it's important to realize that even though two people have contributed genetic material to the embryos and want to claim ownership and make decisions, the frozen embryos may be more than just their property to be fought over. Many believe frozen embryos are legally and ethically more important entities deserving of special respect, and still others believe they are already human beings, self-owned and possessing their own rights. In the end, frozen embryos should occupy a place of special respect, somewhere between regular property and a human being. Decisions about who owns them should favor the person who plans to treat the embryos in the most ethical way, and the decision should be made to benefit society as a whole. In a conflict where one party wants to destroy them, a woman who desires to implant her own frozen embryos in her own body to create a new life should be granted ownership because this accomplishes more ethical goals.

IVF, Cryo-Preservation and Conflicts in Ownership

Ever-increasing IVF procedures in the United States have led to more complex issues, conflicts, and lawsuits over the ownership of cryogenically-frozen embryos. The first baby conceived outside a woman's body was born in 1987, and since then science has continued to perfect IVF procedures whereby fertility experts combine an ovum and sperm outside of a woman's uterus to create an embryo. However, going through IVF includes significant physical challenges that a woman must undergo. Therefore because of the pain, stress, expense and risk involved in IVF, many couples decide to freeze any embryos that have not been implanted, to later use them. The frozen embryos are usually developed to 8-cell blastocysts in the morula stage, the most primary stage of human embryonic development. The frozen embryos are kept in storage, usually at the fertility clinics, and the couples sign agreements about how long the embryos will stay frozen, and when and under what conditions they will be implanted, destroyed or donated for adoption or research. It is when the couples separate or divorce, and there is no longer agreement between them as to the future of the embryos, where the question of who owns the frozen embryos arises. It is usually for courts to decide the ownership issue. (Source A at 408-10).

Is a Frozen Embryo Property, Human Life, or an Entity Deserving Special Respect?

Decisions on who owns frozen embryos when there is disagreement between a couple about what to do with them are generally made by state courts, state legislatures and even ethicists, after a legal suit is filed. Different courts across the country have decided who owns the embryos differently depending on whether they view the frozen embryos as: "(1) human life at the earliest stage; (2) property; or (3) an entity occupying an interim status" which deserves special respect. (Source A at 410). All three theories are in use across the

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country, and it is usually the political characteristics of a particular state that determines which ownership theory is used. In states where the human-life theory is followed, the judges will decide embryo-ownership with a preference toward implanting the embryo and creating life. In states that decide embryo-ownership using a property theory, the courts will look at what the signed fertility agreements say and make decisions on ownership based on the contracts, without necessarily considering the best interests of the embryo or the creators. Often the result is destroying or donating the embryos because of unclear contracts. When embryo-ownership is decided by viewing the embryos as entities deserving of special respect, the courts can look at all factors, including fairness, the circumstances of all parties, and their constitutional rights to procreate or not, in order to make the best ethical determination for the embryos. While the third-theory has the support of the majority in the country, it's important to look at all three theories in use.

Theory Number 1: The Human Life Theory

Professor Robert George, a well-known professor at Princeton, along with University of South Carolina Professor Christopher Tollefsen, take the religious position that an embryo is already human life in their book, *Embryo: A Defense of Human Life*. They state: "a human embryo is a whole living member of the species *Homo Sapiens* in the earliest stage of his natural development [which] will by directing his own internal organic functioning, develop himself toward the next more mature developmental stage, that is the fetal stage." (Source D at 1). Since they believe that an embryo is a complete "human organism" possessing the DNA and other "epigenetic factors" of personhood, they say the frozen embryo is a self-owned person having its own rights, including a right to be born. They are not alone in this view. Two U.S. states, Louisiana and New Mexico, with large Catholic populations, both have created laws saying that an in-vitro fertilized human egg is both a "juridical person" and a "biological human being". Louisiana, in particular, says that embryos are separate, independent entities with a legal capacity to sue, and that with respect to ownership, they are not the donors' property. (Source A at 411-12). Louisiana also requires that in a conflict between a couple, the embryos must be either implanted or stored until they are adopted. In fact, as reported in *Vox's The Verge Science and Tech* magazine, Sofia Vergara and her ex-fiance Nick Loeb, who went through IVF and had 4 frozen embryos in storage, were sued by their own embryos in Louisiana by a trustee who named the embryos "Emma" and "Isabella" arguing that the embryos had the right to be implanted in a surrogate. (Source F at 1). The case was recently dismissed by a judge, but only because the couple did not have real connections to Louisiana, not because the embryos could not sue them to be born.

Professors George and Tollefsen's views that frozen fertilized embryos are already human beings with their own rights, and self-owned, is basically a traditional pro-life argument -- that life begins at conception -- just now rearranged to fit into the frozen-embryo scenario. This religious theory already goes against U.S. law in *Roe v. Wade*. (Source A at 412), so it is easy to see why it is not usually followed. The fact that it goes against U.S. law is also a good reason for why this ownership theory is not really sound. The professors are most concerned that millions of fertilized embryos currently in storage will be donated for stem cell and human cloning research. To fix this, they believe that IVF should be limited to produce only small numbers of embryos to be implanted, and that millions of frozen embryos nationally be adopted. These positions are unreasonable. IVF is expensive, not covered by insurance, and it is unfair to women going through the pain of the procedure to have to do it multiple times in order to limit the number of embryos that will be frozen. Also, it is nearly impossible to find donors for millions of unused frozen embryos. *The Verge's* view is actually a more thoughtful one, stating that "although embryos are not fetuses" requiring the same rights of human beings, couples really need to give more thought about "the moral status of a human embryo" than what is currently occurring between couples going through IVF who don't really think about future of their embryos. (Source F at 2)

Theory Number 2: The Property Theory

The second theory in deciding ownership of embryos is the “property” theory. In this theory, frozen embryos are considered by courts or ethicists as moveable pieces of property like furniture or automobiles. Since there is no special human element about the embryos under this view, the joint owners have sole equal ownership rights -- and the embryos have no rights. The owners can sell them, or use them, or give them up for adoption, or dispose of them, or donate them to research, or exchange them for another piece of property in a divorce agreement. In cases where the property theory is used to decide who owns the frozen embryos in a conflict, a judge would look at the contract that the couple signed when they went to the fertility clinic in order to understand the agreements they once had about what to do with their frozen embryos. (Source A at 413). But this property-theory should really be rejected by courts because it can lead to unfair results which ignore ethical considerations. Dean Kathleen Guzman at the University of Oklahoma Law School agrees that this property theory takes away from the special nature of the embryos and sometimes causes decisions that do not feel fair and ethical. She writes: “If the embryo is property . . . the legal owners lay their claim through a combination of labor and occupation theories -- those who first expend capital or effort to produce the goods have the rights paramount to all others claiming an interest therein. Issues would focus not on the embryo but on others’ status thereto -- who has paramount rights relative to whom. . . . In short, if a person, the embryo can own property. If property, the embryo [which can become a person] can be owned.” (Source B at 206). Other ethicists agree that the idea of actually owning a potential human being, even if in embryo form, is an ethical dilemma. There are also other problems with the property theory of embryo ownership. What if a divorced spouse changes his or her mind about the original terms in a contract, and now wants to create life? Can an early contract really take away the fundamental human right of a person to have a child or not? These are challenging issues which the property theory does not handle well.

In the recent case of *Terrell v. Torres*, the Supreme Court of Arizona denied giving frozen embryos to the genetic mother Ruby Tores, who had IVF before her cancer treatments started because they would leave her unable to have a baby. The Court said the fertility contract she signed with her former boyfriend was not specific enough to give her the rights to her own embryos now, over his objection. (Source H). Meanwhile, had the Arizona Supreme Court considered ethical factors, instead of just looking at the old contract, it might have ruled for Ruby Torres, given the extenuating circumstances of a cancer- survivor wanting to be a mother. After the Supreme Court denied Torres her own embryos, the Arizona legislature passed a law ruling that in a dispute, the embryos go to the person who wants to implant them. But this new law was too late for Ruby Torres. Under the property theory in her case, she will never be a mother using her own embryos, and they will be donated to another woman who will have Ruby’s child. It is easy to see why the property theory has its negatives.

Theory Number 3: The Entity Entitled to Special Respect Theory

The third theory of deciding ownership or the fate of frozen embryos is to consider them “entities entitled to special respect.” This term means that embryos need to be seen as a special kind of property because they represent the potential of human life. They are in their own unique category, somewhere between a traditional idea of property, but not quite human life. The term came out of a court case in Tennessee called *Davis v. Davis*, where a couple divorced after IVF treatments leaving 7 embryos that they were arguing over, and the court coined the phrase that the embryos were entitled to “special respect” as something between human tissue and complete persons. Ethicists have made similar conclusions. The American Society of Reproductive Medicine (“ASRM”) only approves of this third theory requiring special respect in deciding the fate of embryos, and no other theories. The ASRM issues ethics opinions and one of

their most recent recommends the special respect theory stating that: “The preimplantation embryo [occupies] an intermediate position between a human person and human tissue. Accordingly, it is entitled to special consideration because of its potential to become a person and symbolic meaning in the landscape of human development. The moral and legal parameters surrounding the concept of special consideration are less well-defined than in the person property designation, and thus require principled guidance to avoid ad hoc decision-making . . . Embryos should be handled in respectful manner in accordance with the requirement for special consideration for embryos.” (Doc C at 273-74). While different courts and legislatures throughout the country are not in sync, and can apply any one of the three standards often depending on a state's political leanings, it is clear that the third category requiring special respect in deciding who owns or how to handle frozen embryos is the most ethical. It is also used in the majority of situations, and it involves a more ethical approach in looking at many factors to make a determination. When deciding ownership of embryos under this theory, the courts look to a number of different things about the couple, for example: their current lives, their past agreements together, what led them to IVF, how each will be helped or harmed by the decision, their past intentions and their future intentions, their hardships and their respective benefits, and many other things. The courts also do something else, that is, they look at the constitutional rights of each side to procreate or not. (Doc A 428-429).

Courts Should Rule For Women Who Argue Their Right to Procreate

Courts focusing on the “special respect theory” in a conflict over frozen embryo-ownership try to reach an ethical decision by considering many factors, the most important of which is the rights of the parties to procreate or not. However, most courts almost always rule for the party who does not want to procreate. Usually, this is the male. While it’s true that there have been several cases where female cancer survivors with no other chances to ever conceive have been awarded ownership of their frozen embryos to implant, these cases are few and far between with extremely unique and emotional facts. Most courts, when they are looking at the issue of the right to procreate or not, as between the male and female in conflict with each other, side with the parent who doesn’t want the embryos implanted arguing that a person can’t be forced into parenthood. As a lawyer representing a former husband in Missouri said when the court agreed to the father’s wishes not to procreate or allow his ex-wife to use the embryos: “My client should not be forced to become a parent against his will’ and compelling a frozen embryo to be implanted without consent of both people who created it . . .”subjects private citizens to unwarranted governmental intrusion.” (Source E. at 1). It is not only attorneys and courts who feel this way. Some ethicists agree. Arthur Caplan, a bioethicist at New York University agrees we have to support the party who does not want to procreate saying: “I don’t think turning somebody into a parent against their will, even if that is your last chance, is the way to go. . . I think it’s sad, but I wouldn’t still force somebody. The principle we want to keep in mind, particularly in this era as cloning moves forward, is nobody makes you a parent without your explicit permission’.” (Source F at 2).

This viewpoint, even though benefits men, actually stems from *Roe v. Wade*, which says that women should not be forced to have a child against their will because there is a fundamental right women have to make their own decisions about their own bodies and whether to have a child or not, -- and that right is primary to the rights of the fetus. (Source A at 430). But it is important to understand that the *Roe*-abortion situation and the frozen embryo situation are two very different things. In the case of a pregnant woman who wants to have an abortion, she is already pregnant, and given her rights over her own body, she shouldn’t be forced to have a child against her will. However, in the case of a frozen embryo, if the person is a woman and wanting to procreate, the woman here is saying the reverse, that she wants to create life, and bear the health and body risks, and her constitutional rights to life, liberty and happiness count for a lot in this situation to allow her to have a child.

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There are many feminist scholars who feel that in the frozen embryo situation, if a woman wants to create life using her own embryo, this claim to the right to procreate is paramount. These scholars believe that the right of women, in particular, to parenthood in their own lifetimes with their own embryos is of utmost importance, and it benefits society as well. Human society continues to exist because of procreation and there are natural laws and even biological factors and impulses that increase our instincts to be fruitful and create life. For ethicists, it is not just an issue of who will win a contest over embryos, but it concerns larger issues of procreation and furthering society and humankind. Procreation is significant to the very continuation of human existence, and therefore the rights of those who want to participate in this primary, fundamental function of life itself, have to be ahead of the rights of others who feel they are somehow hampered by the event of a birth. There are so many ways that the party who does not want to procreate can resolve their concerns over obligations. Agreements can be arranged where there is no financial or custody responsibility, or even interaction. It is also important to remember that during the IVF process, it is the woman who went through the pain and risk associated with what is generally 4-6 months of IVF procedures and surgeries. Those sacrifices should also be weighted to benefit the woman. John Locke, the 17th century philosopher, would agree with this theory that the woman's special and extra labor into the creation of the embryo during IVF also provides her with additional rights. In John Locke's *Two Treatises on Civil Government*, he makes several arguments relating to how one may acquire ownership of property beyond one's own body from what was previously commonly held-property. According to Locke, even though there may be claims of common ownership in the natural world, what a person invests in with "the 'labor' of his body and the 'work' of his hands, we may say are properly his." (Source G, chapter V). While Locke was likely referring to acquiring land and food in his era, the theories are still valid in the complex ethical issues of today. Applying Locke's theory, the woman who is the undergone the labor of the IVF procedure, daily injections of hormones, daily blood work, the two surgeries of egg retrieval and embryo plantation, and the accompanying risks to her health through all of this has a greater claim to the rights to use the frozen embryos to procreate, than the man who contributed, but with far less labor, work and risk in creating the embryos, and therefore has a smaller claim. In addition to making an argument under Locke, we can also just look at the basic practical principles of fairness in everyday life. The plain fact is: -- that at the point of deliberate creation of the embryo by the couple through IVF, which was the most significant moment in the bringing about of a life into the world, -- the couple was in total agreement that a life should be created. Any later change of interest by one party, should not hurt the rights of a woman wanting to continue the journey using her own body.

Conclusion

In conclusion, although this issue is one where courts and ethicists across the entire country apply different theories and standards to resolve who owns a frozen embryo, the clearest ethical position is that frozen embryos should be viewed as entities entitled to special respect. Decisions about whether to implant, destroy, or donate the embryos to science or another couple should be made by carefully weighing all ethical considerations about what is the best for the embryo, the parties and society. In a case where a woman would like to continue the journey to implant the embryos that she participated in creating as if she were the exclusive owner, her rights to procreate, together with the important ethical goals of furthering human kind, should override any other party's interest in destroy or donating the embryos.

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Source C: Ethical opinion from American Society of Reproductive Medicine 2000.

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