



Future Choices

Assisted Reproductive Technologies and the Law

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Disposition of Frozen Embryos

After two years of fertility treatments and the night before Augusta Roman was to undergo implantation of embryos created through IVF, her husband Randy informed her that he had had a change of heart and did not want to go through with the procedure. The couple underwent counseling and then divorce. The only contested issue was their remaining three embryos.

Augusta won in the trial court, but Randy won in the appellate court. While the case was awaiting appeal with the Texas Supreme Court, both parties vowed to appeal all the way to the United States Supreme Court, which had the papers buzzing about the “legal implications for *Roe v. Wade*.”⁷¹ The argument advanced by Augusta’s lawyers in the briefs to the Texas Supreme Court was that a woman should have the same right to control the disposition of embryos outside her womb as she has of naturally conceived embryos. Randy countered that such a position would reduce men to mere sperm donors.⁷²

Ultimately, the Texas Supreme Court refused to consider the appeal and the case ended there.⁷³ But the issue over which the Romans fought is bound to come up again. It is estimated that approximately half a million frozen embryos are currently being stored by fertility clinics in the United States.⁷⁴ Patients who have not used all the embryos they have created have several options from which to choose in deciding what to do with the embryos. They can:

- ☑ Use the embryos themselves for procreative purposes at a later date
- ☑ Donate the embryos to others who would like to have children (sometimes referred to as embryo “adoption”)
- ☑ Donate the embryos for medical or scientific research (primarily embryonic stem cell research)
- ☑ Have the embryos thawed and discarded
- ☑ Keep the embryos frozen indefinitely

Whether overwhelmed by the complexity of the decision or simply because they are never pressed to make a decision, some couples opt for a sixth unofficial option: abandonment. In response to the latter, some fertility clinic contracts now require that if a couple fails to pay storage fees or remain in touch with the clinic, the embryos will

become the property of the clinic after a specified period of time and can be destroyed or used for research. But there is little statutory or case law to provide clinics and patients with guidance.

Statutory Law

Only a handful of states have enacted statutes that are related in any way to the disposition of frozen embryos. The majority of these laws simply require that couples undergoing fertility treatments be provided with “information sufficient to enable them to make an informed and voluntary choice regarding the disposition of any unused” embryos or other genetic material; that they be presented with the option of storing, discarding, or donating the embryos; and that donation for research purposes be accompanied by written consent.⁷⁵ Under these statutes, none of the options except donation for research requires written consent, and patients do not have to select a disposition in order to commence treatment.⁷⁶

Florida alone requires that a physician and couple enter into a written agreement providing for the disposition of gametes and embryos “in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.”⁷⁷ The statute, however, also provides that absent a written agreement, decision-making authority regarding the embryos shall reside jointly with the couple—which may not be of much use should the couple encounter a dispute about control of the embryos. Even if there is a written agreement pursuant to the statute, it is possible a court would re-evaluate the contract in light of changed circumstances if a dispute arises about the terms of the contract itself.

Only two states—New Hampshire and Louisiana—make any pronouncements about what may or may not be done with embryos, but the two statutes are about as different as can be.⁷⁸ New Hampshire merely mandates that an embryo that has not been implanted may not remain unfrozen for more than 14 days beyond fertilization. It also places a ban on transferring an embryo to a uterus if the embryo has been donated for research purposes.⁷⁹

Louisiana’s regulatory scheme regarding human embryos is unique both in its scope and in its implications.⁸⁰ To begin with, it defines a human embryo as a fertilized ovum that will develop into an “unborn child” and classifies it as a “juridical person”—meaning one with legal rights to sue or be sued—prior to implantation and at any other time “rights attach to an unborn child.” The law allows IVF patients to “express their identity” or to forfeit their rights as parents, be treated as gamete donors, and put their embryos up for “adoptive implantation.”

Under Louisiana law, a viable embryo may not be intentionally destroyed and the physicians and medical facilities that perform IVF are charged with safeguarding the fertilized ova in their care. The judicial standard to be applied to any disputes that arise is the “best interest of the in vitro fertilized ovum,” which is the same standard used when determining the custody of children.

The unmistakable import of this law is to undermine abortion rights by treating embryos as if they were born children.⁸¹ Although the statutory scheme has not been invoked to challenge abortion rights directly, it invests non-sentient, microscopic organisms with rights—including,

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apparently, the right to be gestated and born—and legal standing in court.

Beyond abortion law, this regulatory framework raises a number of other significant constitutional issues. It transforms fertility patients into gamete donors, it potentially violates their right not to procreate, and it denies them their right to determine the disposition and use of their own genetic material.⁸²

Case Law

Left without statutory guidance, courts have struggled to determine whose interests shall prevail when disputes arise between couples as to the disposition of their unused embryos.

Of the six highest state courts to address this issue thus far, Tennessee's was the first. In *Davis v. Davis*,⁸³ the Tennessee Supreme Court decided that it must first reach the threshold question of how to categorize the human embryo. Rejecting suggestions that embryos are either persons or property, the court found that they inhabit “an interim category that entitles them to special respect because of their potential for human life.”⁸⁴

The court declared that any agreement regarding the disposition of frozen embryos should be presumed valid and enforceable.⁸⁵ Because there was no contract in the *Davis* case, however, the court engaged in a balancing test, where it weighed the interests of the parties against each other.

The court determined that the essential question was whether the parties would become parents, thereby implicating their constitutional right to privacy and the

related right to procreate or to avoid procreation. Despite the increased stress and discomfort that women undergo in the IVF process, the court found that women and men must be seen as “entirely equivalent gamete providers.”⁸⁶

Furthermore, unlike with the question of abortion, the case did not involve interference with a woman's bodily integrity; therefore her interests would not automatically trump the man's.⁸⁷ The court also found that the state's interest in the potential life embodied by the embryos was “at best slight” and not sufficient to justify any infringement upon individuals to make their own decisions about whether to allow the IVF process to continue.⁸⁸

Under the particular facts of the case, the couple divorced and the husband wanted to prevent the embryos from being implanted. The wife initially wanted to use the embryos herself, but by the time the case reached the state supreme court, she had changed her position to wanting to donate the embryos to a childless couple. The court determined that unwanted parenthood for the husband was a greater burden than the wife's knowledge that the IVF process would be rendered futile and the embryos she helped create would never become children.

The court noted, however, that it would have been a closer case had the wife wanted to use the embryos herself. In that event, the court said, an additional factor to consider would be whether she could achieve parenthood by other reasonable means, including adoption.

Since *Davis*, five other courts of last resort have addressed the issue. Generally, they first have inquired whether a couple signed a consent form with the fertility

clinic that indicated what their intent was when they created the embryos. Some courts, however, have been reluctant to enforce such agreements given that what a couple decided when they started treatment may differ vastly from how they feel after several years and significantly changed circumstances, such as the divorce that brought them into court.

In *Kass v. Kass*,⁸⁹ New York's highest court held that agreements between couples regarding their unused frozen embryos should be enforced unless those agreements violate public policy⁹⁰ or unless the couple's circumstances have significantly changed. "Advance directives," the court said, "both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."⁹¹

New Jersey and Iowa's supreme courts also agreed that such contracts should be honored, but subject to a large caveat—the right of either party to change his or her mind prior to use or destruction of the embryos.⁹² This model, known as the "mutual consent" model, requires that both parties must contemporaneously agree in order for any action to be taken.

According to the New Jersey court, when a couple disagrees as to the disposition of the embryos, the interests of both parties must be evaluated (effectively a balancing test).⁹³ In Iowa, when the parties disagree, the status quo must be maintained until they can reach resolution or until the fertility clinic is no longer contractually obligated to maintain the embryos, with the expenses for maintaining the embryos to be paid by the person opposing destruction of the embryos.⁹⁴

Although the courts have adopted a variety of tests to resolve such issues, thus far they have consistently ruled in favor of the spouse who opposes use of the embryos for procreative purposes. Massachusetts, New Jersey, and Iowa all based their reasoning in part on the fact that advance agreements to procreate or form other family relationships violate their states' public policy and are unenforceable.⁹⁵ Tennessee, in contrast, was reluctant to announce any bright-line rule and strained to point out that its holding should not be read to provide an automatic veto to a party seeking to avoid parenthood.⁹⁶

The only other state supreme court to have considered this issue, the Supreme Court of Washington, limited its ruling to the contractual rights of the parties. In *Litowitz v. Litowitz*,⁹⁷ the couple had used the husband's sperm and a donor's eggs to create the embryos. Although only the husband had a biological connection to the embryos, the court found that both husband and wife had equal contractual rights. However, because the contract provided that the clinic could destroy the embryos after five years and more than five years had passed, the court assumed the embryos were destroyed and declined to rule on which party would control the embryos if they did still exist.

In *Roman v. Roman*, described above, the Texas Court of Appeals also followed a contractual approach. It observed that there was "an emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of the agreement."⁹⁸ The court also gleaned from the handful of Texas statutes that do address assisted

reproduction that the public policy of the state would support this approach.⁹⁹

Randy and Augusta had signed a consent form in which they explicitly elected to have their embryos destroyed in the event that they divorced. Augusta claimed that she thought the provision only applied to embryos that remained after at least one attempt at implantation, but the court found that the agreement was clear and unambiguous: “Although Augusta’s choice may not have been fully considered, the evidence shows that she was aware of and understood the significance of her decision.”¹⁰⁰

What all of these courts have emphasized is that such disputes should be governed by statute and that these decisions should be confined as much as possible to the particular set of facts encountered in each case.

On the one hand, it makes sense to require any person who contributes genetic material to an embryo with the intent to become a parent to designate, in advance, what should happen to that embryo if it is not used for its initial purpose. The process alone should help couples think through future scenarios and commit themselves to a particular course that may reduce the likelihood that a dispute will arise. To that end, further regulation may be helpful.

On the other hand, it is in the clinics’ best interests to have patients fill out consent forms and it is likely that they now routinely collect information about what is to be done with unused embryos, obviating the need for legislative mandates. Moreover, as many of the cases above indicate, even where there are initial agreements, some disputes will inevitably

arise and the courts must nevertheless adjudicate whether the agreements will be enforced.

If allowing one progenitor to use an embryo against another progenitor’s objection amounts to forced procreation for the objector, should patients even be given the option to choose to have their embryos used by one partner or by others for procreative purposes? Perhaps such an option should come with a caveat that its selection requires mutual consent at the time of actual use so that patients are on notice that enforcement of this option is conditional. That solution, however, would seem to dictate that provisions to discard the embryos or use them for research should always be enforced; otherwise we are back in the position of allowing one progenitor to use embryos against another progenitor’s will.

It may also be beneficial to have guidance on what happens when donor gametes are used to create embryos. Should sperm or egg donors have a say in what happens to an embryo to which they contributed if it is not used by the intended parents? In practice, it appears that a donor’s right to withdraw consent to the use of gametes expires when the gametes are collected or, at the latest, when the gametes are used to create embryos.

But if an embryo is not used for its intended purpose, should donors have the opportunity to indicate what they would like to happen to the embryos or to place limits on what may happen? Or should the embryos be treated as the property of the intended parents, with them having exclusive control over disposition? And should an intended parent who used a donor have as much say as an intended parent who contributed sperm or eggs?

We should ensure that such guidance reflects progressive values and does not violate or undermine constitutional protections.

These questions have the potential to challenge and test our most core values, among them:

- When the right to procreate clashes with the right not to procreate, which one should prevail?
- Does our answer change when we are talking about an established pregnancy in a woman versus an embryo in a lab?

- What do we mean by consent, and how long does it last?

As with child custody disputes, fights over embryos can be incredibly fact sensitive and courts will no doubt have to resolve these disputes from time to time. But despite the nature of these suits, they can still benefit from legislative guidance. We should ensure that such guidance reflects progressive values and does not violate or undermine constitutional protections.

Endnotes

- 1 Naturally, the commercial structure of the fertility industry also has real-life ramifications, but that topic is beyond the scope of this paper. For a thorough review of the market aspects of assisted reproduction, see Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Boston: Harvard Business School Press, 2006).
- 2 Rob Stein, "First U.S. Uterus Transplant Planned; Some Experts Say Risk Isn't Justified," *The Washington Post*, January 15, 2007, p. A01.
- 3 "Hidden No More: What Everyone Should Know About Infertility," available at http://www.resolve.org/site/PageServer?pagename=lrn_wii_home (last accessed November 2007); "Fast Facts About Infertility," available at http://www.resolve.org/site/PageServer?pagename=fmed_mcff_ffj (last accessed November 2007).
- 4 "Infertility Myths and Facts," available at http://www.resolve.org/site/PageServer?pagename=lrn_ffaf_moi (last accessed November 2007).
- 5 "Frequently Asked Questions About Infertility," available at www.resolve.org/site/PageServer?pagename=lrn_wii_faq (last accessed November 2007).
- 6 See Liza Mundy, *Everything Conceivable: How Assisted Reproduction Is Changing Men, Women, and the World* (New York: Knopf, 2007), ch. 5-7.
- 7 Some have noted that people who provide eggs or sperm for a fee are "vendors," not "donors." However we will use the term "donor" in this paper because of its current widespread use.
- 8 "Multiple Pregnancy and Birth: Considering Fertility Treatments," available at http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf (last accessed November 2007).
- 9 The variation used will depend on the type of fertility problem that is in need of correction.
- 10 Originally, PGD and PGS were used primarily to screen for early-onset life-threatening or severely impairing diseases. However, PGD and PGS also have been used for late-onset diseases, for diseases that are not severely debilitating, or for non-therapeutic characteristics such as sex. The current and potential uses of this technology have raised criticism from some activists in the disability rights, civil rights, women's rights, and LGBT rights movements.

For an overview of the laws governing mistakes in the use of PGD, donor gametes with genetic abnormalities, and a failure to warn family member of the results of genetic tests, see Susan L. Crockin, "Overview of Court Decisions Involving Reproductive Genetics" (Washington: Genetics and Public Policy Center, 2007), available at http://www.dnapolicy.org/resources/Overviewofcourtdecisions_Crockin.pdf (last accessed November 2007).
- 11 "Multiple Pregnancy and Birth: Considering Fertility Treatments," available at http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf (last accessed November 2007).
- 12 For a more in-depth overview of reproductive and genetic technologies, see Emily Galpern, "Assisted Reproductive Technologies: Overview and Perspective Using a Reproductive Justice Framework" (Oakland: Center for Genetics and Society, 2007), available at <http://geneticsandsociety.org/downloads/ART.pdf> (last accessed November 2007).
- 13 Anne Harding, "Survey belies tales of donor egg market gone awry," Reuters News Service, May 31, 2007, available at <http://uk.reuters.com/article/healthNews/idUKFLE16477220070531> (last accessed November 2007).
- 14 Peggy Orenstein, "Your Gamete, Myself," *New York Times Magazine*, July 15, 2007, available at <http://www.nytimes.com/2007/07/15/magazine/15egg-t.html?ex=1187409600&en=41cd9fb9fb0178d5&ei=5070> (last accessed November 2007).
- 15 Ibid.
- 16 Spar, *The Baby Business*, at xi, 46.
- 17 "ASRM Issues Guidelines For Egg Freezing To Preserve Fertility For Some Young Women," available at www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=48371 (last accessed November 2007).
- 18 Mundy, *Everything Conceivable*, p. 214. Multiple pregnancies also can result from the use of hormonal drugs, such as Clomid, that stimulate egg production.
- 19 March of Dimes, "Multiple Pregnancy and Birth: Considering Fertility Treatments" (2006), available at http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf (last accessed November 2007); Shari Roan, "Multiple births, multiple risks; The recent news of sextuplet births isn't being celebrated by fertility experts," *Los Angeles Times*, June 25, 2007, p. F01.
- 20 Mundy, *Everything Conceivable*, p. 215-19; American Society of Reproductive Medicine, "Patient's Fact Sheet: Complications of Multiple Gestations" (2001), available at <http://www.asrm.org/Patients/FactSheets/complications-multi.pdf> (last accessed November 2007).

- 21 American Society of Reproductive Medicine, "Patient's Fact Sheet: Challenge of Parenting Multiples" (2003), available at <http://www.asrm.org/Patients/FactSheets/challenges.pdf> (last accessed November 2007).
- 22 Mark Henderson, "Single embryo IVF 'boosts chance of success while reducing the risk.'" *The London Times*, June 11, 2007, available at <http://www.timesonline.co.uk/tol/news/uk/science/article1913144.ece> (last accessed November 2007).
- 23 The Practice Committee of the Society for Assisted Reproductive Technology and the Practice Committee of the American Society for Reproductive Medicine, "Guidelines on number of embryos transferred" (2006), available at <http://www.asrm.org/Media/Practice/NoEmbryosTransferred.pdf> (last accessed November 2007).
- 24 Tom Rawstorne, "Are fertility treatments damaging our children?" *The Daily Mail*, June 18, 2007, available at http://www.dailymail.co.uk/pages/live/articles/health/womenfamily.html?in_article_id=462644&in_page_id=1799 (last accessed November 2007).
- 25 Andrea Boggio, "Italy enacts new law on medically assisted reproduction," *Human Reproduction* 20(5) (2005): 1153-1157, available at <http://humrep.oxfordjournals.org/cgi/content/full/20/5/1153> (last accessed November 2007).
- 26 "Frequently Asked Questions About Fertility," available at www.asrm.org/Patients/faqs.html#Q6 (last accessed November 2007).
- 27 Spar, *The Baby Business*, p. x-xii, 46.
- 28 Restrictions on services imposed by insurance companies also carry policy implications, but those are beyond the scope of this paper.
- 29 For instance, some laws apply only to HMOs or exempt only HMOs. Each law specifies which types of health plans must cover or offer to cover infertility services. Likewise, most of the laws regulating coverage of infertility services specify which services must be included and sometimes mention which services may be excluded.
- 30 States that require insurers to include coverage of particular infertility treatments in their health plans include Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, and West Virginia. See ARK. CODE ANN. §§ 23-86-118, 23-85-137 (2007); CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007); HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007); 215 ILL. COMP. STAT. 5/356m, 125/5-3 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); MONT. CODE ANN. §§ 33-31-102, 33-22-1521 (2005); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); N.Y. INS. LAW §§ 3221(k)(6), 4303(s) (2007); OHIO REV. CODE ANN. § 1751.01 (2007); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007); W. VA. CODE § 33-25A-2 (2007); see also "States mandating infertility insurance coverage," available at www.incid.org/article.php?cat=statemandates&id=275 (last accessed November 2007).
- 31 California and Texas only require health plans to offer coverage of infertility services for those who want it included in their health plan. See CAL. HEALTH & SAFETY CODE § 1374.55 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007); see also "States mandating infertility insurance coverage," available at www.incid.org/article.php?cat=statemandates&id=275 (last accessed November 2007).
- 32 LA. REV. STAT. ANN. § 22:215.23 (2007); NEV. REV. STAT. ANN. §§ 689A.0415, 689B.0376, 695B.1916, 695C.1694, 695C.1715 (2007).
- 33 Arkansas, Hawaii, Maryland, Rhode Island, and Texas have marriage requirements. See ARK. CODE ANN. §§ 23-86-118, 23-85-137 (2007); 054 00 Ark. Reg. 001 (2007); HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007); 28 TEX. ADMIN. CODE § 11.512 (2007).
- 34 Arkansas, Hawaii, Maryland, and Texas require couples to use their own gametes. See ARK. CODE ANN. §§ 23-86-118, 23-85-137 (2007); 054 00 Ark. Reg. 001 (2007); HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007); 28 TEX. ADMIN. CODE § 11.512 (2007).
- 35 CONN. GEN. STAT. §§ 38a-509, & 38a-536 (2007).
- 36 N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007).
- 37 N.Y. INS. LAW §§ 3221(k)(6), 4303(s) (2007).
- 38 R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007).
- 39 CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007).
- 40 HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007).
- 41 215 ILL. COMP. STAT. 5/356m, 125/5-3 (2007).
- 42 MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007).
- 43 N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, & 26:2J-4.23 (2007).
- 44 Instead of setting caps, Massachusetts requires parity for infertility services: it does not allow health plans to set benefit maximums that are more restrictive than those set for services unrelated to infertility. MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); 211 MASS. CODE REGS. §§ 37.00-37.12 (2007).
- 45 The Catholic Church, for instance, prohibits any assisted reproduction procedures that involve obtaining sperm through masturbation, adding a third party into the act of conception, or substituting a laboratory procedure for intercourse, effectively prohibiting most types of assisted reproduction. "Reproductive Technology (Evaluation & Treatment of Infertility) Guidelines for Catholic Couples," available at www.usccb.org/prolife/issues/nfp/treatment.htm (last accessed November 2007). The states with religious exemptions are California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, and Texas. See CAL. HEALTH & SAFETY CODE § 1374.55 (2007); CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007); 215 ILL. COMP. STAT. 5/356m, 125/5-3 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007).

- 46 MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007).
- 47 CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007).
- 48 CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007).
- 49 To our knowledge, no state provides coverage of infertility treatments to recipients of public benefits. We simply mention here those states that have expressly codified the exclusions in their statutes or regulations. Several states also explicitly exclude coverage of fertility drugs or other infertility services within their state plans for medical assistance.
- 50 MINN. STAT. § 256B.0625, Subd. 13(a) (2006); 56 OKLA. STAT. § 204 (2007).
- 51 MONT. ADMIN. R. 37.79.309, 37.85.207 (2007); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); OHIO ADMIN. CODE §§ 5101:3-2-03, 5101:3-4-07, 5101:3-4-28 (2007); PA. STAT. ANN. tit. 62, § 443.6 (2006); R.I. GEN. LAWS § 23-13-21 (2007).
- 52 In contrast, for instance, the IRS allows individuals to include some infertility treatment costs in deductible health care costs, which benefits those who can afford out-of-pocket payments for services in the first place. See, e.g., Sandra Block, "Individual Insurance Buyers Should Check IRS Deductions," *USA Today*, Oct. 14, 2003, available at http://www.usatoday.com/money/perfi/columnist/block/2003-10-14-ym_x.htm (last accessed November 2007).
- 53 *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 323 (S.D.N.Y. 2000).
- 54 See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996).
- 55 *Ibid.*
- 56 *Bragdon v. Abbott*, 524 U.S. 624 (1998).
- 57 *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 765 (W.D. Mich. 2001); *Saks*, 117 F. Supp. 2d at 324.
- 58 *Krauel*, 95 F.3d at 678; *Saks*, 117 F. Supp. 2d at 326.
- 59 *Alexander v. Am. Airlines*, 2002 U.S. Dist. LEXIS 7089, *6 (N.D. Tex.); cf. *Niemeier v. Tri-State Fire Protection Dist.*, 2000 U.S. Dist. LEXIS 12621, *19 (N.D. Ill.) (noting that the PDA does not require an employer to cover every expense associated with pregnancy; it just must treat pregnancy and related conditions in a neutral way).
- 60 Some courts have found potential PDA or Title VII violations, however, when an employee has experienced an adverse employment action (like termination) for taking leave in order to undergo surgical impregnation. *Erickson v. Bd. of Governors*, 911 F. Supp. 316 (N.D. Ill. 1995), *rev'd on other grounds*, 207 F.3d 945 (7th Cir. 2000); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994).
- 61 42 U.S.C. §§ 2000e to 2000e-17 (2000).
- 62 42 U.S.C. § 2000e(k) (2000).
- 63 *Krauel*, 95 F.3d at 679-80.
- 64 *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003).
- 65 The court did note that an argument could be made that the exclusion disadvantaged unmarried female employees as compared to unmarried male employees, but *Saks* did not make that argument.
- 66 See Justin Trent, *Health Care Law Chapter: Assisted Reproductive Technologies*, 7 GEO. J. GENDER & L. 1143, at *10 (2006).
- 67 *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).
- 68 *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936 (8th Cir. 2007).
- 69 Relief may also be available at the state level. Connecticut, for instance, includes fertility in its definition of discrimination on the basis of sex in its human rights statute. CONN. GEN. STAT. § 46a-51 (2007).
- 70 *Saks*, 316 F.3d at 343-44 (discussing Congress's reaction to *Gen. Elec. v. Gilbert*, 429 U.S. 125 (1976)).
- 71 Kevin Stack, "Her Embryos or His?" *Los Angeles Times*, May 30, 2007, p. A1.
- 72 *Ibid.*
- 73 "Court Won't Hear Battle over Embryos," *The New York Times*, Aug. 26, 2007, available at http://www.nytimes.com/2007/08/26/us/26embryos.html?_r=2&oref=slogin&oref=slogin (last accessed November 2007).
- 74 Mundy, *Everything Conceivable*, p. 7.
- 75 See CAL. HEALTH & SAFETY CODE § 125315 (2007); CONN. GEN. STAT. § 19a-32d (2007); MD. CODE ANN. art. 83A, § 5-2B-10 (2007); N.J. STAT. ANN. § 26:2Z-2 (2007); see also MASS. GEN. LAWS ch. 111L, § 4 (2007) (similar to other statutes but no requirement of written consent for research donation).
- 76 Massachusetts does require that an informed consent form be executed by the patient prior to treatment, but only with regard to the nature of the treatment, not to the disposition of unused embryos. See also CAL. PENAL CODE § 367g (2007).
- 77 FLA. STAT. § 742.17 (2007).
- 78 In addition, New Mexico states that IVF will not be governed as clinical research provided that the procedure includes "provisions to ensure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient." But it does not appear to mandate affirmatively that every embryo created be implanted in a woman. N.M. STAT. ANN. § 24-9A-1 (2007).
- 79 N.H. REV. STAT. ANN. § 168-B:15 (2007).
- 80 See LA. REV. STAT. ANN. §§ 9:121-9:133 (2007).

- 81 One could read the law to say that fetuses, and therefore embryos, have no rights. But there would be little purpose in enacting such a law.
- 82 For further analysis of the Louisiana human embryo statutes, see Jessica Arons, "Sex, Lies, and Embryos," *Science Progress*, October 16, 2007, available at www.scienceprogress.org/2007/10/sex-lies-and-embryos/ (last accessed November 2007).
- 83 Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
- 84 Ibid. at 597.
- 85 Ibid.
- 86 Ibid. at 601.
- 87 Ibid.
- 88 Ibid. at 602.
- 89 Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).
- 90 In addition to looking to the text in statutes to decide cases, courts often look to the policies that underlie or are expressed by the statutes. Some contracts are said to be against public policy if they are seen as injurious to the public good, and courts will refuse to enforce them for that reason. See, e.g., Black's Law Dictionary 1041 (5th ed. 1979).
- 91 Kass, 696 N.E.2d at 180.
- 92 J.B. v. M.B., 783 A.2d 707 (N.J. 2001); In re Witten, 672 N.W.2d 768 (Iowa 2003).
- 93 J.B., 783 A.2d at 719.
- 94 In re Witten, 672 N.W.2d at 783.
- 95 A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000); J.B., 783 A.2d at 717-18; In re Witten, 672 N.W.2d at 781.
- 96 Davis, 842 S.W.2d at 604.
- 97 Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).
- 98 Roman v. Roman, 193 S.W.3d 40, 48 (Tex. App. 2006).
- 99 Ibid. at 49-50.
- 100 Ibid. at 53.
- 101 Mundy, *Everything Conceivable*, p. 101 (quoting an adoption lawyer).
- 102 Elizabeth Marquardt, "When 3 Is Really a Crowd," *The New York Times*, July 16, 2007, available at <http://www.nytimes.com/2007/07/16/opinion/16marquardt.html> (last accessed November 2007).
- 103 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); see also Belsito v. Clark, 644 N.E.2d 760 (Ohio Misc. 1994). Of course, these decisions are each made based upon a particular set of facts, and it is impossible to predict the extent to which prior agreements, understandings, and actions influenced each judicial outcome.
- 104 Andrea F. Siegel, "Ruling Alters Idea of Mother," *Baltimore Sun*, May 17, 2007.
- 105 Galpern, *supra* note 12, "Assisted Reproductive Technologies," available at <http://geneticsandsociety.org/downloads/ART.pdf>.
- 106 "The Uniform Parentage Act of 2002," available at <http://family-law.lawyers.com/paternity/The-Uniform-Parentage-Act-of-2002.html> (last accessed November 2007).
- 107 See Maria Kokiasmenos & Lori Mihalich, *Health Care Law Chapter: Assisted Reproductive Technology*, 5 GEO. J. GENDER & L. 619, at *3-4.
- 108 Elisa B. v. Emily B., 117 P.3d 660 (Cal. 2005); see also In re Parentage of Robinson, 890 A.2d 1036 (N.J. Super. 2005); Chambers v. Chambers, 2002 Del. Fam. Ct. LEXIS 39. But see In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (lesbian non-biological co-parent did not have standing to establish parentage under Washington Uniform Parentage Act, but she did have standing under the state's common law).
- 109 K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
- 110 In order to protect the privacy of the parties and their children, the court did not divulge the couple's last names.
- 111 In re C.K.G., 173 S.W.3d 714 (Tenn. 2005).
- 112 COLO. REV. STAT. § 19-4-106 (2006).
- 113 TEX. FAM. CODE ANN. § 160.704 (2007); UTAH CODE ANN. § 78-45g-704 (2007); WASH. REV. CODE § 26.26.715 (2007).
- 114 WASH. REV. CODE § 26.26.735 (2007).
- 115 WASH. REV. CODE § 26.26.101 (2007).
- 116 OHIO REV. CODE ANN. § 3111.97 (2007).
- 117 See Spar, *The Baby Business*, Ch. 6.
- 118 10 OKLA. STAT. §§ 554-556 (2007).
- 119 Spar, *The Baby Business*, p. 82.
- 120 In addition, although Maryland has not passed a law that addresses surrogacy, an Attorney General's opinion states that paid surrogacy contracts are generally illegal and unenforceable under the state law. However, the payment of a surrogacy fee will not be a bar to an adoption proceeding and may be considered with regard to the voluntariness of the birth mother's consent and other factors relevant to the adoption. 85 Op. Md. Att'y Gen. 348 (Dec. 19, 2000) (interpreting Md. CODE ANN., FAM. LAW § 5-362, which bars payment for children).

- 121 North Dakota and Washington fall into more than one category because they allow some types of contracts but void or ban others.
- 122 See, e.g., ALA. CODE § 26-10A-34 (2007); IOWA CODE § 710.11 (2006); OR. REV. STAT. § 163.537 (2005); W. VA. CODE § 48-22-803 (2007).
- 123 TENN. CODE ANN. § 36-1-102(48) (2007).
- 124 In the Matter of Baby M., 537 A.2d 1227, 1234 (N.J. 1988).
- 125 See also R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (finding traditional surrogacy agreement unenforceable where compensation was paid beyond pregnancy-related expenses and mother was given no reasonable period after birth in which to revoke consent to father's custody).
- 126 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
- 127 As noted previously, the court later clarified this position in K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
- 128 Johnson, 851 P.2d at 787.
- 129 In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
- 130 In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).
- 131 Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Comm. Pleas 1994); see also J.F. v. D.B., 848 N.E.2d 873 (Ohio App. 2006).
- 132 Dorothy Roberts, "Race and the New Reproduction," in *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (New York: Pantheon Press, 1997), available at <http://geneticsandsociety.org/article.php?id=1993> (last accessed November 2007).
- 133 Spar, *The Baby Business*, p. 82.
- 134 Katherine Drabiak, et al., "Ethics, Law, and Commercial Surrogacy: A Call for Uniformity" J.L. MED. & ETHICS, 300, 304, 306-308 (Summer 2007).
- 135 Ibid.
- 136 Due to the controversial nature of gestational agreements, the drafters made adoption of Part 8 of the 2002 Uniform Parentage Act optional for the states. See UNIF. PARENTAGE ACT Art. 8 cmt. at 68-69 (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf> (last accessed November 2007). Thus far, it appears that only Texas and Utah have enacted a version of it.
- 137 Arthur Caplan, "Should Kids Be Conceived after a Parent Dies?" *MSNBC.com*, June 27, 2007, available at <http://www.msnbc.msn.com/id/17937817/> (last accessed November 2007).
- 138 Claudia Wallis, "Quickening Debate over Life on Ice," *Time*, July 2, 1984, available at <http://www.time.com/time/magazine/article/0,9171,926680,00.html?iid=chix-sphere> (last accessed November 2007).
- 139 Linda Kramer, "He Looks Just Like His Dad," *People*, September 10, 2007, p. 111-12.
- 140 FLA. STAT. § 742.17 (2007).
- 141 VA. CODE ANN. § 20-158 (2007); see also VA. CODE ANN. §§ 64.1-5.1, 64.1-8.1 (2007).
- 142 COLO. REV. STAT. § 19-4-106 (2006); 13 DEL. C. § 8-707 (2007); N.D. CENT. CODE § 14-20-65 (2007); TEX. FAM. CODE § 160.707 (2007); UTAH CODE ANN. § 78-45g-707 (2007); WASH. REV. CODE § 26.26.730 (2007); WYO. STAT. ANN. § 14-2-907 (2007).
- 143 UNIF. PARENTAGE ACT § 707, at 67 (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf> (last accessed November 2007).
- 144 Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).
- 145 Stephen ex rel. Stephen v. Barnhart, 386 F. Supp. 2d 1257 (M.D. Fla. 2005).
- 146 The Arizona Court of Appeals found that the presumption provision violated the Equal Protection Clause of the federal and state constitutions because it did not afford a genetic mother the opportunity to rebut a presumption of maternity. That case involved a dispute between the intended parents who had divorced. The court made no ruling as to the validity of the statute if a gestational surrogate wanted to keep the child. Soos v. Superior Court, 897 P.2d 1356 (Ariz. 1994).
- 147 Every state would void a contract with a person who is not competent to enter into a contract, but Washington goes a step further by penalizing those who induced the incompetent person to enter the contract. Michigan does so as well.
- 148 The Michigan Court of Appeals has interpreted the statute to mean that any surrogate parentage contract that requires both the impregnation of a surrogate and the relinquishment of her parental rights is void and unenforceable, and those that provide compensation are unlawful and prohibited. However, the Act does not prohibit contracts which compensate for conception or gestation services alone, meaning a commercial contract potentially could be upheld if payment is not conditioned on the surrender of the child. Jane Doe v. Atty. Gen., 487 N.W.2d 484 (Mich. Ct. App. 1992).
- 149 New Hampshire and Virginia's surrogacy laws are modeled after the 2000 version of the Uniform Parentage Act. Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 630 (2003).

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