Custody of Embryonic Children Act

Model Legislation & Policy Guide
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I. Introduction

Since the late 1970s and the advent of in vitro fertilization (IVF), hundreds of thousands of human embryos have been conceived and stored across the United States. In the United States alone, approximately 600,000 to one million cryopreserved (frozen) human embryos are in storage.1

The human embryo is an embryonic human being entitled to legal protection even in his or her frozen state. Human embryology and early developmental biology have established the fact that a human embryo is not just a mass of cells but rather “a whole, living member of the species Homo sapiens. The human embryo, in other words, is an embryonic human—a human individual in the embryonic stage of his or her development.”2 Embryology texts agree that “this cell [zygote] results from fertilization of an oocyte, or ovum, by a sperm, or spermatozoon, and is the beginning of a human being.”3

Historically, the common law protected human beings from the earliest point that they could be determined to be alive, and some federal and state laws currently protect human children from conception expressly. These include prenatal injury, wrongful death, and fetal homicide laws.4 The law recognizes conception as the beginning of the life of a human being, even if proof that the life existed or that an injury caused death may be difficult to establish in some circumstances. The problem of proof at early stages of existence does not prevent the law from attempting to protect the life from the biological beginning.

State laws have failed to keep up with the rapidly growing number of people who undergo IVF procedures and produce “out of body” or “extracorporeal” embryos. Over the past quarter century, there have been limited options as to what to do with these

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3 Keith Moore, The Developing Human: Clinically Oriented Embryology 1, 14 (3d ed. 1982).
vast and growing numbers of embryos, especially in the case of divorce proceedings. Depending on state law and any dispositional agreement signed by the genetic parents, they can be implanted (in the genetic or a surrogate mother), stored, destroyed, donated to adoptive parents, or donated for research. Some transfer or donation of embryos is currently conducted under contract and property law.

If a couple divorces or the relationship dissolves, couples, states, and clinics are often at a loss with what to do with the frozen embryos. Without specific legislative guidance, courts in a number of states since the 1980s have treated frozen embryonic human beings as property and disposed of them according to any contract of the couple. Some courts have also created a novel “right not to procreate,” empowering one of the couple, typically the man, to destroy them. Most often, the woman wants the embryos preserved or implanted, but the courts have sided with the man and his supposed “right not to procreate,” ending in the destruction of the embryos over one parent’s objection. Regardless of what method has been employed to resolve these disputes, it is clear that courts lack precedent, guidance, and law in resolving this very delicate issue in already tense situations.

This bill is needed to fill that legal vacuum. Courts have recognized that legislative guidance is needed in this area of reproductive technology. Without legislative guidance, courts have read the word “child” in marital dissolution statutes to apply only to a born child. Without legislative guidance, several state courts have treated human embryos as property. This legislation is needed to clarify the status of frozen embryos

5 Some courts have adopted the term “pre-embryo” to apply to what are biologically embryos. This term is based on the location of the unimplanted embryo, not on its biological nature. See e.g., McQueen v. Gadberry, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016) appeal denied, 2017 Mo. LEXIS 32 (Mo., Jan. 31, 2017) (adopting the term “pre-embryo” from a 2001 American Law Report, 87 A.L.R.5th 253 (2001)).


8 See McQueen, supra note 5, at 145–148 (balancing right to procreate versus right not to procreate) and J.B. v. M.B., 170 N.J. 9, 783 A.2d 707, 717 (2001) (recognizing a fundamental right not to procreate).

9 “Advances in medical technology have far outstripped the development of legal principles to resolve the inevitable disputes arising out of the new reproductive opportunities available.” See J. B. at 715; Kass, supra note 7, at 696 (“As science races ahead, it leaves in its trail mind-numbing . . . legal questions.”).

10 McQueen, supra note 5, at 142–143.

as human beings under state law.\textsuperscript{12} It will also guide judicial decision-making and provide advance notice to individuals, couples, and IVF clinics as to how frozen embryos will be treated in state law. Individuals and couples will have notice that they will be considered parents when they create embryos through artificial reproductive technology.

Across the country, courts have been applying various standards to address embryo custody disputes that arise during divorce proceedings. A mixture of contract, property, and family law has been applied. This is confusing and leads to arbitrary outcomes that cannot be relied upon with any level of certainty as guidance in other cases. Courts are finding that contract law is unhelpful in these circumstances because couples seeking IVF treatments are not anticipating divorce. In addition, due to the humanity of an embryo, property law is not the proper legal standard that should apply. Applying family law principles, such as the best interest standard, is the most just way to resolve the challenging situation facing genetic parents and courts.

**Application of the “Best Interest” Standard**

The Custody of Embryonic Children Act clarifies state law by directing that judges in custodial disputes shall treat frozen embryos as children and shall apply the “best interest of the child” standard. This is a familiar and common standard in American dissolution of marriage law governing the custody of children.\textsuperscript{13}

**States with Laws Addressing the Custody of Embryonic Children**

As of 2019, two states directly address the status or custody of human embryos who are the subject of custody disputes: Louisiana and Arizona. Both state laws are in effect.


Arizona’s statute, enacted in 2018, amended the dissolution of marriage statutes. A.R.S. section 25-318.03 (2018), protects human embryos in the context of marital dissolution and directs courts to resolve disputes “in a manner that provides the best chance for the in vitro human embryos to develop to birth.”

**Constitutionality**


States have an interest in protecting embryos and developing fetuses. Many states have criminal and tort laws that protect the extracorporeal embryo as a human being from conception. These laws have been upheld as constitutional due to the legitimate state interest in protecting and preserving life from the moment of conception. Additionally, criminal and tort laws validate a state’s interest in recognizing the potential life and vindicating a parent’s interest to procreate and bear life.

The United States Supreme Court has not limited state legal protections for the life of an extracorporeal embryo. Nor, is there any controlling Supreme Court precedent that state embryo custody laws are unconstitutional. That is fairly acknowledged even by legal scholars who support a broad right to reproductive autonomy.

Outside the context of a pregnancy and abortion, the state may protect a human being at every stage of biological development. Just as the states may protect a developing human being—from conception—under fetal homicide, wrongful death and prenatal injury law, the state may protect that human being in child custody, divorce, and dissolution law.

The focus of this bill is specifically on protecting the life of the extracorporeal embryonic human when a woman is not pregnant. Roe v. Wade and Planned Parenthood v. Casey are limited to the context of a woman’s desire to “terminate pregnancy.” Cf. Kass v. Kass, 696 N.E.2d 174, 179 (NY Ct. App. 1998) (Kaye, C.J.) (“Disposition of these pre-zygotes does not implicate a woman’s right of privacy or bodily integrity in the area of reproductive choice.”). When discussing extracorporeal embryos in custody disputes, no pregnancy has yet begun. Thereby, Roe and Casey are inapplicable.

Additionally, providing legal protection for the life of an embryonic human does not involve contraception. The parents have deliberately created an embryonic human.

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13 See Commonwealth v. Bullock, 913 A.2d 207, 214 (Pa 2006) (finding the Crimes Against the Unborn Child Act constitutional because states have an important and legitimate interest in protecting fetal life at all stages.); See also, Ex parte Phillips, No. 1160403, 2018 Ala. LEXIS 105 *70 (Oct. 19, 2018) (under the criminal laws of the State of Alabama, the value of the life of an unborn child is no less than the value of the lives of other persons).
15 Id. at 513-527 (addressing the limits of Roe v. Wade and the Supreme Court’s doctrine of substantive due process).
16 See e.g., I. Glenn Cohen, The Constitution and the Rights Not to Procreate, 60 STAN. L. REV. 1135 (2008); I. Glenn Cohen, Regulating Reproduction: The Problem with Best Interests, 96 MINN. L. REV. 423, 513 (2011) (“The only U.S. Supreme Court decision to consider whether there is a fundamental right to become a genetic parent, Skinner v. Oklahoma—finding a fundamental right that was violated by physical sterilization of individuals . . . is subject to a myriad of possible interpretations, especially as applied to reproductive technologies.”); John Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437, 500 (1990) (noting that “[i]t is unlikely that a Supreme Court disinclined to expand the menu of unwritten fundamental rights will accord the purely psychosocial interest in not having biologic offspring fundamental right status.”).
being who exists independently of a pregnancy. Therefore, *Griswold v. Connecticut* and *Eisenstadt v. Baird* are also inapplicable. ¹⁹

Each Supreme Court decision in the area of reproduction is limited to specific, concrete circumstances; none has created a broad, abstract right to “procreational autonomy.” Therefore, states do not need to fear they are infringing on a constitutional right, especially because in vitro fertilization (IVF) has not been declared to be a constitutional right.

Contrary to the broad dicta in some Supreme Court privacy cases, the Supreme Court in *Webster v. Reproductive Health Services*, 492 U.S. 490, 506–507 (1989), specifically examined Missouri Statute sec. 1.205, which declared that human beings have protectable interests from conception, and found that it did not violate the right to privacy without specific application to limiting abortion, leaving it to the state courts to decide its application.

Numerous state laws constitutionally protect the life and health of children within the context of family relationships and childrearing. This bill provides that children at the earliest stages of human development are protectable human beings and are not excepted from legal protection and cannot be abandoned in the limited context of a dispute over their custody.

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¹⁹ Jill Madden Melchoir, *Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties*, 68 U. Cin. L. Rev. 921 (2000) (“reject[ing] any presumption that favors a right to avoid procreation after intentional creation of an embryo, arguing that related Supreme Court jurisprudence more strongly supports a presumption favoring the right to procreate, especially after intentional fertilization, and especially if a woman's bodily integrity is not involved. Therefore, any right to avoid procreation should end upon intentional fertilization in the context of frozen embryos.”)
II. Custody of Embryonic Children Act

AN ACT concerning

Be it enacted by the People of the State of [State], represented in the General Assembly:

Section 1. Short Title.

This Act may be cited as the Custody of Embryonic Children Act.

Section 2. Legislative Purpose and Findings.

(1) The legislature finds that:

(a) There are an estimated 600,000 to 1 million cryopreserved (frozen) human embryos in the United States, and the number grows annually;

(b) The established facts of human embryology and early developmental biology make clear that the human embryo is no merely incidental mass of cells, but is a whole, living member of the species Homo sapiens. The human embryo, in other words, is an embryonic human—a human individual in the embryonic stage of his or her development;

(c) Human beings at the embryonic stage are currently protected by various state laws, including prenatal injury laws, fetal homicide laws that begin legal protection from conception in 30 states, and wrongful death laws in several states;

(d) There is scant guidance from federal or state law for the disposition of frozen human embryos; few states have legislation governing the disposition of frozen embryos;

(e) In the wake of unclear guidance from federal or state law, numerous contested lawsuits have arisen across the country over the past quarter century relating to disputes over the status of and rights to frozen embryos, including cases decided by the supreme courts of Colorado, Massachusetts, New Jersey, New York, Tennessee, and Washington;

(f) Two States—Louisiana and Arizona—have specific legislation to protect the lives of embryonic human beings in custody law.

(2) The [General Assembly]'s purpose in enacting this law is to:

(a) Clarify the legal status of frozen embryos;
(b) Promote the best interests of these embryonic children in marital dissolution law;
(c) Clarify the rights of parents.
(d) Protect embryonic children from destruction.

Section 3. Definitions

For purposes of this Act:

“Human embryo” or “embryo” means an individual organism [fertilized ovum] of the human species.

Section 4. Legal Status of Cryopreserved Embryos and Legal Standard to be Applied

Notwithstanding any provision is a contract or agreement, written or verbal, between the parties to a divorce or custody proceeding or a third party in [State] under [section of state dissolution of marriage law] in which frozen or cryopreserved embryos are at issue, the embryos are deemed to be children under the law, and the judge shall apply the best interests of the child standard, and shall determine the custody of the embryos after applying that standard.

Section 5. Severability.

The provisions of this Act are declared to be severable, and if any provision, word, phrase, or clause of the Act or the application thereof to any person shall be held invalid, such invalidity shall not affect the validity of the remaining portions of this Act.

Section 6. Right of Intervention.

The [General Assembly], by joint resolution, may appoint one or more of its members who sponsored or co-sponsored this Act, as a matter of right and in his or her official capacity, to intervene to defend this law in any case in which its constitutionality is challenged or questioned.
III. Myths & Facts

Myth: A human embryo is not a human being.

**Fact:** Embryological textbooks verify that an embryo is a human being—a member of the species *Homo sapiens* in early developmental stages.

Myth: Human embryos cannot be protected by the law in this way.

**Fact:** Prenatal injury, wrongful death, and fetal homicide laws in many states already protect the embryonic human as a human being from conception. Two states, Arizona and Louisiana, have passed a law like this. Both laws are in effect and have not been challenged as unconstitutional under state or federal law.

Myth: An embryo custody statute violates *Roe v. Wade*.

**Fact:** Outside of the context of abortion, states can and do protect the developing human being as early as conception.

Myth: An embryo custody statute forces people to become genetic parents against their will.

**Fact:** The Supreme Court’s decisions have recognized “an individual’s right to decide to prevent conception or terminate pregnancy.” *Carey v. Population Services Inter’l.*, 431 U.S. 678, 688 (1977). An individual who has created frozen embryos has chosen to conceive and has therein relinquished their right to “prevent conception.”

The “unwanted parenthood” that the Court addressed in *Roe v. Wade* was the individual woman’s distress at being pregnant. During a frozen embryo custodial determination, there is no pregnancy. Therefore, the court is neither ordering an opposing party to parent the child nor should a court ever order this. Rather, that party can terminate their parental rights in the event that the other spouse implants the embryo and the child is born. Additionally, if the couple donates the embryos for adoption, their legal rights may be altered or relinquished.

Myth: Embryo custody laws imply approval of in vitro fertilization.

**Fact:** Not at all. Embryo custody simply takes the situation of frozen embryos as it exists, without implication for how the frozen embryos came to be, and provides a legal protection to preserve the future health of the embryo.
To the contrary, the condemnation of embryo adoption or custody will send an inconsistent or contradictory message about the humanity of the frozen embryo, treating it as sub-human, or not a “real” child, or not worthy of adoption.

Myth: Embryo custody laws will encourage the production and preservation of more frozen embryos.

**Fact:** IVF is a physically arduous and expensive procedure for the genetic mother, costing an average of $10,000 for each reproductive cycle. Most couples will go through multiple IVF cycles with the true costs ranging anywhere from $24,373 to $61,377.20 In contrast, embryo adoptions cost on average $8,000. It is similarly costly and difficult for the woman who physically carries the child to term. Given the expense, risks, and medical procedures involved in implantation of the embryo, it is unlikely that many women or couples would prefer embryo adoption if there are alternatives—either procreation or adoption of a born child.

There is no reason to think that the passage of a law that guides judges adjudicating custodial disputes would encourage anyone to choose IVF over natural procreation. If anything, a law that firmly recognizes the humanity of a fertilized embryo may give pause to couples considering IVF because it illuminates the ethical concerns that accompany all assistive reproductive technology.

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20 Patricia Katz et al., *Costs of Infertility Treatment: Results from an 18-Month Prospective Cohort Study*, 95 Fertil Steril. 915, 920 (2011).
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