

6-1-2013

Acquiring, Distributing, and Disposing of Potential Human Life: The Current Status of Human Embryos Beyond Chicanery II

J. Brad Reich

University of Puget Sound, breich@pugetsound.edu

Follow this and additional works at: http://soundideas.pugetsound.edu/faculty_pubs

Citation

Reich, J. Brad. 2013. "Acquiring, Distributing, and Disposing of Potential Human Life: The Current Status of Human Embryos Beyond Chicanery II." *Journal Of Management Policy & Practice* 14(3): 11-17.

This Article is brought to you for free and open access by the Faculty Scholarship at Sound Ideas. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Sound Ideas. For more information, please contact soundideas@pugetsound.edu.

Acquiring, Distributing, and Disposing of Potential Human Life: The Current Status of Human Embryos Beyond Chicanery II

J. Brad Reich
University of Puget Sound

A human embryo is, by medical definition, "...the developing organism from fertilization to the end of the eighth week." In the largely un-settled legal realm, a human embryo is "...[neither] 'persons' or 'property', but occupy[ing] an interim category that entitles them to special respect because of their potential for human life." Much of the overall debate about human embryos comes from the fact that they may be people, property, or something in between. There is no clear consensus, but we can debunk some inaccuracies based on what is recognized now. This article will attempt to begin to do so.

INTRODUCTION

*The line it is drawn
The curse it is cast...
For the times they are a-changin'*
- Bob Dylan, *The Times They are A-Changin'* (Dylan, 1964)

I have written extensively before about "Cyberprocreation", or using the Internet to create human life. While Bob Dylan pre-dates me, his comments were prescient. The simple fact is that we can now craft human life in ways never before imagined, and still incomprehensible to some. This advancement raises a variety of moral, ethical, and legal issues...and no shortage of economic opportunities and concerns. We are moving closer and closer to life before breathing life.

REGULATORY PERSPECTIVE

There is no federal statutory law defining the legal status of human embryos, but embryos are not "persons" possessing independent rights under federal common law (*Roe v. Wade*, 1973, 162). However, there is some state legislation providing different perspective. Louisiana designates embryos as legal persons, while Georgia legislation declares that embryo life begins at the single-cell stage and that embryos have rights and responsibilities under state law. New Mexico gives embryos the status of "fetus" by its broad statutory definition and Missouri law is that the life of each human being begins at conception. At the other end of the continuum Michigan recently passed a statute treating some embryos as property and Florida law grants sperm and egg donors joint decision-making regarding embryo disposition. At common law, Texas treats embryos as property by allowing contract law to determine disposition. It appears that Maine, Massachusetts, North Dakota, and Pennsylvania statutorily recognize a special interim status making embryos more than property but less than human and, while Tennessee has

not codified such status, its Supreme Court held that "[Embryos are] not, strictly speaking, either 'persons' or 'property', but occupy an interim category that entitles them to special respect because of their potential for human life" (Davis v. Davis, 1992, 588). These are only legal evaluations, so we turn to an "authority" in the field to gain ethical perspective as well.

The American Society for Reproductive Medicine ("ASRM") is "...a voluntary, non-profit organization devoted to advancing knowledge and expertise in reproductive medicine, including infertility, menopause, contraception, and sexuality" (American Society for Reproductive Medicine, 2011). It is "...the leading market force in the field of reproductive medicine" (Reddix-Small, 2008, 673). The Society for Assisted Reproductive Technology ("SART") is "...the primary organization of professionals dedicated to the practice of assisted reproductive technologies ("A.R.T") in the United States," and "...is also extensively involved in data collection, practice guidelines and standards, government interaction, quality assurance, and research" (American Society for Reproductive Medicine, 2011). ASRM and SART, along with the College of American Pathologists ("COP") created the Reproductive Laboratory Accreditation Program ("RLAP"). That program proffers standards for reproductive laboratories and performs on-site accreditation every two years. SART represents 85% of the clinics practicing ART in the United States and as of 2005, two-thirds of SART programs were RLAP accredited. ASRM appears to be "the" ethical bar for human embryo standards. It contends that "Embryos are deserving of special respect, but they are not afforded the same status as persons" (American Society for Reproductive Medicine, 2011). ASRM goes on to elaborate:

In previous reports, this Committee has made clear its view that embryos should be accorded an elevated moral status compared with other human tissues, but that they should not be viewed as persons (3–5). Indeed, many of the publications of this Committee refer as a starting point to this description of the embryo first published in 1986: "The (pre)-embryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of person- hood, it is not yet established as developmentally individual, and it may never realize its biologic potential (American Society for Reproductive Medicine, 2011).

So there is, at least some, ethical and state level legal agreement that human embryos occupy a unique status. Accordingly, important questions of acquisition and disposition must be answered, at least so far as currently possible.

ACQUIRING HUMAN EMBRYOS: "ADOPTION", "DONATION", AND WHY SUCH TERMS ARE MISLEADING

Any discussion of acquiring human embryos must, at least eventually, address Assisted Reproductive Technology ("A.R.T."). A.R.T. is the umbrella term for the various medical technologies creating conception through means other than coital reproduction. A.R.T. developed, and is developing, because an increasing number of people cannot conceive a child through intercourse. Those people may well choose to acquire a human embryo. In common nomenclature, there are two ways to do so, adoption or donation; both terms are disingenuous.

The most vociferous debate regarding human reproductive tissues focuses, not surprisingly, on a moral issue. That issue is referred to as "commodification", or whether or not human reproductive tissue should be bought and sold. While there is strident disagreement as to whether human reproductive components, such as embryos, should be bought or sold, the simple fact is that they *are* and there is no reason to think this will change. This is significant because "embryo donation" is a misleading term as such donation usually involves money changing hands for an embryo. Where embryo donation is legal, the Food and Drug Administration regulates the process. Where not given some "human" status, human embryos are goods.

Embryo adoption differs from embryo donation, but the term is even more misrepresentative. While a variety of sources tout the virtues of embryo adopting, true “adoption” is usually not possible. Human adoption refers to a legal process to establish parentage for a living human being. As previously discussed, in most jurisdictions, embryos are not human life; therefore they cannot be adopted. It is more accurate to understand that, in the vast majority of jurisdictions, embryos are not legally adopted; ownership simply changes hands using traditional contract law. Only one state, Georgia, passed an embryo adoption statute, and that law is predicated on an underlying contractual agreement. Where embryo adoption could exist, it would likely be much more regulated than embryo donation, as it should entail traditional adoption steps such as a home study and judicial approval. In reality, embryo adoption is fundamentally quite similar to embryo donation; the terms are misleading marketing ploys likely designed to make the parties feel “good” and obscure the fact that, regardless of whether the process is termed “adoption” or “donation”, it involves money in exchange for reproductive human tissue.

PERSONAL DISPOSITION: EMBRYO “CUSTODY”

A couple gets divorced. They have embryos in preservation. Who “owns” them, if anyone? The answer is unclear, and may always be so, particularly in light of the varying state-level public policy considerations above. As succinctly stated by one commentator, “We’ve got a state by state patchwork of approaches across the country” (In Divorce, Who Gets the Embryos?, 2012).

“Custody” of embryo litigation will become more common as more married people attempt to utilize frozen embryos to produce children. The basic problem is that “[t]he law is having trouble keeping up with [human reproductive] technology” (Farr, 2012) and there is little reason to think that gap will do anything but increase in light of astoundingly rapid technological development. This leaves courts in a difficult position and, understandably, they are forced to simply do what they think is “right” as there is little actual precedent or other legal guidance. It appears that courts ruling on the issue of human embryo custody tend to side with a biological parent’s right not to be forced into parenthood when one party to the dissolution wants to use the embryos to pursue human life and the other does not. There is also litigation pending addressing custodial rights where at least one party on the donor side has a biological connection to the embryo, and no party on the donee side has any. The outcome of that issue has yet to be decided but, by analogy to sperm donor cases, it may well be that the biological donor has parental rights to embryos provided that the donor is “known” to the donee (Lezin, 2003, 188) and embryos are considered something legally akin to traditional living children.

COMMERCIAL EMBRYO ISSUES: DISPOSAL OF POTENTIAL HUMAN LIFE

There may be more than 500,000 human embryos in storage. Those embryos belong to the prospective parents, at least until certain contractual events do or do not occur. Many of those prospective parents eventually place the holding facility in a position where it has the legal right to dispose of the embryos due to the “owner’s” failure to execute contractual duties. While many of these facilities would probably like to dispose of these embryos, they may be very afraid of resulting, and unpredictable, litigation. Such facilities might gain guidance from a very small pool of decisions holding that embryo disposition is usually dictated by contract, but not all courts hold such agreements enforceable and almost all of the existing cases arose out of disputes that addressed some aspect of potentially unwanted familial relationships. Only one case is possibly on point in terms of the independent disposition by a holding facility with no inter-related “custody” issues, *New York-Del Zio v. Presbyterian Hospital*.

In *New York-Del Zio*, the Del Zios underwent in vitro fertilization using Mr. Del Zio's sperm and Mrs. Del Zio's egg. The co-mingled materials were placed in an incubator. A supervisor learned of the embryo, felt it was his ethical duty to destroy it, consulted hospital officials, and did destroy it. The Del Zios brought suit for intentional infliction of emotional distress and wrongful conversion. The jury returned a verdict for the Del Zios on the intentional infliction claim, but for the hospital on the wrongful conversion cause of action. We glean two things from *New York-Del Zio*. First, a holding facility disposing of an

embryo, without contractual right, can be liable to the prospective parents in tort. Second, if the embryo is viewed as other than property, the facility is not liable under wrongful conversion, as conversion is predicated on wrongful possession of property. This is extremely interesting because, if embryos are not property, some disposal would open the door for wrongful death claims, but one court found that it unlikely a defendant could be held responsible for the wrongful death of a human embryo because the claim would be too speculative, while another found that the state Wrongful Death Act was not applicable to situations where the embryo was destroyed pre-implantation. On the other hand, if embryos are property, it seems only logical that facilities disposing of them, in violation of an existing contract, could face liability from conversion claims, and possibly other causes of action such as trespass to chattels.

WHERE EMBRYOS ARE HUMAN LIFE (OR MAY INTERPRETED AS SUCH)

“One of the most deeply held beliefs in our society is that life-whether experienced with or without major physical handicap-is more precious than non-life.”

(Bermon v. Allan, 1979, 12)

Some storage facilities may be able to legally dispose of human embryos as abandoned property. However, what about the few jurisdictions actually, or arguably, treating human embryos as human life? In those, a very interesting question would be what “should” be done to/for human embryos abandoned to storage facilities? Such inaction would be, directly analogous to, parental abandonment of a living child, so what should the judiciary do regarding the abandonment of human life not yet born?

It appears that, while a question of individual state law, the nation-wide standard, regarding the health and welfare of living children, is “best interests”. It also appears, albeit with reluctant admission from certain courts in light of the moral issues involved, that they support the existence of life over the lack of life. Combining these two perspectives, the current conclusion is that the majority of jurisdictions would hold that it is in the best interest of unborn life to have the chance to be born. Accordingly, and likely impossibly, storage facilities holding human embryos, in states that give them human status, would have to commence termination of parental rights actions in order to facilitate some form of transfer from storage to wherever the courts determine the best interests of the embryo lie. In a circuitous development, perhaps this then creates available embryos, and a judicial procedure, for true human embryo adoption.

CONCLUSION

Assisted Reproduction Technology is big business and should continue to grow. The acquisition, distribution, and disposal of human embryos should grow accordingly. The reality is that, absent a United States Supreme Court decision on point, the judicial status of human embryos will be made on a state-to-state basis, arguably reflecting public policy of those respective states. Whether such determination is “right” or “wrong” is not a legal issue, but rather one of individual morality. But, as morality frequently shapes legislation and judicial decision making, it is a discussion that needs to happen now.

REFERENCES

A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

Adamson, D. (2005). Regulation of Assisted Reproduction Technologies in the United States. *Family Law Quarterly*, 39, 727 – 744.

Adoption. *Thefreedictionary.com*. Retrieved Jan. 12, 2012, from <http://legal-dictionary.thefreedictionary.com/adoption>.

American Society for Reproductive Medicine. 2011. Defining Embryo Donation. Retrieved Jan. 10, 2012, from http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/DefiningEmbryoDonation.pdf.

American Society for Reproductive Medicine. 2011. Membership Overview. Retrieved Jan. 5, 2012, from available at <http://www.asrm.org/join>.

American Society for Reproductive Medicine. 2011. What is SART?. Retrieved Jan. 5, 2012, from <http://www.sart.org/detail.aspx?id=1864>.

Baiman, A. (2009). Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights? *William and Mary Journal of Women and Law*, 16, 133-154.

Baum, K. (2001). Golden Eggs: Toward the Rational Regulation of Oocyte Donation. *Brigham Young Law Review*, 2001, 107-166.

Becker, D. Georgia Passes Nation's First Embryo Adoption Law. Retrieved March 24, 2011, from <http://www.thevoicemagazine.com/headline-news/headline-news/georgia-passes-nations-first-embryo-adoption-law.html>.

Bender, J. (2010). Snowflakes in Texas? Enacting Legislation to Allow for Human Embryo Adoption. *Texas Wesleyan Law Review*, 16, 413-436.

Berman v. Allan, 404 A.2d 8 (N.J. 1979).

Bresnick, D. The Commodification of Human Reproductive Materials. Retrieved Jan. 18, 2012, from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC479139/pdf/jmedeth00001-0026.pdf>.

Brown-Barbour, V.S. (2004). Bartering for Babies: Are Preconception Agreements in the Best Interests of Children? *Whittier Law Review*, 26, 429-486.

Conde, J.E. (2006). Embryo Adoption: The Government Adopts a Cause. *William and Mary Journal of Women and the Law*, 12, 273 – 303.

Davis v. Davis, 84 S.W.2d 588 (Tenn. 1992).

Dylan, B. (1964). The Times They are a-Changin. On The Times They are a-Changin (album). Columbia Records.

Embryo. *Thefreedictionary.com*. Retrieved Jan. 10, 2012, from <http://medical-dictionary.thefreedictionary.com/embryo>.

Farr, L. Whose Egg is it, Anyway? An Embryo-Custody Battle. Retrieved on Jan. 2, 2012, from <http://www.more.com/relationships/attitudes/whose-egg-it-anyway-embryo-custody-battle?page=5>.

Florida Statutes § 742.17(2) (2009).

Florida Statutes Annotated § 873.05 (2000).

Food and Drug. C.F.R. pt. 1271.55.80 (2006).

Goldberg, C. Nov. 14, 2005. Boston Globe. In Vitro Field Facing Shutdown. Retrieved Jan. 17, 2012, from http://www.boston.com/yourlife/health/women/articles/2005/11/14/in_vitro_field_facing_slowdown/.

In Divorce Who Gets the Embryo?. Retrieved Jan. 10, 2012, from blogs.wsj.com/law/2011/12/20/in-divorce-who-gets-the-embryos/?blog_id=14&post_id=41564.

In Re Marriage of Whitten, 672 N.W.2d 768 (Iowa 2003).

J.B. v. M.B., 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000).

Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (Ariz. Ct. App. 2005).

Kass v. Kass, 696 N.E.2d 174 (N.Y. 1984).

Lezin, J. (2003). Misconceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors. *Hastings Women's Law Journal*, 12, 185-214.

Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

Louisiana Revised Statutes Annotated § 9:122 (2006).

Louisiana Revised Statutes Annotated § 9:123 (1986).

Louisiana Revised Statutes Annotated § 9:126 (2008).

Manning, P.J. (2004). Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation. *Georgetown Journal of Gender and the Law*, 5, 677-721.

Marietta, C.S. Frozen Embryo Legislation Spotlights Pressing Questions: What is the Legal Status of an Embryo and Can it be Adopted?. Retrieved Jan. 8, 2012, from [Marietta-Embryolegal.pdf](#).

Mercer, B. (2006). Embryo Adoption: What are the Laws? *Journal of Juvenile Law*, 26, 73-83.

Miller v. American Infertility Group, 897 N.E.2d 837 (Ill. 1st Dist. 2008).

Missouri Revised Statutes § 1.205 (2010).

Mundy, L. (2006-07). Mother Jones. Souls on Ice: America's Embryo Glut and the Wasted Promise of Stem Cell Research. Retrieved Jan. 15, 2012, from <http://motherjones.com/politics/2006/07/souls-ice-americas-embryo-glut-and-wasted-promise-stem-cell-research>.

New Mexico Statutes Annotated § 24-9A-1G (2007).

New York-Del Zito v. Pres. Hosp., 1978 U.S. Dist. LEXIS 14450.

Penn, J. (2008-09). A Different Kind of Life Estate: The Laws, Rights, and Liabilities Associated With Donated Embryos. *Regent University Law Review*, 21, 207-228.

Phillips v. Irons, (2005). WL 4694579 (Ill. App. Ct. 2005).

Rao, R. (2006). Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research. *Berkeley Technology Law Journal*, 21, 1055-1066.

Reddix-Small, B. (2008). Assessing the Market for Human reproductive Tissue Alienability: Why Can We Sell Our Eggs, but Not Our Livers? *Vanderbilt Journal of Entertainment and Technology Law*, 10, 643- 689.

Reich, J.B. & Swink, D.R. (2010). You Can't Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era. *Albany Law Journal of Science and Technology*, 20, 1-66.

Reich, J.B. & Swink, D.R. (2011). Outsourcing Human Reproduction: Embryos and Surrogacy Services in the Cyberprocreation Era. *Journal of Health Care Law and Policy*, 14, 241-297.

Roan S. Obama Victory Delights. Retrieved Jan 5. 2010, from http://latimesblogs.latimes.com/booster_shots/2008/11/ob-ama-victory-d.html.

Roman v. Roman, 193 S.W.3d 40 (Tx. App. 2006).

Roe v. Wade, 410 U.S. 113 (1973).

Skouvakis, F.A. (2005). Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Babies in Pennsylvania. *Pennsylvania State Law Review*, 109, 885-905.

Sweet C. & Eskin, H. Why Embryo Donation and not Embryo Adoption? Retrieved on Jan. 13, 2012, from www.dreamababy.com/donation-not-adoption.php.

Thornbury v. Am. Coll. Of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

Virginia Code Annotated § 32.1-289.1 (2006), repealed by Acts 2007, c.92, cl.2 (2007).

York v. Jones, 717 F.Supp. 421 (E.D. Va. 1989).

Copyright of Journal of Management Policy & Practice is the property of North American Business Press Inc. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.