LEGAL STATUS OF CRYOGENIC EMBRYO

Sukanya Basu, BA LLB, Delhi Metropolitan Education (Affiliated To Guru Gobind Singh Indraprastha University), Department of Law

ABSTRACT

This research paper commences with an "Introduction" that outlines the concepts of embryo cryopreservation and ovarian preservation. It identifies two primary demographics of women who are likely to utilize these reproductive technologies. The subsequent section, titled "The Legal Status of an Embryo," presents an overview of the legal standing of cryogenic embryos in the context of divorce, supported by relevant case law. Following this, the section "Legal Opinion on an Embryo as a 'Legal Person'" discusses judicial perspectives, noting that while couples possess the autonomy to determine the use of their embryos, this right is not absolute. Courts have refrained from categorizing embryos as mere property in divorce cases. Additionally, it is conceivable that state regulations concerning health may impose restrictions on the sale of embryos. The next section, "Disposition During and After Marriage," elucidates, with the aid of case law, the processes involved in the handling of embryos both during and following marriage. This is followed by a discussion of case law regarding the division of frozen embryos in divorce proceedings along with its legal status in India. The paper concludes with a summary of the findings.

Keywords: Cryogenic Embryo, Embryo Cryopreservation, Legal Status of Embryo, Status of Embryo Post-Divorce

Introduction

I. Embryo Cryopreservation

Cryogenics encompasses the exploration of phenomena occurring at low temperatures, particularly focusing on the processes of freezing, thawing, and potential regeneration of human tissues and organs. Recent advancements in this field are being leveraged by infertility clinics across the United States and globally to retrieve human oocytes, facilitate fertilization through assisted reproductive technologies, and subsequently cryopreserve embryos within in vitro fertilization (IVF) laboratories for future use. In the IVF protocol, cryogenics is employed when a human zygote is placed in a glass pipette and submerged in liquid nitrogen during the critical stages of development, specifically between the two-cell and eight-cell stages. These cryopreserved embryos are later thawed and transferred into the uterus of the gestational carrier during her menstrual cycle. Although the freeze-thaw process poses risks to the embryo prior to re-implantation, research indicates that embryos that successfully endure this process exhibit developmental rates and risks of abnormalities comparable to those of naturally conceived embryos. Furthermore, findings suggest that women receiving these embryos can achieve healthy pregnancies and successful live births. While the technology for frozen embryos is increasingly accessible to the public, it remains financially unattainable for a significant portion of the population. The evolution of embryo cryopreservation has reached a stage where facilities can now accommodate the storage of previously deemed unusable embryos. Given the favorable global reception of cryogenics and IVF treatments over the past decade, an increase in demand for these technologies is anticipated in the near future.

II. Ovary Cryopreservation

The cryopreservation of human female ovaries has become a viable procedure, paralleling the established practice of embryo cryopreservation. This technique involves the extraction of ovarian tissue, its preservation through cryogenic methods, and subsequent reimplantation into the female's ovarian bed. Consequently, this process facilitates the restoration of both reproductive and endocrine functions in women.

Two primary demographics are anticipated to be the predominant beneficiaries of ovarian and embryo cryopreservation technologies. Firstly, women undergoing chemotherapy or radiation therapy are likely to seek these interventions. Secondly, women in their mid-30s to mid-40s,

who face increased risks of fetal anomalies or challenges in natural conception, are also expected to utilize these technologies frequently. Furthermore, women who opt to prioritize their careers and delay motherhood can now do so, thereby redefining societal norms regarding the "appropriate" age for childbearing. This advancement allows women previously deemed too advanced in age for conception to have children without significantly increasing the risk of birth defects.

For millennia, the process of human reproduction has involved the fertilization of a mother's egg by a father's sperm, resulting in childbirth approximately nine months later. Recent scientific advancements have enabled the extraction of an egg from the mother, its fertilization with the father's sperm, and subsequent cryogenic preservation of the resulting embryo. This frozen embryo can be thawed and implanted into a uterus—potentially that of a surrogate—months or even years later, with the possibility of developing into a healthy child, albeit with a success rate of less than 50%.

In clinical settings, the extraction, fertilization, and freezing of egg cells are typically performed in small batches due to the invasive nature of the procedure. The thawed embryos are then implanted individually. However, given the current divorce rates, it is likely that couples with a limited number of frozen embryos may experience separation before the implantation process is fully realized.As a result, frozen embryos have been added to the list of uncommon sorts of properties that divorce courts must deal with.

The Legal Status of an Embryo

The legal status of an embryo is as crucial determining factor for establishing whether divorced spouses have the legal authority to donate their embryos for implantation to another couple. In a number of states, disputes regarding the disposition of cryopreserved embryos have already been dealt with in the setting of divorce, though not necessarily uniformly. While the problem is most traditionally associated with divorce, a separated non-marital pair would probably encounter it as well. In this case, the court would likely rely on the principles used in cases of divorce, especially when there are contract and reproductive choice issues at play.

In many cases involving the use of excess cryopreserved embryos by divorcing spouses, courts have made determinations about the status of embryos. Embryos represent an "interim category" between persons and property, which "entitles them to special regard because of their

potential for human existence". See Davis v. Davis, 842 S.W.2d 588 at 597 (Tenn. 1992). In A.Z. v. B.Z., 725 N.E.2d 1051, 1059. (Mass. 2000), the Massachusetts court ruled that embryos are not only a type of property to be divided between separating spouses;. Typically, embryos are not divided as an aspect of property in divorce; however, a few states have held that marital right to dispose of cryopreserved embryos created during marriage is some form of personal property that can be divided in divorce. See Marriage of Dahl, 194 P.3d 834. (Ore. App. 2008) (Under Oregon law, a contractual right to hold or dispose of embryos is considered personal property susceptible to distribution in a divorce case according to the terms of the contract.). Reber v. Reiss, 38 FLR 1279 (2012), is another example (embryos treated as personal property, although not argued).

Legal Opinions on an Embryo Being a "Legal Person"[1]

The legal status of embryos in the United States is illustrated by various abortion cases, which indicate that embryos are not recognized as legal persons under constitutional law. In the landmark case Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court determined that a fetus does not qualify as a "person" under the due process clause of the Fourteenth Amendment. Nevertheless, a report by Sherry Colb on CNN.com highlights a ruling where a judge stated that frozen embryos could be considered people, suggesting that a fertility clinic that disposed of nine embryos belonging to a plaintiff might face a wrongful death lawsuit based on the assertion that embryos are human beings. While the prevailing legal consensus maintains that embryos do not possess the status of legal persons, regarding them solely as property could undermine their potential for human development. Some courts have established an "interim category" for embryos, granting the biological parents certain rights of ownership or control over their embryos, thus allowing them to make decisions regarding their future use without engaging in the broader national debate on abortion. However, it has been noted by legal experts that while couples have the authority to determine the fate of their embryos, this authority is not absolute. Although progenitors may have specific rights concerning the use, management, and disposal of embryos, the classification of embryos as "property" is not entirely applicable. Courts have refrained from treating embryos as mere property in divorce cases, and regulations surrounding embryo research vary, with some jurisdictions imposing

[1] Charles P. Kindregan Jr & Maureen McBrien, A Look at Embryos in Divorce, familylawyermagazine.com (Dec. 18, 2019), https://familylawyermagazine.com/articles/embryos-in-divorce/

restrictions or outright prohibitions. Additionally, it is conceivable that a state, in fulfilling its obligation to safeguard public health, might impose limitations on the sale of embryos.

Dispositions During and After Marriage

It is not unusual for a couple's agreement with a fertility clinic, commonly referred to as a cryopreservation agreement, to contain provisions regarding the fate of unused embryos following in vitro fertilization (IVF). Nevertheless, during divorce proceedings, the parties may reach a different resolution that supersedes the original clinic agreement. For instance, in a case from Washington, the wife's cryopreservation agreement granted her the authority to determine the disposition of embryos created using the husband's sperm and donor eggs. Following divorce mediation, which prompted the court to address the issue of embryo disposal, the previous clinic contract was rendered inapplicable. The court ultimately had the jurisdiction to award the embryos to the husband, who expressed a desire to pursue parenthood through a surrogate. See Marriage of Nash, 2009 WL 1514842 (Wash. App., 2009)[2]. Conversely, in A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000), the Massachusetts Supreme Judicial Court adopted a different perspective. The court determined that a purported contract between the spouses, based on a form provided by a reproductive clinic, lacked binding authority. It ruled that if one party chose to relinquish the option of reproduction post-divorce, that decision would be definitive. In another instance, J.B. v. M.B[3]. and C.C., 783 A.2d 707 (N.J. 2001), the New Jersey court upheld that agreements regarding the disposition of embryos do not contravene public policy. It affirmed that each partner retains the right to change their mind until the embryos are either utilized or destroyed. Typically, in such cases, the individual opting out of parenthood prevails. However, the New Jersey court refrained from addressing the implications if an infertile party sought to utilize the embryos without the consent of their partner. This situation raises pertinent questions about the treatment of couples who lack alternative means of having a genetically related child.

Recent Case Laws on Division of Frozen Embryo in Divorce Proceeding

Davis v. Davis[4]

Davis v. Davis, 842 S.W.2d 588 (Tenn.), on reh'g in part, 1992 WL 341632 (Tenn. 1992), cert.

[2] Marriage of Nash, 2009 WL 1514842 (Wash. App. 2009).
[3] J.B. v. M.B. and C.C.
[4] Davis v. Davis, 842 S.W.2d 588 (Tenn.), on reh'g in part, 1992 WL 341632 (Tenn. 1992).

denied sub nom. Stowe v. Davis, 507 U.S. 911 (1993), was the first American decision to consider the status of frozen embryos. In Davis, the parties participated in a frozen embryo plan and had divorced when the frozen embryos were not yet implanted. There was no formal agreement between the parties and the facility which had frozen the embryos. The woman claimed that the remaining embryos were to be donated to a childless couple. The remaining embryos were to be destroyed because the spouse did not want another child. The trial court held that frozen embryos constituted children and gave the frozen embryos to the wife to be implanted.

The Tennessee Supreme Court held that the frozen embryos are neither property nor children in the sense that those terms have traditionally been used in divorce cases but rather a new kind of entity that incorporates elements of both:

"We conclude that pre-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.". This means that any interest that Mary Sue Davis and Junior Davis may have in the pre-embryos, in this case is not a true property interest. However, they do have an interest like ownership, to the extent that they have decision-making authority concerning the disposition of the pre-embryos, within the scope of policy set by law.

The court has held that an agreement between the parties should be the first recourse in determining the fate of frozen embryos:

We believe, as a first principle, that an understanding regarding disposition of any untransferred pre-embryos in the event of contingencies (such as death of one or more of the parties, divorce, financial reversals or abandonment of the program) should be deemed valid and should be taken as enforceable between the progenitors. This finding is consistent with the principle that the parents, having contributed the gametic tissue which leads to the pre-embryos, are vested with decision-making power regarding their fate."

However, the court agreed that the contract can be not prima facie determinative especially if it is not capable of further amendment:

At the same time, we realize that life is dynamic and human feelings are more extreme in overcoming infertility issues when a married couple tries. Consequently, parties' initial

"informed consent" to IVF procedures often becomes uninformed for reasons of impossibility to predict all emotional and psychological turns that the IVF process may take. We believe that providing for the alteration of initial agreements by the agreement itself will protect the parties from some of the hazards they encounter in this regard. However, in the absence of such an agreed upon amendment, we conclude their previous agreements are binding.

Unfortunately, since the parties involved in Davis had no contract, giving paramount weight to their agreement did not help the court deal with the matter before them. As a result, the court was left with little choice but to settle the question between the wife's right to donate the embryos and the husband's right to prevent the embryos from becoming children. The answer was found in the constitutional right to privacy. That right surely shelters the right to bear children from frivolous state incursion. See Eisenstadt v. Baird, 405 U.S. 438 (1949); Skinner v. Oklahoma, 316 U.S. 535 (1942). Davis makes the plausible case that, by the same reasoning, the right of privacy guards against an individual's decision to forego having children. "For this case, it is useful to recall that, however the right to procreational autonomy is finally bounded in constitution, it consists of two closely but separately related rights: the freedom to reproduce and the right to procreation that can be barred." In Davis, the husband's decision not to have any children outweighed the wife's right to donate the frozen embryos:

Junior Davis wants the freedom to postpone parenthood while Mary Sue Davis wants to donate the pre-embryos to another couple for implantation. It would condemn her to the burden of knowing that all the lengthy IVF treatments she endured were to no avail, and that the pre-embryos to which she provided genetic material would never become children. Now, this hardly represents a light emotional toll, so we can only conclude that Junior Davis's desire to avoid fatherhood is greater than Mary Sue Davis's wish to donate. If she is allowed to donate these pre-embryos, he will spend the rest of his life worrying over his status as a father or knowing about it but having no say about it. If these pre-embryos were taken to term, he said he would have defended custody over his child or children. If a child was born of the donation, he would be robbed twice: his procreative autonomy would be lost and his relationship with his offspring would be forbidden.

This is partly what made the decision of the court: the wife did not want the embryos implanted in herself.

If Mary Sue Davis desired to use the pre-embryos herself, the case would be more compelling

one, but only if she could not conceive otherwise. We empathize with Mary Sue's anguish and additional suffering she would suffer were she to choose IVF again. However, she would have a good chance of trying parentage once more at IVF in all its dimensions: genetic, gestational, carrying, and rearing.

Held that the facility must follow its usual course of conduct "in dealing with" unused frozen embryos because the husband's decision not to have children was constitutionally protected.

Kass v. Kass[5]

In the case of Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350, the frozen embryos were put before the court once again for their disposition (1998). In Kass, the woman wished to have the embryos implanted in her womb, and the husband did not want children. This time, before the eggs had been extracted, fertilised, and frozen, both parties signed a consent form. Under the form:

Our frozen pre-zygotes will not be removed from storage for any reason without both our written approval, by the standards of the IVF Program and applicable law. We agree that all legal ownership of any stored pre-zygotes shall be determined in a property settlement in the event of divorce and that they shall be released as instructed by a court of competent jurisdiction.

Three weeks after such divorce became inevitable the parties both signed an agreement, typed by Maureen Kass, which provided:

The 5 frozen pre-zygotes at Mather Hospital shall be disposed of according to our consent form, and neither Maureen Kass, Steve Kass nor any other person will receive custody of said pre-zygotes.

The court accepted Davis' contention that an agreement between the parties should prevail :

Agreements between gamete providers, which concern the destiny of their pre-zygotes, should be presumed valid and enforceable and implemented in case of a dispute. Indeed, parties should be encouraged to contemplate foreseeable contingencies and make their wishes clear in writing

[5] Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350 (1998).

prior to embarking on IVF and cryopreservation. Agree to deals, explicit agreements can avoid costly litigation. They are much more critical and relevant in situations of decision-making regarding one's reproductive life when the intangible costs of any move are beyond estimation.

The problem, however, was in the construction of the agreement. The husband argued that the agreement stated that the arrangement required joint consent before implantation, while the wife argued that it did not. This was essentially a contract construction issue, which the court found to be somewhat familiar. "Although the facts of this dispute are unique, the common-law rules governing the construction of contracts are not." The court accepted the husband's case:

What is most striking about this analysis of consents taken together is that appellant and respondent both agreed that the disposal of the pre-zygotes was to be a shared decision. The consents show they both did not want some third party to make that decision for them. Even if they were not available, even if they died, the consents mutually indicated the disposition that was to be made in the event of unforeseen circumstances. Throughout all the lengthly texts, a public declaration of the sentiment is noted. Scattered throughout this book are the three words "we," "us," and "our.". Certainly, these parties' overarching choice could not be clearer: "We are in charge of deciding what to do with our frozen pre-zygotes. Our frozen pre-zygotes shall not be removed from storage for any reason without both our written approval by the standards and applicable law."

Therefore, after an analysis of both agreements in their entirety, the court concluded that this cryptic reference by the permission form to the decision of the court on legal ownership was not there with intent to confer permission for implantation when one party was not so desirous of it. Thus the court refused to permit implantation.

Cahill v. Cahill[6]

Cahill v. Cahill, 757 So. 2d 465 (Ala. Civ. App. 2000), was the next case to involve an agreement. The Cahill agreement stipulated that:

Under the following conditions, the wife and husband agree to cede full control and direction

[6] Cahill v. Cahill, 757 So. 2d 465 (Ala. Civ. App. 2000)

of our frozen embryos to the physicians of the Department of Obstetrics and Gynaecology:

A court-ordered dissolution of our marriage.

The trial court refused to award the embryos to the wife, citing the language of the agreement that stated that if the parties divorced, ownership would appear to revert to the medical facility. The appeals court upheld the decision.

J.B. v. M.B[7]

J.B. v. M.B., 170 N.J. 9, 783 A.2d 707 (2001), involved a similar arrangement to the one in Cahill:

Under the following conditions, I, J.B. (patient), and M.B. (partner) agree to give full control, direction, and ownership of our tissues to the IVF Program:

A court-ordered dissolution of our marriage, unless the court stipulates who controls and directs the tissues.

The situation was unique in that the husband desired to donate the embryos for implantation to another couple, but the woman preferred that the embryos be discarded.

The court began by examining the contract's text but found it to be confusing because the parties' agreement to relinquish control in the case of divorce did not apply if the court indicated who would govern the embryos. Kass was distinguished by the court because the language there was significantly less vague. Readers can compare and contrast the languages and draw their judgments; this author thinks the languages to be more similar than dissimilar. The court did not refer Cahill, which found little uncertainty in similar language.

The court determined that the agreement was vague, but that the ambiguity was unimportant because a contract to implant frozen embryos was against New Jersey public policy. The court went on to say:

"We recognize that persuasive reasons exist for enforcing pre-embryo disposition agreements. Both the Kass and Davis decisions pointed out the benefits of enforcing agreements between

[7] J.B. v. M.B., 170 N.J. 9, 783 A.2d 707 (2001).

the parties... We also recognize that in vitro fertilization is in widespread use and that there is a need for agreements between the participants and the clinics that perform the procedure. We believe that the better rule, and the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos."

The net impact of this law is that frozen embryos cannot be implanted unless both parties' consent at the moment of implantation, regardless of any agreement made by the parties. According to A.Z. The court only gave the party seeking implantation a small window of opportunity, saying that "where there is disagreement as to disposition because one party has reconsidered his or her previous choice, the interests of both parties must be assessed." "In most cases, the party who chooses not to become a biological parent will win." The court agreed with Davis that the right not to become a parent was materially stronger in this case because the spouse wanted to donate the embryos rather than act as a parent himself. As a result, the embryos were not implanted.

Litowitz v. Litowitz[8]

Litowitz v. Litowitz, 146 Wash. 2d 514, 48 P.3d 261 (2002), is far more dissimilar from the others. The husband and wife in Litowitz wished to have children. She was unable to conceive or carry a child to term. They obtained egg cells from a third party-an egg donor-fertilized them with the husband's sperm, and froze the embryos. One of them was transferred to a surrogate woman who gave birth to a healthy baby. In case the couple divorced, the leftover embryos lay there in storage.

Such a contract with the egg donor should outline:

All the eggs produced through the Egg Donor by this Agreement will be owned by the Intended Parents and the Intended Parents shall have discretion to make whatsoever decisions regarding their disposition(s) as they may deem proper. No other person shall use the eggs without the express written permission of the Egg Donor by the Intended Parents. Our pre-embryos shall have been preserved in cryopreservation for a period of five years following the date of first cryopreservation unless otherwise agreed upon by the Center to extend our participation for an

[8] Litowitz v. Litowitz, 146 Wash. 2d 514, 48 P.3d 261 (2002).

additional time, the medical clinic's contract pointed out. Our pre-embryos will be thawed but not permitted to proceed further from development, the parties penned on the hand.

In Litowitz, like in Davis, the trial court focused on the best interest of the frozen embryos and directed that the father make due diligence efforts to have the embryos transferred for implantation in a married couple. On appeal, the Washington Supreme Court, like the appellate court in Davis, reversed, relying exclusively on the express provisions of the contract between the medical center and the parties. It would not "undergo further development," according to the contract, after five years of preservation. More than five years had elapsed between the date of preservation and the date of divorce. The court, therefore, held that the embryos could not be implanted with their existence under the terms of the contract. The court dismissed the wife's claim to establish rights under the agreement with the egg donor, holding that the agreement ceased to apply once the eggs were fertilised and turned into embryos. Finally, the court determined that a general provision allowing a court to determine an acceptable disposition if the parties could not agree on one did not grant authority to reach a different outcome.

Legal Developments and Judicial Interpretations Regarding Cryogenic Embryos in India

There are no specific laws concerning the status of frozen embryos in India, and judicial interpretations have taken different turns. The courts have preferred not to enforce agreements related to the disposition of an embryo in cases of changed circumstances and, instead, have shown a preference for giving weightage to the present intentions of the parties rather than strictly adhering to contractual obligations.

According to National Guidelines for ART Clinics in 2005[9], conception through IVF does not amount to consummation of marriage. It is likely that such marital disputes or divorce involving cryogenic embryos may lead to further legal questions.

Prakash v. Arun Kumar Saini (2010)[10], this is an important case that touched the issue of personhood of embryos; it called attention to the fact that a child in the womb only can be considered as a person after birth, which indirectly influences the legal treatment of frozen embryos.

[9] National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, Ministry of Health and Family Welfare, Government of India, Indian Council of Medical Research, 2005.
[10] Prakash v. Arun Kumar Saini,(2010) 2 SCC 368 (India).

The Delhi High Court has ruled on October 13th 2024 to consider the posthumous use of cryopreserved semen for reproduction. Such a judgement is an important landmark in the arena of reproductive rights in India. This landmark judgment allowed for the utilization of sperms of deceased persons for artificial insemination, thus enabling them to impregnate their partners even after death. The case was based on the application of a lady whose partner had died, leaving behind cryopreserved semen. She sought the court's order for legal consent to become pregnant using that semen, as she indicated that she intended to have children with her dead partner.

The court, in determining the consequences of reproductive rights and the right to posthumously procreate, concluded that those consequences regarding emotional and family ties continuing after death brought it to assert that denial of this right may even contravene the autonomy of the surviving partner.

It is observed that the Delhi High Court permitted cryopreserved semen to be used; an element of reproductive rights extends beyond life. Such a judgment underscores the importance of the courts respecting individual choices in family planning and the ever-changing face of family structures in modern society.

Conclusion

The developing case law on this topic has largely evolved towards a decision that is highly consistent. Any genetic parent has an absolute right to ensure that their body or future life shall not be affected by the implantation of any frozen embryo due to their constitutional right to privacy. That right is more significant than the right of the other parent to procreate and much more significant than a contract which mandates implantation on its face. If implantation will ever be the proponent's only realistic hope of having a kid, the right to bear a child will probably take precedence. However, the tone of the cases leads to a conclusion that the power to veto implantation is probably absolute.

Without any opinions on the validity of US Supreme Court law in abortion cases, it is obviously worth noting that the case law concerning a frozen embryo is, per se, a logical and obvious extension of the cases regarding abortion. The US Supreme Court abortion precedents themselves state that a mother's right to privacy and control over her own body trumps any

right a nonviable foetus may have. See Roe v. Wade, 410 U.S. 113 (1973)[11]; Webster v. Reproductive Health Services, 492 U.S. 490 (1989)[12]. In the frozen embryo cases as well, the right of the objecting parent not to reproduce is an incident of the right to privacy, and it prevails over any countervailing rights of the other parent or the embryo. State courts will quite likely continue holding that the right to privacy trumps the rights of a frozen embryo as long as the Supreme Court continues to maintain that the right to privacy trumps the rights of a nonviable foetus.

While cryogenic embryos were recognized and regulated by legislation and court rulings in India, which has progressed much in this respect, yet there are yet innumerable ambiguous issues of law. It is the urgent discussion between the legislative arm, lawyers, and ethicists to come up with effective solutions for them.

[11] Roe v. Wade, 410 U.S. 113 (1973).
[12] Webster v. Reproductive Health Services, 492 U.S. 490 (1989).