

Safeguarding Frozen Embryos Through Estate Planning



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It is often the case that our clients teach us more about the law than we learned in law school. This is the case for the issue of frozen embryos. When meeting with a client about her estate plan, the client volunteered that she had frozen embryos in storage. This provided an opportunity to delve into a newly emerging field.

For many with dreams of starting a family, the dream is not easily realized. Today, infertility affects a much larger demographic than ever before. Single women, same-sex couples, unmarried couples and married individuals alike face challenges when trying to start a family. According to the American Pregnancy Association, 6.1 million individuals throughout the United States face infertility. Most know that working with a doctor who is a fertility expert can increase their chances of conceiving, but few realize the legal issues that can result from undergoing such treatments. This article focuses largely on estate planning issues related to Artificial Reproductive Technologies ("ART") and highlights some of the key legal issues that should be considered by anyone seeking fertility treatments or anyone with frozen embryos in storage now.

To overcome fertility challenges, an increasing number of individuals are turning to in vitro fertilization, or IVF as it is commonly referred. IVF is the process of fertilization by manually combining an egg and sperm in a laboratory dish to create an embryo, which is later transferred into a uterus. When successful, IVF can help infertile individuals conceive.

Often, the result of IVF treatments is the creation of multiple embryos that are stored (frozen) for future use. Individuals undergoing IVF treatments should consider at the beginning of the process how they want to handle the embryos remaining after implantation. Answering this question has raised many more legal and ethical questions, especially if the person does not desire additional children. There are a variety of preferences: some desire their embryos to remain frozen indefinitely; some would love the opportunity to donate their embryos to another infertile couple; some will allow the embryo to be "adopted;" while some may opt for the destruction of embryos that are not going to be implanted. These considerations, and particularly the final option mentioned, raise both legal and moral issues that have implications that differ depending on the applicable laws of the state in which a person resides and the state in which the embryos are stored.

Few clients, or their attorneys for that matter, will consider the issue of frozen embryos when thinking about estate planning. Few attorneys counsel clients about this issue, particularly because it is such a newly emerging field and many states are still divided or undecided as to how to treat embryos. The bottom line is that if you have frozen

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embryos or plan to undergo IVF treatments in the future, it is crucial to learn the laws in your state and to plan your estate accordingly.

Currently, there are three schools of thought on the legal classification of embryos: 1) an embryo is human life, 2) an embryo is pure personal property, no different than a pet or other household item, or 3) an embryo is property deserving of special respect. Existing statutes and case law in Virginia suggest that the Commonwealth follows the second approach: that embryos are treated as personal property. For an estate plan, this is good news in that an individual can provide for the disposition of their embryos in their estate plan rather easily and couples can enter into legally binding contracts to direct the future treatment of their embryos. Regardless of Virginia's stance on this issue, some clients will wish to treat the embryos as property deserving of special respect and that can be thoughtfully addressed in an estate plan as well.

In other states, especially where embryos are treated as human life, an individual must be exceedingly careful as to how and where the frozen embryos are stored. The potential destruction of the frozen embryos in these jurisdictions opens the door to serious legal issues that are often cloaked in moral issues. Couples undergoing IVF should review the frozen embryo storage contract carefully. Some contracts provide for the destruction of the embryo if the storage fee is not paid. Some contracts specifically address which party owns the frozen embryos (the donor, the husband or the wife). Some contracts specifically address who gets to decide what happens to the frozen embryos in case of legal separation or divorce. For example, one spouse may want to use the embryos created during the marriage after a divorce, while the other may be adamantly opposed to such an act. It is best to discuss these matters early in the IVF process, and a post-nuptial or pre-nuptial agreement may be the best way to memorialize both parties' wishes.

In addition to the contractual issues, estate planning issues require attention. It is important that your estate plan reflects your desired wishes for how you want your frozen embryos handled upon your death or incapacity. This means your wishes need to be memorialized in a Durable Power of Attorney (especially if you live in a state that follows either of the latter two approaches discussed above). Such a document should be clear as to whether you want the annual storage fee to continue to be paid on your behalf if you are ill or incapacitated and whether you want to allow for potential donation of your embryos, etc. Lastly, your wishes as to how you want your frozen embryos handled upon your death needs to be addressed in your Last Will and Testament or your Revocable Trust.

The decisions facing individuals with frozen embryos are extremely personal, and people's beliefs vary greatly on this subject. A licensed attorney can assist you with learning your applicable state laws and ensure your estate plan conforms to your beliefs and is a reflection of your wishes.