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UNANSWERED QUESTIONS: THE DISPOSITION OF FROZEN EMBRYOS IN CALIFORNIA

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California is typically at the forefront of reproductive healthcare practices and the legal issues arising from these sensitive and deeply emotional topics. However, our state has fallen behind many others in answering the question of what happens to unused frozen embryos following *in vitro* fertilization treatments if the intended parents are unable to agree on a disposition at the end of their relationship. Since Tennessee first answered this question in 1992, at least a dozen states have wrestled with this problem, setting forth various approaches to resolve this issue. Twenty-four years later, California remains largely silent on providing a framework for the courts to resolve these disputes.

The purpose of this article is to provide a practical guide to California divorce attorneys with clients who have frozen embryos stored at a fertility clinic. By analyzing related California law and the approaches taken in other jurisdictions, we can better predict the likely path future California courts will choose when confronted with this issue.

Approaches of Other Jurisdictions

The first case to address the disposition of frozen embryos upon divorce, *Davis v. Davis*, was decided by the Tennessee Supreme Court in 1992.[1] *Davis* established a two-part analysis that has since served as the starting point for every other jurisdiction confronted with this question. The threshold inquiry under *Davis* is whether the parties previously entered into an agreement demonstrating their unambiguous intent as to the disposition of any unused frozen embryos in the event of certain occurrences, such as divorce or the death of either intended parent. If no prior agreement exists, the court would conduct a balancing test of the parties' respective interests in the use, or non-use, of the embryos.

The existence of an agreement between the intended parents is often easily ascertainable. Typically, the parties will have filled out a cryopreservation consent form at the fertility clinic by checking a box or initialing next

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to the desired outcome on a list of possible contingencies. For example, the parties may elect to donate the embryos to science if they both die, or they may want the embryos discarded in the event of divorce. In fact, *Davis* is the only reported case where there was no agreement whatsoever between the parties; every other case has at least some type of agreement. Still, nothing is perfect and the case law reveals instances of failed or deficient agreements. These include instances when IVF participants completed a cryopreservation consent form, but failed to make an election in the event of divorce (either by neglect or inability to reach consensus).[2] In other cases, the courts have found ambiguity in the fertility clinic's boilerplate consent form.[3] In each of these scenarios, the parties found themselves in the same position as if there were no agreement. Although some courts have stretched to disregard an agreement for technical reasons, the form of an agreement may not be so rigidly prescribed. In 2015, an Illinois court found there was an *oral* agreement between the parties, providing that the female partner would retain the embryos at the end of their relationship.[4] At least seven courts have followed a dispositional agreement without having to conduct a balancing test.[5]

In the absence of an agreement, the balancing test established in *Davis* was intended as the means to decide between conflicting individual freedoms, "composed of two rights of equal significance – the right to procreate and the right not to procreate." In *Davis*, the court found that the husband's interest in avoiding genetic parenthood was superior to the wife's competing interest in seeking to have the embryos donated. The court added, however, that the result might be different if the wife wanted the embryos for her only opportunity to have children. This added piece of dictum is important to note because it is common for one of the IVF participants (usually, but not always, the female) to have age- or medical-related fertility issues that led the parties to seek fertility treatments in the first place.

Only two post-*Davis* appellate courts have found it appropriate to apply the balancing test. In one court, the key factor was the female partner's infertility;[6] in the other, the court found that one spouse's right not to procreate outweighed the other's right to use the frozen embryos.[7] In fact, twice as many trial court decisions have been overturned for using a balancing test when an agreement should have resolved the issue in the first instance. Two of those reversals occurred because the trial court disregarded the agreements in favor of infertile women, citing the *Davis* dictum about an infertile party preserving her last opportunity for children.[8] In both cases, the reviewing courts determined that infertility did not overcome a clear agreement and the consideration of balancing test factors was entirely incorrect.

There are a bevy of generic concerns that a client might want to present to the court for consideration in the balancing test. High on this list is the fact that the relationship between the intended parents (which might be a marital or nonmarital relationship) is over. The termination of that relationship is incompatible with the notion of co-parenting, especially when the intended parents cannot even agree what to do with the embryos. Intended parents are not statutory sperm or egg donors so it is likely that an unwilling parent would be deemed a legal parent even if the parties try to agree that he or she will have no parental obligations or responsibilities.[9] This may expose both parties to unwanted challenges about parentage, custodial rights, and child support issues. It can also create estate planning problems such as potential challenges to an unwilling parent's estate, or more remote inheritance rights, such as from a genetic grandparent's estate.

The prevalence of citations to *Davis* in subsequent cases might lead one to think that its analysis has reached widespread acceptance. That is not the case. Alternative approaches are at least as frequent, if not more so,

than the *Davis* approach. The predominant theme of these other cases is that until the embryos are implanted, either party can change his or her mind about using the embryos to create a child. To date, there are two states in the U.S. that have adopted this approach through decisional law, while two others have done so by statute, under certain circumstances. There are also at least nine European countries which have adopted the same approach, as did the ABA.

Iowa's approach acknowledges that the end of a marriage evidences changed circumstances from when the intended parents first decided to undergo fertility treatments.[10] These changes are sufficient reason for the courts to disregard a dispositional agreement altogether in favor of requiring "contemporaneous mutual consent" of the parties before using or destroying the frozen embryos. If the parties cannot agree at the time of divorce, the embryos must remain frozen until they can reach an agreement.

A Massachusetts court held that even if there is a valid agreement, it would violate public policy to enforce a contract compelling a sperm or egg provider to become a parent against his or her will.[11] The court noted "[a]s a matter of public policy, forced procreation is not an area amenable to judicial enforcement."

Both Florida and Texas have passed legislation that would give an individual the opportunity to stop implantation of an embryo in certain circumstances, despite the absence of a dispositional agreement or the application of a balancing test. In Florida, if there is no written agreement, the decision-making authority resides *jointly* with the commissioning couple, so either intended parent could refuse to allow implantation.[12] In Texas, a gestational contract for a surrogate must be completed fourteen days prior to implantation of an embryo into a surrogate; refusal by either intended parent to enter into a surrogacy agreement would preclude implantation from taking place regardless of any dispositional agreement made when the embryos were created.[13] In either state, a balancing test would be incompatible with these statutes.

As of 2007, national laws in the United Kingdom, Denmark, France, Greece, the Netherlands, and Switzerland all provide the right to withdraw consent prior to implantation of the embryos, while Belgium, Finland, and Iceland appear to grant the same freedom as a matter of law or practice.[14] The national law of the United Kingdom was challenged before the Grand Chamber of the European Court of Human Rights, which upheld the male participant's absolute right to withdraw his consent to use the embryos prior to implantation notwithstanding the conclusive infertility of the female partner.[15] Despite sympathy for the woman, the court found the requirement for bilateral consent "was the culmination of an exceptionally detailed examination of the social, ethical, and legal implications of developments in the field of human fertilization and embryology, and the fruit of much reflection, consultation, and debate."

The laws of other countries are expectedly not uniform. In Iceland, embryos are to be destroyed in the event of divorce. In Germany and Italy, neither party can revoke consent after fertilization. In Hungary a woman can proceed with implantation in the event of divorce if there is no agreement to the contrary. In Estonia and Austria, a man's consent can be revoked until fertilization. In Spain, a man can revoke his consent only if married and living with the woman.[16]

In 2008, with the benefit of many of these decisions at its disposal, the ABA constructed an Act Governing Assisted Reproductive Technology (the "ABA Act") to provide clarity and a mechanism for resolving these novel disputes. Although the ABA Act would require the intended parents to enter into an agreement regarding the use of the embryos upon divorce and other contingencies, either party would be entitled to withdraw his or her consent at any time prior to implantation.[17] Although the ABA Act has not been enacted in California, it provides additional support for a party asking the court to order non-use of frozen embryos despite the existence of a dispositional agreement to the contrary.

California Authority on Reproductive Rights Issues

Although California has not yet answered the ultimate question regarding the disposition of frozen embryos, both the legislature and the courts have been faced with related reproductive rights issues that indicate the state's policies to both recognize artificial reproductive rights agreements and to grant each individual autonomy over the use or non-use of his or her genetic material. While it is possible that California courts could fashion an altogether different analysis for resolving this issue, it is more likely that the approaches of other jurisdictions will be evaluated and harmonized, if possible, in a manner consistent with existing California authority.

The California legislature's first foray into this field came in response to a series of scandals in which fertility doctors in Irvine and San Diego used individuals' reproductive material without their consent. In 1996, Penal Code section 367g was enacted, making it a felony to use or implant sperm, eggs, or embryos except as expressly authorized in a signed writing by the provider of the genetic material.[18] Although there has been no case law interpreting Penal Code section 367g, the effect of the statute is to protect an individual's autonomy over his or her own reproductive material.

Penal Code section 367g also highlights what dispositional agreements do not cover: the specific consent of each gamete provider to *implant* the embryos into a uterus. Cryopreservation consent forms address only what will happen upon the happening of certain contingencies. For example, the parties may choose that in the event of divorce, any unused embryos will be discarded, donated for science, donated to an infertile couple, or they be given to one of the spouses. However, a compelling argument can be made that Penal Code section 367g precludes, under threat of imprisonment, *implantation* of the embryos without each progenitor's written consent, regardless of an

agreement giving the embryos to one of the spouses upon divorce. We can think of this process as having two locked doors that the progenitors must pass through together: the first door is the agreement to create the embryos; the second is an agreement to implant the embryos. Simply awarding the frozen embryos to one spouse may not be sufficient to allow for that spouse to pass through that second door.

California has also implemented minimum requirements as it relates to the information made available to IVF participants from their doctors. Health & Safety Code section 125315 requires reproductive healthcare providers to give each individual participant in fertility treatments a form with certain statutorily prescribed options for the disposition of the reproductive material upon the occurrence of stated contingencies, such as the death of one or both participants, the passage of time, or divorce.[19] As with Penal Code section 367g, Health & Safety Code section 125315 applies to individuals, again indicating that control and decision-making with regard to one's reproductive material belongs to each person individually. Because Health & Safety Code section 125315 went into effect in 2003, most clients with frozen embryos in California will have signed a cryopreservation consent form containing this required language. Although the requirements of Health & Safety Code section 125315 do not obligate IVF participants to make any elections, fertility clinics may require their patients to make dispositional instructions as a clinic-mandated prerequisite to undergoing IVF treatments.

The purpose of section 125315 is for intended parents to document their intentions before undergoing treatment, and before any future disputes arise. The goal is to add a degree of certainty to the process and reduce the possibility of litigation in the future. This process results, in most situations, in a contract between the intended parents (and possibly the fertility clinic) as to the disposition of the embryos. If one of the contingencies occurs, the parties may decide they want an outcome other than as previously selected—such as to donate instead of discarding the embryos. If the parties want to change the prior agreement, they are free to enter into a new agreement including the new dispositional instructions. If a dispute over frozen embryos arises during a divorce, it will come up in one of two situations: (1) the parties no longer agree and one of them wants a disposition other than as set forth in the dispositional agreement, or (2) the agreement does not address what will happen to the embryos upon divorce.

California cases involving agreements to participate in fertility treatments provide that the key question for the court is the intent of the parties when they entered into the agreement at the commencement of the treatment. If one party later decides to change his or her position and is unable to obtain consent from the other party, it is the initial intent that dictates the outcome of the case.

In *Johnson v. Calvert*, a married couple was in a parentage dispute with their gestational surrogate over the surrogate's claim of parenthood despite a surrogacy agreement in which she relinquished any parental claims.[20] In deciding between the competing maternity claims, the court upheld the intentions of all three parties as manifested in the surrogacy agreement, holding that the surrogate was not the mother.

The same analysis was used in *In re Marriage of Buzzanca*, where a married couple created an embryo through artificial reproductive technology, then arranged to have it implanted in a surrogate. While the surrogate was pregnant, the husband filed for divorce, claiming there were no children of the marriage; the wife responded that they were expecting a child via a gestational surrogate. In overturning the trial court's ruling that neither the couple nor the surrogate were legal parents, the court found the spouses were the parents because they intended to be the parents and had initiated the chain of events that resulted in a child.[21]

In both of these cases, the intent of the parties going into the fertility treatment, as evidenced by an agreement, was upheld. In neither case was a party to the agreement allowed to unilaterally change his or her position after the embryos were implanted.

The conclusion that California favors the gamete providers' intent is reinforced by the holdings in two cases regarding the disposition of frozen sperm. In both *Estate of Kievernagel* and *Hecht v. Superior Court*, the courts upheld the decedent sperm providers' instructions for the disposition of the reproductive material.[22]

How Will California Decide the Disposition of Embryos?

Taking the authorities from California and other jurisdictions together, we can fairly predict that the first step of analysis by the California courts will be to look to the terms of an agreement between the parties. Health & Safety Code section 125315 indicates a legislative preference for intended parents to make dispositional directives prior to undergoing fertility treatments. Combine that preference with the rulings in *Hecht* and *Kievernagel* (the instructions of gametic donors controls disposition), as well as in *Buzzanca* and *Johnson v. Calvert* (the intent of the parties that initiated the chain of events leading to creation of the embryos is the determinative factor), and we can safely say that California will look initially to the dispositional instructions found in the cryopreservation consent form in much the same way as the Tennessee court suggested in *Davis*.

That first step is the easy part. More difficult is trying to divine what the courts will do after that. If the parties do not have an agreement, will California apply the *Davis* balancing test? A strong case can be made against the use of a balancing test in California. Penal Code section 367g requires the signed written consent of the sperm, ova, or embryo provider prior to implantation, under penalty of up to five years in prison. If there is no dispositional agreement between the parties, then it is highly unlikely there will be a writing from both gamete providers consenting to the implantation of the embryos. If a court applied a

balancing test and awarded the frozen embryos to one of the spouses, the outcome would result in the possibility of state compelled parenthood on a party who never consented to the implantation of his or her genetic material. This means that if a party does not make a decision early on, that decision-making process will be taken over by the courts—an outcome inconsistent with an individual's privacy rights under state law, that "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions."[23]

The balancing test also appears inconsistent with the no-fault divorce scheme in California. What started in *Davis* as high-minded discourse on competing rights of procreational authority and privacy rights has predictably devolved into a mudslinging contest between the one spouse that desperately wants to use the embryos to have children, and the other, who desperately wants to avoid two decades of parental and financial entanglements with a future ex-spouse. The current state of this analysis encourages attorneys to leave no stone unturned and no potentially persuasive fact held back from the court. In short, the balancing test encourages—if not requires—extensive litigation for the sole purpose of having a court decide if one party deserves to be a parent more than the other deserves not become a parent.

Only once in the three balancing test cases were the interests of the spouse seeking to use the embryos victorious over the interests of the spouse that wanted the embryos discarded. The Pennsylvania court, in *Reber v. Reiss*, appears to have sided with the wife out of sympathy directed at her, displeasure with the husband's conduct, or both. As just one example from *Reber*, the court reviewed the wife's medical history, recounting that after undergoing IVF to preserve her fertility options at the age of thirty-six, the wife underwent treatment for breast cancer which included two surgeries, eight rounds of chemotherapy, and thirty-seven rounds of radiation.[24] In the very next paragraph of the factual background, the court juxtaposes the wife's medical struggles with the husband soon starting a new relationship, filing for divorce, and having a child that was "intentionally conceived." That the wife won the likeability contest may be fine in Pennsylvania, but the court appears to have applied a fault analysis, something expressly forbidden in California.[25]

In the absence of a dispositional agreement or a balancing test, the only remaining approaches would be to either require contemporaneous mutual consent or to allow either party to veto the implantation of the embryos. Of course, these accomplish the same result: non-use of the embryos.

This leaves us with the dilemma of having an agreement that one party no longer wants to follow. A change of heart can be from any disposition to another, and can be collectively grouped as a change from use to non-use of the embryos, or from non-use to use. The latter argument, which would change the agreement from discarding the embryos at the time of divorce to awarding them to one of the spouses, has never been successful in any court of appeal. The former argument, a change from one spouse being granted the embryos to having the embryos discarded, presents different issues and has plenty of support. This outcome would be supported in the courts in Iowa (which requires contemporaneous mutual consent) and Massachusetts (which will not compel parenthood against one's wishes regardless of an agreement to the contrary). It is consistent with the ABA Act which allows either party to withdraw consent prior to implantation. It also works under the U.K. national law that was upheld by the European Court of Human Rights, as well as with at least eight other European countries.

If there is a change of heart, one option is strict adherence to the agreement. However, if the change goes from use to non-use of the embryos, authority exists to make that change. Maybe the most important reason for a California court to allow a party to back out of a prior agreement is Penal Code section 367g's requirement for written consent to implant the embryos. If one spouse changes his or her mind and refuses to agree to implantation, the spouse who was to receive the embryos under the terms of the agreement may have control of the embryos, but will not be able to use them. As a practical matter, the courts should not ignore the second door that a spouse will not be able to pass through without the consent of the other spouse.

Conclusion

Comparing known California law and public policy with the various approaches taken by other jurisdictions supports the conclusion that California will initially look to the agreement entered into by the parties when fertility treatments began to determine their intentions. However, if one intended parent wants to stop the use of the embryos, he or she might be able to escape from the terms of the dispositional agreement. If there is no agreement, a court has valid persuasive authority going in both directions: the court could conduct a balancing test or it may allow a dissenting party to unilaterally avoid the risk of compelled parenthood. Until the courts or legislature provide concrete rules on how to approach these issues, there is enough uncertainty to allow for good lawyering on both sides of these disputes.

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1 *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).
2 *Reber v. Reiss*, 42 A.3d 1131 (Pa. 2012).
3 *J.B. v. M.B.*, 170 N.J. 9 (2001); *A.Z. v. B.Z.*, 431 Mass. 150 (2000).
4 *Szafranski v. Dunston*, 2015 IL App. (1st) 122975.
5 *Kass v. Kass*, 91 N.Y.2d 554 (1998); *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006); *Szafranski v. Dunston*, 993 N.E.2d 502 (Ill. 2013); *Dahl v. Angle*, 222 Or. App. 572 (2008); *Litowitz v. Litowitz* 48 P.3d 261 (Wash. 2002); *Cahill v. Cahill*, 757 So. 2d 465 (Ala. 2000); *York v. Jones*, 717 F. Supp. 421 (Va. 1989).
6 *Reber*, 42 A.3d 1131.
7 *J.B.*, 170 N.J. 9.

8 *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006), *Kass v. Kass*, 91 N.Y.2d 554 (N.Y. 1998).
9 See Cal. Fam. Code § 7613(b)(1), *Robert B. v. Susan B.*, 109 Cal.App.4th 1109 (2003), *K.M. v. E.G.*, 37 Cal.4th 130 (2005).
10 *Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003)
11 *A.Z. v. B.Z*,. 431 Mass. 150 (Mass. 2000).
12 Fla. Stat. § 742.17(2).
13 Tex. Fam. Code § 160.754 (*cf. Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006)).
14 See *Evans v. United Kingdom*, 43 E.H.R.R. 21, Para. 37 and 41 (U.K. 2007).
15 *Evans v. United* Kingdom, 43 E.H.R.R. 21 (U.K. 2007).
16 See *Evans v. United Kingdom*, 43 E.H.R.R. at Para. 41.
17 ABA Act Gov. Asst. Repr. Tech., § 50101(a)-(b) (2008).
18 Cal. Pen. Code § 367g.
19 Cal. Health & Saf. Code § 125315.
20 *Johnson v. Calvert*, 5 Cal.4th 84 (1993).
21 *In re Marriage of Buzzanca*, 61 Cal.App.4th 1410 (1998).
22 *Estate of Kievernagel*, 166 Cal.App.4th 1024 (2008), *Hecht v. Superior Court*, 16 Cal.App.4th 836 (1993).
23 Cal. Health & Saf. Code § 123462.
24 *Reber v. Reiss*, 42 A.3d at 1133.
25 Cal. Fam. Code § 2335.

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