Dividing Frozen Embryos

MCLE program by Anna C. Howard, Esq.

Familiarity Level



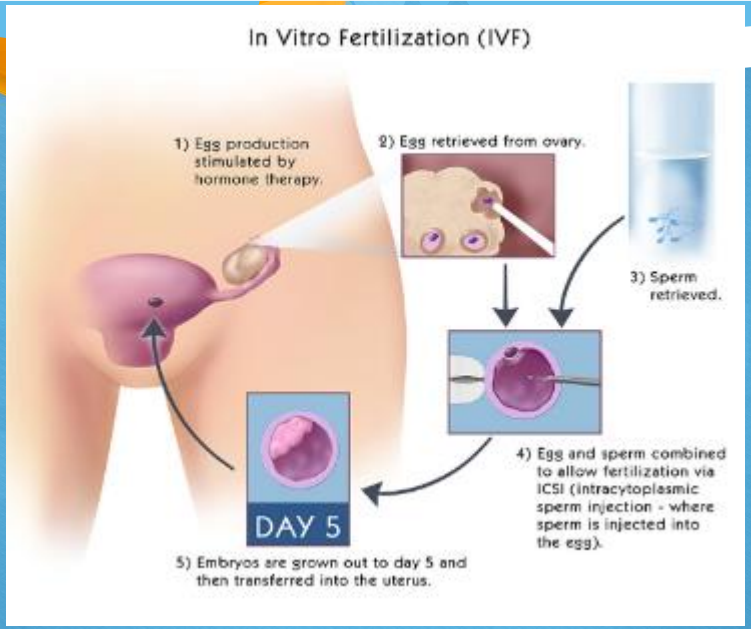
INFERTILITY & ASSISTED REPRODUCTIVE TECHNOLOGY

- As of 2002, CDC said 7.3 million, or 12%, of women and their partners were experiencing infertility.
- Infertility is a profoundly private and personal matter.
- Genetic material is still quasi-property for purposes of ownership, control, transfer and bailment.
- Sophia Vergara's ex-boyfriend's suit for "custody" of their embryos was thrown out by Louisiana judge.



In Vitro Fertilization

Louise Brown, born on 7/25/78 in U.K.


In Vitro Fertilization (IVF)
1) Egg production stimulated by hormone therapy.
2) Egg retrieved from ovary.
3) Sperm retrieved.
4) Egg and sperm combined to allow fertilization via ICSI (intracytoplasmic sperm injection - where sperm is injected into the egg).
DAY 5
5) Embryos are grown out to day 5 and then transferred into the uterus.

Standard transfer amount is *usually* 1-3 embryos



Adoption v. Donation





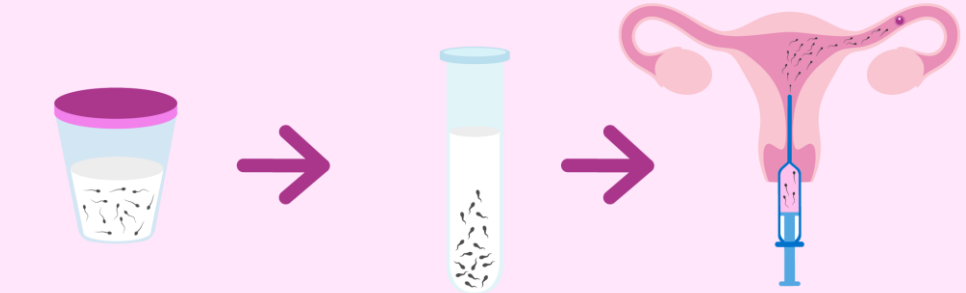
Embryos are NOT persons.

They are property entitled to special respect as a result of their potential for life.



Artificial Insemination




Sperm collection
Laboratory processing
Insemination


Aaden
Alexis
Colin
Joel
Leah
Hannah

In Re Marriage of Buzzanca

Court of Appeal, Fourth District, Division 3, California.

61 Cal. App. 4th 1410 Decided: March 10, 1998

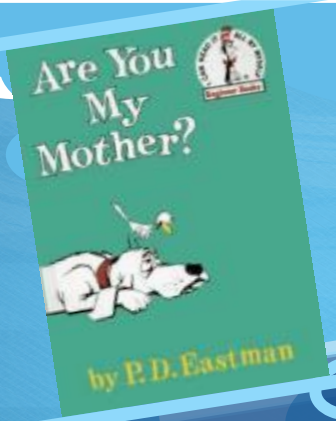
- Van Deusen, Youmans and Walmsley and Robert R. Walmsley, Santa Ana, for Appellant.
- Taylor Flynn and Mark Rosenbaum, Los Angeles, as Amici Curiae on behalf of Appellant and Minor.
- Schwamb & Stabile, Thomas P. Stabile and Mark A. Hewitt, Orange, for Respondent.
- Jeffrey W. Doeringer, under appointment by the Court of Appeal, Costa Mesa, for Minor.
- Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Carol Ann White and Mary A. Roth, Deputy Attorneys General, and Leslie Ellen Shear as Amici Curiae on behalf of minor.

Johnson v. Calvert, 1993

ANNA JOHNSON, Plaintiff and Appellant, v. MARK CALVERT et al., Defendants and Respondents.

(Superior Court of Orange County, Nos. X633190 and AD 57638, Richard N. Parslow, Jr., Judge.)

- (Opinion by Panelli, J., with Lucas, C. J., Mosk, Baxter and George, JJ., concurring. Separate concurring opinion by Arabian, J. Separate dissenting opinion by Kennard, J.)
- Richard C. Gilbert and Diane J. Marlowe for Plaintiff and Appellant.
- Van Deusen, Youmans & Walmsley, Christian R. Van Deusen and Robert R. Walmsley for Defendants and Respondents.
- Harold LaFlamme, Michelle Ben-Hur, John L. Dodd and Karen J. Dodd for Minor.
- Jon Davidson, Paul L. Hoffman, Carol A. Sobel, Rogers & Wells, Rebecca C. Klipfel and Suzanne M. Madison as Amici Curiae.



Uniform Parentage Act of 1973, adopted in CA

See Family Code sections 7600 – 7962+



Assists individuals conceived as a result of sperm, egg or embryo donation - seeking to make mutually desired contact with others with whom they share genetic ties.

Founded in 2000

Frozen Embryo Storage

5-8 cells size



“flash” freezing



600,000 – 1m frozen embryos currently in storage in USA



What to do if parties disagree about disposition of unused embryos?

- Answered by 11 courts of appeal so far.
- 12th case in Supreme Court of Colorado is pending, see *In Re: Marriage of Rooks*
- HELPFUL CASES NOW:
- Missouri = McQueen v. Gadberry
- Tennessee = Davis v. Davis

McQueen v. Gadberry

- Marry in 2005, create 4 embryos in 2007 and have two children. Cryopreserve remaining 2 embryos. Separate in 2010.
- IVF clinic form they both signed in 2007 said McQueen could keep embryos if they divorced.
- Court wonders whether there was a meeting of the minds about this IVF clinic directive consent form.

- Wife - McQueen argues MO's laws say embryos are a person with protectable right to life and well being from conception onward. Frozen embryos are therefore children.
- Husband – Gadberry says MO law has no such requirement that frozen embryos are classified as children. His counsel, Tim Schlesinger, is the source of much of my materials and lectures at ART conferences.
- Court of Appeal says frozen embryos are a special-quality marital property.
- Court says McQueen has right to procreate but Gadberry's fundamental constitutional right NOT to procreate would be irrevocably extinguished if he were forced to have children against his will.

Davis v. Davis, TN 1992

- No express agreement between parties, first case of this kind. Becomes lodestar case.
- Award based on balancing the parties' interests.
- Party wishing to AVOID procreation should prevail when other party has a reasonable possibility of achieving parenthood by other means.
- Procreational autonomy governing interest in embryos.

3 theories get same result.



Three Possible Theories

- Enforcement of the Contract
- Public Policy and Constitutional Rights
- Cases ALLOWING use of Frozen Embryos.

Theory #1: enforce IVF consent forms as written.



- Two cases had consent forms stating embryos should be destroyed in the event of divorce.
- One said when they cannot agree, the embryos would be donated for research as determined by the IVF clinic.
- *Litowitz v. Litowitz* – forms said if no direction to IVF clinic, then clinic would destroy. Wife objected, though egg donor was used. She had standing! Husband not wanting kids prevails.

Divorce or Dissolution of Relationship

In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, I/we agree that the embryos should be disposed of in the following manner (check one box only):

☐ A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

☐ Award for research purposes, including but not limited to embryonic stem cell research, which may result in the destruction of the embryos, but will not result in the birth of a child.

☐ Destroy the embryos.

Consent form courtesy of Dr. Kristi Maas

Fertility Specialists Medical Group
8010 Frost St. Suite P San Diego, CA 92123
Ph: (858) 505-5532 F: (858)505-5571
ivfspecialists.com

Embryos are understood to be your property, with rights of survivorship. Future use of these embryos needs to be with consent of both partners, please review **each** future situation and provide us with your mutually agreed on disposition option **(select one for each situation a,b,c)**

a) In the event of **divorce or dissolution of the marriage or partnership**, the ownership and/or other rights to the embryo(s) are directed as the following...

	Patient	Partner
1) Directed by court decree and/or settlement agreement	_____	_____
2) Thaw and discard the embryo(s)	_____	_____
3) Donate the embryo(s) for research	_____	_____
4) Donate the embryo(s) to another couple	_____	_____
5) Donate to training	_____	_____
Other (please be specific)	_____	_____

_____

_____

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www.sdfertility.com | www.eggdonors.com



Theory #2: Public Policy

- 2001 NJ Supreme Court, “we will not force J.B. to become a biological parent against her will.”
- 2000 MA Supreme Court, “ [a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.”
- 2003 IA Supreme Court, “contemporaneous mutual consent” principle - against public policy to enforce a prior agreement between parties no longer in agreement about their future family and reproductive choices.



Theory #3: *Only* Chance for Genetic Child

- *Reber v. Reber (Pa. Super. 2012)* & *Szafranski v. Dunston (Ill. App. 2015)* – appellate court lets woman use frozen embryos to have children against wishes of sperm source because of COMPELLING INTEREST (CI)
- Reber = no prior cases involved a woman having no ability to procreate biologically because of cancer, thus a CA. Court balance of their interests and she prevailed.
- S v. D = boyfriend agreed to help create embryos because she received cancer diagnosis, so enforceable oral agreement.

Further Reading:

- Hecht v. Superior Court of CA 16 Cal.App.4th 836 (Cal. 1993) – deceased person has the right to bequeath his own gametes (property) in the form of frozen sperm samples to his girlfriend for posthumous reproduction.
- Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (Ariz. 2005) – a frozen embryo outside the womb is not a person.



Posthumous Disposition

clinic forms often prevail.

Matter of Kievernadel, 166 Cal.App.4th 1024 (Cal. 2008)

Thank you!

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