

For frozen embryos in dispute, scholars propose guidelines

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Couples who freeze embryos sometimes disagree about later use. New proposed guidelines could prevent such disputes from becoming bitter court battles.
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In at least 11 cases over the last 24 years, including the appeal of a Missouri case heard in June, U.S. courts have grappled with difficult arguments between men and women who fertilized and froze embryos together, but then disagreed about whether they should be gestated and born. The scattered case law has resolved little, creating a need for common ground rules that could prevent such disputes.

In a new paper, two experts review this history and propose five specific guidelines. The results could offer clarity for disputes over any of the estimated million or so frozen [embryos](#) in the U.S.

"All of these ad hoc, individually tackled cases aren't taking us anywhere or pointing us in a common direction," said Dr. Eli Adashi, professor and former dean of medicine and biological sciences at Brown and co-author of the new paper in the *Hastings Center Report*. "But a lot of these issues are preventable."

The cases typically arise because it's unclear, once a couple has split up, whether one can oblige the other to become a parent. In four of the 11 cases Adashi reviewed with co-author I. Glenn Cohen, professor at Harvard Law School, there was no valid contract between the parties. Meanwhile, courts have applied various legal tests to considering the cases. Often—but not always—they have arrived at rulings that favored the party who did not want the outcome to be a child.

In a case resolved in Illinois last year, *Szafranski v. Dunston*, the parties had an oral contract only. The court considered the case as both a contract dispute and one in which the parties' interests should be balanced. Ultimately it allowed the woman to gestate an embryo, despite the father's objection, because cancer had left her unable to reproduce otherwise.

In the Missouri case heard on appeal in June, *McQueen v. Gadberry*, the

original decision favored the man who did not want an embryo used by his ex-wife. The case gained particular notice when, in an unprecedented twist, the Thomas More Law Center interjected the argument that an embryo should be considered a child and that the court should therefore consider the child's best interests.

Five recommendations

In reviewing the 11 prior cases, Cohen and Adashi discerned five ways that couples and fertility clinics could use to prevent disputes from arising. The authors argue that these practices could become standard procedure at the time of embryo creation either because the parties simply agree, because they become adopted as clinic policy, or because they've become enshrined as federal law.

"There are a finite number of cases now," Adashi said. "We're trying here to learn from the mistakes. Really our proposal is all about avoiding mistakes that were already committed."

Here's what they recommend:

- Don't blend contracts into other forms: When clinics have combined informed consent language together with the text meant to direct the disposition of embryos, they have created confusion. Clear, standardized contract language regarding what to do with the embryos should be presented separately.
- Require a contract: Clinics shouldn't freeze any embryos for later possible use without the parties fully executing a binding legal agreement.
- The original agreement stands: What the parties agree to at the time they sign the contract should serve as the rules from then on. If one party unilaterally changes his or her mind later, for instance because of divorce, that shouldn't matter.

- 'Legal parenting' not compulsory: As soon as the embryo exists, the man and woman are "genetic" parents, but if one party later uses an embryo against the other's desires, that non-consenting person should not have to be the resulting child's legal parent.
- Anticipate tragedy: No one expects to suddenly lose fertility—because of injury or disease, for instance—but the parties should plan for the possibility. Contract language that anticipates circumstances in which one party may want to use an embryo can ensure both parties pre-agree on what to do.

"Individuals who cryopreserve embryos face an uncertain and shifting terrain of varying state laws, with varying degrees of respect for contract, and case law that might generate different outcomes depending on changes in the underlying fact pattern," Cohen and Adashi wrote in their conclusion. "A uniform approach throughout the country seems desirable."

More information: I. Glenn Cohen et al. Embryo Disposition Disputes:, *Hastings Center Report* (2016). [DOI: 10.1002/hast.600](https://doi.org/10.1002/hast.600)

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