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Fifty Shades of Gray Area: Are Cryopreserved Embryos "Property?"

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Estate Planning Practitioners Should Know Whether Their Clients Underwent In-Vitro Fertilization Treatments

Whether estate planning clients have ever undergone or participated in an assisted reproduction treatment at an in-vitro fertilization (IVF) clinic is probably not an issue that is frequently raised by their attorneys. Most clients probably would not volunteer this information; after all, infertility and the need to resort to assisted reproduction technologies are still rather sensitive and intimate subjects. Some IVF patients do not disclose this issue even to their family members, fearing their disapproval on moral or religious grounds. Most estate planning attorneys probably do not inquire about their client's IVF treatments, because this information seemingly has nothing to do with estate planning. Science has again outpaced the law, however, and in the context of assisted reproduction it has presented a question that most estate planning attorneys should address: how does one provide advice to and counsel an estate or a testator who has cryopreserved embryos stored at an IVF clinic?

To properly address this issue, an estate planning practitioner would need to know the legal status of a cryopreserved embryo. Is it property in the classic sense of the word? The answer sounds more like a descriptive riddle: it is tangible, yet microscopic; people contribute raw materials and hire skilled professionals to make it; people contract with storage facilities to store it; people send it from place to place; people donate it to other people; and people exercise dispositional control over it and enter into enforceable agreements establishing such control. Notwithstanding these characteristics, courts have not expressly and unequivocally held that it is property.

The Number of Estate Planning Clients with Cryopreserved Embryos Is Significant and Will Continue to Increase

Establishing the legal status of human embryos should be of particular interest to estate planning practitioners because the number of clients who have cryopreserved embryos is already significant and is likely to increase in the future. According to the Society for Assisted Reproductive Technology (SART), which collects data from U.S. IVF clinics, at least 174,962 IVF treatment cycles were performed in the United States in 2013. See

National Data Summary of IVF Success Rates, at www.sart.org. This number represents an increase of 55% over the number of IVF cycles performed in 2003. The need for IVF treatments is expected to continue to rise because of a significant prevalence of infertility among heterosexual couples. Indeed, some studies suggest that up to 30% of couples may experience infertility over their child-bearing years. See M.E. Thoma et al., *Prevalence of Infertility in the United States as Estimated by the Current Duration Approach and a Traditional Constructed Approach*, 99 Fertility and Sterility, Apr. 2013, at 1324, 1329. In addition, the use of assisted reproductive technologies by same-sex couples also is expected to rise and will contribute to the increase in the total number of IVF treatments. Therefore, a significant number of estate planning clients, regardless of their sexual orientation or marital status, may have participated in one or more IVF treatments.

What is relevant in this statistic is that many IVF treatments result in the cryopreservation of embryos and their long-term storage. Consequently, a significant number of estate planning clients may have cryopreserved embryos stored at an IVF clinic. Therefore, a prudent estate planning practitioner should ask her clients about any cryopreserved embryos that may exist, so that appropriate disposition instructions for the embryos can be drafted and included in the clients' estate plan.

This task may not be straightforward, however. The spectrum, validity, or enforceability of such disposition instructions is currently not clear and unpredictable, because the issue of the legal status of cryopreserved embryos—whether they are property or not—is not resolved. Consider the following issues:

- • Can cryopreserved embryos be devised in a will?
- • Can a testator devise assets to a cryopreserved embryo?
- • Can a cryopreserved embryo be included in a class of trust beneficiaries?
- • What rights, if any, to the cryopreserved embryos may be granted to the next of kin of the deceased embryo "owners"?
- • May "abandoned" embryos (that is, embryos whose "owners" have not maintained contact and paid storage fees to the storage facility) become the property (or wards) of the state in which the embryo storage facility is located?

None of these questions is easily answered until the legal status of cryopreserved embryos has been established. Those who consider these questions to be too speculative should consider that in April 2014 a Texas probate court ordered that cryopreserved embryos created by the deceased parents be maintained by the IVF clinic for the benefit of their two-year old son. See *Order Regarding Disposition of Embryos, in the Estate of Yenenesh Abayneh Desta, Deceased*, No. PR-12-2856-1 (Prob. Ct. No. 1, Dallas Cnty., Tex., Apr. 7, 2014).

The uncertainty surrounding the legal status of human embryos crystalizes the disconnect between law and the fast-paced clinical science of assisted reproduction. Despite the fact that human embryos have been created and used in assisted reproduction treatments since the late 1970s, it is still not clear how the cryopreserved embryos are to be legally defined and treated.

State and Federal Courts Differ in Their Willingness to Address the Legal Status of Cryopreserved Embryos

U.S. courts, both at the state and federal level, have had limited exposure to cases in which they had to rule on the legal status of a human embryo that was created and cryopreserved during an IVF treatment. Moreover, unless they are "forced" to rule on that issue for procedural or substantive reasons, courts are reluctant to directly address the legal status of the cryopreserved embryo. Instead, some courts tend to rely in their analyses on contract law principles, rather than on property law principles. The author is unaware of any decision in which a court has held, clearly and unambiguously, that a cryopreserved human embryo is "property."

Disputes over cryopreserved embryos have so far arisen in two distinct contexts. At the federal level, courts have addressed the subject of human cryopreserved embryos in the context of challenges to federal funding of stem-cell research. At the state level, judicial review has been conducted in the context of embryo disposition disputes between married or unmarried couples. In both contexts, however, the origin of human embryos at issue is the same: they were produced and cryopreserved via IVF treatments. Federal courts have shown no hesitation in holding that a cryopreserved embryo is "not a person" under federal law. By contrast, state court rulings either lack clarity or avoid addressing the legal status of embryos altogether.

Under Federal Law Embryos Produced and Cryopreserved During IVF Treatments Are Not Persons

In 2009, "Mary Doe"—an unspecified human embryo that had been produced and cryopreserved during an IVF treatment—filed a suit in the district court for the District of Maryland. Ms. Doe alleged (on behalf of herself and a putative class of similarly situated unspecified embryos) that Executive Order 13505 violated, inter alia, her constitutional rights to due process, equal protection, and freedom from involuntary servitude under the Fifth, Fourteenth, and Thirteenth Amendments. See *Doe v. Obama*, 670 F. Supp. 2d 435, 436–37 (D. Md. 2009). Executive Order 13505, which was issued by President Obama on March 9, 2009, removed some limitations previously imposed on federal funding of stem cells research. See Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009). The plaintiff alleged that if those limitations were not in effect, federal funding would be allocated for the removal of cells from the putative class of cryopreserved embryos, so that stem cell lines could be created from those cells. If this practice were permitted, such removal of cells would ultimately destroy the plaintiff and other class members (that is, human cryopreserved embryos). Defendants in *Doe* argued that plaintiff Mary Doe lacked legal standing to sue and moved the court to dismiss the suit on that basis. See *Doe v. Obama*, 670 F. Supp. 2d at 439. The court agreed with the defendants and held that cryopreserved human embryos could not show an invasion of a legally protected interest "as they are not considered to be persons under the law." Id. at 440; see also *Doe v. Shalala*, 862 F. Supp. 1421 (D. Md. 1994) (holding that "embryos are not persons with legally protectable interests . . . ."). Subsequently, this holding was upheld on appeal. See

Doe v. Obama, 631 F.3d 157 (4th Cir. 2011), cert. denied, *Doe v. Obama*, 131 S. Ct. 2938 (2011), rehearing den., *Doe v. Obama*, 132 S. Ct. 47 (2011).

In addition, the District Court for the District of Columbia reached the same conclusion in an analogous challenge to the National Institutes of Health guidance on federally funded stem cell research (issued under authority given by the President in Executive Order 13505). See *Sherley v. Sebelius*, 686 F. Supp. 2d 1 (D.D.C. 2009) (holding that plaintiff human embryos lacked standing because they "are not persons under the law"). This ruling also was affirmed on appeal. See *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012), cert. denied, *Sherley v. Sebelius*, 133 S. Ct. 847 (2013).

In sum, federal courts that have considered the legal status of a human embryo created and cryopreserved during an IVF treatment cycle have consistently held that such embryos are not persons. It seems unlikely that other federal courts would address this issue, perhaps because the federal institutions that may be challenged are located in Maryland (National Institutes of Health) or Washington, D.C.

Some State Courts Categorize Cryopreserved Embryos as Neither Persons Nor Property

State courts have had a greater exposure to controversies involving human embryos cryopreserved during IVF treatments than have federal courts. Notwithstanding their greater experience in such matters, some state courts have avoided addressing the issue of the legal status of the cryopreserved embryos. On the other hand, those courts that have addressed this issue have left practicing attorneys with more questions than answers.

The context for most state cases involving cryopreserved embryos is similar: a couple ("IVF patients") initiates an IVF treatment and during this treatment some embryos are cryopreserved and are stored at the IVF clinic. Cryopreservation and storage are performed under a written informed consent or an agreement executed by the IVF patients, on the one hand, and the IVF clinic, on the other. These consent forms or agreements are prepared by the IVF clinics and are presented to IVF patients as nonnegotiable documents. They generally contain disposition instructions that direct the IVF clinic to dispose of the stored embryos in a particular way if the IVF patients die, divorce, or abandon the embryos (for example, IVF patients do not maintain contact with the IVF clinic, do not respond to storage renewal notices, and fail to pay storage fees for a certain number of years). In addition to being nonnegotiable, these consents or agreements are generally not drafted or reviewed by the IVF patients' counsel. The scope and the wording of the disposition instructions contained in the IVF clinic documents are selected by their drafter, who may not even be an attorney.

The case that provided the philosophical and legal underpinning to subsequent decisions concerning the legal status of cryopreserved embryos was the 1992 Tennessee case of *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). *Davis* involved a divorced couple who disagreed on how to dispose of the cryopreserved embryos created during a prior IVF treatment. Following her divorce from Mr. Davis, Mrs. Davis sought control of the

embryos for the purpose of attempting to become pregnant. Mr. Davis, on the other hand, did not wish to become a father to his ex-wife's future children and objected to awarding the embryos to Mrs. Davis. At trial, the court held that the cryopreserved embryos were persons under Tennessee law and awarded the embryos to Mrs. Davis, permitting her "the opportunity to bring these children to term through implantation." Id. at 589. Mr. Davis appealed. The appellate court disagreed with the trial court's classification of the cryopreserved embryos as persons or children. Consequently, the court reversed and remanded the case to the trial court for entry of an order vesting them with "joint control . . . and equal voice over their disposition." Id. Not content with the appellate court's ruling, Mrs. Davis appealed to the Tennessee Supreme Court. The supreme court affirmed but also supplemented its ruling with the following analysis, "because the decision of the Court of Appeals does not give adequate guidance to the trial court in the event the parties cannot agree":

[P]reembryos 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. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have *an interest in the nature of ownership, to the extent that they have decision-making authority* concerning disposition of the preembryos, within the scope of policy set by law.

Id. at 590, 597 (emphasis added; the difference between the terms "preembryos" and "embryos" is purely semantical).

Davis was a seminal case (no pun intended). It set the tone for subsequent legal analyses in the cryopreserved embryo disposition disputes in other jurisdictions. From the practitioner's perspective, however, the "adequate guidance" of *Davis* raises obvious questions: what do "interim category" and "special respect" mean? The *Davis* court should not be faulted for not knowing what the scientific community has learned since 1992: that most IVF-produced embryos are so chromosomally abnormal that they have *no* potential for human life. See M. Rabinowitz et al., *Origins and Rates of Aneuploidy in Human Blastomeres*, 97 Fertility and Sterility 395, Feb. 2012 (finding that less than 30% of embryo cells contained correct number of chromosomes). Should, according to *Davis*, the chromosomally normal embryos be afforded greater respect than the chromosomally abnormal embryos?

Subsequent decisions provided little clarity to the *Davis* "adequate guidance." In fact, at least one court made it even less clear. Consider *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. Ct. App. 2005). Mr. and Mrs. Jeter had undergone an IVF treatment and had several of their embryos cryopreserved and stored at a local IVF clinic. The Jeters alleged that the IVF clinic's negligence resulted in the destruction of those embryos. In their complaint, plaintiffs included an alternative claim to recovery for the loss of "irreplaceable property," that is, their cryopreserved embryos. Id. at 1256. The court, relying on the *Davis* rationale, concluded that cryopreserved embryos were "not property," but that they should be afforded "*varying* degrees of special respect *dependent on the issues involved*." Id. at 1271 (emphasis added). Unfortunately, the court neither

clarified what degrees of variation of special respect were available, nor did it specify how "an issue involved" should be correlated to one degree of special respect or another. Moreover, despite its own conclusion that cryopreserved embryos were not "property," the court held that the Jeters could maintain a common-law cause of action for harm resulting from the loss of "things." Id. at 1272 (internal quotations preserved).

Some State Courts Tacitly Approve of the Litigants' Own Categorization of Cryopreserved Embryos as Property

Another approach taken by state courts in embryo disposition disputes is to impliedly approve the property status ascribed by the IVF patients to their frozen embryos.

An example of this approach can be found in the 2012 Pennsylvania case of *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012). In *Reber*, after her husband initiated divorce proceedings, Ms. Reiss petitioned the court to grant her exclusive control of the cryopreserved embryos that the couple had produced during a prior IVF treatment. Mr. Reber objected. Of interest here is the fact that Mr. Reber and Ms. Reiss had previously agreed that the cryopreserved embryos "are marital property subject to equitable distribution." Id. at 1133. The trial court did not question the couple's categorization of the cryopreserved embryos as "property," applied principles of equitable distribution of marital property, and awarded all embryos to Ms. Reiss. Id. at 1134. Mr. Reber appealed, and the Pennsylvania Superior Court affirmed without disturbing (or even questioning) the trial court's acceptance of the couple's categorization of their cryopreserved embryos as marital "property." Moreover, the Superior Court observed that "the contested disposition of frozen pre-embryos in the event of divorce is an issue of first impression in Pennsylvania." Id. at 1134 (suggesting that no court in Pennsylvania would have previously held that cryopreserved embryos were marital "property"). The Superior Court's opinion is devoid of any analysis of the legal status of the cryopreserved embryos. The court may even seem to be treating this issue as if it were settled law. Nor was there any reference to the special respect owed to the embryos because of their peculiar legal status. See *Davis*, supra. Instead, the court focused exclusively on what would be the proper approach to the equitable distribution of the couple's marital "property," that is, the couple's cryopreserved embryos.

A similar approach was taken by a Texas court in *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006). In *Roman*, after Mr. Roman had filed for divorce, he and Mrs. Roman reached a "final binding agreement as to all marital property," except for the several cryopreserved embryos that the couple had produced and cryopreserved at a local IVF clinic. Id. at 43. Consequently, the unresolved issue of who would be awarded the cryopreserved embryos was litigated. The trial court awarded all of the embryos to Mrs. Roman. Mr. Roman, who wanted the embryos to be discarded (consistent with the Romans' directive in the signed IVF clinic's consent), appealed and moved for findings of fact and conclusions of law regarding the award of all embryos to Mrs. Roman. One of the court's findings of fact was that "the three [cryopreserved] embryos are community property"; and one of the court's conclusions of law was that "the award of three (3) embryos to [Mrs. Roman] is part of a just and right division of the community estate . . .

." Id. at 43–44. Subsequently, the appellate court reversed the award of the embryos to Mrs. Roman, but it did so without challenging the Romans' and the trial court's findings that cryopreserved embryos were community "property."

Exceptions to the Tacit Approval Approach

There are exceptions to the tacit approval approach. Such exceptions occur when plaintiffs allege that cryopreserved embryos have a particular status under state law or when a state legislature has specifically addressed the legal status of the cryopreserved embryos.

But, even when the parties place the legal status of embryos as property directly at issue, courts find ways to resolve a dispute without expressly holding on the legal status of embryos. This approach is exemplified by an Oregon court that held that a *contractual right to dispose* of the cryopreserved embryos—rather than the embryos per se—was the IVF patients' "personal property." See *In re Marriage of Dahl and Angle*, 194 P.3d 834 (Or. Ct. App. 2013) (emphasis added).

The context of *Dahl* is similar to other embryo disposition disputes. During their marriage, Laura Lee Dahl and Darrell Lee Angle were patients at a local IVF clinic, where they had several embryos produced, cryopreserved, and stored. Mr. Angle and Ms. Dahl signed an embryo storage agreement with the IVF clinic in which they directed the clinic to donate the embryos for research, or destroy them if the clinic was unable to do that or if the couple could not agree on the disposition. Subsequently, Ms. Dahl and Mr. Angle dissolved their marriage but failed to agree on the disposition of their cryopreserved embryos. Mr. Angle wanted the embryos awarded to him, so that he could donate them to other (yet to be identified) patients. In support of his claim, Mr. Angle argued that embryos were marital property under Oregon law and that awarding embryos to him would be a "just and proper distribution of personal property." Id. at 838. Ms. Dahl, however, wanted the embryos destroyed and argued that cryopreserved embryos were not property at all, and, therefore, an award under the "just and proper distribution" approach would be unlawful. Id. at 837. Thus, the litigants placed the issue of the legal status of their embryos directly at issue. Forced to resolve the legal status of cryopreserved embryos under state law, the Oregon Court of Appeals held—expressly acknowledging the "inherent awkwardness" of its own holding—that it was not the embryos per se, but "the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a 'just and proper' division under [state marriage dissolution statute] ORS 107.105." Id. at 839.

Some courts may not have to address the legal status of cryopreserved embryos. This occurs when state legislatures make that determination. For example, under Louisiana state law a cryopreserved embryo would be deemed a "judicial person" with the capacity "to sue or be sued." See La. Rev. Stat. §§ 9:123 and 9:124.

Estate Planners Should Take a Proactive Approach and Review Their Clients' IVF Consents or Agreements

Considering the lack of clarity on the issue of the legal status of cryopreserved embryos, estate planning practitioners should take a proactive approach in counseling their clients. First, it would be prudent to inquire whether estate planning clients have ever participated in IVF treatments, regardless of the goal (that is, transfer embryos to the client's uterus or to the uterus of a gestational surrogate) and regardless of the outcome (pregnancy, birth of a child, or neither). The purpose of this inquiry is to determine whether the clients may have cryopreserved embryos maintained at an IVF clinic. Second, practitioners should direct the clients to confirm with the IVF clinic that it maintains the embryos. As strange as it may sound, the author's experience as an embryologist and an IVF laboratory director suggests that some IVF patients may not even remember that they had cryopreserved embryos. Alternatively, the clinic may have transferred the cryopreserved embryos to another storage facility. Third, practitioners should direct the clients to request from their IVF clinics whatever consent forms or agreements the clients may have signed at the clinic. The purpose of this inquiry is to review those documents to ascertain that embryo disposition instructions contained therein are consistent with the clients' contemplated estate plan. This step is of paramount importance because IVF clinic documents may have been drafted by or for the clinic, and the drafter may not have been an attorney. Consequently, the forms may contain clauses that are invalid, unenforceable, ambiguous, or are inconsistent with the client's contemporaneous dispositional intent. Finally, when in doubt, practitioners should consult an attorney who is knowledgeable in assisted reproduction technologies law.

Cryopreserved embryos raise a host of legal issues and questions that are unsettled and will most likely remain unsettled for the foreseeable future. But proactive estate planning practitioners could bring a little more certainty to their clients who wish to include cryopreserved embryos in their estate plans.