

August 31, 2015; Dilemma in Embryo Cases

Two recent articles recently caught my attention. In a divorce proceeding, who has the right to decide what happens to the couple's frozen embryos? What factors should judges consider when making this tough decision?

This is a topic I've pondered over the past few years, but not one I've ever had to deal with in my law practice. That's because I don't believe Guam currently has a fertility clinic that has the facilities to fertilize eggs, then to freeze and store the human embryos. But this doesn't mean that some Guam couples might not face such a dilemma. After all, there are local couples who have traveled both abroad and Stateside to pursue such procedures.

The first article was about a divorced California couple embroiled in a legal battle over who should decide the fate of their frozen embryos. The couple, 45 year-old Stephen Findley, and his former wife, Mimi Lee, an anesthesiologist, married in 2010. Shortly after their marriage they procured the services of the University of California San Francisco Center for Reproductive Health to help fertilize five of Mimi's eggs with Stephen's sperm.

Apparently, the motivating factor behind the couple's desire to preserve embryos was the fact that Mimi had been diagnosed with breast cancer and was facing months of cancer treatment. The couple realized that a possible side effect of such treatment could be the loss of Mimi's fertility. Freezing the embryos would give the couple the option of becoming parents sometime in the future if Mimi successfully battled her breast cancer.

Mimi survived. The couple decided to divorce before any of the embryos were implanted. As feared, Mimi's cancer treatment left her infertile. She was comforted by the fact she had the frozen embryos, so a future family wasn't out of the picture.

As is standard procedure in most fertility clinics, Stephen and Mimi had been required to enter into a written agreement prior to beginning the fertilization process. Among other provisions, the agreement addressed the fate of the embryos under certain circumstances, such as death of one spouse or divorce. The couple's agreement included a specific provision that if they ever divorced any remaining embryos would be destroyed.

But, destruction of the embryos would end any hope that Mimi could produce her own child. As a result, she filed a lawsuit asking the judge to award her the embryos. Stephen countered demanding that the embryos be destroyed as provided in their agreement. This set the stage for a highly emotional trial. A decision is expected in the near future.

In a similar high profile case, Modern Family actress Sofia Vergara and her former boyfriend, Nick Loeb, also found themselves in court battling over two frozen embryos. The couple had the

embryos frozen in 2013. They separated in 2014. Vergara is now engaged to Joe Manganiello and does not wish to have the eggs implanted.

Loeb, on the other hand, wants a surrogate mother to carry the embryos to term. He filed a lawsuit against Vergara asking the court to prevent her from destroying the embryos and to award him control.

Like Mimi and Stephen, Vergara and Loeb also signed an agreement prior to beginning the cryogenic process. Their agreement apparently did not include a specific provision for the possibility of divorce. However, it did state that both had to consent before the embryo could be brought to term.

How should the courts rule in these cases? Is an embryo simply a type of property, the disposition of which should be regulated by contractual agreements? Or, is it a human life that deserves heightened safeguards and protection? Should its fate rest on legal or moral principles?

If Mimi wins her lawsuit and gives birth, should Stephen have the legal obligation to support the child? Should he be viewed as the child's father with full custodial rights and obligations, or is he merely a sperm donor devoid of any legal right to claim paternity?

Should a court approve and uphold Loeb's promise to Vergara that he will hold her harmless for any future parental obligations, including paying child support, if she'll let him have the embryos? Or does the best interest of the child demand that she be forced to assume the maternal role and responsibilities?

The United States does not regulate such matters on a national level. Instead, each state has the authority to decide these issue on behalf of its citizens. As a result, we can expect years of litigation and resolutions that differ from state-to-state. The process will be painful.

With human lives in the balance, the stakes couldn't be higher.