

Date: November 30, 2018

To: ULC Committee on Scope and Program

From: JEBUFL – Barbara Atwood, Chair; Linda Elrod, Reporter

Re: Recommendation for Study Committee

At its annual in-person meeting on November 16, 2018, the Joint Editorial Board for Uniform Family Law voted unanimously to recommend the appointment of a study committee to explore the feasibility and desirability of a uniform or model law governing the disposition of human embryos and gametes at divorce, separation, or death. We attach a recent court decision and a law review article, both of which provide an excellent overview of the law: In re Marriage of Rooks, ___ P.3d ___, 2018 WL 5316404 (Colo. 2018); Debele & Crockin, *Legal Issues Surrounding Embryo and Gametes: What Family Law Practitioners Need to Know*, 31 J. Am. Acad. Matrim. Law. 55 (2018).

Description of project

Increasing numbers of persons are freezing gametes or entering into fertility treatments to create embryos for future implantation. Disputes over disposition of cryopreserved embryos and gametes frequently involve issues of whether embryos should be discarded, used for research, or implanted for purposes of reproduction. While these conflicts arise most frequently when parties are separating or divorcing, issues have also arisen at the death of one of the parties to the contract. Fertility clinics routinely require individuals to sign documents indicating their desires about disposition. Disagreements may arise when one party changes his or her mind about use and challenge the intended meaning of these forms and the binding effect of the agreements. Very few states have enacted legislation on the subject, but several courts have weighed in with varying standards for resolving disputes. As explained in the attached materials, courts employ a variety of approaches and, significantly, often note the absence of legislative guidance. Statutory law varies as well. [do we need any statute example?]

Benefits of and need for uniformity:

As the attached materials demonstrate, there is a pressing need for regulation of embryo and gamete disposition. The use of assisted reproduction is on the rise in the United States, due in part to a decline in fertility among both males and females. Also, with universal recognition of same-sex marriage under *Obergefell v. Hodges* (US 2015), same-sex couples are now more likely to consider becoming parents and, in general, to rely on assisted reproduction. In addition, assisted reproductive technology has advanced, permitting much longer storage periods than in previous times. Finally, with the increased acceptance and practice of gestational surrogacy (see, e.g., Article 8, UPA (2017)), the use of in vitro fertilization will only increase, necessarily involving the creation and storing of human embryos.

The ULC has recognized the benefits of uniform standards in family law through its many family-law related acts. Uniformity across the states on the topic of embryo disposition will serve the goals of predictability and stability -- policies of particular importance in family law. If a couple enters into an agreement about future disposition of embryos under the law of State A but moves to State B where the governing standards may be quite different, justified expectations may be thwarted. The uncertainty about applicable law is particularly problematic when the dispute is between one individual wanting to avoid parentage and another wanting to implant the embryo. In addition to the need for predictability for individuals using assisted reproductive technology, we believe that clinics and medical professionals would benefit from uniformity. Professor Susan Crockin, an expert in the field of assisted reproductive technology law and coauthor of the attached article, met with the JEB at the November 2018 meeting. She is enthusiastic about the recommended project and suggested to us that fertility clinics would likely welcome a uniform or model law.

In light of the scarcity of legislation on this subject, legislatures would likely be receptive to a thoughtful uniform or model law. As noted, courts often mention the lack of legislative guidance. In the parlance of the ULC guidelines, regulation of embryo disposition is an “emergent need,” in light of technological advances and increased access to IVF among the general public.

Existing state law on embryo disposition:

We refer you to the attached materials for a detailed summary of existing law. In general, state common law approaches include (1) a contracts-based standard, which looks to prior agreements between the parties; (2) a balancing of interests approach, which evaluates the parties’ competing interests in directing the disposition of embryos (often involving one party’s desire not to be a parent and the other party’s desire to be a parent); (3) a contemporaneous consent approach, which requires contemporaneous mutual agreement for any transfer of embryos.

In most states, no statutory law exists regarding disposition of embryos and gametes when the “owners” of the genetic material disagree. A few states have characterized embryos as property, with the progenitors holding joint decision-making authority. See Fla. Stat. § 742.17(2) (2009); Mich. Comp. Laws § 333.10102 (2018). In contrast, Louisiana law declares a human embryo to be a “biological human being,” with the best interests of the embryo governing disputes between genetic parents. La. Rev. Stat. Ann. § 9:126 (2008). In a few other states, research on donated embryos is prohibited. See, e.g., N.M. Stat. § 24-9A-3 (2008). Arizona recently enacted a statute that directs courts to award the embryo to the spouse who desires to develop the embryo to birth, without regard to prior agreements between the parties. See A.R.S. § 25-318.03.

Other relevant law:

Article 7 of the Uniform Parentage Act (2017) addresses parentage implications of consent to the use of assisted reproduction and withdrawal of consent. It also provides for parentage determinations in the posthumous use of gametes or embryos. See Section 708. The UPA, however, does not address the actual disposition of gametes or embryos when there is conflict about the disposition itself.

We are not aware of federal laws or regulations governing embryo or gamete disposition at divorce, separation, or death. Fertility clinics themselves are regulated by three federal agencies: The Centers for Disease Control and Prevention, the Food and Drug Administration, and the Centers for Medicare and Medicaid Services. These agencies regulate some, but not all, aspects of clinical operations. The CDC collects data from all fertility clinics in the United States and calculates standardized success rates for each clinic. The FDA regulates the use of medical devices and drugs in the fertility industry, and the Medicare and Medicaid Services regulates access to care. Most substantive regulation comes from professional and industry groups, which can pull accreditation from clinics that don't meet their standards.

Stakeholders and other interested groups:

American Bar Association Assisted Reproductive Technology Committee

American Academy of Adoption and Assisted Reproduction Attorneys

American Academy of Matrimonial Lawyers

American Society of Reproductive Medicine

Society for Assisted Reproductive Technology

Society of Reproductive Biology and Technology

College of American Pathologists

National Infertility Association

Goals for study committee:

We recommend that a study committee be appointed, with directions to determine whether there would be widespread support among stakeholders for the recommended project. While the need for regulation of embryo disposition seems clear, a study committee could get a more concrete sense of the support for such a project among major stakeholders and an understanding of potential opposition.