

ABANDONED EMBRYOS: The Dilemma of Eternal Storage

by Catherine Tucker

With more and more patients turning to *in vitro* fertilization (IVF) to build their families, it's inevitable that legal issues related to IVF treatment will need to be resolved in the courts. This area of law is still largely unsettled, with only a handful of relevant appellate decisions across the country. One particular aspect of IVF law that has arisen only in very recent years relates to abandoned embryos.

Currently, many facilities feel obliged to continue maintaining abandoned embryos indefinitely because there is no clear legal path that allows for disposal of the tissue. However, continued storage is expensive, and ultimately the costs must be passed along to other patients. Thus, abandoned embryos often remain in expensive legal limbo. From a legal viewpoint, what are the best practices in this field? How can legal practitioners identify and address issues to assist clients with quick resolutions to indefinite storage.

NATURE OF THE DILEMMA

IVF is a highly technical type of fertility treatment that involves the stimulation of the female partner's ovaries with hormonal medications in an attempt to generate multiple eggs at one time. These eggs are then surgically retrieved and combined with the male partner's sperm in the laboratory, with the hopes that fertilization will take place. Any resulting embryos are cultured in the laboratory, typically for five days, and one or two embryos are placed in the female partner's uterus with the goal of producing a viable pregnancy.¹ Any additional potentially viable embryos can be cryopreserved (frozen) for future use. It is notoriously difficult to predict at the beginning of an IVF cycle how many embryos will remain for cryopreservation. And both doctors and patients often desire extra embryos to reduce the expense and, for the female partner, the pain and inconvenience associated with a fresh IVF cycle.

Equally difficult is predicting which embryos will actually result in a viable pregnancy. Thus, some cryopreserved embryos may be

used relatively soon following a failed cycle that did not result in a pregnancy. This short term storage, which is often for only a few months, will typically be at the medical clinic that performed the IVF procedures. Other embryos will be stored for much longer, often because the woman becomes pregnant and the remaining embryos won't be needed until the couple is ready for their next child. Long term storage may be either at the medical clinic or at a dedicated cryobank that is independent from the medical facility. For the purpose of this article, both of these entities will be referred to as "facilities". The couple may ultimately decide not to pursue further treatment. Typically, this decision is made following a successful pregnancy that completes their family, but it may also come about due to health reasons, divorce, death, or simply a desire to discontinue treatment. Or the couple may feel unable to make a decision about whether to try again, and delay the decision-making indefinitely. In any event, they still have an obligation to continue to pay storage fees, which average about \$500 per year at cryobanks, or easily twice that amount at medical clinics. The dilemma arises when patients simply stop paying the storage fees and are unresponsive to bills and other communications sent to them. These embryos are colloquially referred to as "abandoned".

Facilities are understandably reluctant to unilaterally dispose of these abandoned embryos without written permission from the patients. After all, the embryos are not easily replaceable and, in some cases, it may be impossible for the patients to produce additional embryos. For example, a woman may have undergone IVF treatment at an advanced age or just before starting chemotherapy which rendered her unable to produce more eggs. Yet, continued storage costs the facility money because the embryos need to remain in temperature controlled and continuously monitored storage tanks, since even a slight deviation in temperature can leave the genetic materials useless. When some patients do not pay their storage bills, it's inevitable that the costs will have to be borne, to some extent, by other patients.

SCOPE OF THE PROBLEM

Because there are no national statistics kept on abandoned embryos, it's impossible to conclusively determine the total number of such

embryos currently in storage. Older estimates placed the number of stored embryos at close to half a million, but most were stored for patients who were continuing active fertility treatment.² Only a small percentage were officially designated as abandoned, but this type of analysis fails to account for the fact that all patients in the active treatment category will ultimately stop treatment and some of those patients will subsequently abandon their embryos.³ Thus, the ultimate number of abandoned embryos will accumulate over time. While the number of stored embryos today is likely even higher given that more people are undergoing IVF treatment and laboratory techniques have improved to allow for better culture of embryos, an accurate figure still remains elusive.⁴ Also, while embryos destined for patient use or other designated disposition (as further described below) move through the system, abandoned embryos can remain in the system indefinitely and become a nagging problem for facilities.

It is clear that this issue is of concern for facilities struggling to use their available storage space most efficiently. Given the routine maintenance, observation, and diligent recordkeeping required, as well as the limited physical space available at some IVF clinics, even hundreds of abandoned embryos at one facility can pose a significant problem. Yet, facilities remain reluctant to dispose of abandoned embryos without explicit patient consent. As one IVF program director noted “We’ll keep [abandoned embryos] forever . . . It’s not beyond imagining that a couple could show up after five years in Japan and say, ‘We’re back; we want our embryos,’ and what would we do then?”⁵ At least one facility has gone to the lengths of hiring private investigators to track down patients who have abandoned their embryos.⁶ Another facility spent 15 years diligently tracking down embryo owners to obtain disposition consents, and yet still had 1,000 abandoned embryos in storage.⁷ Ironically, patients may not realize that their nonpayment causes such consternation, incorrectly assuming that the embryos were destroyed promptly after the storage bill became overdue. As one former lab director explained about her outreach to patients, “We called or wrote everyone we could call or write and surprisingly, the reaction was often, ‘Oh, I assumed those embryos were discarded years ago when we stopped paying for storage.’”⁸

In a conversation with the author, the former director of the sole facility in New Hampshire estimated that the facility had approximately 700 embryos stored for 150 patients, with only a small number designated as abandoned at any given time.⁹ However, many New Hampshire residents seek IVF treatment out-of-state and thus accurately calculating the number of embryos stored for New Hampshire residents is not realistically possible. What is clear is that lawyers need to specifically inquire of individual clients to determine whether they have embryos at risk of being deemed abandoned.

DISPOSITION OPTIONS FOR ABANDONED EMBRYOS

When embryos are abandoned, the facility has a number of options. The legally safest course is to store the embryos indefinitely, accepting the burden as one of the costs of doing business. Another alternative is to discard the embryos but, due to the unique nature of

embryos as a potential for human life, many facilities are reluctant to do this without a clear written directive from the patients. However, patients who ignore their bills are similarly likely to ignore pleas from the facility to execute written consents for destruction.

Between these two extremes are alternatives that are often chosen by patients who take an active role in disposition of their embryos. Extra embryos can be used for non-procreative purposes, such as research or training, or for procreative purposes by different patients (often termed embryo donation or, less accurately, embryo adoption). Some commentators favor the release of abandoned embryos to other patients in need for procreative purposes, in order to avoid waste of these scarce resources.

DONATION FOR PROCREATION

However, donation of abandoned embryos is highly controversial. There is a long-standing ethical principle underlying donation of human tissue that the donation must be made with the *explicit* consent of the patient.¹⁰ Only contemporaneous consent for embryo donation can truly satisfy this requirement, as it implicates the kind of thoughtfulness that our society has deemed important when making such immense decisions. Nonetheless, some observers have suggested that abandoned embryos are no longer the property of the original patients, with all rights to the embryos having been ceded to the facility, which can make all dispositional decisions.

In recent years, one medical clinic in Spain simply began using embryos abandoned at the facility in fertility treatment for other patients, without the express permission of the progenitors.¹¹ This type of approach has been deemed unacceptable by the American Society for Reproductive Medicine and is unlikely to sit well with most Americans.¹² Nor is it an acceptable option for many facilities, given the potential liability involved.

Furthermore, practical difficulties arise with donation of abandoned embryos for procreative use. For example, the donors will not be able to receive the mental health consultation that is critical to helping them fully understand the implications of embryo donation.¹³ Nor will donors be able to have a legal consultation to understand their legal risks arising from the donation. The absence of these critical components means that patients are unprepared for potential outcomes, such as being contacted in the future by a resulting child.

Furthermore, it is unlikely that the original patients signed HIPAA compliant releases permitting disclosure of their information to the ultimate embryo recipients. Thus, physicians may not feel comfortable providing *any* information about the original progenitors. As a result, the recipients might not receive information that would be important for the resulting child’s health, such as information about a history of breast cancer in the female genetic contributor or the results of genetic testing showing that one of the genetic contributors is a carrier for cystic fibrosis.¹⁴ Furthermore, most prospective recipients want basic information about the donors, such as race and educational level, and this information may not even be available from the records. And, while not required by the FDA, recipients may want additional communicable disease testing performed on the donors who, by definition, will be

unavailable for such tests.¹⁵ The recipients may also desire information about the donors' family genetic background, which would not usually be collected in the course of the donors' own treatment. A further complication arises from the practical aspect of eventually having to explain the circumstances of such a conception to the resulting child. For these reasons, many have questioned whether prospective parents in this country would even be willing to receive embryos of unknown origins and indeterminate legal status.

LEGAL STATUS OF EMBRYOS

Embryos have generally been treated as quasi-property by the courts. Historically, this analysis has come up in other contexts, with the dispute typically between the patients themselves. For example, appellate courts in several states have considered the allocation of cryopreserved embryos among divorcing spouses. While the courts have taken different approaches to determining the ultimate rights of the litigants, courts have almost universally approached the analysis from a quasi-property perspective with various degrees of consideration given to the unique qualities of human embryos and the rights of progenitors to control their own reproductive decisions.¹⁶ The New Hampshire Supreme Court has not (yet) considered this issue.¹⁷

However, the quasi-property analysis used in divorce cases does not translate well to the analysis of legal rights relative to abandoned embryos. Many states, including New Hampshire, have statutes that specify the treatment of abandoned property. For example, New Hampshire's laws provide that certain property remaining unclaimed for five years is deemed abandoned.¹⁸ The statutory scheme sets forth that the abandoned property must be delivered to the state, which shall assume responsibility for its safekeeping, and ultimately the property is auctioned off to the highest bidder who takes the property free of all claims of the original owner.¹⁹ Even putting aside medical privacy law related concerns, such provisions don't adequately address the unique nature of embryos. The state does not have the facilities or trained personnel to properly keep the embryos stored in continuously monitored and temperature controlled cryotanks. And the ethical problems associated with the auction of potential human beings to the highest bidder are obvious.²⁰

The difficulty here lies not only with the fact that embryos are unique, irreplaceable, and deserving of special recognition as a potential for human life, but also with the fact that the constitutional rights of procreation, including the right not to procreate, are implicated.²¹ In recognition of these concerns, some commentators have suggested that donation of abandoned embryos to third parties for procreation should be permitted if the patients, at *any* point, signed consent forms permitting such a donation. However, consent forms not signed contemporaneously with the donation provide insufficient protections for the facility as well as the progenitors.²²

CONSENT FORMS

IVF patients are typically presented with many consent forms over the course of treatment. Many clinics require patients to affirmatively specify what they would like to see happen to their embryos in the

event they divorce or die. The given options may include permitting the embryos to be used by the surviving spouse, discarding the embryos, donating the embryos to research, or donating to other patients for procreative purposes.

Consent forms are typically signed pre-procedure and are appropriately analyzed as merely an expression of the patient's intent at that time.²³ Medical practitioners anecdotally know that patients' views about their cryopreserved embryos can change drastically over time.²⁴ And informed consent for the disposition of not-yet-created embryos is only illusory, because it's impossible for patients to truly understand the scope of their decision pre-procedure. In the seminal Tennessee case of *Davis v. Davis*, the Court recognized this, noting "the parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds."²⁵ Statutes that require embryo disposition options to be specified pre-treatment fail to recognize this critical progression.²⁶

At the outset of fertility treatment, most patients have tunnel vision focused entirely upon having a child and cannot fully appreciate the inherent complexities of decisions such as donation of excess embryos to others for procreation. And patients lack important information that factors into the decision-making, such as whether a child will ultimately result from that batch of embryos. Furthermore, it is the rare patient who seeks legal advice as to the legal implications of these consent forms. Thus, any decision made before IVF treatment commences cannot be a fully informed one, and it is not surprising that facilities can be reluctant to rely upon these consent forms when determining the ultimate fate of abandoned embryos. The potential liability for making the wrong choice is simply too high.²⁷ This is particularly true when the decision made is to allow others to use the embryos for procreation. As one Massachusetts court explained, "we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement."²⁸ Given this kind of judicial hesitation, overreliance on consent forms can expose a facility to various civil claims.

MODEL ACT AND GUIDELINES

The American Bar Association's Model Act and professional guidelines have considered the problem of abandoned embryos but fail to provide a comprehensive solution.

The ABA's Model Act provides for binding agreements, subject to later amendment, prior to embryo creation which specify the time and conditions under which embryos shall be deemed abandoned.²⁹ The ABA's Model Act also provides for a presumed time frame of five years, since the creation of the embryos, as the standard for deeming embryos abandoned.³⁰ While the ABA's Model Act also requires diligent attempts to notify the patients and medical providers, as well as the existence of a specified written informed consent document executed prior to acquisition of the embryos by the facility, the Model Act fails to incorporate non-payment and non-communication, over the five year period, into this definition.³¹ Thus, patients who dutifully pay their

storage fees for five years, in the hopes of spacing their children many years apart, could find their embryos classified as abandoned under the ABA's Model Act. And, conversely, patients who fail to both make payment and respond to notices with the facility may have embryos that cannot be deemed abandoned simply because the proper paperwork was not completed at the outset. With older embryos, created at the time when fertility clinic paperwork was less comprehensive, this can particularly be a problem. Thus, the ABA's Model Act's prerequisites do not appropriately classify embryos as "abandoned" in accordance with the real-life needs of participants.³²

The ABA's approach to the disposition of abandoned embryos is also of concern. The Model Act advocates disposal "in accordance with the most recent recorded agreement between participants and the facility."³³ The challenge arises when the written agreement permits or requires abandoned embryos to be donated to others for procreative purposes. In order to fully respect the interests of the progenitors to make their own decisions as to whether to permit procreation with their own genetic material, the ABA should consider limiting the permissible disposition options to those that do not involve procreation.³⁴ Notably, the ABA's Model Act provides immunity to facilities that follow the designated procedures for disposition.³⁵ While such immunity is a step in the right direction, it must be coupled with a prohibition on donation of abandoned embryos to others for procreative use.

The American Society for Reproductive Medicine (ASRM), which is the professional organization representing fertility professionals, has promulgated guidelines regarding abandoned embryos.³⁶ ASRM defines embryos as abandoned when the patients cannot be contacted or have affirmatively reneged on their obligations toward the embryos.³⁷ ASRM recommends that medical programs obtain an "advance directive" providing for the disposition of the embryos in the event of failure to pay storage charges or loss of contact, among other specified circumstances.³⁸ This written directive should be obtained before the first treatment cycle and/or at the time of the cryopreservation, and can be amended if desired by the patients.³⁹ The opinion suggests that disposition may be made in accordance with *any* of the selected disposition options which, again, raises the issue of procreation without specific, contemporaneous consent.

When no such advance directive exists, ASRM guidelines state that it is ethically acceptable for a program to dispose of embryos after five years when the unavailability of the patients "reasonably indicates" they have abandoned the embryos.⁴⁰ ASRM wisely recognizes that a "program's willingness to store embryos does not imply an ethical obligation to store them indefinitely. . . [a patient] who has not given written instruction for disposition, has not been in contact with the program for a substantial period of time, has not provided current contact information, and who cannot be located after reasonable attempts by the program and facility, cannot reasonably claim an ethical violation on the part of the program or facility that treats the embryos as abandoned and disposes of them".⁴¹ Significantly, ASRM is very clear that the only acceptable disposition of these abandoned embryos is thawing the embryos, which will inevitably result in their destruction.⁴² Donation of the embryos to others for procreation or to

research is expressly forbidden.⁴³ Thus, the situation that took place in Spain would not similarly occur under these guidelines.

RECOMMENDATIONS FOR BEST PRACTICES

Medical clinics, as well as off-site facilities, should consider mandatory patient education, improved consent forms practices, and financial incentives to avoid the dilemma posed by abandoned embryos. Currently, patient education on cryopreserved embryos for routine IVF cycles is minimal, with most patients undergoing neither a mental health consultation nor a legal consultation.⁴⁴ These missed opportunities to educate patients about the complex emotional and legal issues pertaining to cryopreserved embryos result in a patient population that is uneducated about their options and the implications of those options. Such education, combined with routine re-evaluation of disposition options during the treatment process, as contemplated by ASRM, and afterward would result in a more informed patient population better able to make decisions for themselves. Hopefully, this information would translate into a patient population more likely to continue to take an active role in the decision-making for their excess embryos down the road, thus reducing the number of abandoned embryos.

Clinicians are all too aware of the extreme difficulties that some patients have in making final decisions about these embryos, so actively


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revisiting the issue over time can put subtle, and appropriate, pressure on patients to make decisions as they are ready.⁴⁵ The ultimate result would be more patients proactively selecting final dispositions instead of abandoning their embryos.

Such education and review of dispositional decisions can be combined with better consent form practices. One medical director of a large IVF program describes the experience of standardizing consent forms at his clinic as follows: “We had more than 3,000 documents that were ‘out of control,’ such as outdated consents, flow sheets that had been revised years before, and forms that no one knew existed. Our documents were a mess.”⁴⁶ Ultimately, the IVF program reaped the benefits of the improved consent form procedures, and other medical clinics can likewise expect similar benefits. With standardized and accurate consent forms combined with stringent internal protocol related to attempts at patient contact, medical clinics can reduce their liability concerns. With potential liability minimized, the medical clinics (or the off-site facility) can ultimately make appropriate decisions about the fate of abandoned embryos when patient input is not contemporaneously available.

Additionally, incentives, particularly financial ones, may prod particularly indecisive patients to affirmatively make a disposition decision. Some facilities have offered to waive storage fees in exchange for decision-making by the clients. Similarly, late fees could be waived or charitable donations made in exchange for a disposition decision. Obviously, care must be taken to ensure that patients are not inappropriately influenced by such incentives. When patient choice is limited, perhaps to the options that are most economically or intangibly beneficial to the facility, patients might not be making truly informed decisions. This author is aware of one medical clinic that offers to waive storage fees when the embryos are donated to others for procreative purposes, but won’t similarly waive fees when patients seek to discard their stored embryos. Given that the IVF clinic benefits financially from the additional medical treatment involved with embryo donation, the influence on the patient may thus be undue. Similar concerns would apply if storage fees are waived only upon donation to the IVF clinic’s internal research program. A more ethically appropriate option would be for a facility to offer such incentives contingent only upon prompt decision-making, and not contingent upon the particular disposition selected.

On the legislative side, laws providing statutory time frames for a presumption of abandonment and limiting facility liability for good faith disposition decisions made in accordance with a specified statutory scheme would enable facilities to make timely decisions without fear of unwarranted liability. Furthermore, in order to avoid the potential liability associated with alternative dispositions, abandoned embryos should be discarded unless sufficient written documentation exists permitting a specified non-procreative use of the embryos.⁴⁷

IMPLICATIONS FOR NEW HAMPSHIRE ATTORNEYS

For family lawyers, the key is to identify clients who may have embryos in storage to facilitate timely disposition decision-making. In particular, all divorce and estate planning clients should be asked

whether they have embryos remaining in storage. A well-known axiom among reproductive lawyers is that infertility is a very private matter and clients won’t disclose their fertility history unless specifically asked.⁴⁸ Once the issue has been identified by proactive inquiry, clients can be advised about the legal and financial risks associated with ignoring the ultimate decision-making, and guided toward taking affirmative action to facilitate their preferred disposition. Attorneys should consider how to effectively document the client’s intentions to avoid inadvertently abandoning the embryos by failing to notify the correct facility, a particular risk when the embryos have been transported off-site to an unaffiliated facility. For the spouse who leaves the marital home, notifying the facility of a change of address is critical to ensuring receipt of any abandonment-related notices. Otherwise, the spouse who remains in the marital home will be the only one to receive mail from the facility, and thus could attempt to surreptitiously authorize a final disposition for the embryos. And lawyers can also play a role in negotiating a reduction of unpaid storage fees in exchange for the execution of a written disposition consent.

A word of caution: practitioners must be aware that conflicts between laws in different jurisdictions may exist, given the frequency with which New Hampshire residents rely upon out-of-state medical programs and facilities. A secondary caution for lawyers is that failing to affirmatively inquire of a client could mean that cryopreserved embryos are not appropriately addressed in a divorce decree or estate plan.

Health care lawyers may find themselves needing to advise facilities on this currently uncertain area of the law. Facilities need to be proactive with written embryo abandonment policies in place as well as patient educational materials that are distributed in a timely manner and are easily accessible (such as on a website). Facilities should refuse to accept embryos without contemporaneous notarized consent forms in place. Such consent forms should identify the time period after which embryos shall be deemed abandoned, the obligation of the clients to affirmatively notify the facility of any changes in their disposition desires, relationship status or contact information, the efforts that the facility must make in attempting to establish contact with clients following abandonment, and the permitted non-procreative disposition options selected by the clients. Appropriate releases of liability should also be incorporated into the paperwork. If this paperwork is in place for every single storage contract, the facility’s ability to dispose of abandoned embryos is greatly enhanced.

Routine contact (at a minimum, yearly) should be maintained with patients. Written internal procedures relating to attempts at patient contact should specify when and how contact must be attempted for embryos deemed at risk for abandonment. The procedures should also allow sufficient lag time before moving forward with final disposition in order to account for late-responding patients. Facilities should employ an internal verification process to ensure that contact was attempted using the correct procedures and patient information, and to ensure that any response was not inadvertently neglected. With regards to embryos that are already in storage and at risk of abandonment, creative solutions such as financial incentives in exchange for decision-making

may be necessary to avoid prolonging storage of unwanted embryos.

The law regarding cryopreserved embryos is rapidly evolving. It's only a matter of time until the New Hampshire Supreme Court is called upon to address the complex legal issues involved with assisted reproductive technologies, such as the treatment of abandoned embryos. In the meantime, practitioners should be careful to ascertain whether clients have abandoned embryos in their legal or physical possession and proactively identify appropriate solutions.

ENDNOTES

1 The procedure is adapted slightly for patients requiring surrogates or donated eggs or sperm; these variations also allow for treatment to be pursued by same-sex couples and single individuals.

2 D.I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, *Fertil Steril*, May 2003 (authors calculated almost 400,000 stored embryos in 2002, with close to 90% designated for patient use).

3 Less than 5% were abandoned. *Id.*

4 With embryos now routinely cultured longer in the laboratory (in order to weed out the embryos that spontaneously stop developing) and with improved testing available to assess the potential viability of embryos, the number of stored embryos could ultimately decline simply because the poor quality ones are identified and discarded instead of cryopreserved. How these trends balance against each other, and how many of these stored embryos are destined to be abandoned, is yet to be fully assessed.

5 http://articles.chicagotribune.com/2004-09-12/news/0409120108_1_fertility-centers-embryos-fertility-clinics.

6 <http://www.businessobserververl.com/section/detail/the-egg-man/>.

7 <http://www.newsweek.com/doctor-who-adopted-thousands-abandoned-embryos-80525>.

8 <http://fertilitylabinsider.com/2013/12/abandoned-embryos-the-clinics-right-to-dispose/>.

9 This facility has implemented stringent protocol for the timely disposal of abandoned embryos, so the number of abandoned embryos has not accumulated over time.

10 E.g., N.H. RSA 291-A:5-7, 9 (anatomical gifts after death may be made based on the consent of the deceased or designated family members not acting in contradiction of deceased's express wishes).

11 See *Hundreds of IVF Embryos Donated Without Consent*, *The Telegraph*, July 22, 2010.

12 Ethics Committee of the American Society for Reproductive Medicine, *Disposition of Abandoned Embryos: A Committee Opinion*, *Fertil Steril*, June 2013.

13 Such consultation is "strongly recommended" by the American Society for Reproductive Medicine. The Practice Committee of the American Society for Reproductive Medicine and the Practice Committee of the Society for Assisted Reproductive Technology, *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, *Fertil Steril*, January 2013.

14 While such disclosures arguably are permitted under HIPAA, individual medical provider comfort level and more restrictive state laws must also be taken into consideration in the analysis.

15 21 C.F.R. § 1271.90(a)(4).

16 E.g., *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). Louisiana stands in stark contrast to the overwhelming majority with a statutory designation of embryos as legal persons. *La. Rev. Stat. Ann.* § 9:125 (2011).

17 However, bills that would have granted rights of personhood to embryos have repeatedly failed in New Hampshire's legislative process.

18 N.H. RSA 471-C:2-3, 18.

19 N.H. RSA 471-C:19-24.

20 But see N.H. RSA 471-C:32 (property of insubstantial commercial value can be destroyed or otherwise disposed of by the state).

21 See *J.B. v. M.B.* at 711-9.

22 When patients affirmatively choose to donate their leftover embryos, they typically sign consent forms contemporaneously with the donation. Note that the rights of any gamete (egg or sperm) donors can be differently analyzed.

23 See *A.Z. v. B.Z.* at 1057-8.

24 C.R. Newton et al., *Changes in Patient Preferences in the Disposal of Cryopreserved Embryos*, *Hum Reprod*, December 2007; Susan Klock et al., *The Disposition of Unused Frozen Embryos*, *NEJM*, July 5, 2001 (while the sample sizes in both studies were small, the results match with anecdotal information known to this author).

25 *Davis* at 597.

26 E.g., Fla. Stat. §742.17 (2010).

27 Consider the lawsuits brought against one fertility clinic for losing track of nine embryos. <http://www.nytimes.com/1995/10/01/us/fertility-clinic-is-sued-over-the-loss-of-embryos.html>.

28 *A.Z. v. B.Z.* at 1057-8.

29 American Bar Association Model Act Governing Assisted Reproductive Technology (February 2008) § 501(1.) (currently in revision).

30 *Id.* at § 504(1.) (a.).

31 *Id.* at § 504(1.) (b.)-(c.).

32 The ABA's Model Act is currently undergoing revision.

33 ABA Model Act § 504(2.).

34 The Uniform Parentage Act (UPA), which is the other major model act that addresses assisted reproduction, fails to directly address the issue of abandoned embryos. *Unif. Parentage Act* (2000) (amended 2002).

35 ABA Model Act § 504(3.).

36 *Disposition of Abandoned Embryos*, *supra*. While these guidelines are considered voluntary, ASRM member programs must pledge to follow them.

37 *Id.* at 1848.

38 *Id.*

39 *Id.*

40 *Id.* at 1849. The five year time period is presumptive; ASRM specifically allows programs to have written policies designating a different time period.

41 *Id.*

42 *Id.*

43 *Id.*

44 At most IVF clinics, such consultation is required only for patients using donor gametes or surrogates, if at all.

45 See Anne Lyerly et al., *Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent*, *Hum Reprod*, March 1, 2011 (analyzing struggle of patients to make decisions regarding excess embryos at nine U.S. fertility clinics and recommending that decisions be periodically revisited, particularly after treatment is complete). See also http://www.boston.com/news/health/articles/2009/11/22/the_maybe_baby_dilemma/?page=1 (discussing the struggle from the patient perspective).

46 Michael M. Alper, *Experience With ISO Quality Control in Assisted Reproductive Technology*, *Fertil Steril*, December 2013.

47 While non-procreative uses are theoretically appropriate, they may be impossible to implement. For example, the progenitors won't be available to provide the type of informed consent required for most research projects.

48 See Steven H. Snyder, *I'm a Divorce Lawyer! So Why Should I Read About ART?*, *Family Advocate*, Fall 2011.

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