

Virtual Mentor

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CASE AND COMMENTARY

Loss of Frozen Embryos

Commentary by Linda MacDonald Glenn, LLM

Case

Mr. and Mrs. Donald Smith underwent fertility treatments and subsequent in vitro fertilization at a clinic that offered assisted reproduction technology. The in vitro fertilization consisted of harvesting Mrs. Smith's eggs, fertilizing them with her husband's sperm, implanting some of the resulting embryos for gestation, and freezing the others for future use, if necessary. Four embryos were implanted and 9 were frozen.

The first attempt did not result in a pregnancy. A year and a half later, when Mr. and Mrs. Smith returned to the clinic to prepare for a second attempt, they were informed that the frozen embryos had been inadvertently lost when the clinic relocated the year before. The Smiths were shown the "Informed Consent and Contract for Embryo Freezing" which they had signed before the prior treatment. The forms stated, in part, that "a laboratory accident in the Clinic may result in the loss or damage to one or more of said frozen embryos." Nevertheless, the Smiths brought suit against the clinic for the loss and destruction of their embryos, the loss of their "potential children," and emotional harm.

Questions for Discussion

1. Does the "lab accident" clause release the clinic from liability for the loss of the Smith's embryos?
2. If the clinic is liable for the loss, should it be liable for loss of "property" or something more? If Mrs. Smith had been carrying a viable fetus, and someone caused the death of the fetus, that person could be charged with the "wrongful death" of the fetus. Are the embryos "victims" of wrongful death in the same way the viable fetus would have been?
3. Are embryos so distinctive a form of life as to need specific legislation that applies only to embryos?

Subsequent Legal Proceedings

This scenario is based in part on a case brought in Rhode Island in 1995. A Superior Court issued a decision this past summer that frozen embryos were not "persons" within the meaning of the wrongful death statute and therefore could not be considered "victims" or "potential children." The court did not permit the plaintiffs to seek compensation for negligent infliction of emotional distress because the

plaintiffs (1) did not witness the actual loss or destruction of the embryos, and (2) they did not suffer any physical manifestation of the emotional distress.

The Court, however, did hold that the frozen embryos were a form of "irreplaceable" property and allowed the plaintiffs to proceed with a claim for loss of "unique property." Despite the "informed consent" document, the Court found that there remained a question of fact as to whether or not the plaintiffs were truly informed, that is, whether they fully understood "the possible risk associated with the loss or destruction of their pre-embryos." This aspect of the case has been remanded to the trial court and parties for further discovery and is still pending.

The issue of frozen embryo loss has yet to be addressed statutorily; to date, state courts have relied on case law. Interestingly, a recently adopted federal regulation in the Health and Human Services Department extends the definition of "child" to include fetuses and embryos so that they can be covered under HHS's State Children's Health Insurance Program (SCHIP). The extended definition would allow prenatal care to be reimbursed under SCHIP. No lawsuit has yet been filed claiming that this "expanded" definition applies to other areas of the law, but such action should be expected sooner rather than later. Legislation regarding the liability of IVF clinics in general has been proposed by the bioethics community, but has not yet been enacted.¹

References

1. Capron AM. Too many parents. *Hastings Cent Rep.* 1998;26(5):22-24.

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