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Who Gets Custody of Embryos?

Recent innovations in reproductive technology have helped many couples and individuals achieve pregnancies that may have been impossible even a few years ago. As with many innovations, however, rapid scientific advances have brought with them new ethical and legal dilemmas. Twenty years ago, judges and attorneys who were accustomed to dealing with the often challenging issues of child custody may not have guessed that they would soon be faced with potentially even tougher issues involving custody of frozen embryos.

Embryo Custody Disputes: Real-Life Cases

Take the case of a Tacoma, Washington couple who had two embryos formed with donor eggs and the husband's sperm "left over" after a successful birth using a surrogate. The couple had the eggs frozen with the intention that they, too, would someday be implanted in the uterus of a surrogate mother. The couple later divorced, and the judge awarded custody of the frozen embryos to the husband. The husband wanted to place any children born from the embryos for adoption in a two-parent family outside the state of Washington. The wife appealed from the court's ruling, arguing that she wanted to raise any potential children. The egg donor also wanted a say, and sided with the wife.

A Michigan couple faced a similar dilemma. The divorced couple fought over five frozen embryos for years. The former wife wanted to have more children, using the embryos, but the former husband objected to that plan and the case went to court. The judge ruled in favor of the husband, stating that the husband had a right to choose not to have more children. In that case, too, the wife appealed.

An Illinois court struggled with a similar problem in another case involving frozen embryos, ordering in late 1999 that they remain frozen until the court could sort out the weighty constitutional questions involved. In that Cook County case, the husband and wife were in the midst of divorce when the husband asked the court to order the wife not to attempt to become pregnant through implanting the embryos they had frozen earlier in their marriage. The court issued the requested order, ruling that custody of the embryos would be decided as a part of the divorce trial.

These cases demonstrate that thorny legal issues may arise when assisted reproductive technology is implemented, further complicating an already stressful situation like divorce. Couples considering assisted reproductive technology are generally only thinking of the potential positive outcomes and fulfilling their dreams of starting a family. Such couples would be well advised, however, to discuss the legal implications of their decisions with an experienced lawyer before the fact, so that if for some reason they do not live happily ever after, they will have prepared themselves as well as possible to deal with the legal and ethical challenges presented by their situation.

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