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Custody of Frozen Embryos upon Dissolution of Marriage in Georgia Research Guide

By Lauren Zaki

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Introduction, Scope, and Jurisdiction

Because Georgia has not yet promulgated a statute governing who gets custody of frozen embryos at divorce or decided a case on the matter, there is no precedent to turn to in determining how they should be treated in divorce proceedings. Few states have enacted statutes referencing frozen embryos in any capacity. In addition, states have held a limited number of hearings on custody of frozen embryos. This guide therefore includes information on various sources to consult when faced with this new and rapidly evolving legal issue. The guide begins with primary sources of law, then moves to secondary sources that are helpful in providing an overall context on custody of frozen embryos throughout various states.

Disclaimer

This research guide is a starting point for a law student or an attorney to research the area of frozen embryo custody after marriage. This guide should not be considered as legal advice or as a legal opinion on any specific facts or circumstances. If you need further assistance in researching this topic or have specific legal questions, please contact a reference librarian in the Georgia State University College of Law Library or consult an attorney.

Primary Sources

State Statutes

Georgia:

- O.C.G.A. § 19-8-40 – Definitions - As used in this article, the term:
 - “Embryo” or “human embryo” means an individual fertilized ovum of the human species from the single-cell stage to eight-week development.
 - “Embryo relinquishment” or “legal transfer of rights to an embryo” means the relinquishment of rights and responsibilities by the person or persons who hold the legal rights and responsibilities for an embryo and the acceptance of such rights and responsibilities by a recipient intended parent.
 - “Embryo transfer” means the medical procedure of physically placing an embryo into the uterus of a female.
 - “Legal embryo custodian” means the person or persons who hold the legal rights and responsibilities for a human embryo and who relinquishes said embryo to another person or persons.
 - “Recipient intended parent” means a person or persons who receive a relinquished embryo and who accepts full legal rights and responsibilities for such embryo and any child that may be born as a result of embryo transfer.
- Ga. Code Ann., § 19-8-41. Relinquishment of rights to embryo.
- Ga. Code Ann., § 19-8-42. Expedited orders of adoption.
- Discusses written adoption contracts between legal embryo custodians and recipient intended parents.
- Ga. Code Ann., § 19-8-43. Termination of rights of past legal custodians of embryos.

California:

- West's Ann.Cal.Health & Safety Code § 125315. Information to be provided to fertility treatment patients; failure to provide information constitutes unprofessional conduct; disposition of human embryos; health care providers to obtain informed consent; requirements.

Connecticut:

- C.G.S.A. § 32-41jj. Regenerative medicine research: Definitions. Prohibition on human cloning. Disposition of embryos or embryonic stem cells following infertility treatment. Written consent required for donations. Embryonic stem cell research authorized. Penalties.

Florida:

- West's F.S.A. § 742.17: Disposition of eggs, sperm, or pre-embryos; rights of inheritance.

Louisiana:

- LSA-R.S. 9:121. Human embryo; definition.
- LSA-R.S. 9:129. Destruction.
- LSA-R.S. 9:2718.1. Definition of Terms.
- LSA-R.S. 9:2720.9. Termination of contract by notice.
- LSA-R.S. 9:127. Responsibility.

Massachusetts:

- M.G.L.A. 111L § 2. Definitions.
- M.G.L.A. 111L § 4. Information on choice of disposition of remaining embryos or gametes; informational pamphlet; informed consent form

New Jersey:

- N.J.S.A. 26:2Z-2(b). Public policy regarding derivation and use of certain human cells.

Case Law

- Kass v. Kass, 91 N.Y.2d 554 (1998).
 - New York adopted the Contractual Approach stating that agreements determining disposition of remaining embryos patients make with clinics should be presumed valid and binding, and enforced in any dispute between the divorcing couple.
- Vitakis v. Valchine, 987 So.2d 171 (2008).
 - District Court of Appeal of Florida adopted the Contractual Approach and forced the parties to adhere to the provision of their settlement agreement concerning disposition of their frozen embryos.
- Roman v. Roman, 193 S.W.3d 40 (2006).
 - Texas took the Contractual Approach and found the agreement between Husband and Wife was binding at divorce because the parties' intentions were clear and document was unambiguous.
- Szafranski v. Dunston, 993 N.E.2d 502 (2013).
 - Appellate Court of Illinois adopted the Contractual Approach in this case.

- Reber v. Reiss, 42 A.3d 1131 (2012).
- Litowitz v. Litowitz, 146 Wash.2d 514 (2002).
- Karmasu v. Karmasu, 2009 WL 3155062.
 - Ohio
 - The court in this case employed the Contractual Approach.
- In re Marriage of Rooks, 2016 WL 6122561.
 - Colorado Appellate court decision in which the court adopted the Contractual Approach.
- In re Marriage of Dahl and Angle, 222 Or.App. 572 (2008).
 - Court of Appeals of Ohio adopted the Contractual Approach.
- In re Marriage of Witten, 672 N.W.2d 768 (2003).
 - The Supreme Court of Iowa applied the Contemporaneous Mutual Consent approach and held that “agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo.”
- A.Z. v. B.Z., 725 N.E.2d 1051 (2000).
 - Massachusetts Court stated: “even had the husband and the wife entered into an unambiguous agreement ... [it] would not enforce an agreement that would compel one donor to become a parent against his or her will.” Forced parentage would violate public policy.
- McQueen v. Gadberry, 507 S.W.3d 127 (2016).
 - Missouri Court of Appeals designated frozen pre-embryos as marital property of special character and adopted the Contemporaneous Mutual Consent approach, requiring the couple to keep the pre-embryos frozen until they could come to a mutually agreed upon decision as to their disposition.
- Davis v. Davis, 842 S.W.2d 588 (1992).
 - Supreme Court of Tennessee
 - Court adopted the Balancing Approach in absence of written agreement and weighed each party’s interests against one another.
- J.B. v. M.B., 783 A.2d 707 (2001).
 - Supreme Court of New Jersey adopted the Balancing Approach from Davis v. Davis and found that W, “the party wishing to avoid procreation,” should not be forced to become a parent against her wishes.

Forms

- Embryo Adoption Agreement Sample Form (Nichols Cyclopedia of Legal Forms Annotated)

Secondary Sources

Law Journals

Journal of Law and Health, 17 J.L. & Health 103 (2002-03).

- “Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law”
- by Shelly R. Petralia
- Discusses way in which various states treat IVF Agreements.
- some do K
- Some (LA) won’t allow you to purposely destroy/dispose of them bc they are a “person”
- Also discusses contracts of adhesion and arguments by proponents and opponents of enforcing IVF agreements

25 Hastings Women’s Law Journal, 25 Hastings Women’s L.J. 179 (2014).

- “Ice Ice Baby! The Division of Frozen Embryos at the Time of Divorce”
- by Meagan R. Marold

Nova Law Review, 40 Nova L. Rev. 257 (Spring, 2016).

- “What to Expect Before You’re Expecting: Clarifying Florida’s Statute Governing Pre-Embryo Disposition Agreements and Divorce”
- By Alison P. Barbiero
- Discusses IVF procedures generally as well as the statutes some states have created to govern IVF procedures. It further discusses which cases if any, discuss disposition of frozen embryos upon divorce. It also looks at cases in states that have held hearings on custody and disposition of frozen embryos and how clinic agreements that indicate disposition preferences are treated in each such state.

Columbia Journal of Gender and Law, 24 Colum., J. Gender & L. 378 (2013).

- “Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability”
- By Deborah L. Forman

Law Reviews and Journals – Family Law Westlaw

- Journals address background information and legal issues surrounding custody of embryos. I found relevant information within the links to Family Advocate, Family Court Review, Family Law Quarterly, Journal of Law and Family Studies and Whittier Journal of Child and Family Advocacy. You can search for particular information within these results.

HeinOnline – Law Journal Library Subjects

- Contains various family law journals. Search “embryo” or other relevant search terms to locate articles within the subject of family law specifically on custody of frozen embryos.

LegalTrac

- Use this to search for academic journals articles written about embryo custody and disposition. Type in “embryo” to populate over one thousand results. Can search within results to narrow the list of articles and can also search by date to find the most recent articles since this area of law is changing so rapidly.

Treatises

Westlaw Next General Treatises:

Equitable Division of Property

- By Brett R. Turner
- Discusses way in which frozen embryos should be classified and some relevant cases.

Handling Child Custody, Abuse and Adoption Cases

- By Ann M. Haralambie
- Discusses IVF generally and the way in which courts throughout the U.S. treat agreements between clinics performing IVF services and individuals undergoing the process during a divorce process.

Marital Property Law

- By John Tingley, J.D., Nicholas B. Svalina, LL.M., Updated by Nancy McKenna, J.D.
- §60:1 – Generally: Discusses the three types of analyses courts employ when determining custody of cryopreserved embryos at divorce: 1) The Contractual Approach; 2) The Contemporaneous Mutual Consent Approach; and 3) The Balancing Approach.

Associations:

American Bar Association Section of Family Law

- Includes links to current news articles.

Georgia Bar Association Family Law Section

- Includes links to various resources including: educational information and webinars, important announcements, and ethics and professionalism rules.

American Academy of Matrimonial Lawyers

- Includes a list of Academy Fellows recognized as expert negotiators and litigators in the field of family law. Also contains an Info Center with links to various family law related issues, including one for reproductive technology.

American Academy of Matrimonial Lawyers Georgia Chapter

- Includes a list of Academy members in Georgia one could consult or refer a client to.

Online:

National Registry for Adoption

- Includes background information of Embryo Adoption/Donation as well as general information about Legalities of Embryo Adoption/Donation within the U.S.

[Justia](#)

- Includes links to Articles, Web Resources, Law Blogs, Laws and Cases relating to family law as well as a search bar to search for specific resources.

Print Sources:

- Reproductive Technology: a research guide to the legal status of embryos.
 - Coppo, Timothy (1996) KF341. D65 C67
- Assisted Reproductive Technology: a lawyer's guide to emerging law and science.
 - Kindregan, Charles P. (2006 and 2011) KF3830. K56
- Reproductive Technologies and the Law
 - Daar, Judith (2006) KF3830. D33
- Legal Conceptions: the evolving law and policy of assisted reproductive technologies
 - Crockin, Susan L. (2010) K3611. A77 C76

American Law Reports:

- 87 A.L.R.5th 253 (Originally published in 2001): "Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances"
 - By Elizabeth A. Trainor, J.D.

Other Useful Guides:

[American Bar Association Model Act Governing Assisted Reproduction Technology Agencies, \(February 2016\).](#)