

EMBRYO ADOPTION: AN EVOLVING STATUTORY LANDSCAPE

I. Introduction

The field of embryo adoption is one of an evolving statutory landscape. Until recently, Louisiana was the only state in the country defining an embryo as a juridical person, having passed its statute in 1986.¹ On July 1, 2009, a Georgia statute allowing for the adoption of the embryo became effective, the first law in the country.² The new Georgia statute goes beyond the existing Louisiana statute in its construction of embryos as legal human beings; while the Louisiana statute recognizes embryos as juridical human beings, the Georgia statute is the only one in the country setting forth provisions allowing for their adoption before those embryos have been brought to term. Employing the concept of the embryo as a human being, first pioneered in Louisiana, Georgia has created a legal framework of embryo adoption in an effort to promote the stability of embryo transfers and of the children who result from them.³

The legal status of embryos across states is not clear; they are variously held to be property, human beings, human tissue, or an intermediate category of potential life. They have been held to be the property of the gamete donors, or to be subject to family law and in custody of the couple that intends to bring them to term.⁴ The need for a stable regulatory regime is therefore great, both for the families adopting embryos and for the best interests of the embryos themselves.

¹ Britney Glaser, *The Fertility Dilemma: Frozen Embryos*, KLPC News, Mar. 27, 2009 (<http://www.kplctv.com/Global/story.asp?S=10081861>).

² Stephen Gurr, *Georgia's Newest Laws Now in Effect*, GAINSVILLE TIMES, Jul. 1, 2009, <http://www.gainesvilletimes.com/news/archive/20665>.

³ O.C.G.A. § 19-8-42 (d) (2009).

⁴ Michelle Anderson, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U.L. REV. 589, 602 (2006).

The problem for 2010 considers the interaction between embryo adoption law in Louisiana and Georgia. Will embryos created in Louisiana for a couple residing in Louisiana, and later transferred to a couple in Georgia, be subject to a regime of property law or of family law? Can an egg donor be awarded custody of her embryos if they were transferred to another couple without her consent? Can she be awarded damages in this situation? Whose interests do state laws consider in deciding these questions? How will the interaction of the laws of two states resolve this dispute?

II. Summary of Facts

Mike and Robyn, a couple living in Louisiana, created eighteen embryos with the services of a fertility clinic in Louisiana.⁵ The egg donor entered into a contract with Mike and Robyn giving her eggs to them and terminating her parental rights to any children born from her eggs. The contract required Mike and Robyn to obtain her consent prior to transferring the embryos to any other couple, but no consent was required if they chose to donate her eggs to research. She was paid \$25,000 for the donation of her eggs.

Mike and Robyn created three children from the embryos, then donated the remaining six embryos to Bill and Susan, a couple residing in Louisiana. All four parties signed an agreement giving full legal rights to the embryos to Bill and Susan. Bill and Susan used four of the embryos to and gave birth to one child. Two of the original embryos remain.

⁵ This fact pattern was created by the Embryo Adoption Awareness Campaign, Problem Presented for Essay Response, 2010 Embryo Donation/Adoption Essay Competition, <http://www.embryolaw.org/problem.asp>.

One year later, the egg donor learned of Mike and Robyn's donation of the embryos to Bill and Susan. She filed a breach of contract lawsuit against Mike and Robyn seeking damages and return of the remaining embryos. Mike and Robyn filed a suit in Georgia seeking to terminate their agreement with Bill and Susan and to regain custody of the remaining two embryos.

III. Issues of Law

A. The Agreement between the Egg Donor, Mike and Robyn

The egg donor is bringing a suit in Louisiana state court against Mike and Robyn for a breach of contract lawsuit; she is seeking both monetary damages and custody of any remaining embryos. Even though her eggs were eventually shipped to Georgia, she would most likely bring the breach of contract suit in Louisiana, since the contract was created and the eggs were donated to a fertility clinic in Louisiana.

This dispute would therefore be governed by Louisiana law. Louisiana recognizes embryos as human beings under the law, or "juridical persons."⁶ It cannot be destroyed or owned as property by its legal custodians or a clinic appointed as a temporary guardian.⁷ Louisiana, prior to the enactment of the Georgia statute, was the only state specifically recognizing an embryo as a legal human being. Missouri implicitly recognized this status of embryos by statutorily defining life as beginning at conception, while Florida did so by including

⁶ La. Rev. Stat. Ann. § 9.124 (2010).

⁷ Susan L. Crockin, "What is an Embryo?": A Legal Perspective, 36 Conn. L. Rev. 1177, 1182 (2004).

in the definition of a child one that was conceived by means of a insemination as part of a preplanned adoption arrangement.⁸

1. Arguments of the Egg Donor

The egg donor might argue that the clear language of the contract should govern the dispute. She would argue that under the terms of the contract, Mike and Robyn had the clear responsibility to obtain her consent prior to transferring the embryos to any other couple. She would liken her contract for the eggs to a property contract under which Mike and Robyn's possessory interest in the embryos would indefinitely remain subject to the condition that the egg donor consent before the embryos created from her eggs were transferred to another couple. She would argue that she should be granted custody of the remaining embryos, since Mike and Robyn had performed the action, transferring the embryos to another couple, which terminated their property rights under the terms of the contract. Four of the embryos transferred to the other couple cannot now be returned, since one was brought to term by Bill and Susan and is now a child, and because the other three were used in attempting to bring that child to term. The egg donor would argue that she is entitled to damages for the loss of this embryo, because she had a possessory interest in the embryo triggered when Mike and Robyn transferred it to Bill and Susan, and because her possessory interest was destroyed when the child was brought to term and when the other three embryos were used in the process.

To support her claim, the egg donor would argue for a contractual view of the agreement between her and Mike and Robyn. She would argue for a similar interpretation as in *Litowitz v. Litowitz*, where the Supreme Court of Washington decided to strictly enforce a contract calling for embryos to be thawed and disposed of after five years, even where neither party wanted the

⁸ *Supra* note 4 at 604.

embryos to be disposed of at the time of the suit.⁹ This argument, however, would not be likely to be ultimately persuasive in a Louisiana court. While the Washington court in *Litowitz* decided to strictly interpret the contract at issue, it did so because the state framework as a whole viewed embryos as property. In contrast, the Louisiana state system views embryos as having the legal status of human beings, and is more likely to view this matter as a custody dispute instead of as in the property framework of *Litowitz*.

2. Responses of Mike and Robyn

Mike and Robyn would respond to the breach of contract claim by pointing out that under Louisiana law, embryos are not considered property, but instead, “[a]n in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients who owe it a high duty of care and prudent administration.”¹⁰ Mike and Robyn could argue that the egg donor’s breach of contract suit is an inappropriate instrument for either damages or to regain custody of her embryos, since the embryo is considered a juridical person under Louisiana law and so contracts cannot be made concerning the terms of its placement. Mike and Robyn would argue that the egg donor has, in the language of the statute, “renounce[d], by notarial act, [her] parental rights for in utero implantation,” and so the embryo now has become “available for adoptive implantation in accordance with the written procedures of the facility where it is housed or stored.”¹¹ They would argue that the language of the statute contemplates only a full and complete relinquishment of rights to an embryo, and does not allow the egg donor to maintain the right to refuse consent to the placement of her embryos once she has relinquished her parental rights for in utero implantation.

⁹ *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

¹⁰ La. Rev. Stat. Ann. § 9:130 (2010).

¹¹ *Id.*

According to the Louisiana statute, “[t]he in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to received the in vitro fertilized ovum.”¹² Mike and Robyn might argue that they acted properly under this statute in entering into a contract with Bill and Susan to give them the remaining embryos, since they were indeed a married couple who clearly demonstrated their willingness and ability to receive the fertilized ovum when they had a child from one of the embryos.

Furthermore, the statute goes on to note that “[i]n disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the bests interests of the in vitro fertilized ovum.”¹³ Mike and Robyn might argue that it is in the best interests of the embryos to have remain in the custody of Bill and Sue, who have already implanted one of the embryos to have a child and may be presumed intend to use the other embryos to create a family. Mike and Robyn could argue that it is not, in fact, in the best interests of the embryos to be returned to the egg donor, who does not seem to have a similar intent to implant her embryos and bring them to term.

The language of the Louisiana statute in § 122 could be used to support their argument; it states that “[t]he use of a human ovum fertilized in vitro is solely for the support and contribution of the complete development of human in utero implantation.”¹⁴ Mike and Robyn could argue that the court should uphold their donation of the embryos to Bill and Susan as consistent with the purposes of the statute, which seems to be to bring the embryo to term and to develop it into a complete human being. Mike and Robyn would argue that while Bill and Susan have the intent

¹² *Id.*

¹³ La. Rev. Stat. Ann. § 9:131 (2010).

¹⁴ La. Rev. Stat. Ann. § 9:122 (2010).

to bring the remaining embryos to term, the egg donor has not demonstrated a similar intent. Mike and Robyn would also cite § 129, which states that “[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical persons or through the actions of any other such person.”¹⁵ According to the statute, the egg donor cannot destroy the embryos if she does obtain custody of them. Mike and Robyn might argue that because she cannot destroy the embryos, it is in the best interest of the embryos to be placed with Bill and Susan, where they might be brought to term, rather than to remain indefinitely frozen in the custody of the egg donor, who has demonstrated no intent to bring them to term but cannot destroy them under Louisiana law.

3. Likely Decision of a Court

A court deciding the issue of breach of contract would likely find that the portion of the agreement between Mike and Robyn and the egg donor requiring consent before her eggs be placed with another couple is void under Louisiana law. Although Louisiana law does not specifically set forth procedures for embryo adoption, the purpose and explicit statement of the law is to consider embryos as human beings and to protect them as such. A court could well decide that is against the public policy of considering embryos as human beings for restrictions to be placed on their adoption by their former guardians. The Louisiana court might decide that the egg donor, having relinquished her custodial rights, no longer has the right to determine how the embryo as a human being is placed, whether it be with a family or research institution.

Furthermore, a court might also note that the provision that would have allowed Mike and Robyn to donate the embryos to research would also be void. As § 9:122 states, “[t]he use of a human ovum fertilized in vitro is solely for the support and contribution of the complete

¹⁵ La. Rev. Stat. Ann. § 9:129 (2010).

development of human in utero implantation. No in vitro fertilized human ovum will be farmed or cultured solely for research purposes...”¹⁶ Given the nature of the Louisiana statute, which considers an embryo to be a juridical person, a court might find that a contract, as opposed to a custody agreement, is an inappropriate instrument to regulate the transfer of a human being. The court might therefore dismiss a breach of contract suit and characterize the agreement between Mike and Robyn and the egg donor as a custody agreement instead, bringing the matter into family court instead of finding for the egg donor as a contractual matter.

When considering to whom the court will award custody of the remaining embryos, it is impossible to determine in advance how the Louisiana court will decide, since the statute does not provide for embryo adoption. The court may conclude that the intent of the donor was not to maintain custody over the embryos, since she was willing to donate them to research, and so the court may decline to award custody to the egg donor.

The Louisiana court, however, would most likely not award damages to the egg donor since it considers an embryo to be a juridical person and not as property. The egg donor will most likely ask for damages in order to compensate her for the embryos that she lost as a type of property claim, and not to compensate her for pain and suffering or similar measures as a tort claim for the destruction of the embryos as persons. Given the structure of the Louisiana statute and the way that it considers embryos as persons, and not as property, the court would therefore most likely decline to award damages to the egg donor for the loss of embryos as property.

¹⁶ La. Rev. Stat. Ann. § 9:122 (2010).

B. Mike and Robyn's Action to Regain Custody of the Remaining Embryos

Mike and Robyn have filed an action in Georgia seeking to terminate their agreement as to, and regain custody of, the remaining two embryos. Their action will be decided under the newly added Option of Adoption Act section of the Georgia statute (O.C.G.A. § 19-8-40 through § 19-8-43), which became effective July 1, 2009.¹⁷ According to the state representative who introduced the bill, James Mills, although the Act does not explicitly define embryos as human being, the unmistakable intent of the bill was to classify them as such.¹⁸ The law represents a change from the earlier state of Georgia law, under which gamete donors preserved parental rights and could later bring custody suits after the embryo had been brought to term by another party.¹⁹

1. Arguments of Mike and Robyn

Mike and Robyn might argue that while the new Georgia Option of Adoption Act does indeed govern embryo adoption and the legal relinquishment of rights to embryos, that the statute should not be applied retroactively to govern the donation of embryos from Mike and Robyn to Bill and Susan. Mike and Robyn might argue that the statute therefore did not provide for a full relinquishment of rights to Bill and Susan, and that Mike and Robyn can still have a custodial interest in the embryos that they donated. This argument, however, might not be ultimately effective, since Mike and Robyn entered into an agreement providing for the irrevocable relinquishment of their embryos.

¹⁷ Georgia General Assembly, HB 388 – The Option of Adoption Act (2009), http://www.legis.ga.gov/legis/2009_10/sum/hb388.htm.

¹⁸ *Supra* note 2.

¹⁹ *Id.*

Mike and Robyn might also argue that Bill and Susan should not be considered to have adopted the embryos since they did not follow the technical procedures set forth by the new statute, which was passed after they were in physical custody of the embryos and after their agreement with Mike and Robyn. Mike and Robyn might argue that because their agreement did not comport with the technical form and requirements of embryo adoption, since it was not available at that time, Bill and Susan cannot be considered to have completed an embryo adoption. They would further argue that the agreement between Mike and Robyn and Bill and Susan is now invalid and cannot serve as an embryo adoption agreement, since it did not comport with the form set forth in the new statute for embryo adoptions.

2. Responses of Bill and Susan

§ 19-8-40 (5) of the Georgia code defines a “recipient intended parent” as any person “who receive[s] 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.”²⁰ Bill and Susan would argue that the language of the statute does not allow for the partial transfer of rights and responsibilities from one embryo custodian to another embryo custodian that allows the former embryo custodian to maintain the right to regain custody of any embryos at a later date, so long as the embryos have not been brought to term. § 19-8-41 (b) states that when an “embryo was created using donor gametes, the sperm or oocyte donors who irrevocably relinquished their rights in connection with in vitro fertilization shall not be entitled to any notice of the embryo relinquishment, nor shall their consent to the embryo relinquishment be required.”²¹ Bill and Susan would point to both the language and the intent of the statute as conferring the legal status

²⁰ O.C.G.A. § 19-8-40 (5) (2009).

²¹ O.C.G.A. § 19-8-41 (2009).

of a human being on an embryo. They would argue that as such, the statute does not allow for the partial transfer of custodial rights from one embryo custodian to another, nor does it allow a prior embryo custodian to reclaim an embryo after it has relinquished its legal rights to that embryo. Indeed, § 19-8-41 (c) of the Georgia code states explicitly that “[u]pon embryo relinquishment by each legal embryo custodian ... the legal transfer of rights to an embryo shall be considered complete.”²² Bill and Susan would argue that under this statute, Mike and Robyn cannot now reclaim the embryos that they donated to Bill and Susan.

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3. Likely Decision of a Court

Given the provisions specifically allowing for embryo adoptions now in Georgia law, it is easier to predict how the Georgia court will decide these issues than it was to predict the

²² *Id.*

²³ *Id.*

outcome of the Louisiana court case. Because Mike and Robyn entered into an agreement providing for the full relinquishment of legal rights to the embryos to Bill and Susan, the Georgia court will most likely consider that an embryo adoption has taken place and that Bill and Susan now have full custody of the embryos. The court will most likely decide that Mike and Robyn now have no right to custody of the embryos.

Even if the court decides that the statute specifically providing for embryo adoptions should not apply retroactively to agreements concerning embryos made before July 1, 2009, the court will still likely declare that the embryos are to remain in the custody of Bill and Susan. The court could look to the agreement between the parties irrevocably transferring custody of the embryos to Bill and Susan from Mike and Robyn. It does not seem likely, however, that the court will choose to revert to a property conception of the nature of an embryo. The court will more likely consider the current state of the law as applying to past agreements as set forth in § 19-8-42 (d), which notes that “[i]n the interests of justice, to promote the stability of embryo transfers ... the court in its discretion may waive such technical requirements as the court deems just and proper.”²⁴ The court will therefore likely conclude that even if the agreement between Mike and Robyn and Bill and Sue does not meet all the technical requirements for an embryo adoption as set forth by the new statute, it is in the best interests of the stability of the embryo transfer for the embryo to remain in the custody of Bill and Susan. The court will likely therefore award custody of the embryo to Bill and Susan.

²⁴ O.C.G.A. § 19-8-42 (2009).

IV. Conclusion

The new statutory framework of the Option of Adoption Act in Georgia provides a more stable regime for embryo transfer than exists in other states. Even where embryos are considered juridical persons, as in Louisiana, a lack of a clear set of mechanisms for embryo adoption can lead to unclear results when custody disputes arise over embryos. It would be logical for Louisiana, who has committed to the notion of embryos as human beings under the law, to consider adopting a similar framework in order to avoid unnecessary litigation in the context of embryo adoptions. The Georgia Option of Adoption Act provides a stable set of expectations for couples choosing to adopt embryos, and allows those embryos to remain in the custody of those parties most likely to bring them to term.

The Georgia statute can still be revised in order to better promote the interests of embryos and the stable expectations of the parties who adopt them. The language that was to define an embryo as a legal person was removed from Option of Adoption Bill.²⁵ By revising the Georgia statute to define embryos as legal persons, the Georgia legislature would be able to combine the aspects of the Louisiana law with the new Georgia framework for embryo adoption to best protect the interests of embryos. This problem has demonstrated the ways in which Louisiana's definition of an embryo as a person, and Georgia's regime for embryo adoption, can interact to produce optimal results for parties seeking to adopt embryos and for courts charged with protecting the interests of those embryos. Ballot initiatives with language defining embryos as humans are likely to appear or be debated in California, Colorado, Florida, Mississippi, Missouri,

²⁵ Tina Trenkner, *Georgia Clears a Path for Legal Adoption of Embryos*, GOVERNING.com, Nov. 2009, <http://www.governing.com/article/georgia-clears-path-legal-adoption-embryos>.

and Montana.²⁶ This is a valuable opportunity to consider the contribution of Louisiana's specific definition of an embryo as a human being, and how that can contribute to a legal framework for embryo adoption such as that set up by Georgia.

²⁶ *Id.*