Legalwise

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"When married couples turn to this technology and later divorce, IVF can present a host of legal dilemmas, including how to resolve disagreements over the disposition of cryogenically preserved pre-embryos that remain at the time of dissolution."

Colorado Supreme Court in *Rooks* [2018]

This afternoon I am going to be discussing whether or not embryos can be property, and practical steps when parties may have embryos in storage. I will deal with the practical steps first and the theoretical matters second.

Begin at the beginning

It's rare that intended parents come to lawyers before they create embryos - but if they do, remember this piece of advice: do not rely on the IVF clinic's forms as the basis of any future planning.

Provided you know what you are doing, and the issues for the clinics have been met (typically those matters they are required by their regulation to cover), there is nothing to stop you drafting the consents of the parties as to treatment, and in particular to the storage of gametes of embryos. Gametes are eggs and sperm. Of course, as our insurer keeps telling us, only do work for which you have expertise.

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Nick Loeb v. Sofia Vergara

Your clients, too, could be in the nightmare case like Hollywood director Nick Loeb and his ex, Modern Family actress Sofia Vergara.

They first met in 2010. In 2013, as a couple, they created two embryos at the ART Reproduction Center in Beverly Hills with the intent of creating biological children to be carried to term by a gestational surrogate. They entered into a surrogacy agreement with a friend and employee of Vergara to be their surrogate.

They tried twice to implant embryos into the surrogacy- but failed both times.

In 2013 they looked at undertaking surrogacy with someone else. They underwent further IVF, during which time two more embryos were created. Their consent form, called a Directive, stated that neither could use the embryos without the other's consent.

The form provided three options for the embryos in the event of the death of either Vergara or Loeb:

(1) donate the embryos to research;
(2) thaw the embryos with no further action; or
(3) if one party died, allow the embryos to be used in a living partner.

Loeb asserted that Vergara forced him to choose option number two.

As they had not yet chosen a surrogate, the embryos were cryopreserved at the clinic.

In 2014 the couple called off their engagement.

By 2015, Loeb commenced proceedings in California to use two embryos that were in storage so that he could become a dad through surrogacy. Loeb discontinued the proceedings in California when he did not want to disclose the identities of former girlfriends who were pregnant with his children and had undergone abortions.

Loeb commenced proceedings in Louisiana, where officials consider embryos to be human beings. In Louisiana, therefore Vergara was sued by the two embryos! They were named Emma and Isabella and listed as plaintiffs. The pleadings stated:

"Emma and Isabella seek that they be entrusted to their natural father Loeb, who is willing and desirous that they be born."

In his claim, Loeb sought:

• a declaratory judgment declaring the Directive a void and unenforceable contract between Loeb and Vergara;
• a declaratory judgment declaring that the Directive does not control decisions regarding the future and disposition of Emma and Isabella;
• rescission of the Directive due to duress; rescission of the general informed consent as against public policy;
• rescission of the Directive due to fraud and misrepresentation;
• a declaratory judgment prohibiting consent to the destruction and death of Emma and Isabella;
• mandating Vergara release Emma and Isabella for uterine transfer, continued development, and live birth;
• breach of oral contract; tortious interference with inheritance; appointment of Loeb as curator of Emma and Isabella;
• a declaration of Ms. Vergara as an egg donor with regard to Emma and Isabella; and
• termination of Ms. Vergara's parental rights with regard to Emma and Isabella.

In 2017 Vergara then brought proceedings in California seeking to restrain Loeb. She was successful. The embryos could not be used without the consent of both parties.

During the course of the proceedings, which were numerous, Loeb became the director of the film *Roe v Wade*, which he happily publicised, as well as publicising his court cases.

After his loss in California, Loeb said:

"It's sad that Sofia, a devout Catholic, would intentionally create babies just to kill them."

The proceedings were finally dismissed on appeal in 2021 when the Louisiana appeals court found that the proceedings made a mockery of the Louisiana legal system, and that Loeb and one of his attorneys had "blatantly engaged in forum shopping."[2]

The professional indemnity question

For most family lawyers, a discussion about embryos is entirely esoteric. Who cares whether or not embryos are property? What does it have anything to do with family law?

I would put it this way - it is a potential professional indemnity issue. According to Monica Mazzei[3] , a family lawyer at Sideman & Bancroft, who represents high net worth clients in Silicon Valley:

"It's so common that now it's a routine question that I have to ask: Is there any genetic material that we need to talk about?"

In the most recent year reported, 2019, 16,310 babies were born in Australia and New Zealand following embryo implantation[4]. This represents about 4.4%[5] of all births in Australia, or just under one child in 20. Put another way, one child is born via IVF for every classroom in Australia. Given that IVF is often not cheap, even with Medicare, one might expect a higher number of children born via IVF in locations that have a higher socio-economic profile, than those with a lower socio-economic profile. However, it should not be assumed that there are no children born via IVF in poorer places. I have acted for clients whose children have been born via surrogacy, for example, and my clients have come from all parts of Australia - in poor places, rich places, and in between, from the inner city of our capitals to the outback - and everywhere in between.

Why it is a professional indemnity question is simple - both as to parenting and property matters.

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[2] The judgment of the Court of Appeal can be found here: https://www.courthousenews.com/wpcontent/uploads/2021/01/embryobattle.pdf viewed 7 March 2022.

[3] "The Latest Issue in Divorces: Who Gets the Embryos?", The New York Times 3 April 2021, viewed 7 March 2022: https://www.nytimes.com/2021/04/03/health/IVF-frozen-embryo-disputes.html .

[4] Australia and New Zealand Assisted Reproduction Database, 2019 annual report, viewed 7 March 2022: https://npesu.unsw.edu.au/sites/default/files/npesu/data_collection/Assisted%20Reproductive%20Technology%20in%20Australia%20and%20New%20Zealand%202019.pdf .While I am a lecturer at UNSW, I am not connected with ANZARD.

[5] The ANZARD figures are for both Australia and New Zealand. A rough estimate, based on Australia's population divided into the total population of Australia and New Zealand, ends up with 13,592 births in Australia via IVF. This assumes that the per capita rate for IVF is the same for Australia and New Zealandwhich we don't know. There were 305,832 births in Australia in 2019: https://www.abs.gov.au/statistics/people/population/births-australia/latest-release viewed 7 March 2022. 13,592 divided into 305,832 equals 4.44%.

Don’t assume

It is necessary to ask clients how their children were conceived. Do not assume that they were conceived naturally. I have seen a number of cases where the lawyer did not ask - and assumed that one or both parties were parents as a matter of law, when they were not. Of course, if someone is not a parent, the then various presumptions under the Family Law Act 1975 do not apply - and the party may not have standing in parenting matters, unless they can show that they are someone concerned with the care, welfare and development of the child under s.65C(c).

It is necessary to ask, in your initial consultation or client questionnaire, if the parties have any sperm, eggs or embryos, as part of the checklist of property. There are two reasons why.

The first is that if your client wishes to become a parent again, or indeed a parent for the first time. It may be that the only reasonable, cost efficient way (and sometimes only way in which their genetics can be used) is by use of that sperm, eggs or embryos that are already in storage. If you have not taken steps to enable them to use that sperm, eggs or embryos – or, worse, impeded them from doing so - your client might be prevented from doing so. Self-evidently, your former client might be seeking to make your responsible for their loss.

The second is if there are embryos and the parties have separated, there is the possibility of fraud. As set out below, there have been a number of cases both here and overseas where desperate mums to be have forged their ex-husband’s signatures. Of course, the possibility of fraud is not limited to opposite sex relationships. If you learn that your client and their ex have a number of embryos, then you need to ask if they want to be a parent again. Your client might be the driving force to be a parent. By contrast, your client may not want to be a parent (again), or might be happy for the ex to be a parent provided that there is no ongoing responsibility by your client to the child (including, of course, child support).
If you learn that your client DOES want to be a parent, then you need to turn your mind to three things:

1. **Is there agreement between the parties on that point?** If not, what are the barriers? What steps can be taken to assist in reaching agreement - and conversely, what steps can be taken to remove those barriers?

2. **Who will be a parent of the child when it is born?** Often the barrier for the other party is a fear that they will be a parent, and have parental responsibility- especially 18 years of child support. It is important to know the law about who is a parent, which I discuss in part below. If the other side are fearful of this, address it plainly - if necessary by a letter setting out the law as you understand it. If you are wrong, the other side will usually quickly tell you so. When writing a letter of this kind, it is necessary to go through, painfully, every step in legislation or case law. Skipping through this leads to errors. No shortcuts! As I said above, don’t assume. Work off first principles, no matter how many times you have done it before. It is essential to be meticulous.

3. **What are the ways in which the deal between them can be documented?** I cover this below.

Example: Goldilocks and Rapunzel

Goldilocks and Rapunzel are in a de facto relationship. They decide to have children. They go to the Wonderful IVF clinic in Sydney, and choose an anonymous, clinic recruited sperm donor. Sperm is set aside for both of them. The plan is to have a child each, but with the two children being genetically related to each other as siblings, through the same sperm donor.

Goldilocks goes first. A number of embryos are created using her eggs and the donor sperm. She undergoes a number of IVF cycles. Eventually she falls pregnant. There are no embryos left. Goldilocks gives birth to a boy, Prince.

Goldilocks and Rapunzel split up. Property settlement orders are made by consent. Rapunzel buys Goldilocks out of their home - and there is a super split. A standard she keeps/she keeps order is made.

It is at this point that Rapunzel wants to try and become a mum, after the stress of the split and property settlement are out of the way. She goes to Wonderful IVF - who tell her that the sperm is jointly owned by Goldilocks and Rapunzel, and that Rapunzel cannot access the sperm without either the consent of Goldilocks or an order from the court.

Rapunzel feels let down by her family law solicitor in that this should have been covered in the deal. She told her solicitor about their plan to have a family together, including the sperm, but the solicitor was much more interested in the value of the property pool and percentages, and overlooked the sperm. Rapunzel, of course, approached Goldilocks for use of the embryos. Goldilocks tells Rapunzel that the orders as made are “just right”, and Goldilocks will not co-operate with Rapunzel in allowing use of the sperm. That is why Rapunzel has come to you, a commercial litigation solicitor, to make a claim and a complaint about her family law solicitor.

Example 2: Goldilocks and Rapunzel created embryos

In a variation of example one, at the time that Goldilocks created embryos, so did Rapunzel, using her eggs and the donor sperm.

When Rapunzel approaches Wonderful IVF post- property settlement, seeking to use “her” embryos, she is told by the clinic that the embryos are owned by both Goldilocks and Rapunzel, and that she cannot use them without either Goldilocks’ agreement or a court order. Rapunzel is enraged that the embryos cannot be used - because they are, after all, her genetic material. She has been told by doctors that she cannot produce any more eggs. Her last chance to become a mum using her genetic material is through the use of those embryos, which use has been denied her.

Current methods of resolution

If I have an embryo problem, how I do I resolve it by consent? As family lawyers, we are used to two ways of doing so:

• Consent orders; or
• Binding financial agreements.

The problem when talking about embryos (and for that matter gametes) is this - if they are not property, then what?

Currently there are six ways, none of which is ideal:

1. Have an order made as to property settlement. I have seen orders made by Registrars in Brisbane as to embryos. I am also aware that at least one Registrar in Brisbane has declined to make orders by consent as to embryos because he did not have jurisdictionbecause embryos were not property.

2. Enter into a binding financial agreement. I have seen this done concerning embryos. The risk of course is that if embryos are not property, then the binding financial agreement may not cover the embryos at all. The agreement must deal with property or financial resources, or spousal maintenance: ss. 90B(2), 90C(2), 90D(2), 90UB(2), 90UC(2), 90UD(2).

3. Have an injunction made so that one of the parties can use the embryos. This is per Piccolo and Piccolo [2017], discussed below. This can be made by consent by a Senior Judicial Registrar- clauses 11.2 and 11.3, Schedule 4, Family Law Rules. It may also be able to be made by a Judicial Registrar under clause 2.2, Schedule 4, if there is an order being made by consent: Part 10.2 Family Law Rules. It may be difficult to persuade a registrar to make an injunction by consent in such a novel area. To commence proceedings now so that the matter can come straight before a judge is, as we know so well, subject to a series of barriers with pre-action procedures. Of course, one could have an undertaking proffered instead of an injunction - but the difficulty with an undertaking is having it recognised by the IVF clinic.

4. Have one of the parties authorise the clinic to provide treatment to the other parent and acknowledge that the embryos belong to the other. An authority is not accepted by some clinics - because it is not an agreement between the parties, and because of the obvious risk of fraud. Fraud and IVF have occurred or been alleged to occur in the pastfor example:
    a. In Munich, where Inge forged her ex-husband Karl's signature to have IVF. She gave birth to two children - and he had to pay child support, despite being the victim of fraud[6].

[6] https://www.dailymail.co.uk/news/article-5687477/Ex-husband-ordered-pay-child-support-former-wifeforged-signature-undergo-IVF.html viewed 7 March 2022.

b. In London, where R and her partner ARB had a child through IVF. They then separated. R then forged ARB's signature to consent to IVF, resulting in the birth of a second child[7].

c. In Nottingham, where a man alleged his ex forged his signature for IVF after they split up. He said he found out about the fraud when he was asked to pay child support, when the child was 18 months old[8].

d. In Abu Dhabi, where it was alleged that the ex-wife forged her ex-husband's signature in a consent for an IVF clinic to conceive a child without his knowledge of consent[9]

e. In Perth, where Megan Jane Hooper forged her estranged husband's consent in order to be become pregnant via IVF with previously frozen embryos[10].

5. **Have the parties execute statutory declarations** for the clinic that they consent to one of them being able to use the embryos. This is the favoured approach by one of the clinics. The benefit of mutual statutory declarations would reflect an oral or partly oral and partly written agreement entered into between the parties. Of course, statutory declarations are merely reflections of an agreement. While they are a step up from an authority, it may be difficult to show an agreement in place.

6. **Have the parties enter into a written agreement** as to what can happen with the embryos. It is preferable that the agreement is witnessed, and in light of the solemnity and issues of consideration, that it is in the form a deed. This also reduces the risk of fraud. The agreement has the benefit of flexibility. The risk with an agreement is that if the parties have not resolved property settlement, then the terms of the agreement could be the subject of a contrary s.79 or s.90SM order. However, if a party has willingly agreed to let embryos be controlled by the other party, presumably after the first party either had independent legal advice or was given the clear opportunity to obtain that independent legal advice, to obtain a subsequent order seeking to put the genie back in the bottle may prove very difficult

[7] https://www.theguardian.com/law/2018/dec/17/father-loses-damages-claim-over-forged-ivf-signature viewed 7 March, 2022.
[8] https://www.mirror.co.uk/news/uk-news/exclusive-woman-stole-my-sperm-to-have-ivf-340024 viewed 7 March 2022.
[9] https://www.bionews.org.uk/page_93804 viewed 7 March, 2022.
[10] https://www.heraldsun.com.au/news/national/woman-forges-exhusbands-signature-to-use-storedembryo/news-story/c1a8078969ecc7a3bb0d029a5e5b551d viewed 7 March 2022.

My preference in the current uncertain law is to:

1. Have a specific written agreement in place, preferably in the form of a deed.
2. Ensure that my client is told clearly about issues of risk. This needs to be properly documented.
3. Ensure that the other party is told clearly about issues of risk. Again, properly documented. Although you do not owe a duty of care to the other side, they may decline to obtain independent legal advice, and may also later claim duress or some unconscionable conduct. By documenting clearly what they have been told the risk of the deal falling apart later is reduced.
4. Ensure that the other party is told clearly to obtain independent legal advice. Again, properly documented.
5. Ensure that I send the agreement to the clinic - so that the clinic knows that solicitors have been involved, and if there are any issues for the clinics, these can be answered.

In appropriate cases, it may be also be wise for the parties to attend a fertility counsellor, so that their expectations can be properly addressed, and documented.

Bec and Sophie

Bec and Sophie were living in a de facto relationship. They agreed to create a family, via IVF as their local IVF clinic, Wonderful IVF, with a clinic recruited (anonymous) sperm donor, using Bec's eggs.

One child, Ben, has been born. Sophie has applied to the Court to be able to relocate with Ben. This application is opposed by Bec.

Bec wants to become a mum again, using more of the embryos that are stored. Wonderful IVF refuses to provide treatment until an agreement or order is in place between Bec and 13 Sophie. The agreement they signed with the clinic covers what is to happen if they died, but is silent about what happens if they separate.

In the midst of the litigation, Bec approaches Sophie to seek Sophie's agreement that Bec can use the embryos to become a mum again. Sophie at first refuses. Her concern is not that she would be a parent- but that because Bec would have a second child who is the halfsibling of Ben that this might tilt the scales that would prevent relocation of Ben to occur.

Bec and Sophie reach agreement that Bec can use the embryos in 2 ½ years time, when it is anticipated that the trial will have been held, and time for any appeal to have been heard with delivery of reasons. In other words, Bec can have treatment, but it should not potentially prejudice Sophie's chance at litigation.

Embryos as property?

There is no case decided in Australia as to whether embryos are property, or at least *human* embryos.

There is no question that cattle sperm is property. It is frequently sold[11]. Rocky Repro, which bills itself as *"Queensland's Bovine Reproduction Centre"* has a great variety of cattle sperm on sale, for example from Billabong Hendrix, the $100,000 top priced Droughtmaster bull of 2019, at $600 a straw[12] including GST & 1 rego[13]. Their semen marketing letter says:

"Rocky Repro- Semen Marketing Division- has now become the company with the "go to" website for those looking to purchase semen in northern Australia…."

Animal reproductive material, including embryos, eggs and semen are subject to export controls under the *Export Control Act 2020 (Cth) and the Export Comtrol (Animals) Rules 2021* (Cth).

It is fair to assert therefore that cattle embryos are also property, in the ordinary context. They are physical things that are possessed, and have value.

CASE LAW ABOUT EMBRYOS

I am aware of three cases that have been decided:

i. G and G [2007] FCWA 80 ("G and G");

ii. Piccolo and Piccolo [2017] FCWA 167 ; and

iii. An unreported decision approximately 10 years ago in which a Federal Circuit Court judge in regional Victoria declined to hear an application concerning use of an embryo because it was held that the Court did not hold jurisdiction. I am unable to supply a citation.

G and G

Following their separation, the husband wanted to retain the embryos kept in storage at the WA IVF clinic. The wife wanted them to succumb. The parties had entered into conditions of use with the IVF clinic, the effect of which was that they had agreed that if they separated the embryos were to succumb. The embryos were created from the wife's eggs and the husband's sperm.

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[11] For example, bull semen sold for $67,000 at auction in 2019: https://www.abc.net.au/news/2019-05-11/bullsemen-fetches-for-tens-of-thousands-of-dollars-at-auction/11103932 viewed 7 March 2022; rare bull sperm sold by CSIRO: https://www.gloucesteradvocate.com.au/story/6508656/csiro-is-selling-rare-breed-cattle-semen/ viewed 7 March 2022.

[12] A straw is the standard container for frozen sperm, and is typically a 0.5ml vial.

[13] https://rockyrepro.com.au/semen-search/# viewed 7 March 2022.

The wife wanted the eggs to be discarded because:

> *"she says that at the time of undergoing the IVF treatment with [Mr G] the parties were in a committed relationship and were planning to have children together at some stage in the future. She says that since separation her relationship with [Mr G] has completely deteriorated to the point that she cannot have a rational conversation withhim and does generally not get along with him. She says she does not want to have children with [Mr G] as she wants to move on in her life and does not want him to be a part of it. She says that if she and [Mr G] had children together they will not be able to have separate lives. She is concerned that this is what [Mr G] wants to achieve."*

Not surprisingly, the wife was opposed to the embryos being donated because:

> *"she does not want children who are unknown to her. She says any children that result from the embryos will be able to obtain her contact details at the age of 16 years. She is also concerned that if the children are born with any genetic defects that she and [Mr G] will be legally liable for non-disclosure of any known genetic conditions. She says all these possibilities are extremely worrying for her and will have long-term consequences on her emotional health. [Mrs G] says in her affidavit … that she feels so strongly about not having children from the six frozen embryos that even if she cannot have children in the future, she still wants the embryos discarded."*

The parties had been ordered to notify the clinic of the dispute. The clinic responded that it did not wish to be heard at trial.

G and G was a case from Western Australia. WA, like NSW, Victoria and South Australia, has specific State legislation regulating IVF, in addition to *Ethical Guidelines* issued by the NHMRC. The ACT, Northern Territory, Queensland and Tasmania by contrast do not have State legislation specifically regulating IVF.

Penny J considered it was not necessary for an embryo to be classed as property for the issue to be determined by the Court. Her Honour referred to section 114 as the basis for jurisdiction and a provision of the State legislation regulating IVF clinics.

G and G was primarily decided on the basis of Western Australian law. Not surprisingly, the Court held that the embryos should be allowed to succumb.

Piccolo and Piccolo (2017)

Piccolo concerned a second parenting journey. The husband and wife had a child conceived through surrogacy in Canada, although they lived in Western Australia. The embryo used was comprised of the husband's sperm and egg from a donor. Following the birth of the child, the parties separated. The husband wanted to proceed again. He had re-partnered with a relative of the wife. He wanted to use any of the remaining embryos stored in Canada either for his partner to become pregnant or for a Canadian

surrogate to be pregnant. Under the relevant Canadian law he was the only person who could decide the use of the embryo.

The wife opposed the use of the embryos. She wanted them to succumb.

Both parties approached the matter on the basis that while embryos are not properly characterised as "property", the court has both jurisdiction and power to make orders in relation to the dispute by virtue to the definition of matrimonial cause in s.4(e) of the Act:

> *"Proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship (other than proceedings under a law of a State or Territory prescribed for the purposes of section 114AB)."*

O'Brien J relied on s.114(1) as the basis for jurisdiction.

The parties had agreed:

1. The embryos should be jointly owned by them.
2. Their agreement with the IVF clinic should be in accordance with the laws of that Canadian province.
3. If their relationship terminated:

> *"we acknowledge that there may be dispute over the ownership of the embryos. If this occurs, we agreed to inform [the fertility clinic] in writing (within 3 months) that there has been a change in our relationship, and that we will provide the necessary legal documentation to [the clinic] indicating who will assume sole ownership of the embryos. Both Parties' signatures will be required on this document.*
>
> *In the event of the death of one of us, we hereby give authority to the surviving partner to assume ownership of the stored embryos.*
>
> *In the event of both of our deaths, we hereby give authority for [the clinic] to dispose of our embryos in an ethical fashion."*

Under the relevant Canadian law, following the separation of the parties, the husband was the sole donor and only his consent was required for the embryos to be used.

O'Brien J noted that the wife accepted that state of affairs, but[14]:

> *"Nevertheless, while acknowledging that the requirements of the Canadian legislation have been met, the following submission is made on her behalf:*
>
> *More importantly, however, as concerns the parties to this dispute, both parties remain the*

[14] At [145]-[150].

owners of the embryos and the intended parents of any child born as a result of the embryo creation in accordance with the documentation. In other words, it is important that both of the parties remain the current joint owners of the embryos in Canada notwithstanding who must provide consent for the purposes of complying with the [AHR] Regulations.

146 That submission is, with respect, somewhat difficult to follow. While the distinction is drawn between ownership of the cryopreserved embryos and the power to consent totheir use, there is no elucidation of the "importance" of that distinction.

147 It was not suggested on behalf of the wife that she would be at risk of facing any form of legal obligation to a child born of the cryopreserved embryos. It is accordingly unnecessary to speculate as to the parentage under Western Australian law of any child born of the cryopreserved embryos to a surrogate mother in Canada or elsewhere, or the impact, if any, on that issue of a distinction between such arrangement being altruistic or commercial. Should one or both of the cryopreserved embryos be carried to term by Ms P, she would be the mother of that child for the purposes of Western Australian law in any event: Artificial Conception Act 1985 (WA).

148 In short, the wife has advanced no cogent reason as to why the cryopreserved embryos should be permitted to succumb, nor as to why the husband should not be

permitted to preserve and eventually use them. The agreement executed by the parties in this case stands in sharp distinction to the agreement between the parties in G and G (supra) that in the event of separation the embryos owned by them were to be discarded.

149 The parties in this case expressly contemplated and agreed that in the event of separation one of them would assume sole ownership of the embryos. The wife does notwish to assume such sole ownership, but the husband does.

150 In all the circumstances I consider it appropriate to grant the relief sought by the husband."

O'Brien J granted an injunction to enable the husband to use the embryos.

Summary of US law on point

I was recently the co-guest editor and author of articles for a special ART edition of *Family Court Review*, the magazine of the Association of Family and Conciliation Courts, issued in January 2021. One of the articles was published by Mr Tim Schlesinger, an attorney practicing in St Louis about embryos and the legal issues[15].

Mr Schlesinger refers to pre-embryos, whereas in Australia they are referred to as embryos, consistent with the legislative regulatory scheme.

[15] T Schlesinger, *Disputes over frozen embryos in family law cases – a defense of counsel or contemporaneous mutual consent*, (2021) 59 Family Court Review 83, http://doi.org/10.1111/fcre.12537

Aside from constitutional issues, there have been three different approaches taken in the United States:

i. The contract approach. This is clearly the approach that was applied in *G and G*.

ii. Balancing of interests. This approach accords well with the approach taken by the court in section 79 applications in any event.

iii. Public policy and other considerations/contemporaneous mutual consent. Without agreement of both parties, the embryos can never be used. This can lead the party who wishes to use the embryos to be held at ransom, and potentially the embryos being used as a bargaining chip in wider negotiations as to property settlement. I have sadly already seen embryos used as bargaining chips in property settlement negotiations.

WHAT IS AN EMBRYO?

Put simply, an embryo is an egg fertilised with sperm. Embryos are frozen in liquid nitrogen in order to preserve them for later use.

As Schlesinger states:

> *"Differing cases have categorized frozen embryos as occupying an interim status between property and person, being property of a special character, or simply property, but no published US case is held that a frozen embryo is a person, or that a frozen embryo is protected by legal rights."*
>
> *(emphasis added)*

Davis v Davis (1992) 842 S.W.2d 588 (Tenn. 1992) ("*Davis*") was a decision of the Tennessee Supreme Court and took a balancing approach, as Schlesinger states:

> *"Davis held that embryos 'are not, strictly speaking, either 'persons' or 'property',' but occupy an interim category that entitles them to special respect because of their potential for human life."*[16]

This holding in *Davis* regarding the character of embryos, which has been cited by nearly every subsequent embryo disposition case[17], was based on the position of the American Society for Reproductive Medicine.[18] That position remains the view of the mainstream medical community today.[19]

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[16] At 597.

[17] And referred to in *G and G.*

[18] At 596.

[19] *McQueen v Gadberry*, 507 S.W.3d 127 (Mo.App. 2016), a decision of the Missouri Court of Appeals, brief of Amicus Curiae American Society of Reproductive Medicine, PP13-14, citing also the American College of Obstetrics and Gynecology.

In Australia, conception of a child is not considered to be the act of fertilisation of an embryo, but the commencement of pregnancy, after implantation of the embryo.[20]

Schlesinger concludes:

> *"If an agreement (most likely, an informed consent) has been signed that prevents one party from using the embryos without the consent of the other party, that consent agreement will most likely be enforced. If, on the other hand, the IVF informed consent provides that one party may use the embryos without the consent of the other party, courts will search for a way not to enforce that agreement. It will likely depend upon the particular circumstances of the case in the jurisdiction. If there is no unambiguous agreement, the interests of the parties will be balanced. If the person who wants to use the embryos has other reasonable means of having genetic children, that person will probably not be allowed to use the embryos against the wishes of the other person … The only thing certain is uncertainty…*
>
> *Most of the courts addressing disputes over frozen embryos have expressed support for the idea that unambiguous written agreements should be enforced. However, the same courts have been extremely reluctant to force procreation when one of the parties does not want it. When couples are involved in the emotionally draining mutual undertaking of trying to have a child while battling infertility, it isn't reasonable to expect them to make rational decisions about what should happen to unused embryos if their relationship ends. It is the furthest thing from the minds of people undergoing this experience… The contract approach is consistent with our values of being able to make choices, and being bound by those choices. However, that approach is ill suited to determine the disposition of frozen embryos with the potential to develop into a child. As the cases have shown, the contract approach virtually guarantees litigation if the parties don't agree, one party will challenge the validity or the meaning of the contract, or both. The balancing approach appeals to our sense of fairness, but it guarantees litigation because someone must decide whose interests are more compelling."*

Schlesinger then says:

> *"Finally, the elephant in the room has not been adequately addressed by any court. What are the child support obligations and what are the parental rights of a person who has been compelled to be a parent against their wishes?"*

[20] *LWW v LMH* [2012] QChC 26 per Judge Clare QC.

***In re marriage of Rooks* (2018)**[21]

This was a decision of the Supreme Court of Colorado.

Mandy and Drake Rooks entered into a written agreement with an IVF clinic. The agreement was silent about what would happen to any stored embryos if they divorced. Mandy sought to keep the embryos to use them to become pregnant. Drake did not want to have genetic children and wished for the embryos to be discarded.

> *The Court held*[22]*:*
>
> *"Considering the nature and equivalency of the underlying liberty and privacy interests at stake, a court presiding over dissolution proceedings should strive, where possible, to honor both parties' interests in procreational autonomy when resolving 5 disputes over a couple's cryogenically preserved pre-embryos. Thus, we hold that a court should look first to any existing agreement expressing the spouses' intent regarding disposition of the couple's remaining pre-embryos in the event of divorce. In the absence of such an agreement, a court should seek to balance the parties' interests when awarding the pre-embryos. In so doing, a court should consider*
>
> 1. *the intended use of the pre-embryos by the spouse who wants to preserve them (for example, whether the spouse wants to use the pre-embryos to become a genetic parent him- or herself, or instead wants to donate them);*
> 2. *the demonstrated physical ability (or inability) of the spouse seeking to implant the pre-embryos to have biological children through other means;*
> 3. *the parties' original reasons for undertaking IVF (for example, whether the couple sought to preserve a spouse's future ability to bear children in the face of fertility-implicating medical treatment);*
> 4. *the hardship for the spouse seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations;*
> 5. *a spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings; and*
> 6. *other considerations relevant to the parties' specific situation.*

[21] Colorado Supreme Court NO 16SC906, viewed at https://cases.justia.com/colorado/supreme-court/2018-16sc906.pdf?ts=1540827309 7 March 2022.
[22] At [4].

> *However, a court should not consider whether the spouse seeking to use the preembryos to become a genetic parent can afford a child. Nor shall the sheer number of a party's existing children, standing alone, be a reason to preclude implantation of the pre-embryos. Finally, a court should not consider whether the spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children."*

The Supreme Court remanded the matter to a lower court to determine the matter in accordance with its ruling.

JARGON

The world of IVF is full of jargon. Trying to get your head around the jargon at times can make your head hurt, but still no closer to what you thought.

I have a pretty good vocabulary. I thought I knew my way around the jargon, until one day I had to speak at an IVF clinic's national conference. A previous speaker was talking in so much scientific jargon that I had no idea what she was saying. I wanted to know what the words were that she was describing. So, I quickly entered them into my phone and then I googled them. I particularly wanted to see if they were in the Scrabble Dictionary. Not that I play Scrabble often. I wanted some broad measure to see if the words she was using were widely recognisedand if I happened to put one of these words on the board, amongst all the arguments, I would triumph!

One of the words that the speaker used was *trophectoderm*. When I looked trophectoderm up on www.scrabblewordfinder.org, the page said:

"Not a valid word."

Then when I looked up the meaning of *trophectoderm* online, I got this definition from Merriam-Webster[23]- which explains why I called this chapter jargon schmargon:

> ***"trophectoderm***
>
> *noun*
>
> *troph·ec·to·derm | \ trōf-'ek-tə-,dərm*

[23] https://www.merriam-webster.com/medical/trophectoderm.

Medical Definition of trophectoderm

: trophoblast especially : the outer layer of the mammalian blastocyst after differentiation of the ectoderm, mesoderm, and endoderm when the outer layer is continuous with the ectoderm of the embryo" .

And then I figured out what it was. Derm is of course to do with the skin. Trophectoderm is in effect the skin of the embryo. Bingo!

So here are some terms that you may come across, and what they mean. Where there is a word used in italics in translation, it is also a term (except when a reference to legislation or case law).

Term	Translation
ANZICA	Australian and New Zealand Infertility Counsellors Association. Most counsellors you see in Australia concerning surrogacy will be ANZICA members. However, they may not be. In Tasmania, for example, counsellors for surrogacy must be accredited, but may not have much or any infertility experience. Those considering counselling in this area should consider seeing an ANZICA counsellor.
ART, assisted reproductive treatment, assisted reproductive technology, artificial reproductive technology	Depending on who you listen to depends on which form of these words is used. Sometimes this includes artificial insemination, but confusingly sometimes it does not. It is usually seen as the whole kit and caboodle of how to have a baby other than through sex. For example: Assisted Reproductive Treatment Act 1988 (SA), Assisted Reproductive Technology Act 2007 (NSW).
Artificial conception procedure	This is the definition of how a child has come to be born other than via sexual intercourse - as defined under section 4 Family Law Act 1975 (Cth).
Blastocys	This is a day 5 or day 6 embryo. Clinicians will usually implant a blastocyst as this is seen as the most advanced (and therefore viable) embryo.
Conception	This is when a child is conceived. This is such a controversial term (as to whether conception occurs at the time of cell division or pregnancy) that there is not a world consensus on what it means. In a world first in a Queensland case in which I acted for the surrogate[24], the court determined it meant the act of pregnancy.
Cryopreservation	Freezing through the use of liquid nitrogen of eggs, sperm and embryos

[24] LWV v LMH [2012] QChC 26- see Chapter 1.

Embryo	An egg fertilised by sperm.
Gamete	Egg or sperm.
Gamete provider	The person who provided their genetic material - whether egg or sperm.
Hatching, assisted hatching	Where the IVF clinic assists the embryo's shell to be broken, so that cell division can then commence quickly
ICSI	Intra cytoplasmic sperm injection. If you google IVF, typically you will see a picture of ICSI. This is where one sperm is chosen (typically in cases of low male fertility or surrogacy) in the lab, the tail is snipped off, the head is placed in a tube, another tube holds the egg- the skin or trophectoderm of the egg is pierced and the sperm is injected, causing fertilisation. The skin of the egg then reseals once the tube is removed from the egg.
IVF	In vitro fertilisation - where the egg is fertilised in glass (hence "in vitro") by sperm. Traditional IVF involves up to 200,000 sperm being placed into a dish holding one egg (an egg is humanity's largest cell, and a sperm cell is the smallest), in the hope that one of them will pierce the skin of the egg (the tropectoderm) and enable fertilisation. ICSI is a form of IVF.
oocyte	Egg. Pronounced "oh- a site".
Parent	The person recognised by law as the parent of a child. The person may or may not be the genetic parent.
pre-embryo	This is the term used in the US for what is a cryogenically frozen embryo which has not yet been implanted. The term used in Australia is embryo.
spermatazoa	Sperm.
thawing	The complicated process of enabling a frozen embryo is brought to room temperature. It is quite unlike putting a frozen chicken on the sink to defrost
vitrification	Where an egg, sperm or embryo is snap frozen so that it can be stored in liquid nitrogen, typically by placing the egg, sperm or embryo in close contact with super chilled metal. The egg, sperm or embryo then instantly turns into a glass like substance, i.e. it vitrifies.

REGULATION OF USE OF EMBRYOS

To operate an IVF clinic in Australia, one must have a licence from what is now called The Fertility Society of Australia and New Zealand Ltd. Under section 10 of the Research Involving Human Embryos Act 2002 (Cth) it is an offence to use an excess ART embryo.

That Act is part of a Commonwealth- State scheme to ensure that certain practices in assisted reproduction are prohibited or regulated. The other Commonwealth Act is the Prohibition of Human Cloning for Reproduction Act 2002 (Cth). Each Act allows for matching State and Territory legislation25. All the States and the ACT have legislated matching legislation for both Commonwealth Acts. Only the Northern Territory has not. Part of the reason for Stat elegislation is because of the limits of Commonwealth power under the Constitution, for example, dealing with constitutional corporations under section 4 of each Act. The States are not so limited, being able to legislate concerning individuals and partnerships, for example.

One exception to the commission of that offence in section 10 of the Research Act is contained under section 10(2)(d):

> *"The use is carried out by an "accredited ART centre"."*

Section 8 of the Act provides, relevantly:

> *"In this Part:*
>
> *"**accredited ART centre**" means a person or body accredited to carry out assisted reproductive technology by:*
>
> *(a) the reproductive technology accreditation committee of the Fertility Society of Australia; or*
>
> *(b) if the regulations prescribe another body or other bodies in addition to, or instead of, the body mentioned in paragraph (a) – that other body or any of those other bodies, as the case requires."*

There is no other body or bodies prescribed under the relevant Commonwealth regulations.

The Fertility Society of Australia in 2020 changed its name to The Fertility Society of Australia and New Zealand. It continues to have a Reproductive Technology Accreditation Committee.

The Queensland Act that matches both Commonwealth Acts is the Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003 (Qld). Section 23 of the Queensland Act matches section 12 of the Commonwealth Research Act. It is similarly an offence under the Queensland Act to use an excess ART embryo. The relevant exception is contained in section 23(2)(d):

> *"The use is carried out by an accredited ART centre, and –*

(i) the excess ART embryo is not suitable to be placed in the body of the woman for whom it was created whether suitability of the embryo is determined only on the basis of its biological fitness for implantation; and

(ii) the use forms part of diagnostic investigations conducted in connection with the assisted reproductive technology treatment of the woman for whom the excess ART embryo was created."

Human embryo is defined in the dictionary as:

"means a discrete entity that has arisen from either –

(a) the first mitotic division when fertilisation of a human oocyte by human sperm is complete; or

(b) any other process that initiates organised development of a biological entity with a human nuclear genome or altered human nuclear genome that has the potential to develop up to, or beyond, the stage at which the primitive streak appears;

and has not yet reached 8 weeks of development since the first mitotic division

A human oocyte is a human egg. What is described in (a) is what is commonly known as fertilisation of a human egg by a human sperm resulting in a human embryo.

Section 21 provides, relevantly:

"In this part –

"accredited ART centre" means an entity accredited to carry out assisted reproductive technology by an entity prescribed under a regulation.

Regulation 2 of the Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Regulation 2015 (Qld) sets out the prescribed accrediting entity:

"For the Act, section 21, definition

*'**accredited ART centre**', the reproductive technology accreditation committee of The Fertility Society of Australia ACN 006 214 115 is a prescribed entity."*

In essence, both Commonwealth and State law requires an accredited ART centre or in other words - an IVF clinic operating in Queensland - to submit to a process of self-regulation determined by what is now The Fertility Society of Australia and New Zealand Ltd.

The Fertility Society has published a Code of Practice for assisted reproductive technology units (2017). The code states at 1.3 Compliance (Critical Criterion 1), relevantly:

> *"The ART Unit must comply with statutory and regulatory requirements and provide evidence of:*
>
> *(a) identification and compliance with national and state-based statutory and regulatory requirements in regard to ART treatment including: statutory storage periods; donation of gametes or embryos; surrogacy; record keeping; and reporting requirements. This should be in the form of a risk assessment with clear pathways and evidence of discussion by top management, communication of any changes through documentation and staff training, and valid consent forms,*
> *...*
> *(b) compliance with the RTAC Code of Practice,*
> *(c) records of current signed Deed of Agreement with the FSA,*
> *(d) compliance with the NHMRC Ethical Guidelines on the use of ART in clinical practice and research (2017 or more recent review) or New Zealand equivalent, except where in conflict with legislation, or where alternative requirements have been directed by a register*

Unlike New South Wales, Victoria, South Australia or Western Australia, there is no Assisted Reproductive Treatment Act (however titled) in Queensland. Queensland relies on the Ethical Guidelines in effect to operate as licensing conditions for any IVF clinic. Tasmania and the ACT similarly do not have an Assisted Reproductive Treatment Act and take the same approach. The Northern Territory does not have an Assisted Reproductive Treatment Act, but the Northern Territory Government has a service agreement with the only IVF clinic in the Northern Territory in effect requiring that clinic so far as it can to comply with South Australian law. In NSW, Victoria, South Australia and Western Australia, the IVF clinic is required to comply with State law, such as the Assisted Reproductive Treatment Act 2008 (Vic), and so far as they do not conflict with State law, the Ethical Guidelines.

The *Ethical Guidelines* are not law but act in effect as licensing conditions. The *Ethical Guidelines* define consent:

> *"For consent to be valid:*
>
> *• The person giving consent must be considered to have the capacity to provide consent*
> *• The decision to consent to the treatment or procedure must be made without undue pressure*
> *• All relevant requirements regarding the provision of information and counselling requirements must be satisfied*
> *• The consent must be specific, and is effective only in relation to the treatment or procedure for which information has been given."*

Guiding Principle 5, contained on page 20 says:

> *"Decision-making in the clinical practice of ART must recognise and respect the autonomy of all relevant parties, promoting and supporting the notion of valid consent as a fundamental condition of the use of ART."*

Guiding Principle 7 says:

> *"Processes and policies for determining an individual's or a couple's eligibility to access ART services must be just, equitable, transparent and respectful of human dignity and the natural human rights of all persons, including the right to not be unlawfully or unreasonably discriminated against."*

Guiding Principle 9 provides:

> *"The provision of ART must be transparent and open to scrutiny, while ensuring the protection of the privacy of all individuals or couples involved in ART and persons born, to the degree that is protected by law."*

The Guidelines state on page 20:

"The status of the human embryo

> *There are different views held in the Australian community about the status attributed to a human embryo. To different individuals the same embryo can be seen as a living human entity in the early stage of development, potential life, or a group of cells. Some argue that the value and significance of an embryo is best determined by the individual or couple for whom it was created, based on their individual or collective set of values, preferences, and beliefs.*
>
> *Nevertheless, under commonwealth legislation, the human embryo is given a special status. The Research Involving Human Embryo Act 2002 and the Prohibition of Human Cloning for Reproduction Act 2002 regulate the creation and use of human embryos outside of the human body, providing sanctions for those who misuse embryos. The Acts and these Ethical Guidelines, recognise that the creation and use of a human embryo requires serious consideration."*

Under Guiding Principle 3.5 this is said about consent on page 25:

> *"Valid consent must be obtained from all relevant parties for each specific procedure or treatment. The process of obtaining consent for ART activities is ongoing and not a single event."*

Similarly, on page 29 under Information Counselling and Consent this is said:

> *"Valid consent must be obtained from each relevant party for each specific treatment or procedure."*

This is clarified further on page 37, paragraph 4.5.1:

> *"Clinics must ensure that valid consent for each specific procedure is obtained from all relevant parties and remains current. For consent to be valid:*

• The person giving consent must be considered to have the capacity to provide consent
• The decision to consent to the treatment or procedure must be made without undue pressure
• All relevant requirements regarding the provision of information and counselling requirements must be satisfied …
• The consent must be specific, and is effective only in relation to the treatment or procedure for which information is being given
• Consent must be sought for all training and quality assurance activities conducted on embryos, including where an embryo is deemed unsuitable for transfer."

Paragraphs 4.5.3 and 4.5.4 on page 37 provide:

> *"4.5.3 Clinics must have procedures to verify the identity of those providing consent and to ensure the validity of the consent.*
>
> *4.5.4 Consent must be obtained in writing and documentation must include a signed statement by the treating clinician confirming that all relevant provision of information and counselling requirements have been satisfied …"*

If there were any doubt, paragraph 4.7.1 makes plain that a party can withdraw their consent from proceeding further, this being on page 37:

> *"Clinics must recognise that, with the exception of some specific issues relating to the donation of gametes and embryos … individuals and couples have the right to withdraw or vary their consent for ART activities."*

At this point, I note that there is a difference of opinion by the clinics. One clinic, I will call clinic A, takes the view that a person who has contributed their eggs or sperm who then splits up from the other party and does not have control of the embryos is a donor. Other clinics, let's call them Clinic B, take the view that the person is not a donor, because at the time of the creation of the embryo the gamete provider was not a donor. The difference as to practical outcomes can be stark.

Next steps	Clinic A: gamete provider is a donor	Clinic B: gamete provider is not a donor
Requirement for further counselling before implantation can occur	Required.	Not required.
Requirement for that party's consent to treatment (which can be withdrawn at any time)	Required.	Not required.
Ability to export overseas	In Queensland, not required.	In Queensland, not required.

Because a person who needs to consent to treatment can withdraw their consent at any time, and because of the nature of the consent that is required (including for counselling), if the embryo is stored at clinic A, then a section 106A order will be ineffective. If the gamete provider is not co-operative, then the likely course will be to export the embryos overseas to a jurisdiction where their consent is not required.

However, if the embryo is stored at clinic B, then the gamete provider's consent to ongoing treatment is not required, and in the absence of that consent being withdrawn, treatment can occur at clinic B.

If the former partner is not a gamete provider, then their consent will not be required for treatment in either case.

Paragraph 7.4 on page 56 provides:

> *"7.4.1 Clinics must have clear policies for managing disputes that may arise between individuals for whom an embryo is stored.*
>
> *7.4.2 When a dispute arises, a clinic may suspend the expiry of the period of storage specified in the consent form (see paragraph 4.6.4) at the request of either party. Such a suspension should be notified in writing to both parties and should be reviewed by the clinic every 5 years. Any subsequent discard of the embryos, without the consent of both parties, must be in accordance with the clinic's policy, which should have been clearly articulated to the responsible couple before the storage initially occurred (see paragraphs 4.2.6 and 7.6.)."*

It is clear, therefore, that further treatment using the embryo, such as the implantation of the embryo, in the absence of agreement between the parties or court order, cannot occur.

Consideration of whether the other party might become a parent

If a child is born as a result of implantation, the court might be concerned that the other party would be a parent- what Schlesinger calls "the elephant in the room". In my view, this issue must always be addressed at the very beginning. Is the other party going to be a parent or not?

With lesbian couples, for example, where the other party is not the gamete provider of the egg, it's pretty simple. If the parties have separated, then the other party will not, subject to the test in Masson and State law, be a parent- because one or both elements of s.60H(1) will not exist:

1. *If in a de facto relationship, the relationship ended on separation. However, as we have seen from case law, when de facto relationships end can be uncertain[26]. For marriages, the relationship remains intact for the purposes of s.60H(1) until the parties are divorced.*

[26] See for example Clarence & Crisp [2016] FamCAFC 157.

2. *The other will not have consented to the implantation. Here the requirements of the Ethical Guidelines for consent to treatment are critical. While the other party may have consented to the creation and storage of the embryo, it is an entirely different consent required for the implantation, which is the process that is an artificial conception procedure under the Family Law Act.*

I am going to cover the most common scenario- that of a wife seeking to use the embryos but she is not divorced yet from her husband. However, what I am seeing in practice are two groups who are commonly arguing about embryos:

- Heterosexual couples
- Lesbian couples

What has been seen in the US is that gay couples have also argued about who gets to keep the embryos[27].

Prior to divorce the husband might be a parent, due to the effect of the parentage presumptions arising from marriage contained in section 69P of the Family Law Act and section 24 of the Status of Children Act 1978 (Qld) – each of which is a rebuttable presumption: section 69U and section 29 respectively.

A reminder, this is what section 69P provides (s.24 of the Status Act is a mirror):

"(1) If a child is born to a woman while she is married, the child is presumed to be a child of the woman and her husband.

(2) If:

(a) at a particular time:

(i) a marriage to which a woman is a party is ended by death; or

(ii) a purported marriage to which a woman is a party is annulled; and

(b) a child is born to the woman within 44 weeks after that time;

the child is presumed to be a child of the woman and the husband or purported husband.

(3) If:

(a) the parties to a marriage separated at any time; and

(b) after the separation, they resumed cohabitation on one occasion; and

(c) within 3 months after the resumption of cohabitation, they separated again and lived separately and apart; and

(d) a child is born to the woman within 44 weeks after the end of the cohabitation, but after the divorce of the parties;

the child is presumed to be a child of the woman and the husband."

[27] As seen in https://www.nytimes.com/2021/04/03/health/IVF-frozen-embryo-disputes.html viewed 7 March 2022.

The reference to 44 weeks is to make allowance for the child being born full term (typically 40 weeks, but varying from 38 to 42 weeks) plus another 2 weeks to take account the length of a period (or to put it another way, 40 weeks plus 4 weeks).

In those circumstances a husband, although the genetic father of the child, would not be a parent of the child (even if the birth occurred prior to the divorce of the parties) because under the Family Law Act, despite the general presumption, he does not intend to be a parent. The High Court in Masson v Parsons [2019] HCA 21 found that intention was an element in that case as to whether Mr Masson was a parent. A husband who did not want to be a parent would fall within this description[28]:

> *"To characterise the biological father of a child as a "sperm donor" suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure."*

If the *Status of Children* Act were otherwise to apply, a husband will not have consented to the fertilisation procedure and would not be a parent for the purposes of section 23 of that Act.

Tree J in *Lamb and Shaw* [2017] FamCA 769 and [2018] FamCA 629 held that the effect of s.23 of the *Status Act* is that a man who provided his sperm is a parent, albeit, in accordancewith the language of s.23 of that Act has no rights or liabilities in relation to any child born-[unless he then marries the mother, and from the date of marriage only].

As set out below, it seems that *Lamb and Shaw* was incorrect on this point, and in any event has been overtaken by the decision in *Masson*.

PARENT UNDER THE FAMILY LAW ACT?

The High Court in *Masson v Parsons* [2019] HCA 21 made plain that the position of Mr Masson, who was not only the genetic father but intended to be the father and had engaged in parenting from birth, was different from that of a sperm donor, as quoted above.

It is clear that the intention of a husband who is a genetic parent but does not want to be a parent is exactly that, namely, a clear understanding that he is thereafter to have nothing to do with any child born as a result of the procedure.

The term "*artificial conception procedure*" is defined in section 4 of the Act as including:

> *"(a) artificial insemination; and*
> *(b) the implantation of an embryo in the body of a woman."*

---

[28] *At [54].*

It is clear that the relevant intention of the husband as to whether or not he intends to be a parent occurs at the time of the implantation of the embryo. It would be helpful in any proceedings to properly put before the court evidence about whether the other party does or does not want to be a parent.

For the sake of completeness, section 60H(3) provides:

> *"If:*
>
> *(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and*
>
> *(b) under a prescribed law of the commonwealth or of a state or territory, the child is a child of a man;*
>
> *Then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act."*

There has been no law prescribed for the purposes of section 60H(3) of the Act.

In such a circumstance, a husband who has provided his sperm for the creation of embryos in effect would become a sperm donor who has no relationship with the child to be born. The circumstances become more complex for the existing children and any proposed children if the couple have already have children, and more are proposed:

- The existing children having two parents - namely mother and father;
- The proposed child or children having one parent, the mother (subject to s.60H(1) and Masson and the State provisions about who is a parent).

The polity in Masson stated at [27]:

> *"It is implicit in each of the provisions that have been mentioned that the Family Law Act proceeds from the premise that the word 'parent' refers to a parent within the ordinary meaning of that word except when and if an applicable provision of the Family Law Act otherwise provides."*

And further at [29]:

> *"The question of whether a person qualifies under the Family Law Act as a parent according to the ordinary accepted English meaning of 'parent' is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of 'parent' and the relevant circumstances of the case at hand."*
>
> *Further, at [45]:*
>
> > *"The evident purpose of section 60H more generally of Div 1 of Pt VII of the Family Law Act is that the range of persons who may qualify as a parent of a child born of an artificial conception*

procedure should be no more restricted than is provided for in Div 1 of Pt VII. Consequently, although ss60G and 60H are not exhaustive of the persons who may qualify as parents of children born of artificial conception procedures, if a person does qualify as a child's parent either under s60G by reason of adoption, or according to s60H or according to ordinary acceptation of the word 'parent', is beside the point that a state or territory provision like s14(2) of the Status of Children Act otherwise provides … and, as is apparent from its text, context and history, Div 1 of Pt VII of the Family Law Act leaves no room for the operation of contrary state or territory provisions."

STATUS OF CHILDREN ACT 1978 (QLD)

Ordinarily, one need not concern itself with the *Status Act* because of the clear statement by the High Court about the relationship between the *Family Law Act* and the State Act. If the application of the *Family Law Act* is such that a person is not a parent under that Act, they do not then become a parent under the *Status Act*. Out of an abundance of caution, nevertheless, the provisions of the *Status Act* are dealt with below.

Part 3 of the Act concerns parentage of children. That part is divided into 4 divisions:

- Division 1 – application
- Division 2 – parentage presumptions of children conceived by fertilisation procedures
- Division 3 – other parentage presumptions (which includes section 24 parentage presumptions arising from marriage)
- Division 4 – other provisions about presumptions (including section 29 which deals with a rebuttal of presumptions).

It is clear that Parliament intended a legislative scheme so far as children conceived from fertilisation procedures are different to the general parentage presumptions.

Division 2 then has 4 subdivisions:

- Subdivision 1 – interpretation
- Subdivision 2 – fertilisation procedures – married women with husband's consent
- Subdivision 2A – fertilisation procedures – women with female de facto partner's consent [but a woman who is married to another woman cannot rely on this subdivision to become a parent, but instead rely on s.60H(1) and *Masson*.]
- Subdivision 3 – fertilisation procedures – other married women and unmarried women

I will deal, as discussed above, in this paper with a married woman with her husband's consent. Subdivision 2 applies, according to section 16:
"If a married woman, in accordance with the consent of her husband, undergoes a fertilisation procedure."

The relevant fertilisation procedures are:

- Section 17 – artificial insemination
- Section 18 – implantation procedure
- Section 19 – implantation procedure.

The effect of the requirements of the Ethical Guidelines is that the specific consent of the husband is required prior to implantation occurring. Because the husband would not be giving that consent then subdivision 2 does not apply.

Subdivision 3 provides:

"This subdivision applies if:

(a) a married woman undergoes a fertilisation procedure other than with her husband's consent; or

(b) a woman who is not married and does not have a de facto partner or civil partner undergoes a fertilisation procedure; or

(c) a woman who has a de facto partner undergoes a fertilisation procedure other than with her partner's consent; or

(d) a woman who has a civil partner undergoes a fertilisation procedure other than with her partner's consent."

Section 22 does not apply when the woman was married, as it provides:

"(1) A reference in this section to a fertilisation procedure is a reference to the procedure of implanting in the womb of a woman—

(a) an embryo derived from an ovum produced by her and fertilised outside her body by semen produced by a man who is not her husband; or

(b) for the purpose of fertilising an ovum inside her body, an ovum produced by the woman together with semen produced by a man who is not her husband.

(2) If a woman has undergone a fertilisation procedure as a result of which she has become pregnant, the man who produced the semen has no rights or liabilities in relation to any child born as a result of the pregnancy happening because of the use of the semen unless, at any time, he becomes the husband of the child's mother.

(3) The rights and liabilities of a man who produced the semen and becomes the husband of the mother of a child born as a result of a pregnancy mentioned in subsection (2) are the rights and liabilities of a father of a child but, in the absence of agreement to the contrary, are

> *restricted to rights and liabilities that arise after the man becomes the husband of the child's mother."*

Parliament clearly had not considered the possibility of the circumstances that arise where a husband and wife create embryos when they are together and then separate without divorcing - other than the general parentage presumptions. There is no specific provision under the *Status of Children Act* (other than the general parentage presumption) that would make a husband a parent. If the parties were to divorce, then in accordance with section 22(2) a husband would have no rights or liabilities in relation to the child unless the parties subsequently remarried

The 2018 decision in *Lamb and Shaw* was criticised by Richards DCJ in RBK v MMJ [2019] QChC 42[29]. As her Honour stated, when one looks at other provisions of the *Status of Children Act*, for example section 19C that deals with a woman who gives birth with a female de facto partner, the same phrase of no rights or liabilities is used. Sections 22 and 23 of the Status Act were amended by the enactment of the *Surrogacy Act 2010* (Qld), which also inserted division 2A of the *Status Act*, and inserted section 10A of the *Births Deaths and Marriages Registration Act 2013* (Qld) which as her Honour stated[30] allows for only two people to be registered as parents on the birth certificate.

In any event, as her Honour noted, since the decisions in *Lamb and Shaw*, the High Court delivered its judgment in *Masson.*

It is clear that the Queensland Parliament intended sperm donors not to be parents. It has taken this approach consistently since the enactment of amendments to the *Status of Children Act* to provide for sperm donors since approximately 1988. The wording in the Status Act comes from a communique of Attorneys-General referred to by Fogarty J in *B and J [Artificial Insemination]* [1996] FamCA 124, which shows a clear intention for sperm donors not to be
parents:

> *"In July 1980 the Standing Committee of Commonwealth and State Attorneys-General determined that uniform legislation on the status of children born as a result of artificial insemination by donor treatments should be enacted in all Australian jurisdictions, and agreed that the legislation should provide that:*
>
> *"a husband who consents to his wife being artificially inseminated with donor sperm shall be deemed to be the father of any child born as a result of the insemination;*
>
> *the sperm donor shall have no rights or liabilities in respect of the use of the semen; and*

[29] In which the writer appeared for the applicants.
[30] At [16].

> *any child born as a result of AID (artificial insemination by donor) shall have no rights or liabilities in respect of the sperm donor."*
>
> *The Standing Committee re-affirmed these recommendations in 1981, 1982 and 1983.*
>
> *It was as a result of this agreement that legislation which is identical for relevant purposes was passed in the States and Territories, designed to provide that the semen donor would incur no liability (nor attain any rights) in respect of a child born as a result of that procedure." (emphasis added)*

However, if I am wrong and there is some survival of the provisions of the Status of Children Act in light of the High Court statement in Masson, then following a divorce a husband would be a parent albeit, with no rights or liabilities. There would therefore be no obvious prejudice to him, by having no liabilities, by the child being born.

Why might embryos be property?

Property is defined relevantly in section 4(1) of the Act as meaning:

"(a) in relation to the parties to a marriage or either of them – means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion; …" (emphasis added)

There has been no reported case as to whether embryos in Australia, might constitute property, albeit property of a special nature. There have been numerous cases concerning sperm or human tissue. In Clark v Macourt [2013] HCA 56, the High Court considered a Hadley v Baxendale case, being damages arising from the sale of an IVF clinic following the supply of non-compliant sperm. All the members of the High Court had no difficulty accepting that sperm was property. Keane J at [79] set out clause 18.1 of the deed of sale which relevantly said:

> *"Assets means the following assets of the vendor used in or attached to the Business*:
> …
>
> *(b) in the goodwill of the vendor in respect of the business, Records, Embryos (to the extent title in them can at law pass to the Purchaser) and Sperm but specifically excluding Plant & Equipment and any debts owed to the vendor in respect of the Business at completion."*

In *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC118 Mr Bazley deposited a quantity of sperm with the same clinic in this matter at the time that he was diagnosed with cancer. He subsequently died. White J accepted the approach of the High Court in *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406 at [414] which concerned a case of detinue brought to recover possession of a preserved two-headed fetus. Griffith CJ, in dealing with an exception to the general common law principle of no right to possession of human corpse said:

> *"I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it is this, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it is has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances."* (emphasis added)

Among the cases referred to by White J was *Yearworth v North Bristol NHS* [2009] EWCA Civ 37; [2010] QB 1, a decision of the English Court of Appeal. A number of men supplied a quantity of sperm to their local hospital, where the sperm was stored and frozen. Subsequently the sperm was destroyed because it was thawed. The men sued the hospital. The court held that since the claimants had ownership of the sperm for the purposes of claims in negligence, they had sufficient rights in relation to it to render them capable of having been bailors of it.

In *Roche v Douglas* [2000] WASC 146; (2000) 22 WAR 331 a claim was brought concerning certain tissue of the testator that had been removed and stored from him prior to his death, for the purposes of making an order for DNA testing. Master Sanderson observed at 338 [24]:

> *"It defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken."*

Justice White in Bazley held at [33]:

> *"The conclusion, both in law and in commonsense, must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The relationship between the respondent and the deceased was one of bailor and bailee for reward because, so long as the fee was paid, and contact maintained, the respondent agreed to store the straws… furthermore, it must be implied into the contact of bailment, that the semen would, if requested, be returned in the manner in which it was held, which is preserved its essential characteristics as frozen semen capable of being used."*

Again, the same could be said about an embryo.

Bazley has been subsequently followed in *Re Edwards* [2011] NSW CS 478, *Re section 22 of the Human Tissue and Transplant Act 1982 (WA)*; *ex parte C* [2013] WASC 3; *GLS v RussellWeisz* [2018] WASC 79; *Re Cresswell* [2018] QSC 142 and *Chapman v South Eastern Sydney Local Health District* [2018] NSWSC 1231; (2018) 98 NSWLR 208.

Martin CJ in GLS *v Russell-Weisz*, summarised the state of the law concerning sperm as[31]:

> *"In Australia there have been a number of cases in which it has been held, generally in reliance upon the work and skill exception, that frozen sperm samples can be 'property' in the sense that a person or persons may have rights recognised by law in respect of such samples."*

In *Re Edwards* [2011] NSWSC 478, RA Hulme J considered the question of who had proprietary rights in sperm retrieved posthumously from the deceased.

His Honour stated:

> *"It was also submitted that there was persuasive force in what Master Sanderson said in Roche v Douglas about not ignoring the physical reality. There is a sample of sperm being stored by IVF Australia.* ***It is a real object; a physical thing. It has a value or worth in an intangible sense. Indeed, it has, as Mr Kirk put it, potentially enormous human importance to Ms Edwards and her family. These are matters that the law should recognise and protect****."* (emphasis added)

The deceased was excluded, on the basis that he could not hold any proprietary right in the sperm while he was alive, and could not form part of the assets of his estate upon death[32]. It was also not the doctors and technicians who exercised the work and skill required to extract the sperm from the body of the deceased, because they were not doing so for their own purposes, but performed their role as agents for the widow[33].

The widow did not have a proprietary right in the sperm samples as an incident of her rights as administrator of the deceased's estate, as her rights in that capacity were limited to the duty to decently inter the corpse of the deceased[34]. However, the views of the administrator would be relevant to the exercise of the discretion as to the grant of declaratory relief, and that the widow was also the administrator was relevant in that respect.

RA Hulme J concluded that such property as existed in the sperm lay with the widow on the basis that the sperm was removed on her behalf and for her purposes and that no one else in the world had any interest in them[35]. She was therefore entitled to possession of the sperm.

RA Hulme J cited an unreported decision of the NSW Supreme Court of *Pecar v National Australia Trustees Ltd*, Bryson J 27 November 1996:

> "The plaintiff sought an order determining his alleged entitlement as son of the deceased to share in the distribution of his estate. He made an application for orders that would have the effect of permitting a comparison of his DNA with that contained in human tissue samples from the deceased that had been taken during an autopsy and were being held at a pathology laboratory.

31 At [118]
32 At [87].
33 At [89].
34 At [89].
35 At [91].

The application was made under Pt 25 r 8 of the *Supreme Court Rules* 1970 which related to the inspection of "property". Bryson J identified the question before him as whether tissue samples or other parts of a dead human body are property. He referred to the exception identified by Griffiths CJ in *Doodeward v Spence* and held:

> *This view would justify a right to retain possession of autopsy specimens, especially in this case where the human tissue is fixed in and an accretion to a paraffin block which itself is susceptible of ownership. In my opinion the pathology specimen is property within the general meaning of that term which connotes that property has an owner.*
>
> *In my opinion however the word "property" in r8 as extended by subr(4) is not used so as to require that there be any right of ownership. The rule does not deal with rights of ownership but with adduction of evidence, and it was not significant for the purposes of the rule whether or not there was a right of ownership. In my opinion the autopsy samples are property within the meaning of r8."*

In another posthumous sperm case from South Australia, *Re H, AE (No 2)* [2012] SASC 177, Gray J came to the same conclusion as that of RA Hulme J in *Edwards* and that[36]:

> *"the deceased's sperm may be treated as property, at least to the extent that there is an entitlement to possession."*

In Re Cresswell, Brown J concluded:

- *"Sperm while it remains a part of the human body is not recognised as "property".[37]"*
- *"Sperm removed from the deceased is capable of constituting property, where work and skill is exercised in relation to the removal, separation and preservation of the sperm. While Doodeward referred to the body part acquiring different attributes as a result of the exercise of work or skill, in Doodeward, the body in question was only preserved (albeit that it acquired pecuniary value). The state of the preserved sperm has been found to be sufficient for it to be capable of being property."[38]*
- *"While there is some support for the notion that sperm or tissue separated from the human body is a thing which is property capable of ownership, without the exercise of any such work or skill, those cases are limited to where the separation occurred while the donor was living and the donor consented to the removal of the sperm."[39]*
- *"The sperm of a deceased, not removed while they are living, is not capable of being property and does not form part of the assets of his estate upon death."[40]*

36 At [58].
37 At 163](c).
38 At [163](d).
39 At [163](e).
40 At [163](f).

> • *"Prima facie, the person entitled to possession of any sperm removed and preserved will be the party who has exercised the work and skill to extract and preserve the sperm or the principal for whom they act."*[41]

In *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; (2004) 218 CLR 530 at 577, the High Court said:

> *"Property" is a comprehensive term which is used in the law to describe many different kinds of relationship between a person and a subject-matter; the term is employed to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Accordingly, to characterise something as a proprietary right (and, a fortiori, a quasi-proprietary right) is not to say that it has all the indicia of other things called proprietary rights. Nor is it to say "how far or against what sort of invasions the [right] shall be protected, because the protection given to property rights varies with the nature of the right".*

It is suggested:

(a) Embryos exist. They are a thing capable of being possessed. The largest human cell is that of the egg. The sperm is the smallest human cell. An egg is slightly smaller than the ball in a ball point pen. It can be seen with the naked eye. It exists, and is capable, with care, of being held, and also of being stored, fertilised, implanted (either unfertilised, or fertilised as an embryo) or discarded.

(b) The work or skill of doctors and embryologists turns what were eggs and sperm into something new - that of embryos which are then frozen in liquid nitrogen. They do so as agents for others, namely the intended parents, their patients.

(c) The words expressed in cases such as *Roche* and in *Bazley* equally apply to embryos. Embryos are stored by IVF clinics under contracts of bailment (as was the case in *Clark v Macourt*).

(d) Consistent with the *Doodeward* approach, an embryo is created on behalf of the parties. They therefore have prima facie entitlement to the embryo, and consistent with the approach in *Bazley* are the owners of it. Subject to the restrictions as to its use under the law, and any restrictions arising from the *Ethical Guidelines*, the parties are able to determine its storage, use or discard. An embryo therefore has the attributes of being a chattel.

(e) An embryo is capable of being possessed, is to that extent *property* within the definition of section 4 of the Act and therefore subject to the court's jurisdiction under section 79.

(f) An embryo, by its nature, has a special nature to it. There are restrictions about what can be done with an embryo. It cannot, for example, be sold[42]. It has no obvious monetary value.

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[41] At [1](g).

[42] Section 21, 24 *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) and equivalent laws in each State and the ACT, such as s.17 *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003* (Qld), and human tissue laws in each State and Territory, for example, s.32 *Human Tissue Act 1983* (NSW).

If embryos are treated as property, then by consent registrars can easily make orders as to who possesses them. This will provide certainty to the parties as to the law that does not currently exist, and thereby reduce their costs, potentially significantly.

Embryos, like any other property, are the subject of orders that must be just and equitable. The test in *Rooks* is an apt one for the balancing act required under s.79(2) (with my apologies for editing and adding):

(1) the intended use of the embryos by the spouse who wants to preserve them (for example, whether the spouse wants to use the embryos to become a genetic parent themselves, or instead wants to donate them);

(2) the demonstrated physical ability (or inability) of the spouse seeking to implant the embryos to have biological children through other means;

(3) the parties' original reasons for undertaking IVF (for example, whether the couple sought to preserve a spouse's future ability to bear children in the face of fertility-implicating medical treatment);

(4) the hardship for the spouse seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations;

(5) a spouse's demonstrated bad faith or attempt to use the embryos as unfair leverage in property settlement proceedings;

(6) who would be a parent of any child born; and

(7) other considerations relevant to the parties' specific situation.

However, a court should not consider whether the spouse seeking to use the embryos to become a genetic parent can afford a child. Nor shall the sheer number of a party's existing children, standing alone, be a reason to preclude implantation of the pre-embryos. Finally, a court should not consider whether the spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children.

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