

Case Notes

Baby Contracts

Litowitz v. Litowitz, 10 P.3d 1086 (Wash. Ct. App. 2000).

The growing use of in vitro fertilization (IVF) procedures¹ raises a host of troubling legal issues. What should courts do with previously produced preembryos when a couple divorces after the IVF procedure and the parties cannot agree on the preembryos' disposition? Courts and commentators have so far reached different conclusions.² *Litowitz v. Litowitz*³ complicates the picture even further.

In *Litowitz*, unlike most IVF cases, the eggs used in the procedure belonged not to the wife, Becky Litowitz, but to a third party who donated her eggs to the Litowitzes for use in the IVF procedure. The donated eggs

1. In vitro fertilization involves injecting a woman with fertility drugs to stimulate the production of eggs, which can be surgically retrieved and combined with a man's sperm in a petri dish to fertilize the eggs. If fertilization occurs, some of the preembryos are immediately implanted into the woman's body. The rest of the preembryos are usually frozen for later implantation if the couple desires more children, or if the first attempt at implantation fails. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1053 (Mass. 2000).

2. Not counting *Litowitz*, there have been only four published cases dealing with the question of preembryo disposition. *Id.* (holding that forcing a party to become a parent is against the state's public policy); *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000) (same); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (holding that contracts, even in the procreation context, are presumed valid and should be enforced when entered into voluntarily and with informed consent); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (adopting a balancing approach that weighs the equities on both sides).

Legal scholars have devoted a substantial amount of attention to the problem, mostly focusing on its moral and constitutional dimensions and analyzing the issue from a purely ex post perspective—that is, only after disputes have arisen. *See, e.g.*, Mark C. Haut, Note, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493 (1999) (arguing for a clear default rule favoring non-use of frozen preembryos in disputed cases); Mario J. Trespalacios, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803 (1992) (arguing, based on implied-contract theory, that courts should generally favor the party who desires implantation, because the parties' prior participation in the IVF procedure indicates an irrevocable commitment to reproduction).

3. 10 P.3d 1086 (Wash. Ct. App. 2000).

were combined with the sperm of the husband, David Litowitz, to produce preembryos, which were then implanted into the body of a fourth party—the surrogate mother. The procedure did not involve Becky Litowitz's participation, although she and David would become the legal parents of any resulting child. Standing in the middle of this complicated arrangement was an additional fifth party—the medical clinic.

Luckily, the procedure worked, and baby Micah was born. Unfortunately, the couple soon separated. In the marriage dissolution, Becky wanted the court to award the remaining frozen preembryos to her for further implantation in a surrogate. David, on the other hand, did not want to be thrust into an unwanted parenting role and preferred that the preembryos be awarded to him so that he could put them up for out-of-state adoption. The Washington Court of Appeals ruled in David's favor. After finding that there was no agreement governing the dispute, the court adopted a balancing test and found that David's interests were weightier. He was the only genetic progenitor, and courts are generally reluctant to force any party to become a parent.

Focusing on David's rights as against Becky's, the court's opinion is hard to fault. However, *Litowitz* presents a set of facts that warrants a closer look. The large number of parties involved in some IVF procedures makes potential disputes extremely hard to disentangle. In such situations, the desirability of *ex ante* contracting becomes especially obvious. For numerous reasons, however, parties are loathe to contract in the IVF context. This Case Note analyzes the reasons for this reluctance and offers a proposal that maximizes contracting incentives. In brief, I argue that IVF clinics should be assessed a "court user fee" whenever judicial intervention is needed to resolve IVF disputes, unless the particular issues have been adequately anticipated in the contract beforehand. As a first step, I explore the problems that arise when there is no contract.

I

As the *Litowitz* court acknowledged, the case was actually much more complicated than it first appeared, because the interests of the egg donor—who contributed genetic materials and thus had a much stronger claim than Becky—diverged sharply from David's interests. The egg donor in *Litowitz* did not want David to put the preembryos up for out-of-state adoption. "In the event that the court fails to award the preembryos to Becky," she declared in a motion to the court, "I insist that the court award the preembryos to me or return the eggs to me in accordance with the contract."⁴ The court was able to avoid dealing squarely with the egg

4. *Id.* at 1090.

donor's interests and how her rights ought to be balanced because she was not a party to the lawsuit. But the question could not have been avoided if she had asserted her rights.

Making matters worse, the contract the egg donor made with the Litowitz couple before she donated her eggs to them was by no means clear and did not contemplate dissolution of the Litowitzes' marriage. As the court noted, the contract only made reference to "eggs." The eggs no longer existed, however. The court wrote that the eggs "have been fertilized and are now preembryos. Thus, the egg donor's request that the 'eggs' be returned to her . . . cannot be met. And nothing in the contract controls disposition of the preembryos or requires the egg donor's consent to disposition of the preembryos."⁵ Therefore, if she had asserted her rights, the court could not have simply interpreted the contract. No provision was directly on point.

Unfortunately, the question may not be amenable to judicial resolution in the typical, straightforward fashion. In previous cases, courts were often able to resolve disputes by adopting a crisp, bright-line rule that strongly favored the party who did not want to procreate.⁶ In cases like *Litowitz*, however, this bright-line approach is inapplicable. David, unlike the husbands in other cases, was not against the use of the preembryos. Instead, he wanted to put them up for adoption. The conflict was not one between the right to procreate and the right not to procreate. Rather, the conflict was more akin to a custody battle.

II

The multiparty scenario in *Litowitz* and the troubling questions the case raises highlight the desirability of ex ante contracts that address various contingencies, including divorce. Despite the well-known benefits of ex ante contracting, however, parties consistently fail to specify what should be done in case of separation. Even when the egg donor in *Litowitz* took the trouble to contract with the couple, everyone stayed silent about the possibility of divorce. This Part discusses several possible explanations for this reluctance to contract.

The reasons are not hard to fathom. For substantially the same reasons that many couples do not enter into prenuptial agreements, couples

5. *Id.*

6. *See A.Z.*, 725 N.E.2d at 1057-58 (holding that the court would not compel a donor to become a parent against his or her will, since "forced procreation is not an area amenable to judicial enforcement"); *J.B.*, 751 A.2d at 614 (agreeing with the reasoning in the *A.Z.* case and holding that the court would not force a party to become a parent); *Davis*, 842 S.W.2d at 603-04 (finding that the interest of the party who opposes procreation outweighs the interest of the party who prefers implantation). The *Litowitz* court arrived at a similar conclusion.

contemplating the IVF procedure do not like to talk about the possibility of separation. There may be strong norms against bringing the law to bear in the intimate contexts of marriage and reproduction.⁷ Indeed, the IVF procedure goes one large step further than marriage in terms of the level of emotional commitment involved by both parties. Alternatively, one can think of the problem in terms of faulty risk estimation. Evidence has shown that parties underestimate the risks of divorce on the eve of marriage.⁸ At least one commentator has suggested that couples going through the IVF procedure suffer from similar cognitive distortions in their estimation of risks.⁹

Aside from the fact that few people think about the risk of litigation in the first place, the second reason for parties' failure to contract is that the consequences of not contracting may appear minimal. Parties trust that courts will do the "right thing" by balancing the parties' interests when disputes arise. While some courts purport to adhere to bright-line default rules in the absence of contracts, there are reasons to believe that courts will not adhere strictly to defaults when doing so causes injustice. As Carol Rose has observed, courts often fudge even seemingly clear-cut default rules—what she calls "hard-edged rules" or "crystals"—to accommodate notions of equity and "individualized justice," gradually turning them into muddier doctrines that no longer yield clean, mechanical answers.¹⁰ Therefore, even if a party dislikes the default, he still may not contract around it.

Finally, third parties involved in the IVF procedure also have few incentives to speak up. IVF clinics, especially for-profit clinics, do not like to scuttle IVF transactions. They reap immediate profits with each completed procedure, but do not bear the brunt of the costs of any subsequent disagreements by couples. Hence, the incentives faced by clinics—and, to some extent, egg donors—point in the direction of easing the path to the operation. Even if contracts were written governing the rights of the clinic and the couple, respectively, there might not be any contract terms with respect to the rights of the husband as against those of the wife.

7. See Cory Adams, *Part Three: Getting Married: Premarital Agreements*, 11 J. CONTEMP. LEGAL ISSUES 121, 122 (2000) ("[M]any people find the merger of contract and marriage unromantic, even heartless. Premarital contracts are sometimes viewed as a back-up plan *just in case*, the suggestion of which may result in a cancellation of the wedding."); Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 73 & n.45 (1993) (arguing that "relational factors" have a strong influence on parties' willingness to contract around default rules and that "marriage is an example of a contracting context where the relational costs of varying default rules . . . through a prenuptial agreement may be particularly high").

8. William Sieck, Comment, *In Vitro Fertilization and the Right To Procreate: The Right to No*, 147 U. PA. L. REV. 435, 466 n.179 (1998).

9. *Id.*

10. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 595 (1988).

While understandable, these barriers to contracting entail costs to society. The externalized litigation costs are far from negligible, and most likely offset any earlier savings in contracting costs by the parties. Perhaps in recognition of this problem, Florida passed a law in 1997 requiring parties to contract before they embark on the procedure,¹¹ and other states have considered similar legislation.¹² However, this sort of command-and-control solution may not work very well. As several commentators have observed, there is little assurance that these contracts will be entered into knowledgeably. Clinics may simply go through the motions and ask clients to sign standardized forms that turn out to be unenforceable when disputes arise.¹³ Hence, unless courts are to turn a blind eye to these problems and enforce contracts regardless of the lack of consent, judges may still be left without any guidance at the end of the day. Furthermore, as experience in the administrative field shows, a top-down regulatory approach produces inefficiencies.¹⁴ There may be better ways to avoid protracted litigation.

III

A better idea worth pursuing is to make clinics more responsible for the decision whether—and how—a contract should be drawn up in particular cases. As repeat players, clinics are best situated to acquire expertise in writing and revising contracts suitable for simple recurring transactions. They are also the ones that can best decide from experience what sorts of IVF arrangements are most likely to result in disputes that cannot easily be resolved out of court and thus require more extensive contracting. For example, clinics should be particularly alert to the potential landmines lurking beneath a *Litowitz*-type arrangement that requires many parties' cooperation. Ideally, clinics should help the parties write a detailed contract in these situations, spelling out various contingencies and treating contracting costs as ordinary expenses. Under the status quo, however, IVF clinics have no incentives to do so. This Part explains how a system of court user fees may help fix the problem.

When a dispute arises that requires judicial intervention, the court should charge the IVF clinic responsible for the particular IVF procedure in question a court user fee, unless the dispute is governed by a contractual

11. FLA. STAT. ch. 742.17 (2000).

12. See, e.g., A.B. 2478, 208th Leg. (N.J. 1999); S.B. 1120, 222d Leg. (N.Y. 1999). See generally Jennifer Hodges, Comment, *Thursday's Child: Litigation over Possession of Cryopreserved Embryos as a Call for Legislation*, 40 SANTA CLARA L. REV. 257 (1999) (discussing legislation and proposals relating to the disposition of frozen preembryos).

13. See, e.g., Ellen A. Waldman, *Disputing over Preembryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897 (2000); Haut, *supra* note 2, at 523-24.

14. See, e.g., Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 98 (1995).

provision hammered out by the parties *ex ante*. For example, if something is in dispute, but the contract anticipates that contingency and provides guidance for its resolution, the clinic should be spared the fee even if judicial intervention is required. In these cases, the parties have clearly overcome their usual reluctance to contract in the IVF context by having included a provision that directly governs. Charging them a fee in this situation, when other regular users of the court system are not assessed a similar fee, discourages IVF compared to other activities that carry no such penalty. Unless IVF procedures are deemed socially undesirable, chilling the use of the technology is not a good result.

In contrast, if a dispute arises about which the contract provides no guidance, the clinic should be assessed the fee. The amount should be roughly equal to the increase in adjudication costs attributed to the absence of a contractual provision governing the dispute. In the presence of contractual provisions directly on point, courts can usually resolve disagreements more easily. Their absence deprives courts of that benefit and increases adjudication costs, which the parties, not society, should bear. By making IVF clinics internalize this increase in adjudication costs, this proposal gives clinics an incentive to require parties to make socially efficient contracts before they start the procedure. This is because profit-maximizing clinics will now decide whether to require a contract (and how specific the contract should be) based on a consideration of all the relevant costs and benefits, taking into account the probabilities of various contingencies actually happening. For example, clinics will probably require a couple engaged in a simple two-party transaction to complete only a fairly simple form that stipulates how the preembryos should be disposed of in case of separation. Even if the couple divorces and goes to court to fight the issue, the clinic would be off the hook as long as the dispute was anticipated in the contract. In contrast, the clinic will likely require parties undergoing a *Litowitz*-type operation to write more extensive contracts, specifying contingencies not limited to divorce—for example, the possibility that the egg donor may change her mind.

Of course, IVF clinics can shift the court user fee, as well as any contracting expenses, back to their clients by charging them higher fees for the IVF procedure at the outset. But this shifting of costs back to the customers is unobjectionable because, under competitive market conditions, the amount of shifting in a particular case should reflect the complexity of the couple's particular arrangement, as well as the couple's willingness to cooperate with the clinic to reduce costs by writing clear contracts. From a policy standpoint, the proposal here—incorporating a “due care” component by rewarding clinics for anticipating risks and letting them walk off scot-free when there is an adequate contract—is superior to a strict-liability regime in which clinics are assessed a fee whenever IVF issues are

litigated, regardless of the presence of contract. That is because this proposal minimizes a host of potential bias problems in the perception of divorce rates, relating to age, ethnicity, class, and religion. With strict liability, clinics would be tempted to focus on these questions because they would be automatically mulcted in court fees whenever a couple separates and goes to court to resolve the issue of preembryo disposition. From the clinics' perspective, the best policy under such a scheme might well be to deny services to couples deemed to have a high risk of divorce.¹⁵

In contrast, this proposal diverts attention from these troublesome questions by placing the emphasis on writing better contracts more efficiently, since clinics are immune as long as there is a contract provision directly governing the controversy. A young minority couple, therefore, might fare better under this proposal.¹⁶ Even a prejudiced clinic would know that, if the couple divorces, it will not be harmed financially as long as it has an adequate contract worked out beforehand.

In addition, under this proposal, when IVF clinics do decide to require a detailed contract, they would expend the effort to ensure that the requisite elements of voluntariness and informed consent are present, lest the contracts be declared void—a result that would carry stiff financial penalties for the clinic when the dispute goes to court and the court finds that no valid provision directly governs. This safeguard is absent with the command-and-control policy.

Greater attentiveness to the parties, moreover, does not end with contracting. Under the proposal, IVF clinics would have incentives to devote an efficient amount of resources to continue to monitor the progress of the operation in order to forestall and resolve disputes. In case of disputes that go to court, the clinic always faces the possibility that a court will find that a particular contingency before the court has not been anticipated in the contract. IVF clinics thus have every incentive to prevent problems before they occur, both by writing better contracts at the outset, as well as by employing appropriate alternative dispute resolution mechanisms to hammer out compromises once the procedure is underway. This would

15. Another possibility would be for clinics to price discriminate against "high-risk" couples, instead of denying service to them. It is doubtful, however, that clinics would adopt this strategy. Because differential prices are easily quantifiable, clinics might worry that the public would come to find out, for example, that blacks are systematically charged higher prices than whites for the same procedures. In contrast, it is much harder to keep track of how many customers are "denied service" and subtly turned away.

16. Part of the proposal's attractiveness is that it avoids the debate about whether black couples in fact have higher divorce rates than whites. There is by no means a settled consensus on the question. Compare Courtland Milloy, *The Undoing of Black Marriages*, WASH. POST, Mar. 3, 1996, at B1 (citing studies that establish that "black marriages are twice as likely to end in divorce as white marriages"), with Karen S. Peterson, *Black Couples Stay the Course Still, Pressures of Race Are Taking Toll on Relationships*, ASHEVILLE CITIZEN-TIMES, Mar. 12, 2000, at C3 (citing a University of Chicago study that black and white divorce rates are actually quite similar).

further decrease adjudication costs. No IVF clinics, however, should be allowed under the proposal to force their will on any party by impeding access to the courts by, say, providing for binding arbitration procedures. This is because of the importance of the rights involved and the consequent strong public policy reasons for judicial oversight. Allowing clinics to block access to courts, moreover, would destroy the incentive structure by removing the stick—court fees—that prods clinics accurately to take into account all the costs and benefits.

Under this proposal, some clinics might well offer “rebates” to cooperative couples. These financial incentives may lead to an even greater willingness by parties to think about problems *ex ante*, gradually breaking down the taboo against anticipating contingencies in the IVF context. Further, courts may start adhering to default rules. Parties who refuse to contract even in the face of strong financial incentives may have a harder time eliciting judicial sympathy. Refusing to contract even when contracting is rewarded may signal that the parties really have no strong objections to the default rule, despite later protestations to the contrary.¹⁷

IV

The facts of the *Litowitz* case should jolt commentators from their usual posture of looking at the problem only from an *ex post* perspective. By looking at how disputes can be prevented before they arise and by giving clinics incentives to avoid problems, this proposal should go toward lowering some common barriers to IVF contracting in a cost-effective way and prevent the law in this developing area from ossifying.

—*Chi Steve Kwok*

17. The preceding analysis has assumed that courts would generally enforce IVF contracts entered into voluntarily and with informed consent. There may well be weighty public policy reasons, however, for refusing to enforce IVF arrangements in some situations. Nothing in the proposal, however, prevents courts from refusing to enforce certain contract terms drawn up by clinics that violate public policy. As an addendum to the above proposal, courts may impose an added penalty on clinics if they are reckless in drawing up contracts by, for example, including arrangements that clearly contravene the settled public policy of the state and that cannot fairly be seen as legitimate attempts to extend the application of the law.