

# Frozen Embryo Litigation Spotlights Pressing Questions: What is the Legal Status of an Embryo and Can It Be Adopted?

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## Introduction

Dueling lawsuits between two couples battling over the custody of frozen embryos<sup>1</sup> recently hit the national headlines. One of the couples had donated four embryos to the other couple for assisted reproduction purposes, pursuant to an Embryo Adoption Agreement (“EAA”).<sup>2</sup> The recipient couple thawed and used only two of the embryos, achieving pregnancy and the birth of twins. Shortly before the twins’ birth, the donor couple asked the recipient couple to return the remaining two unthawed embryos, but the recipient couple is refusing to do so. They want to use the two embryos in the future to add to their family.

The emotionally-charged feud between these two couples is deeply rooted in the couples’ religious and moral beliefs and stems from a uniquely crafted stipulation in the EAA. The stipulation fueling the dispute – the “reversion” stipulation – specifically allows the donor couple the option to elect whether they want any unthawed frozen embryos to be returned after one year. As the battle over the embryos continues, both couples have filed lawsuits against each other in their respective home states, pursuing custody of the remaining two embryos, which raises the ever-pressing, unanswered questions: What is the legal status of an embryo and can it be adopted?

## Background Facts

The donor couple, Edward and Kerry Lambert of California, underwent fertility treatment in 2006.<sup>3</sup> The embryos made the subject of this lawsuit were created from Edward Lambert’s sperm and an anonymous donor’s eggs.<sup>4</sup> The Lamberts had a son in 2006 from this batch of embryos and then decided to give four unused frozen embryos to

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<sup>1</sup> “Frozen embryos” is a term referring to human embryos not transferred during an *in vitro* fertilization cycles and are subsequently cryopreserved. These embryos are “frozen” or cryopreserved, using a cryoprotectant and liquid nitrogen, and stored at a temperature of -196°C. See Am. Soc’y of Reproductive Med., *Cryopreservation and Storage*, <http://www.asrm.org/topics/detail.aspx?id=408> (last accessed Apr. 23, 2010).

<sup>2</sup> Joe Harris, *Couples Clash Over Frozen Embryo Custody*, COURTHOUSE NEWS SERV., (Apr. 12, 2010), <http://www.courthousenews.com/2010/04/12/26303.htm>; see also *Petition-Equity, Jennifer McLaughlin, et al. v. Edward J. Lambert, et al.*, Cir. Ct. of the Ct’y of Saint Louis, Mo., available at <http://www.courthousenews.com/2010/04/12/Embryos%20Missouri.pdf> (last accessed on Apr. 12, 2010).

<sup>3</sup> Robert Patrick, *Couples Wrangle Over Frozen Embryos’ Fate*, ST. LOUIS POST-DISPATCH, (Apr. 9, 2010), [http://m.stltoday.com/STL/db\\_10907/contentdetail.htm;jsessionid=C186AAAD140444896016E04A36A9CC40?contentguid=SZCF6PhI&detailindex=6&pn=0&ps=10&full=true#display](http://m.stltoday.com/STL/db_10907/contentdetail.htm;jsessionid=C186AAAD140444896016E04A36A9CC40?contentguid=SZCF6PhI&detailindex=6&pn=0&ps=10&full=true#display).

<sup>4</sup> Harris, *supra* note 2; *Petition-Equity, supra* note 2; Patrick, *supra* note 3.

Patrick and Jennifer McLaughlin of Missouri.<sup>5</sup> Both couples entered into the EAA in February 2009, the terms of which state in pertinent part:

1. The four subject embryos are pre-born children who are endowed by God with unique characteristics and are entitled to the rights and protections accorded to all children, legally and morally.
2. Jennifer McLaughlin desires to accept the full moral and legal responsibility for parenting the subject embryos adopted hereunder.
3. Jennifer McLaughlin agrees to implant all of the subject embryos that are viable after being thawed.<sup>6</sup>

Moreover, the EAA contains the unique “reversion” stipulation, which allows the Lamberts to choose whether they want any unused embryos to revert back to them after one year.<sup>7</sup> This stipulation is problematic because generally, in adoption agreements, the biological parents relinquish their parental rights or custody of their children.

After the McLaughlins signed the EAA and obtained rights to all four embryos, only two of the embryos were thawed and transferred to Jennifer McLaughlin’s uterus in May 2009.<sup>8</sup> She gave birth to a set of twins in January 2010.<sup>9</sup> In December 2009, prior to the twins’ birth, the Lamberts notified the McLaughlins by e-mail that they wanted the two unused embryos back.<sup>10</sup>

The Lamberts and McLaughlins subsequently exchanged communications, in which the McLaughlins made it clear they wanted to keep the remaining two embryos to implant in the future.<sup>11</sup> Jennifer McLaughlin claims the four embryos are “genetic siblings,” and she wants to keep the embryo “siblings” together as a family.<sup>12</sup> Based on her physician’s advice, she intends to wait until next year to have the two embryos transferred to her uterus.<sup>13</sup> For now, she is taking time for post-partum recovery and to allow her family of five adopted children<sup>14</sup> to adjust to their new twin siblings.<sup>15</sup>

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<sup>5</sup> Harris, *supra* note 2.

<sup>6</sup> Petition-Equity, *supra* note 2.

<sup>7</sup> Harris, *supra* note 2.

<sup>8</sup> Petition-Equity, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> Harris, *supra* note 2.

<sup>11</sup> *Id.*; *see also* Petition-Equity, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> Harris, *supra* note 2.

<sup>14</sup> The McLaughlins adopted five children before Jennifer McLaughlin gave birth to the twins.

<sup>15</sup> Harris, *supra* note 2; *see also* Brian Flinchpaugh, *Kirkwood Couple Fights for Frozen Embryos*, ST. LOUIS GLOBE-DEMOCRAT, (Apr. 9, 2010), <http://www.globe-democrat.com/news/2010/apr/09/kirkwood-couple-custody-fight-over-frozen-embryos/>.

The Lamberts, however, want the remaining embryos returned. Initially, they had wanted to donate the embryos to a couple that lives close to them so the “future siblings” could possibly grow up with their son, a genetic “sibling” of the embryos as well.<sup>16</sup> That family subsequently withdrew their adoption request.<sup>17</sup>

The two unfrozen embryos are currently stored in a California fertility clinic.<sup>18</sup> In early April 2010, the fertility clinic notified the McLaughlins that the Lamberts wanted to regain custody of the two embryos.<sup>19</sup> On April 8, 2010, Jennifer McLaughlin filed suit in Missouri against the Lamberts and the fertility clinic.<sup>20</sup> Strategically, she filed the suit in her individual capacity and as next friend of her seven minor children, supporting the argument that not only she, but also all of her children, have an interest in the “sibling” embryos.<sup>21</sup> She is seeking a temporary restraining order and permanent injunctive relief, asking the court to order that she has the legal right to direct control over the two frozen embryos.<sup>22</sup>

The Lamberts, in turn, filed suit in California against the McLaughlins and the fertility clinic. They allege the McLaughlins breached the contract by refusing to return the embryos.<sup>23</sup> The Lamberts are asking the court to declare they have sole custody and control over the embryos.<sup>24</sup>

For the time being, the parties have agreed to participate in mediation in an effort to reach an amicable resolution.<sup>25</sup> If they are not able to resolve the dispute, then they may proceed to trial.<sup>26</sup> Presumably, the McLaughlins’ suit in Missouri would be tried first since it was filed first.

### The Parties’ Legal Arguments

#### *Undisputed Facts:*

In February 2009, both parties, who are Catholic, agreed to consider the embryos as “pre-born children” with the same legal and moral rights accorded to all children.<sup>27</sup> Further, both parties signed the EAA, acknowledging that Jennifer McLaughlin: (1) would accept

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<sup>16</sup> Patrick, *supra* note 3.

<sup>17</sup> Flinchpaugh, *supra* note 15.

<sup>18</sup> *Id.*; see also Petition-Equity, *supra* note 2.

<sup>19</sup> Flinchpaugh, *supra* note 15.

<sup>20</sup> Petition-Equity, *supra* note 2. It is not known why her husband, Patrick McLaughlin, is not a named plaintiff.

<sup>21</sup> Petition-Equity, *supra* note 2.

<sup>22</sup> *Id.*

<sup>23</sup> Patrick, *supra* note 3.

<sup>24</sup> *Id.*

<sup>25</sup> Joe Harris, *Embryo Custody Battle Headed for Mediation*, COURTHOUSE NEWS SERV., (Apr. 15, 2010), <http://www.courthouenews.com/2010/04/15/26420.htm>.

<sup>26</sup> *Id.*

<sup>27</sup> Petition-Equity, *supra* note 2.

the full moral and legal responsibility of the adopted embryos and (2) would implant all of the embryos that are viable after being thawed.<sup>28</sup> Moreover, both parties agreed that any children that resulted would be “genetic siblings,” had a right to know their genetic history, and would stay in contact with the Lamberts via telephone, e-mail, and visits.<sup>29</sup>

*Lamberts’ Legal Argument:*

The Lamberts contend the McLaughlins breached the contract by failing to return the unthawed embryos to be used by them or others.<sup>30</sup> They claim they have full unfettered rights to direct the future use and disposition of the embryos after the one-year time frame for the reversion stipulation became effective.<sup>31</sup>

*McLaughlins’ Legal Argument:*

The McLaughlins argue that, under the terms of the contract, Jennifer adopted all four embryos.<sup>32</sup> Further, they claim their interests in the “unborn children” and the embryos’ interests in their siblings “is of such uniqueness” to give the McLaughlins the legal right to the embryos.<sup>33</sup> Moreover, the McLaughlin’s attorney questions the legality of the EAA and whether it is enforceable because it contains out-dated “form” language that is inconsistent with current assisted reproductive technology.<sup>34</sup> Specifically, the “form” language contemplates the transfer of several embryos at one time to ensure a successful pregnancy as was the usual practice several years ago.<sup>35</sup> However, with current technology, and as consistent with current fertility practices, Jennifer McLaughlin’s physician decided to transfer only two embryos to her uterus in one cycle.<sup>36</sup> The current standards of medical fertility practice recommend the transfer of a limited number of embryos per cycle to reduce the incidence of high-order multiple pregnancies<sup>37</sup> and the risks associated with the same.<sup>38</sup> With respect to the one-year reversion stipulation in the EAA, it was medically not feasible for the McLaughlins to use all four embryos within the one-year period; to do so, would have been against Jennifer McLaughlin’s physician’s advice.<sup>39</sup>

What is the Legal Status of an Embryo?

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<sup>28</sup> Petition-Equity, *supra* note 2.

<sup>29</sup> Patrick, *supra* note 3.

<sup>30</sup> Patrick, *supra* note 3.

<sup>31</sup> Flinchpaugh, *supra* note 15.

<sup>32</sup> Patrick, *supra* note 3.

<sup>33</sup> Patrick, *supra* note 3.

<sup>34</sup> Harris, *supra* note 2.

<sup>35</sup> Harris, *supra* note 2.

<sup>36</sup> See Am. Soc’y for Reproductive Med. and Soc’y for Asst’d Reproductive Tech., *Guidelines on Number of Embryos Transferred*, 92 FERTILITY AND STERILITY 1518, 1518-19 (Nov. 2009).

<sup>37</sup> High-order multiple pregnancies result from three or more implanted embryos.

<sup>38</sup> *Guidelines*, *supra* note 36.

<sup>39</sup> See, e.g., Flinchpaugh, *supra* note 15.

The legal status of an embryo is not universally clear. Depending on the language in various state statutes, judicial opinions, or policies held by professional organizations, embryos have been categorized as either property, human beings, or in a class somewhere in between, deserving special respect and protection because of their potential to become persons.

*The Embryo as Property:*

In New York, Texas, and a handful of other states, courts have determined the custody of embryos in divorce proceedings. The courts in these states applied contract law, instead of family law, and looked to the intent of the parties to determine the disposition of the embryos, thus implying the embryos were “property” to be transferred by contract.<sup>40</sup> In Virginia, one court was asked to determine whether a couple could require a fertility clinic in one state to transfer embryos to a clinic in another state.<sup>41</sup> The court characterized the relationship between the embryo donors and the fertility clinic where the embryos were stored as a bailor-bailee relationship, implicitly holding the embryos were property of the donors.<sup>42</sup>

*The Embryo as a Human Being:*

Embryos are not regarded as “persons” under federal law. In *Roe v. Wade*, the United States Supreme Court explicitly refused to hold that the fetus possesses independent rights under law, based upon a thorough examination of the federal constitution, relevant common law principles, and the lack of scientific consensus as to when life begins.<sup>43</sup> The Supreme Court concluded that “the unborn have never been recognized in the law as persons in the whole sense.”<sup>44</sup>

Nevertheless, a handful of states have enacted statutes that either expressly or impliedly characterize the legal status of an embryo as a person. For instance, Louisiana unequivocally provides that an embryo is a juridical person – meaning that it has legal status and can be represented by an attorney in legal proceedings.<sup>45</sup> Missouri has a statute that defines life as beginning at conception.<sup>46</sup> Texas has criminal and civil statutes that define a person as including an unborn child at every stage of gestation from fertilization until birth.<sup>47</sup> Georgia was the first state to enact an embryo adoption law,

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<sup>40</sup> See, e.g., *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. – Hous. [1<sup>st</sup> Dist.] 2006, cert. denied, 128 S.Ct. 1662 (2008).

<sup>41</sup> See, e.g., *York v. Jones*, 717 F. Supp. 421, 425 (E.D.Va. 1989).

<sup>42</sup> *Id.*

<sup>43</sup> *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

<sup>44</sup> *Id.* at 162, 93 S.Ct at 731.

<sup>45</sup> LA. REV. STAT. ANN. § 9.123 (2009).

<sup>46</sup> MO. REV. STAT. ANN. § 1.205.1 (2009).

<sup>47</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (Vernon 2009); TEX. PENAL CODE ANN. § 1.07(26) (Vernon 2009).

implying that embryos are human beings even though the language in the statute does not expressly state so.<sup>48</sup>

*The Embryo as Deserving Special Respect and Protection:*

In Tennessee, the highest court considered the disposition of frozen embryos in a divorce dispute, but unlike New York or Texas, this court concluded that embryos are not strictly persons or property, but rather, they should be considered in an interim category.<sup>49</sup> This interim category entitles them to special respect and protection because of their potential to become life.<sup>50</sup>

The view that embryos deserve special respect is consistent with the opinions held by the 1994 National Institutes of Health (“NIH”) Human Embryo Research Panel<sup>51</sup> and the Ethics Committee of the American Society for Reproductive Medicine (“ASRM”). ASRM takes the position that an embryo is deserving of special respect and should be accorded an elevated moral status as compared with other human tissues because of its potential to become a person.<sup>52</sup> However, ASRM opines that an embryo “should not be treated as a person, because it has not yet developed the features of personhood, it has not yet established as developmentally individual, and it may never realize its biological potential.”<sup>53</sup>

Can Embryos be Legally Adopted?

The law on embryo adoption is likewise unsettled.<sup>54</sup> There are no federal or state laws that specifically govern the adoption of embryos, with the exception of Georgia’s Option for Adoption Act that was enacted in 2009.<sup>55</sup> To date, Georgia is the only state that has a law that expressly allows the adoption of embryos. Some states, however, have laws that relate to or affect embryo donation and assisted reproductive technology.<sup>56</sup>

The word “adoption” refers to a specific legal procedure that establishes or transfers parentage of existing children. ASRM maintains the position that donation of embryos for reproductive purposes is not a legal procedure, but rather, is fundamentally a medical

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<sup>48</sup> GA. CODE ANN. § 19-8-41.

<sup>49</sup> *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>50</sup> *Id.*

<sup>51</sup> Nat’l Inst. of Health, *Report of the Human Embryo Research Panel*, 1994.

<sup>52</sup> The Ethics Committee of the Am. Soc’y for Reproductive Med., *Defining Embryo Donation*, 92 FERTILITY AND STERILITY 1818, 1818-19, (Dec. 2009).

<sup>53</sup> *Id.*

<sup>54</sup> See generally Embryo Adoption Awareness Center, *2009 Legal Issues and Precedence*, available at <http://www.embryoadooption.org/faqs/legal.cfm>.

<sup>55</sup> GA. CODE ANN. § 19-8-41.

<sup>56</sup> See generally Nat’l Conf. of State Legislatures, *Embryo and Gamete Disposition Laws*, <http://www.ncsl.org/default.aspx?tabid=14379> (last updated July 2007).

procedure intended to result in pregnancy.<sup>57</sup> The experience of embryo donation more closely approximates normal human reproduction than it does legal adoption.<sup>58</sup>

Although ASRM recognizes that donation of embryos and the adoption of children are two options to allow infertile patients to build their families,<sup>59</sup> ASRM contends that the use of the term, “adoption” as it applies to embryos is inaccurate and misleading, and could place burdens on infertile recipients that are not appropriate for donated embryos.<sup>60</sup> Moreover, ASRM finds the term “embryo adoption” to be deceptive because it reinforces the concept that an embryo is a fully entitled legal being, when ASRM believes that it is not.<sup>61</sup>

ASRM recognizes that some groups use the term “adoption” to describe the process by which infertile patient acquire embryos from others for their own family building needs. Such groups seek to establish the legitimacy of embryo “adoption” as a process, by imposing requirements simulating those of legal adoption.<sup>62</sup> However, in November 2008, ASRM and the Society for Assisted Reproductive Technology (“SART”) jointly issued practice guidelines for donating embryos, specifying certain requirements to be included in the “consent” forms.<sup>63</sup> One such requirement includes the need for the donor(s) to relinquish all rights to the embryo(s) and any child or children that may result from the transfer of such embryo(s).<sup>64</sup> Had this “relinquishment” provision been included in the McLaughlin-Lambert EAA, more than likely, the parties could have avoided their heart-wrenching dispute.

## Conclusion

The news media reports an estimated 500,000 frozen embryos are currently maintained in cryopreservation storage.<sup>65</sup> That number has increased from the estimated 400,000 figure reported in 2003.<sup>66</sup> One can reasonably expect the numbers to continue to increase, given the advances in technology, more couples seeking infertility treatment, and the

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<sup>57</sup> *Defining Embryo Donation*, *supra* note 51.

<sup>58</sup> *Id.*

<sup>59</sup> Press Release, Am. Soc’y of Reproductive Med., *Ethics Committee of Leading Reproductive Group Calls Use of Term “Adoption” of Embryos “Inaccurate and Misleading,”* 11:56 ASRM BULLETIN, (Dec. 2009), available at [http://www.asrm.org/news/article.aspx?id=2270&terms=\(+%40Publish\\_To+Both+Sites+or+%40Publish\\_To+ASRM+Only+\)+and+Ethics+Committee+of+Leading+Reproductive+Group+Calls+Use+of+Term+%e2%80%9cAdoption%e2%80%9d+of+Embryos+%e2%80%9cInaccurate+and+Misleading](http://www.asrm.org/news/article.aspx?id=2270&terms=(+%40Publish_To+Both+Sites+or+%40Publish_To+ASRM+Only+)+and+Ethics+Committee+of+Leading+Reproductive+Group+Calls+Use+of+Term+%e2%80%9cAdoption%e2%80%9d+of+Embryos+%e2%80%9cInaccurate+and+Misleading).

<sup>60</sup> *Defining Embryo Donation*, *supra* note 51.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Am. Soc’y for Reproductive Med. and Soc’y for Asst. Reproductive Tech., *2008 Guidelines for Gamete and Embryo Donation: A Practice Committee Report, on Number of Embryos Transferred*, 92 FERTILITY AND STERILITY S30, S41-42 (Nov. 2009).

<sup>64</sup> *Id.*

<sup>65</sup> Patrick, *supra* note 3.

<sup>66</sup> David I. Hoffman, *Cryopreserved Embryos in the U.S. and their Availability for Research*, 79 FERTILITY AND STERILITY 1063, 1063- 1069 (May 2003).

recommended practice that only a limited number of embryos be transferred each cycle.<sup>67</sup> With this increase in the numbers of frozen embryos “available” for adoption, more and more embryo adoption agencies are advertising their services for infertile couples. And unfortunately, unless and until the law becomes more settled on the legal status of embryos and uniform standards for “adoption” agreements are implemented, emotionally charged lawsuits such as the *McLaughlin v. Lambert* case will probably continue to appear in the newspaper headlines.

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<sup>67</sup> *Guidelines*, *supra* note 36.