

Couples need to consider legal ramifications before freezing eggs and embryos

By Jeffery M. Leving SM

As more and more people turn to in vitro fertilization (IVF) for assistance in having children, it is vital that they realize how important it is to address questions that could arise down the road, especially when it comes to frozen eggs and embryos.

While freezing eggs and embryos is quite common and accepted (A 2021 survey from corporate benefits firm Mercer found that almost 20 percent of U.S. companies with more than 20,000 employees offer coverage for egg freezing, up from 6 percent in 2015) it does bring about some important questions that couples need to be aware of before embarking on the frozen egg/embryos path.

The most common questions that spring up and need to be addressed are: What would happen to our embryos if one — or both of us — died? What would happen to them if we divorced? Who gets to keep them? Does anyone?

The answers to these questions are complicated and wrought with emotion. It comes down to three main options: maintaining the eggs or embryos in storage, donating the embryos to either another couple trying to conceive or for research and training purposes, or destruction of the eggs or embryos. These sensitive and

difficult decisions are why many lawyers counsel their clients to think carefully before checking the boxes.

A woman who is not ready for children may decide to freeze just her eggs. But a woman may also decide to fertilize her eggs with a partner's sperm or a donor's sperm, since embryos have better survival rates than eggs and will provide more information, such as whether they are healthy enough to be fertilized and begin development.

But if you create an embryo together, your genetic material is stuck together.

For couples who undergo egg freezing, the average patient under 38 could [retrieve 10 to 20 per cycle](#), but that number varies depending on the individual egg supply and the ovarian response to the medication.

Only mature eggs are frozen, through a process called vitrification: a type of flash freezing in which eggs are bathed in liquid nitrogen to prevent the formation of ice crystals, which could damage the eggs. Then, eggs might be kept at the center where they were vitrified or sent to another location for long-term storage.

As of 2021, The National Embryo Donation Center in Knoxville, Tenn., the largest embryo donation clinic in the country, estimated that there are 1 million to 1.3 million

frozen embryos in storage, up from about 500,000 to 600,000 a decade ago.

For couples who end up divorced, what happens to frozen eggs or embryos in storage is especially complicated.

Many who have gone through divorce advise couples trying to have a family through IVF to draw up a legal contract detailing each partner's rights rather than to rely solely on the fertility clinic forms, which attorney James Hagler at my firm, familiar with these cases, states are often signed without the benefit of legal counsel and are subject to being misunderstood.

Without a signed contract dictating the disposition of frozen eggs and embryos, couples have to rely on existing laws, which vary from state to state. Judges have generally ruled in favor of the person who does not want to develop the embryo, but in Arizona, for example, the custody of disputed embryos goes to the party who wants to bring them to term.

Obviously no one who gets married expects to get divorced, or have a spouse pass away at an early age, but these things do happen. It is thus vital that couples have conversations at the outset of the IVF process when they are still happy and committed to each other.

Couples should not only take their time when discussing these issues, but also think about engaging a neutral third party, like a therapist, to help guide the conversation.

According to [Vorzimer Masserman](#), a fertility and family law center in Woodland Hills, Calif., the agreements — like the forms couples often fill out before undergoing fertility treatment, either egg or embryo preservation, are legal contracts. But in the case of divorce, these contracts are often challenged.

Most courts around the country stick to the signed contract in these cases, but in some states, like Arizona, laws have been passed granting custody of the embryos to whichever parent will allow the embryos a chance to live.

Most courts seem to disagree with the child custody approach. So, in the event of a divorce, the IVF contract the couple signed at the outset will control the outcome. However, if there is no contract, the general consensus among courts has been that a person's right not to become a parent overrules the person's right to become a parent. If there's a signed contract, someone would have to prove that the contract was either invalid or breached in some way, which can be incredibly difficult.

It's important to also realize that frozen eggs are different than frozen embryos. Frozen eggs only belong to one partner — not to both — so in case of divorce, the woman usually receives full custody of her frozen eggs, since she can fertilize them with another partner if she chooses. Since embryos are created with genetic material from two parties, the options are more complicated and the outcomes more varied.

The bottom line is that anyone undergoing IVF procedures should consider their options very carefully. It is vital to understand that your reproductive doctors are not attorneys and may not be familiar with the legal ramifications of the contract in all states and cases. Thus, if you have legal questions, it's important to seek legal counsel for those. Take your time, ask questions and make sure you have all the information you need to make the best decision possible.

Attorney Jeffery M. Leving is the recipient of President Biden's 2023 Presidential Lifetime Achievement Award.

Leving, who has dedicated his career to safeguarding children and reuniting them with their fathers, has written three acclaimed books: "Fathers' Rights," "Divorce Wars" and "How to be a Good Divorced Dad," the latter of which was praised by President Obama and by Cardinal Francis E. George, then the Archbishop of Chicago. Follow Jeffery M. Leving on Facebook and X @DadsRights.