FERTILITY SOCIETY OF AUSTRALIA AND NEW ZEALAND

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NO, THEY'RE MINE: WHO OWNS THE EMBRYOS?

Stephen Page

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STEPHEN PAGE[1]

USEFUL CHECKLIST

1. Always check the consent form for the clinic. The form may not have been properly executed, or may mandate disposal of the embryo, or be silent on the issue.

2. Is the matter one that is agreed or contested?

3. The court is not going to force someone to become a parent when they don't want to be (whether they will be recognised as a lawful parent or not).

4. The court has the ability now to make injunctions to enable one of the parties to use the embryos if there is no prejudice to the other party.

5. The court will be concerned about whether the other party will be a parent under the *Family Law Act*.

6. The court will be concerned about whether treatment can occur if the court makes an order.

Until there is clarity from the court about the status of embryos under the *Family law Act 1975* (Cth), the recommended course is ordinarily having a written agreement between the parties. However, in some cases obtaining an injunction from the Court is an option, to break the impasse about use of the embryos.

INTRODUCTION

The status of human embryo in Australian law is unclear. Clearly, it is a physical object that is capable of being possessed and is possessed by someone who can make decisions about how to use it and in particular, whether to, before it exists – to create it, then after it exists to store, use, transport, discard or donate it.

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A continuing issue for couples whose relationship has broken down is who gets to decide the use of embryos.

THE STARTING POINT: NHMRC *ETHICAL GUIDELINES*

Paragraph 7.4 provides:

> *"7.4 Manage disputes between members of a couple for whom an embryo is stored*
>
> *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 five 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."*

Too often, the policy for managing disputes between individuals for whom an embryo is stored is to have them sign a consent form which says that if they split up to let the clinic know. The consent form typically does not then state what is to be done with the embryo.

Sometimes patients then come to family lawyers like me, seeking advice about what can be done with their embryos. Sometimes the consent forms, however inadequate, remain unsigned.

CAN EMBRYOS BE PROPERTY?

There is no case decided in Australia as to whether embryos are property. I am aware of three final cases that have been decided, and two further cases where embryos were in issue:

- *G and G* [2007] FCWA 80. *G and G* was primarily decided on the basis of Western Australian law. The significant feature in *G and G* was that the conditions of use meant that if the parties separated, then the embryo was to succumb. The wife wanted them to succumb. The husband wanted to donate them. The Court order enforced the terms of consent.
- *Piccolo and Piccolo* [2017] FCWA 167. *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 the embryo 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 Court granted him an injunction so he could use the embryos.

- An unreported decision approximately 11 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. The writer is unable to supply a citation.
- *A and B* (1990) FLC 92-126: a couple was in dispute as to the use of frozen embryos after the breakdown of their marriage. The wife sought to use the embryos to become pregnant whereas the husband sought to have the embryos discarded. The outcome of the case in relation to the embryos is unknown as the case before the Court was to determine the wife's application to prevent the husband's solicitor from representing him due to a conflict of interest.
- In *Selkirk & Selkirk* [2018] FamCA 852, a female couple had separated. The terms of the consent form with the clinic were that in the breakdown of the relationship, the embryos were to be discarded. The judge declined to determine this issue on an interim basis:

  > *"The determination of the dispute between the parties about any embryo with the respondent's DNA will require a decision on the force and effect of the parties' agreement about what is to happen to any stored embryos now that there is no issue that the parties have separated. I note the agreement makes no provision for what is to happen should there have been a clear separation and then at a later time a reconciliation such that the parties wish to have a stored embryo embedded.*
  >
  > *I decline to deal with this issue as should I decide in favour of the applicant then the embryos may be destroyed on the strength of an interim determination. In such circumstances the interim determination would be effectively a final decision."*

  As far as can be determined, the matter was not determined on a final basis.

- *Field and Story* [2018] FamCA 1066. A transman became pregnant with an embryo created from his egg and donor sperm. Further embryos were set aside and frozen. A consent order was made whereby the mother transferred "any right or interest" she may have had in the remaining embryos to the father.

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 published by my colleague Mr Tim Schlesinger, an attorney practicing in St Louis was about embryos and the legal issues[2].

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

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.

AMERICAN APPROACHES

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."*[3]

[2]T. Schlesinger, *Disputes over Frozen Embryos in Family Law Cases- Defense of Counsel or Contemporaneous Mutual Consent*, Family Court Review, Vol. 59 No 1, January 2021, 83-101, doi 10.1111/fcre.12537.

[3] At 597.

This holding in *Davis* regarding the character of embryos, which has been cited by nearly every subsequent embryo disposition case, was based on the position of the American Society for Reproductive Medicine.[4] That position remains the view of the mainstream medical community today.[5]

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.[6]

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."*

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[4] At 596.

[5] *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.

[6] *LWW v LMH* [2012] QChC 26 per Judge Clare QC. By way of disclosure the writer appeared for the surrogate in that matter.

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?"*

HOW MIGHT EMBRYOS BE CONSIDERED PROPERTY UNDER THE *FAMILY LAW ACT 1975* ?

Property is defined relevantly in section 4(1) of the *Family Law Act 1975* (Cth) 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; …"*

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. Griffiths 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."*

Among the cases referred to by her Honour 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 IVF clinic 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."*

The same could be said of embryos.

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] NSWSC 478, *Re section 22 of the Human Tissue and Transplant Act 1982* (WA); *ex parte C* [2013] WASC 3; *GLS v Russell-Weisz* [2018] WASC 79; *Re Cresswell* [2018] QSC 142 (where Brown J, in applying *Doodeward* found that *"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"*)[7] and

[7] At [163](d).

Chapman v South Eastern Sydney Local Health District [2018] NSWSC 1231; (2018) 98 NSWLR 208.

It is my view that:

(i) Embryos exist. They are a thing capable of being possessed.

(ii) The words expressed in *Roche* and in *Bazley* equally apply to embryos.

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

(iv) An embryo, by its nature, has a special nature to it.

(v) Consistent with the *Doodeward* approach the embryo was 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. It is the subject of a contract of bailment which has an implied term in it that if it to be returned to the parties, it is to be returned to them in it its current cryogenic state. Subject to the restrictions as to its use under Queensland law, and the restrictions arising from the *Ethical Guidelines*, the parties are able to determine its use or discard.

(vi) An order adjusting those rights can and ought to be made on a just and equitable basis. That is easier in this case where the proposed order (in the form of an injunction) is by consent.

(vii) The appropriate course the Court ought to take, is that of weighing up various factors, to ensure that any orders made are just and equitable.

(viii) Any proposed orders should cause no prejudice to the other party, provide certainty to the person seeking control of the embryo, and enable them to exercise them freedom to reproduce if they wish it.

AUSTRALIAN REGULATION OF EMBRYOS

In considering whether a party should agree as to what is to happen with embryos, or a court make an order as to who can possess the embryos, the party and court needs to know what restrictions there are as to the use of embryos.

The NHMRC *Ethical Guidelines* state[8]:

> *"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 earliest stage of development, a 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."*

Regulation is achieved principally by the accreditation of ART centres under the *Research Involving Human Embryos Act 20*02 (Cth), accreditation being required to come from the reproductive technology accreditation committee of the Fertility Society of Australia.

Section 11 provides:

> *"A person commits an offence if:*
>
> *(a) the person intentionally uses, outside the body of a woman, a human embryo:*
>
> *(i) that was created by fertilisation of a human egg by a human sperm; and*
>
> *(ii) that is not an excess ART embryo; and*
>
> *(b) the use is not for a purpose relating to the assisted reproductive technology treatment of a woman carried out by an accredited ART centre, and the person knows or is reckless as to that fact.*
>
> *Penalty: Imprisonment for 5 years."*

Section 10 provides:

> *"(1) A person commits an offence if the person intentionally uses an excess ART embryo, unless:*

[8] (2017), p.21.

(a) the use by the person is authorised by a licence; or

(b) the use by the person is an exempt use within the meaning of subsection (2).

Penalty: Imprisonment for 5 years.

*(2) A use of an excess ART embryo by a person is an **exempt use** for the purposes of subsection (1) if:*

(a) the use consists only of:

(i) storage of the excess ART embryo; or

(ii) removal of the excess ART embryo from storage; or

(iii) transport of the excess ART embryo; or

(b) the use consists only of observation of the excess ART embryo; or

(c) the use consists only of allowing the excess ART embryo to succumb; or

(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 where the 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; or

(e) the use is carried out by an accredited ART centre and is for the purposes of achieving pregnancy in a woman other than the woman for whom the excess ART embryo was created; or

(f) the use is of a kind prescribed by the regulations for the purposes of this paragraph.

(3) Despite subsection 13.3(3) of the Criminal Code , a defendant does not bear an evidential burden in relation to any matter in subsection (1) or (2) of this section.

(4) In subsection (2):

***"diagnostic investigation"** , in relation to an excess ART embryo, means any procedure undertaken on embryos for the sole purpose of diagnostic investigations for the direct benefit of the woman for whom it was created.*

***"observation"** , in relation to an excess ART embryo, includes taking a photograph of the embryo, or taking a recording of the embryo from which a visual image can be produced."*

Section 8 defines an *accredited ART centre*:

*"**"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."

The regulations have not prescribed another body. In other words, in order to be able to operate an IVF clinic in Australia, one must have a licence from RTAC.

The Fertility Society of Australia in 2020 changed its name to The Fertility Society of Australia and New Zealand Ltd. It continues to have a reproductive technology accreditation committee.

Human embryo is defined in section 7 as meaning:

"a discrete entity that has arisen from either:

(a) the first mitotic division when fertilisation of a human oocyte by a 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."

Each of the States and the ACT (but not the Northern Territory) has legislation that matches the Commonwealth Acts. By way of example, in Queensland the Act 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, as it is under the Commonwealth 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 a 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 to the Queensland Act 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 geno 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 eight weeks of development since the first mitotic division."*

Section 21 of the Queensland Act 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– to submit to a process of self-regulation determined by what is now this organisation.

The Society's *Code of Practice* for *Assisted Reproductive Technology Units (2021)* 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 period; 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;*
>
> *(d) compliance with the RTAC Code of Practice,*
>
> *(e) records of current signed Deed of Agreement with the FSA,*
>
> *(g) 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 registered and compliant HREC [Human Research Ethics Committee] affiliated to the unit."*

DIFFERENCES BETWEEN THE STATES

New South Wales, Victoria, South Australia and Western Australia have an *Assisted Reproductive Treatment Act* (however titled). ACT, Queensland and Tasmania do not, but rely on the *Ethical Guidelines* for regulation. Wherever there is a conflict between the State law and the Ethical Guidelines, the law prevails and the Ethical Guidelines give way.

The Northern Territory does not have an *Assisted Reproductive Treatment Act*, but the Northern Territory Government has a service agreement with Repromed which in effect requires that clinic so far as it can to comply with South Australian law.

In four States, New South Wales, South Australia, Victoria and Western Australia, there is State legislation regulating IVF clinics:

State	**Law**
New South Wales	*Assisted Reproductive Technology Act 2007*
South Australia	*Assisted Reproductive Treatment Act 1988*
Victoria	*Assisted Reproductive Treatment Act 2008*
Western Australia	*Human Reproductive Technology Act 1991*

Where there is a conflict between a valid Commonwealth law and a valid State law, the State law gives way to the Commonwealth law to the extent of the inconsistency: section 109 *Commonwealth Constitution*.

As this area has not been tested, it is unclear if an order is made under the *Family Law Act*, that would appear to conflict with State legislation, whether the court would be still prepared to make the order and find that there is a conflict between the two laws. We won't know until there is a test case.

NEW SOUTH WALES

Under section 17(3) of the *Assisted Reproductive Technology Act 2007* (NSW):

> *"A gamete provider may modify or revoke his or her consent by giving written notice, in the approved form (if any), of the modification or revocation of consent to:*
>
> *(a) the ART provider that obtained the gamete from the gamete provider, or*
>
> *(b) any ART provider that is, or has ever been, in possession of the gamete or embryo to which the modification or revocation of consent relates."*

Once that revocation of consent has been given, then section 17B of that Act makes plain the role of an ART provider (subject to regulations, which are silent on this issue):

> *"(1) An ART provider must not carry out any of the following activities in respect of a gamete or embryo (other than a donated gamete or donated embryo) unless the ART provider has taken the required steps, in accordance with this section, to obtain confirmation of the gamete provider's consent to the activity concerned:*
>
> *(a) use the gamete to create an embryo outside the body of a woman,*
>
> *(b) provide ART treatment to a woman using the gamete or embryo,*
>
> *(c) supply the gamete or embryo to another person (including an ART provider),*
>
> *(d) export, or cause to be exported, the gamete or embryo from this State.*
>
> *Maximum penalty: 800 penalty units in the case of corporation or 400 penalty units in any other case."*

If the gamete provider has revoked consent, then I would consider it most unlikely that the court would compel the ability to use the embryo but, consistent with the sperm cases in New South Wales, there is the possibility that if an order were made, then the person in lawful possession of the embryo is the person the subject of the order and an order could be made under the *Family Law Act* empowering the patient to cause the embryo to be exported to a place where the gamete provider's consent is not required.

VICTORIA

Section 11(1) of the *Assisted Reproductive Treatment Act 2008* (Vic) provides:

> *"(1) A consent under section 10(1) –*
>
> *(a) must specify that the woman and her partner, if any, have consented to undergo the kind of treatment procedure specified in the consent; and*
>
> *(b) must not have been withdrawn or have lapsed where the treatment procedure takes place."*

Sections 16 and 17 concern the requirements for donors – and see the discussion above about whether the other party would be a donor.

Section 20(1) and (2) provide:

> *"(1) A person who gives a consent under section 10(1) or 16 may withdraw it at any time before the procedure action consented to is carried out.*
>
> *(2) A withdrawal of consent under this section must be in writing."*

Section 20(1) is to be substituted with this:

> *"(1) A person who gives a consent under section 10(1) may withdraw it at any time before the procedure or action consented to is carried out.*
>
> *(1A) A person who gives a consent under section 16 may withdraw it –*
>
> *(a) in the case of donor gametes, at any time before the earliest of the following occurs –*
>
> *(i) when the gametes are used in a treatment procedure; or*
>
> *(ii) if the gametes are earlier used to form an embryo, when the gametes are used to form the embryo; or*

(b) in the case of consent given by a person who produced gametes used to create the embryo, at any time before the embryo is used in a treatment procedure."

This provision is contained in the *Assisted Reproductive Treatment Amendment Act 2021* (Vic). The new provision is to come into operation on a day or days to be proclaimed but if not otherwise specified, to occur on 7 September 2022[9].

SOUTH AUSTRALIA

Section 4(A) of the *Assisted Reproductive Treatment Act 1998* (SA) provides:

> *"The welfare of any child to be born as a consequence of the provision of assisted reproductive treatment in accordance with this Act must be treated as being of paramount importance, and accepted as a fundamental principle, in respect of the operation of this Act."*

South Australia otherwise relies on the *Ethical Guidelines* to determine the issue of consent.

WESTERN AUSTRALIA

Section 22 of the *Human Reproductive Technology Act 1991* (WA) sets out the requirements for consent which is that it must be effective:

"(1) For the purposes of the licence condition referred to in section 33(2)(e) —

(a) the gametes of a person shall not be used, or for such a use be received by a licensee or participant, unless —

(i) there is an effective consent, by that person, to the gametes being so used; and

(ii) the gametes are used in accordance with that consent;

(b) the gametes of a person shall not be kept in storage unless —

(i) there is an effective consent, by that person, to the storage; and

(ii) the gametes are stored in accordance with that consent;

[9] Section 2.

(c) the gametes of a person shall not be used in an in vitro fertilisation procedure unless there is an effective consent, by that person, to any human egg undergoing fertilisation or human embryo thereby derived being used for a consequential purpose authorised by this Act;

(d) where the development of an egg undergoing fertilisation or a human embryo was brought about by an in vitro fertilisation procedure it shall not be kept in storage unless —

(i) there is an effective consent, by each person from whose gametes the egg or embryo was derived, to the storage; and

(ii) the egg or embryo is stored in accordance with that consent;

(e) where the development of a human egg undergoing fertilisation or a human embryo was brought about by an in vitro fertilisation procedure, it shall not be used for any purpose, or for such a purpose be received by a licensee or participant, unless —

(i) there is an effective consent, by each person from whose gametes the egg or embryo was derived, to the use for that purpose; and

(ia) in the case of a use outside the body of a woman, there is an effective consent to the use for that purpose by the woman on whose behalf it is being developed and her spouse or de facto partner, if any; and

(ib) in the case of implantation in the body of a woman, there is an effective consent to the implantation by the woman and her spouse or de facto partner, if any; and

(ii) the purpose is authorised by this Act; and

(iii) that egg or embryo is used in accordance with that consent,

and the Code may make further provision in relation to such, or related, matters.

(2) Where a consent is given in general terms to the use or storage of human gametes separately, whether human eggs or human sperm, that consent shall be taken to relate to the use or storage of any of those eggs or sperm, and also to any human egg undergoing fertilisation or human embryo derived from the use of the human gametes, for any purpose, save that —

(a) any such consent may be given subject to specific conditions in its terms; and

(b) notwithstanding subsection (4) or that a human egg undergoing fertilisation or a human embryo, may have developed which is derived from the use of human gametes the subject of any particular consent, in so far as it relates to any human egg or human sperm that has not been used that consent may be varied or withdrawn,

but where a human egg in the process of fertilisation, or a human embryo, has been developed from any human gametes the consent thereafter to be required is not a consent to the use of those human gametes but a specific consent relating to that particular egg undergoing fertilisation or embryo only.

(3) The terms of any effective consent may from time to time be varied or the consent withdrawn, unless subsection (4) applies, by notice given by the person who gave the consent to the person keeping the human gametes, human eggs undergoing fertilisation or human embryos to which the consent is relevant.

(4) The terms of any effective consent to the use of any human gametes, a human egg undergoing fertilisation or a human embryo can not be varied, and such a consent can not be withdrawn, once the gametes have, or that egg or embryo has, been used.

(5) A consent to the use of a human egg undergoing fertilisation or a human embryo must specify the purposes for which the egg or embryo may be used and may specify conditions subject to which the egg or embryo shall or shall not be used.

(6) A consent to the keeping of any human gametes, a human egg undergoing fertilisation or a human embryo must —

(a) specify the maximum period of storage, if that is to be less than such limit as may be prescribed or may be determined in accordance with section 24(1)(b); and

(b) give instructions as to what is, subject to this Act, to be done with the gametes, the egg or the embryo if the person who gave the consent is unable by reason of incapacity or otherwise to vary the terms of the consent or to withdraw it,

and may specify conditions subject to which the gametes, or the egg or embryo, shall or shall not remain in storage.

(7) Before a licensee gives effect to a consent given for the purposes of this Act the licensee shall ensure that each participant has been provided with a suitable opportunity to receive —

(a) proper counselling about the implications of the proposed procedures; and

(b) such other relevant and suitable information as is proper or as may be specifically required by the Code or directions,

including an explanation of the effect of subsection (3) and subsection (4).

(8) For the purposes of this Act a consent to the use or keeping of any human gametes, a human egg undergoing fertilisation or a human embryo shall not be taken to be effective unless —

(a) it is given in writing; and

(b) any condition to which it is subject is met; and

(c) it has not been withdrawn; and

(d) those gametes are, or that egg or embryo is, kept and used in accordance with the consent.

(9) Where a consent required by or under this Act is not given, or is not effective, or is not complied with that matter may be a cause for disciplinary action or proceedings for an offence but does not necessarily affect the rights of any person.

[Section 22 amended: No. 17 of 2004 s. 16.]"

Clause 3.1 of the *Human Reproductive Treatment Directions 2021* (WA) provides:

"3.1 Consent to artificial fertilisation procedure

Any person to whom the licence applies, including an exempt practitioner, who proposes to carry out or to direct the carrying out of an artificial fertilisation procedure must –

(a) at the time of or immediately prior to an IVF procedure, ensure that effective consent to the procedure and to the use of the gametes or embryos (including if relevant consent to the use of the donated gametes or embryos), is given by the recipient and the recipient's spouse or de facto partner (if any);

(b) at the time of or immediately prior to an AI procedure, ensure that effective consent to the procedure and to the use of the gametes (including if relevant consent to the use of donated gametes), is given by the recipient and the recipient's spouse or de facto partner (if any); and

(c) ensure that any other person required under the Act to give effective consent has done so."

Clause 3.2 provides:

"3.2 Consent to use of donated gametes

Any person to whom the licence applies, including the exempt practitioner, must ensure that, prior to the donation of gametes for their use in an artificial fertilisation procedure, effective consent is given by the gamete provider and the gamete provider's current spouse or de facto partner (if any) to the donation and use of the gametes."

Clause 3.3 provides:

"3.3 Consent to use of embryo egg undergoing fertilisation prior to the donation or an embryo or egg undergoing fertilisation for use in an artificial fertilisation procedure, any person to whom the licence applies must ensure that –

(a) effective consent to the donation and use is given by the person(s) for whom the embryo or egg was developed; and

(b) any person who donated gametes used to develop the embryo or egg, and the spouse or de facto partner of the gamete provided (if any) gave effective consent to the use at the time the donation was made."

HOW CAN DISPUTES BETWEEN A SEPARATING COUPLE AS TO AN EMBRYO BE RESOLVED?

There are a number of ways, potentially, that disputes between a separated couple can be resolved so that one of them can use the embryo. The potential methods are:

1. An order is made under the *Family Law Act 1975* by way of property settlement.

2. An injunction is made under the *Family Law Act 1975* (Cth) to determine who is to use (or similar injunction obtained under State law).

3. The parties enter into a binding financial arrangement under the *Family Law Act 1975* (Cth).

4. The parties provide statutory declarations to the clinic consenting to use.

5. The parties enter into a contract between them.

OPTION 1 – OBTAIN CONSENT ORDERS UNDER THE *FAMILY LAW ACT*

Sadly, there is a distinct lack of case law to assist. There have to my knowledge only been three cases decided concerning the use of embryos, there is no case decided in Australia as to whether embryos are property.

***G & G**, described above,* was primarily decided on the basis of Western Australian law. The significant feature in *G & G* was the conditions of use meant that if the parties separated, then the embryo was to succumb. It is always essential in my view to find out what form the parties signed when they agreed to consent and store the embryos. In *G & G* the form said that any embryos were to succumb in the event of their separation.

Most recent forms that I have seen from IVF clinics concerning this issue have merely said that the patients will tell the clinic that they have separated – but there is no method set out in the form as to what is to happen with the embryos. Its left uncertain.

In one recent case, the parties were supposed to have signed that form (which was that they were to have let the clinic know that they had separated – but didn't resolve the ownership of the embryo) – but the form was never signed by them. Therefore, the ownership of the embryos remained uncertain.

In that case, representations were made by me on behalf of my client to assert that she alone could access and control the embryos, to which the clinic later agreed. This was because:

1. All the costs of treatment were met by my client alone.

2. All invoices issued by the clinic were to my client alone.

3. My client was in a lesbian relationship. It was only her DNA and that of an anonymous sperm donor involved. There was, necessarily, no DNA of her former partner.

4. It was a NSW matter. My client was a *gamete provider* under the NSW *ART Act*. Her former partner was not.

5. My client and her former de facto partner had separated. Greater than two years had passed following their separation, meaning that the limitation period that applied under the *Family Law Act 1975* (Cth) concerning property matters had expired.

6. Following the separation of the parties, further invoices were issued by the clinic for storage – but issued to my client alone.

When one looked at the combination of those factors, my client was the only person who had a relevant interest in the embryo and therefore could control its direction.

I have seen registrars of the court make orders concerning who can use embryos. I am also aware that registrars of the court have refused to make orders concerning embryos – because they claim not to have jurisdiction, as embryos are not property. In *Piccolo*, it was common ground (without any expression why) of the parties that the embryos were not property. In particular, there was no discussion in *Piccolo* of the sperm or human tissues cases that I have discussed above.

Any order as to property settlement must be just and equitable: section 79(2), section 90SM(3) *Family Law Act*. The court will be concerned to ensure that someone is not being forced to be a parent against their will. Under the common law, there is a right, or better expressed, a liberty to reproduce or not reproduce as the case may be: *Re Jane* [1988] FamCA 57 and *In the Marriage of F&F* [1989] FamCA 41. Any consideration of whether there should be an order made will have to take into account parentage presumptions under the Family Law Act 1975 (Cth) (or in WA, other than for married couples, under the *Family Court Act 1997* (WA), including consideration of whether someone is seen in the wider of Australian society to be a parent: *Masson v Parsons* [2019] HCA 21.

In considering whether an order is just and equitable, the Court engages in a balancing act, weighing up different factors. A similar approach, concerning embryos (or as they describe them, pre-embryos) was undertaken by the Colorado Supreme Court in the Marriage of Rooks 2018 CO 85:

> *"The supreme court holds that because the underlying interests at stake are the equivalently important, yet competing, right to procreate and right to avoid procreation, courts should strive, where possible, to honor both parties' interests in procreational autonomy. Thus, courts 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, courts should seek to balance the parties' respective interests in receipt of the pre-embryos. In balancing those interests, courts should consider the intended use of the party seeking to preserve the pre-embryos; a party's demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties' reasons for undertaking in vitro fertilization in the first place; the emotional, financial, or logistical hardship for the person seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce process; and other considerations relevant to the parties' specific situation. However, courts should not consider whether the party seeking to become a genetic parent using the pre-embryos can afford a child. Nor shall the sheer number of a party's existing children, standing alone, be a reason to preclude preservation or use of the pre-embryos. Finally, courts should not consider whether the party seeking to become a genetic parent using the pre-embryos could instead adopt a child or otherwise parent non-biological children."*

OPTION 2- OBTAINING AN INJUNCTION

As *Piccolo* makes plain, it is possible to obtain injunctions under the *Family Law Act* as to the use of embryos. However, this is an expensive process, as the orders would need to be made by a judge, even if by consent. This therefore requires the filing of affidavit material with the Court, along with an application (as opposed to filing a quicker, simpler and cheaper application for consent orders which are made by Registrars).

OPTION 3- BINDING FINANCIAL AGREEMENT

I have seen binding financial agreements entered into under the *Family Law Act 1975* have clauses that deal with the use of embryos. Quite simply, if an embryo is considered to be property, then it can be dealt with under a binding financial agreement. If it is not property, it cannot. Until there is a Court ruling confirming as to whether or not an embryo is property, the use of a binding financial agreement (which is necessarily an expensive process) remains unclear and risky.

OPTION 4- MUTUAL STATUTORY DECLARATIONS

The approach by some clinics has been to have mutual statutory declarations by the parties as to who can use the embryos. Whilst these are useful statements of intent, they do not dispose of the use of the embryos. One of the parties could come back later and change their mind. It is not a recommended course to take at all.

OPTION 5- CONTRACT BETWEEN THE PARTIES

Until there is a decision from the court confirming that embryos are property, this is the approach that I've been taking with clients, namely, that there is a written agreement between the parties as to who can use the embryos. The agreement is then supplied to the clinic. There is no reason why the agreement would not be legally binding, as there is no commerciality concerning the use of the embryos as between the former partners.

An issue concerning the agreement, however, is that there could be a subsequent property settlement between the parties under the *Family Law Act* and that a court could determine that the agreement in effect be set aside. I considered that the chances of that happening, while possible, are extremely low, given the sensitive nature of what is involved with embryos and the careful steps that would have been taken by the parties prior to entering into that

agreement. One would expect that the court would tread very warily in seeking to overturn such an agreement.

AVOID ENTANGLEMENT WITH THE PARENTAGE PRESUMPTIONS

Last year a client of mine filed an application in the Federal Circuit Court of Australia seeking, by way of consent, to have clarity about whether embryos were property. Judgment remains reserved. In that case I acted for the wife. There is one embryo which was composed of her egg and the husband's sperm. The husband is consenting to the wife having the use of the embryo.

The court raised two issues of concern:

1. Whether in those circumstances the husband would be a parent.

2. Whether or not my client would be able to use the embryo following the making of an order.

Under the general parentage presumptions arising from marriage contained in section 69P of the *Family Law Act*, and in that case section 24 of the *Status of Children Act 1978* (Qld) – each of which is a rebuttable presumption[10], there is a possibility that the husband in that case could be a parent. In my view, he would not have been a parent because under the *Family Law Act*, he did not intend to be a parent. The High Court in *Masson v Parsons* [2019] HCA 21 held that intention was an element in that case as to whether Mr Masson, the sperm donor, was a parent:[11]

> *"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, the husband would not have consented to the fertilisation procedure and would not be a parent for the purposes of section 23 of that Act[12].

[10] Section 69U and section 29 respectively.
[11] At [54].
[12] There is conflicting case law in Queensland concerning section 23 of the *Status of Children Act 1978* (Qld). Differing case law in Queensland would mean that either: the husband would not be a parent for the purposes of section 23 of the *Status of Children Act* or, if he were a parent, he would have no rights or responsibilities, including as to child support.

In the pending case, the husband made plain that he did not intend to be a parent. To be a parent under the *Family Law Act* one must be one of the following:

Section of the *Family Law Act 1975*	**Presumption**
s.69P	father is presumed to be a parent arising from marriage
s.69Q	man is presumed to be the father arising from cohabitation with a woman
s.69R	the person consents to their name being entered onto a birth register held in Australia or a prescribed overseas jurisdiction that they are a parent
s.69S	the court has found that they are a parent
s.69T	they have executed acknowledgement of paternity
s.4	the child has been adopted by the person
s.60HB	they are a parent by virtue of a surrogacy parentage order
s.60H(1)	they were living in a de facto relationship or marriage at the time of an artificial conception procedure being undertaken and consented to that artificial conception procedure, by which they are both the parents and any person who provided genetic material is not
S.60H(2)	Birth mother
N/A	They are, as a matter of fact, seen in the wider view of Australian society to be a parent: *Masson v Parsons* [2019] HCA 21.

Thus, to avoid being entangled by the parentage presumptions, where the man's DNA was used to create the embryo and the woman is seeking to use the embryo, then treatment should only commence after the parties are divorced (if they were married) or after 44 weeks

after final separation (if they were in a de facto relationship). It is best that there is a clear statement by a man in that situation that he **does not** intend to be a parent.

So far as lesbian couples are concerned, if they have separated, then the former partner or wife (assuming it is not her DNA) will not be a parent of any child who is born because she will not be consenting to treatment occurring (which is a requirement of section 60H(1) of the *Family Law Act* to make her a parent). In this respect, the requirements under the *Ethical Guidelines* for consent to specific treatment are essential. If she hasn't consented to that treatment, she cannot be a parent (unless she falls within those categories described above).

Example

Thelma and Louise were a de facto couple. They underwent IVF with the assistance of a sperm donor, with the result that embryos were created using Thelma's eggs. One of those embryos was implanted into Thelma and a child was born.

Thelma and Louise subsequently separated. They then commenced parenting proceedings under the *Family Law Act*. Louise wanted to relocate interstate with the child.

In the midst of these proceedings, Thelma wanted to become a mother again. Although she was the gamete provider, the treatment had been undertaken by both of them and therefore there needed to be a resolution between Thelma and Louise about the use of any remaining embryos.

Louise was concerned that if Thelma were to have a child now, it might prejudice Louise's relocation application (because the existence of a sibling to the existing child might cause the court not to allow the relocation to occur).

The result? An agreement was reached between Thelma and Louise, documented by a contract, whereby treatment was only to commence after a specified period (which was as best as could be calculated that any contested proceedings would have been completed).

COULD THE WIFE USE THE EMBRYO?

In the pending case, the clinic in which the embryo was stored took the view that the husband would be converted from being a partner in the process to a donor. This is not a universal view of other clinics – some take the view that when the embryo was created, he was not a donor, and therefore does not become a donor now.

The reason that that view is significant is that if the order is made to enable the use of the embryo and the husband is considered by the clinic to be a donor, then treatment could only

occur at that clinic if he consents to treatment and undertakes counselling. No order from the court could force him to do those.

The alternative is to move the embryo to another clinic (within Australia or overseas) whereby his consent is not required.

ESTATE PLANNING

In the recent case of *Wickham and Toledano* [2022] FedCFamC1F 32 a will was executed by a single woman which provided that in the event of her death and she had a partner, the partner was to decide the disposition of the embryos, but if she did not have a partner then a specified family member was to decide the disposition of the embryos.

Despite the will making clear reference to embryos, it did not make any provision for the appointment of a testamentary guardian of any child of the testator.

The woman had a brief, turbulent relationship with another woman. They consented to implantation. They quickly broke up. When the woman gave birth, she was single. Three days later she died.

The birth mother's sister and sister-in-law then had to commence proceedings under the *Family Law Act* to ensure that the children were lawfully in their care after being discharged from hospital because there was the possibility at least that the former partner was a parent, and due to the gap in the Will, there had been no appointment of a testamentary guardian – so a court order was required. Hundreds of thousands of dollars were spent on those proceedings, which *might* have been avoided if the Will had specified the appointment of a testamentary guardian – a clear oversight by the solicitor who prepared the Will.[13]

FINALLY

The use of embryos after relationships break down is a common problem. With good will, embryos can be used now. If there is a conflict between the parties, and the resistant party will not become a parent by virtue of any court action, then going to court might break the impasse that otherwise prevents the use of the embryo.

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14 July 2022
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[13] I acted for the sister and sister-in-law. I did not prepare the Will.