

More.com...Whose Egg Is It, Anyway?

An Embryo-Custody Battle

She's desperate to bear a child; he refuses to be the father. While Augusta and Randy Roman duke it out in court, three embryos they created together are on ice. Welcome to the custody battle of the future.

By Louise Farr

Embryos in Legal Limbo: The Beginning

Ten hours before Augusta Roman's in vitro fertilization appointment at the Center of Reproductive Medicine, in Webster, Texas, her husband, Randy, announced that he had changed his mind. It was April 19, 2002, and Augusta, a registered nurse, had been resting in her nightgown on their floral-patterned living room sofa, watching the evening news. She was tired but excited. The next day was to be the culmination of nearly four years of temperature monitoring and scheduled intimacy, unsuccessful artificial inseminations, and painful fallopian tube surgery.

At 40, Augusta believed that in vitro was her last chance to have the baby she wanted so badly. Two days before, 13 eggs had been harvested from her ovarian follicles. Combined in the lab with Randy's sperm, six of the eggs had become viable embryos, which were to be implanted in her uterus the next morning. When Randy, a NASA technician, backed out, Augusta felt as if her world were spinning out of control. But she says she knew even then that she would do whatever it took to implant her embryos.

While Augusta and Randy fought that night, the seeds of their divorce and the *Roman v. Roman* embryo-custody proceedings -- now heading for Texas Supreme Court -- were stirring to life. And as the case wends its way through the legal system, the arguments that divided the Romans hang in the air in a debate that affects a growing number of midlife women.

We are, after all, the primary customers for assisted reproductive technologies such as IVF. Back when we were in our 20s, "choice" meant having both the means and the legal right to prevent an unwanted birth. Many of us now feel that choice also means the ability to have a baby at 40, or 45, or even 50 and beyond.

But...does Augusta Roman's desire to bring these embryos to term transcend Randy Roman's change of heart about becoming a father? Are embryos simply community property to be divvied up in a divorce tussle, as if they were a car or a plasma TV? Or are they budding lives? Augusta insists they are, in fact, children, offspring that she has a maternal duty, a parental right, to protect. At the fertility clinic, the Romans had initialed an agreement saying the embryos would be discarded if they divorced. So maybe the answer is as simple as enforcing that contract. Or should courts favor the woman because her window of biological opportunity is so much narrower than a man's?

The Desire & Struggle to Have a Family

Sitting at her dining room table, smoothing the crisp white cloth with long, nervous fingers, Augusta speaks of the agony she experienced in her job as an intensive care nurse until she made peace with the idea of mortality -- both her own and that of others. "Life is fragile," she says. "I was crying every time someone died. Watching the family go through it is the hardest. Sometimes I say to them, 'I'm not abandoning you, but I have to step away.'"

Yet she can't step away from her embryos. "People ask me why I fight, ...I don't want to be a poster child." But, she adds, "I made a mistake when I initialed that contract."

When Augusta was a girl, one of seven siblings in a bustling Nigerian household with a father who was a school principal and a mother who traded goods in the local market, she wanted to be a flight attendant. "I liked the hat and the uniform," she says, sitting in the house that she is willing to sell, if necessary, to pay her legal bills. A rare smile, raised by

the childhood memories, softens her strong features. Most of the time, she appears stuck in the fog of disbelief that descended the night Randy changed his mind.

Augusta was 22 in 1983, when she left her home country for Houston. There she juggled plates as a Denny's waitress and worked as a healthcare aide to pay for her nursing studies at Texas Woman's University. Her graduation, in 1992, meant more money to send home to Nigeria. But her American dream was about more than a career: It included a family and children of her own.

Around Christmastime in 1996, long after a brief first marriage had ended, Augusta began chatting with a man she met at the gym. They made an unlikely couple. Augusta was in peak condition, having earned a master's degree in fitness after completing her nursing studies, whereas Randy seemed the stereotypical techie, slender and pale. He'd recently arrived from California to work under contract for NASA.

"He espoused my values and religious beliefs; he had what I was looking for in a husband," says Augusta, who was baptized in the Anglican Church. "I was going on 35. We had both gone through this dating stuff, and we thought, 'We know what we want, so why not get married?'"

Bleak Odds for Pregnancy

Five years ago, when she was 40, Augusta Roman's odds of becoming pregnant with the help of a fertility specialist were 20 to 25 percent, according to her clinic doctor, Vicki Schnell. Now, even if Augusta is awarded the embryos and they survive thawing, the odds of her conceiving will have dropped to around 10 percent. According to the Centers for Disease Control, only 16.5 percent of non-donor frozen embryo transfers result in live births among women age 41 to 42 (the CDC doesn't track this statistic for older would-be mothers). The likelihood of a successful midlife pregnancy is even lower when you factor in the women who drop out simply because they don't have enough viable eggs (which is why older women are increasingly reliant on eggs donated by women in their 20s and early 30s). Those bleak odds did not weigh heavily on Augusta's mind on the warm March day in 2002 when she and Randy initialed a sheaf of consent forms in a small room at the Center of Reproductive Medicine. The couple signed off on potential embryo-transfer medical risks, such as infection and multiple gestations. The paperwork also stated that each embryo was considered joint property "based on currently accepted principles." When asked to decide on "disposition" of this property should the couple divorce, both Randy and Augusta initialed the box giving the clinic permission to discard the embryos.

Cognizant of couples' giddy, baby-centered state of mind, Schnell, who is the center's founder and director, always includes a cover letter stressing the importance of reading the forms carefully. "I've had people who want to initial everything and not read it," she says. "I will not let them do that." Her consent forms also warned of possible psychological strains that high-tech baby-making can put on a marriage. "There have been cases where it does bring them to the edge of divorce," she says. "But it's usually well before [egg] retrieval."

Schnell recommends that couples go to at least one counseling session before they undergo IVF. The Romans chose not to, and Schnell did not force the issue. Later, in court, Randy (who declined to be interviewed for this article) would testify that Augusta didn't think they needed it. That's correct, she says, "but from his treatment and support of me, I thought we were in it together. There was no doubt in my mind. And who would think about divorce when you're trying to have a baby, with your husband encouraging you?"

After Randy broke the news, Augusta, in shock but still hopeful that he would apologize and relent, administered her hormone shot. Neither of them slept, she says. But this was not a case of temporary cold feet. For two years, it turned out, her husband had harbored secret doubts about their relationship. "In my heart, there was just this little nagging, this little tweak going on that something here isn't right," Randy would say later in court. He added how much he regretted waiting so long to speak his mind. Learning of the couple's impasse

and expecting them to enter counseling, the fertility center put the three embryos that had developed enough to undergo freezing into a liquid-nitrogen storage tank. "I was thinking, 'Okay, maybe we'll come out of this stronger, with more maturity,'" Augusta says. But the counseling sessions -- first with a therapist, then with a pastor -- foundered. Suddenly, Augusta says, the husband she thought had admired her for her strength was claiming that he needed to regain control of the family. "He said, 'Maybe if we had sex, the counseling would go faster,'" she recalls. "Now I'm going to give him sex to negotiate for a successful counseling session?"

Divorce & a Bitter Embryo Custody Battle

Somehow, Augusta and Randy coexisted in the same house, eating together but sleeping in separate rooms: "I tried to make things as normal as possible," she says. Finally, in December 2002, Randy filed for divorce. In the settlement, Augusta got the house and Randy got the 32-inch Sony TV and some furniture. The embryos' fate was still to be decided.

"I think Augusta absolutely deserves to have them," says her lawyer, Rebecca Reitz. "I just don't think the in vitro process should create the veto that the law seems to give men over women. The effect has been that the husband can say, 'I don't want you to have this child.'" Reitz is 52 and intense, with white-blond hair, lively blue eyes, and a throaty voice. A former dental hygienist, she earned a law degree at 40 after promising her attorney husband, who is 18 years older, that she'd take care of him forever if he'd put her through law school. She jokes that she once took on clients only if they liked her King Charles spaniel. But she warmed to Augusta within minutes of speaking with her. There was, undeniably, the intriguing possibility of making Texas law where none existed. But equally significant, Reitz says, was Augusta's sincerity.

"She has a quiet, simple desire to have her child," Reitz says, adding that if Augusta were pregnant -- by any means -- "Randy Roman could not have forced her to have an abortion or to give the child up for adoption."

In February 2004, the Romans finally went head-to-head in a bench trial before the Honorable Lisa A. Millard, whose Harris County courtroom is decorated with drawings by her grandchildren. Reitz argued, among other things, that her client believed that life begins at conception. (Augusta now deeply regrets her two abortions and sees her current infertility as some sort of divine retribution.) By not awarding Augusta the embryos, Reitz said, the court would be denying the plaintiff her constitutional right to procreate.

"If you are not awarded these embryos to implant in your womb, do you believe you'll ever have children of your own?" Reitz asked her client. "I don't," Augusta replied.

When Randy's lawyer, Gregory Enos, asked her about adoption as an alternative, she again stressed her desire for a biological child and her firm conviction that the embryos were her children.

As for the agreement Augusta and Randy had signed with the Center of Reproductive Medicine, Augusta said she thought it was with the clinic, not between her and Randy. In addition, she testified, one section of the document referred to "remaining" embryos. Augusta says that when she checked the box, she thought she was agreeing to discard embryos left over after an implantation. And that implantation had never occurred.

Augusta was willing to relieve Randy of financial and emotional responsibility for any children that resulted from her pregnancy and to keep his name off their birth certificates. But when questioned by Enos, Randy testified that he hadn't intended to be a mere sperm donor and was greatly disturbed by the thought of Augusta raising his children alone. "I believe in the traditional nuclear family," he said.

If the court did award Augusta custody of the embryos, he would take responsibility for any children, he said. But, he added, "[the embryos] were not created to be used against my

wishes." "[Why] would it matter to you that she's out there with children that have your DNA?" Enos asked.

"I could not bear the emotional consequences of being forced out of my child's life," Randy replied. "And if my DNA does bring a child in[to] this world, I would want to be a father in every sense of the word, such as financial, emotional, spiritual, soccer, Little League, everything else in between."

Rather than asking to discard the embryos, Randy was now requesting permanent cryopreservation. "Is it just easier on your conscience to have them frozen forever instead of having them destroyed?" Reitz asked. Enos objected, and Millard sustained before Randy had a chance to answer.

The judge announced that she would read her ruling on the embryos at 9:00 the following morning. Augusta was held up in traffic. Millard sidestepped the constitutional issues and the sticky question of when life begins. She treated the embryos as community property, and she awarded them to Augusta. Reitz met Augusta in the hallway, told her the news, and the two women hugged. Then Augusta, weeping, entered the courtroom and repeatedly thanked Judge Millard.

The case was far from over, however. Almost immediately, Randy Roman appealed the court's ruling. The embryos remain in storage, where they have been ordered kept pending all appeals.

The Bigger Picture: Embryos in Divorce Cases

There are now estimated to be close to half a million frozen embryos in the United States. Although President Bush has declared embryos to be "unique and genetically complete, like every other human being," there is no national policy defining what, exactly, they are in the eyes of the law. Thus, there is no policy about what to do with any "leftovers." Are they property or human life? Potential life, because they can't thrive outside the womb? Or "microscopic Americans," as the conservative newspaper columnist Deroy Murdock has called them?

So far, the half-dozen state supreme courts that have handed down opinions about embryos in divorce cases have sided with the individual's right not to be forced into parenthood. The first such case, in Tennessee, came closest to clarifying the status of embryos. It was 1992 -- still early in the era of IVF treatment -- and Junior and Mary Sue Davis hadn't signed an agreement. When they divorced, the lower court boldly declared their embryos "human beings" and gave them to Mary Sue. Junior appealed, and the Tennessee supreme court decided in his favor, stating that the partner who didn't want to procreate should generally prevail, an opinion that courts in subsequent cases across the country have followed. The court also declared embryos neither human nor property, but "occupying an interim category deserving a special respect." It ordered them destroyed.

No one tracks exactly how many couples divorce before their embryo implants take place. Usually such disputes are resolved informally, says Barbara Katz Rothman, a sociology professor at Baruch College and author of *Recreating Motherhood*. "Cases don't come up when things are going well," she says. "So you always end up with crappy, weird, unusual situations when everything else in the world that usually works" -- from informal negotiations between the couple to the pressures and pleadings of family and friends -- "has failed. It's not particularly sensible for these cases to be used as the basis for judging what happens to everybody else."

One case that began with discord yet didn't become a state supreme court battle was that of Allison Le Compte, 46, owner of a Houston human resources management company, whose divorce became final in 2005. Le Compte's attorney husband wanted to keep the 13 remaining embryos from two IVF cycles (which had produced their three children). Le Compte wanted to donate the embryos. "I was a little hesitant about giving mine up to an infertile couple," she says. "But I knew I was done." The divorce was so contentious that ultimately Le Compte decided to let the issue slide. She hasn't even called the clinic to see

whether the embryos remain in storage. But she can sympathize with Augusta. "Bless her heart. I don't blame her," Le Compte says. "Genetically, she knows what she's got, and those were her children."

This past February, to Augusta's dismay, Texas's first court of appeals overturned Lisa Millard's ruling and ordered the Romans' embryos destroyed, based on the clinic contract they signed. The court did not address Randy Roman's claim that he shouldn't be forced to father children he didn't want. In March, claiming that the appellate court had misinterpreted the contract and failed to weigh Augusta's interests against Randy's, Pamela George (a former law school professor of Reitz's) filed a motion for the court to rehear the case. By donating his sperm, she also argued, Randy had already consented to fatherhood, and it was too late for him to change his mind. The court declined a rehearing. As **MORE** went to press, Augusta's legal team was preparing an application to the state supreme court.

There is conflicting legislation in Texas regarding the status of embryos, says Reitz. "The penal code has recently been amended to state that life begins at the point of conception for the purpose of prosecuting people who cause a fetus to die by killing or injuring its mother. But embryos created with the IVF process are not subject to the penal code. And the family code does not view frozen embryos as children.... They're considered property." If Augusta's bid to appear before the Texas supreme court is granted, it will be the first such case to reach that level in the state. Reitz hopes it will be a legislative call to arms to give fertilized embryos protected status.

"The law is having trouble keeping up with technology," she says. If the motion is declined, Augusta will have to decide if she wants to take her case to the U.S. Supreme Court.

Despite the fact that she supports Augusta's contention that life begins at conception, Rebecca Reitz is pro-choice. *Roe v. Wade*, she asserts, guarantees a right to reproductive privacy that, in essence, runs both ways. "Our legislatures cannot require us to have an abortion," she says. "So I don't think it should be any different than if Augusta had gotten pregnant any other way. Life has been created."

If you buy the argument that judges should not require a woman to "abort" an embryo, implanted or not, what about the notion that a man should not be required to produce children against his will?

"I understand the argument -- 'I'm not in love with this woman anymore, and I need a complete break,'" says Ellen Waldman, a professor at Thomas Jefferson School of Law, in San Diego. "But when you weigh that against the individual looking for this very special relationship [with a child], which is not easy to create, I don't think the argument measures up." She suggests that judges consider the human yearning for childbearing, then weigh possible alternatives before awarding embryo custody -- adoption, perhaps, or donor eggs or sperm. Ultimately, they could create a "last chance" standard for someone looking at his or her only option for having a biological child.

This line of thinking alarms Theresa Erickson, a 40-year-old San Diego attorney who specializes in reproductive law. Years ago, as a married law school student with two children, Erickson became a repeat egg donor herself, and she sympathizes with infertile women. But, she says, "if we make rulings that say, 'If it's her only embryo, let her use it,' then we may step into an era where, if a woman wants to have an abortion, then the man could have a similar right to weigh in. It's a slippery slope."

A slippery slope where, theoretically, a man claiming a constitutional right to parenthood might be able to implant an embryo made with his ex-wife's egg in another woman.

And yet, isn't that eerily similar to what Randy Roman wants to avoid? "There's an element of rape or assault if someone makes a child with your gamete without your permission," insists Arthur Caplan, director of the Center for Bioethics at the University of Pennsylvania, Philadelphia. "If a divorced couple can't agree, then it shouldn't be used," he says.

That buzzing noise you hear? It's the sound of King Solomon's head spinning.

This is not where Augusta, who now uses her maiden name of Nzoiwu, expected to be at midlife -- without a family and in a state of limbo, her biological options running out. "I'm consumed with getting my kids and moving on," she says, rubbing wearily at her face. Her court fight leaves her little free time. At one point she held down three jobs to pay legal fees that have now mounted to more than \$60,000. "Catching up on sleep, that's my lightening up," she says. "Dating is the last thing on my mind."

Reitz has stopped billing her, but Augusta charged \$15,000 to her credit card to pay for Pamela George's appellate work. She even tried, unsuccessfully, to sue Randy for fraud.

These days she is sending less of her \$40,000-a-year salary home to Nigeria. Although her family is encouraging, she says, they're shocked by what she is spending on her fight. "When you're making \$250 a month and your sister is spending \$250 an hour [on lawyers], it doesn't make sense," Augusta says. "I tell them, 'This is for my family. This is for my future.'"

For now, the embryos remain at the Center of Reproductive Medicine in a locked, alarm-equipped container in a locked, alarm-equipped room. The hospital where Augusta works is right next door. When she drives her old Honda Del Sol from the hospital parking lot onto palm-lined Medical Center Drive, she glances over at the low-slung clinic building where the embryos lie. "If I could just reach out and get them..." she muses. "But you can't do that."

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