

Custody Battle Over an Egg

Divorced Couple's Fight Over Embryos Could be Headed for State Supreme Court



Embryos created by in vitro fertilization have increasingly been at the center of custody battles. (AP Photo)



By **SIBILE MORENCY**

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When Randy and Augusta Roman got married nine years ago, they could not have foreseen the tremendous challenges they would face trying to create a family.

After numerous failed pregnancies, miscarriages and various fertility treatments, in vitro fertilization became their last hope for a child together, but then, the night before the embryo transfer was to be performed, Randy Roman asked for a divorce.

"I was shocked. I was not expecting that at all, especially the night before the transfer. All along [he was] telling me what a wonderful mom I would be, supplying the sample, never letting on there was a problem," said Augusta, a 45-year-old nurse.

Randy, a 46-year-old aerospace technician, filed for divorce in December 2002 and the ensuing court proceedings turned into a bitter fight.

Divvying up the house, the 32-inch Sony TV and the furniture was not much of a challenge for either party. The point of disagreement between the two was the fate of their shared embryos.

Embryos: Offspring or Property?

Augusta wanted custody of the embryos in order to carry one to term. Randy, who no longer wanted to be a father, wanted the embryos to be destroyed.

Before Augusta and Roman began the in vitro fertilization process, they were both required to sign a consent form in which they agreed that if they divorced, the embryos would be discarded.

"I signed the form but I never expected us to get a divorce. I just wanted to move forward with what we were doing. Didn't think much of it," Augusta said.

Greg Enos, Randy Roman's attorney, insisted on the need to enforce the contract they had both signed at the fertility clinic. "They had an agreement. Part of the consent was what to do with the embryos," Enos said. "They had agreed on what to do."

Rebecca Reitz, Augusta's attorney argued that "when Augusta signed the form at the Center of Reproductive Medicine, she presumed that she would have the initial implantation, and that only the embryos left over would be discarded."

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The consent form also allowed for either Randy or Augusta to change their minds, Reitz said.

In addition to deciding whether to enforce the consent form, Reitz insisted that the court needed to take into account her client's age and the fact that Augusta's window of biological opportunity was diminishing.

To have children," Reitz said. "She just really wants to have a biological child."

Enos insisted that Randy did not "want children with a woman he was not married to. She had other options. She elected not to pursue them. She wants a baby with a man she can't stand."

Lisa Millard, the judge presiding over the 310th Judicial District Court of Harris County, Texas, ruled in favor of Augusta and awarded the embryos to her as property, tactfully sidestepping the issue of the embryos being live beings.

Upset by the court's ruling, Randy Roman filed an appeal and this time the judge ruled in his favor. Augusta decided to fight that ruling, and filed an application to the Texas Supreme Court, which has not yet decided whether to take the case.

Whose Embryo Is It?

The disposition of embryos of divorced couple is an issue that courts have been facing all across the country, and the trend has been to rule in favor of the party who wants the embryos destroyed.

The first such case came out of Tennessee in 1992. Junior Lewis Davis sought a divorce from his wife, Mary Sue Davis, after they had initiated the in vitro fertilization process together. He no longer wanted to be the father of her child.

Nevertheless, Mary Sue wanted to proceed with the IVF process. In granting the divorce, the Blount County court awarded custody of the pre-embryos to Mary Sue. Junior Lewis appealed that decision and the Supreme Court of Tennessee ruled in his favor, explaining that "ordinarily, the party wishing to avoid procreation should prevail."

The state supreme courts of Massachusetts, Washington and Iowa have also all ruled in favor of men who did not want their ex-wives to bear their children after they had divorced.

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Reitz said the trend has been "to give the parent who did not want the embryo to be implanted preference."

"Courts are worried about the psychological fallout," Thomas Jefferson School of Law professor Ellen Waldman said. "There is not a lot of sympathy for the individual desperate to be a parent because the legal system in our society is much more concerned with preserving autonomy over the desire for connection of a parent who wants an embryo."

She said she would not expect the Texas Supreme Court to rule in Augusta's favor if it takes the case.

"Courts have not been sympathetic to women who want to be mothers," Waldman said. "These cases are about people in the face of huge obstacles, but the courts aren't really valuing these family aspirations."

Redefining the Abortion Debate

Reitz said the court rulings undermine the rights of control over their bodies that were ensured by the Roe v. Wade U.S. Supreme Court decision.

"The law is giving men the right to be a father or not. We need laws saying women can use embryos. Men have no right to say they can't implant them," she said. "I think Roe v. Wade is being undermined."

She said men are "being allowed to choose if they want to be fathers or not."

Barbara Katz Rothman, sociology professor at Baruch College and author of "Recreating Motherhood," said the debate is mostly conducted in language that does not properly address the issue.

"We act as if science is driving our decisions, but what we've been doing is using the language of science to reaffirm a very old cultural notion," said Rothman, who has written about the social and legal issues raised by in vitro fertilization. "I think of [the embryos] as property, not a child. A piece of property [a man] had little investment in."

[The woman] had more, the surgery, the shots, etc...so the embryos should be awarded to her because she might be able to have a baby," Rothman continued. "He can't do anything with it. But we're complicating it with our old ideas of parenthood. Socially, culturally, legally, psychologically it's hard for him to say it's not mine."

'We Believe We're Right and We're Ready to Keep Fighting'

Augusta will fight the case until the end, Reitz said.

"If the Texas Supreme Court accepts the case, I think Augusta will refinance or sell her house to continue the fight. I am with her to the end. I brought her to this dance and I'm not leaving her alone," the lawyer said.

If the Texas Supreme Court does not reverse the appeal court's ruling, Augusta is prepared to take her case to the U.S. Supreme Court.

In the meantime, she is trying to prevent other women from making the same mistake she made.

"I would like to encourage the women to sign the embryos over to themselves and not compromise," she said. "Although it won't stop lawsuits, the woman will be at an advantage, since she bears all the physical sufferings involved in the IVF process."

"As more people are using assisted reproductive technology, the divorce rate is staying the same. Typically people are addressing courts reluctant to enforce agreements," said Ellen Waldman.

Dr. Vicki Schnell, founder and director of the Center of Reproductive Medicine in Webster, Texas, where Augusta and Roman's frozen embryos are being kept pending the outcome of their legal battle, said that when couples decide on in vitro fertilization, they need to think clearly about what they want done with the embryos under any situation.

"In most cases, those [consent forms] will hold in court," she said. "IVF is very successful; chances of getting pregnant are very high. People don't really think about it, they need to make sure they're on the same page," Schnell said. "You just need to be aware of what you're doing."