

Frozen assets: Who gets the embryos when a couple splits?

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Esther Farnós-Amorós, a visiting scholar at Cornell Law School, spoke on divorce and legal disputes over frozen embryos Nov. 24 at the Law School.
Image: Jason Koski

(PhysOrg.com) -- Divorcing couples have always fought over property, income and custody of children. But technology has added an even more contentious item to the list: the frozen embryos the couple created during happier times.

Esther Farnós-Amorós, a visiting scholar at Cornell Law School, answered that question and more in a Nov. 24 talk comparing how courts in the United States and European Union handle this issue. About 20 people came to the Law School's Saperston Student Lounge to hear her speak.

Farnós-Amorós began by describing the legal landscape in the United States. With more than 400,000 frozen embryos and a divorce rate close to the 50 percent, the country has seen seven state courts deal with cases of "custody" of frozen embryos between ex spouses since the early 1990s. So far the courts, through a variety of approaches, have usually favored the party wishing to avoid procreation. However, since the data suggest that these conflicts will become more common, uniform criteria for legal decisions are needed, Farnós-Amorós said.

European courts have taken a quite different approach because of major regulation on assisted reproductive technology. However, relying on clearly defined rules that require the future parents' consent at every stage of infertility treatment, European courts have also favored the interest of the party opposing procreation.

But those rulings are based on faulty reasoning, problematic in frozen embryos disputes, that assumes there is a "right not to procreate," she said. The "right" presupposes that a genetic link between a child and its progenitors always develops into some kind of psychological or legal link. This is a debatable point given the context of assisted reproductive technology. On other occasions, courts have appealed to this right based on public policy that avoids enforcement of agreements involving procreation, such as surrogacy or custody. However, these grounds are not entirely compelling in frozen embryo suits where the embryos are still in vitro when the couple divorces.

Farnós-Amorós suggested that uniform legislation be created to guarantee that couples give informed consent when using artificial reproductive technology and to encourage couples to make informed choices about disposition of the embryos before, not after, they are created. If there's no prior agreement and the couple splits, the courts should favor the party wishing procreation as long as legislation guarantees that no legal link between the future child and the other

progenitor is established.

What if neither parent wants to implant the embryos? What if both do? Default rules should be established for what to do with them -- which would surely stir up controversy, Farnós-Amorós said. "These default rules will depend on categorizing the embryo in a way that every legal system will endorse," she said. "Given its scientific and moral controversy, this discussion is beyond the scope of my work."

Farnós-Amorós is a Ph.D. candidate at the Universitat Pompeu Fabra in Barcelona, Spain. Her talk was sponsored by Cornell Law Students for Reproductive Justice.

Provided by Cornell University

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