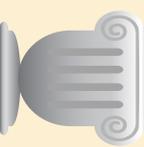
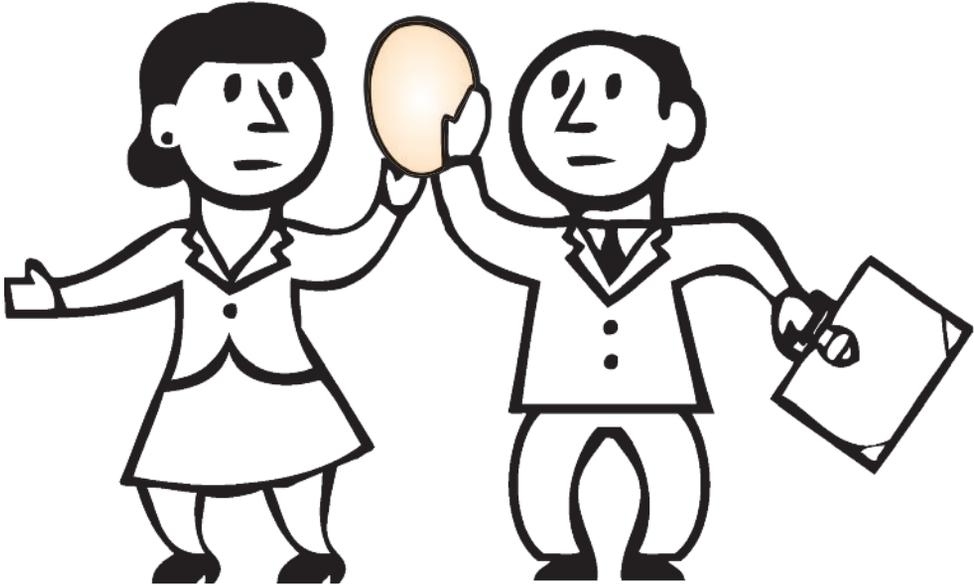


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# Avoiding a Science Fiction Soap Opera

*Excluding the Pre-Embryo from Probate*

BY BRIDGET M. FUSELIER

“The saddest aspect of life right now is that science gathers knowledge faster than society gathers wisdom.”<sup>1</sup> While this concept is expressed incessantly, it does not make it any easier to deal with the very difficult realities that come about as a result of the seeming warp-speed pace of scientific discovery and the glacial pace of understanding, wisdom, and a workable legal framework to go along with it. As we have seen the fertility industry develop since the first “test tube” baby in 1978, society has also witnessed the resulting legal and emotional issues that are more complicated than could have been imagined.



## An Introduction to the Process of Artificial Reproductive Technology (ART)

In order to create a pre-embryo to be utilized in all forms of assisted reproductive technology (ART), medical professionals must acquire sperm from the man and ova (eggs) from the woman. The process of acquiring the woman's eggs is more onerous, painful, and risky than acquiring sperm. The woman undergoes a drug-induced process intended to stimulate her ovaries to produce as many eggs as possible in a single cycle.

When the eggs are sufficiently mature, they are harvested using a needle-guided ultrasound to remove them from the woman. It has been common practice for at least the past 10 years to attempt to fertilize all available eggs because cryopreservation of an egg without fertilization remains an experimental procedure. The fertilization of all available eggs takes place in an effort to have as many viable pre-embryos available for ART initially, and for future attempts without having to subject the woman to more drugs, medical procedures, and emotional strain involved in every cycle of harvesting eggs.

The end result, however, is that the reproductive material of the man and the reproductive material of the woman combine to create something new that emerges from the initial stages of cell division. There is the possibility of the continued development of a human life. Because of this very fact, the pre-embryo falls somewhere in a state of legal purgatory — not a legally recognized person at this stage of development and, yet, something more human than the things we normally associate with property.

### Pre-Embryos: Property, Person, or Something Else?

The setting for the disputes considered in this article are in the context of having two gamete providers, neither of whom are “donors.” Donors do not have any rights to their reproductive material once the donation to the appropriate clinic or individual is made.<sup>2</sup> However, in the relationship of a man and woman who both desire to have involvement in the life of any potential child and are providers, not donors, the clearest approach is to take the property laws and modify them to meet the needs of this property with special dignity.<sup>3</sup> Thus, we must look to the current laws of concurrent ownership and probate to deal with the very difficult and challenging issues that arise in this context. Because of this hybrid state of existence, using property law as the basis and making changes where needed allows the law to provide a degree of dignity to the pre-embryo and takes into account its differences from other items of property.

During the lives of the gamete providers, those individuals should be given the autonomy to determine how the pre-embryos will be used, transferred, and disposed. And as long as one of the providers is alive, that individual can make decisions regarding the fate of the cryopreserved pre-embryo according to their own wishes and the wishes of the other gamete provider who is now deceased. However, once both individuals

are deceased, any pre-embryos remaining in the cryopreserved state are sitting at fertility clinics and storage banks with a fate that must be determined. That is when questions regarding use, disposition, and transfer become most crucial.

### A Client with a Problem for a Lawyer to Solve

Before getting married, Jane was diagnosed with cancer. She was to undergo chemotherapy and radiation treatments that would likely destroy her ovaries. Prior to her treatment and marriage, Jane and her soon-to-be husband John create pre-embryos in their efforts to have a biological child. The pre-embryos are cryopreserved, waiting to be used in the future after Jane completes her medical treatment and she and John are married. Jane and John marry; they successfully go through the IVF process and deliver a healthy baby girl, Joan. The Smiths then have three pre-embryos at the clinic that remain in cryo storage. Mr. and Mrs. Smith had a contract with their fertility clinic indicating that Mrs. Smith was opposed to destruction of the pre-embryos. She did not express an intent regarding use for scientific research. Mr. Smith did not oppose any form of disposition of the pre-embryos.

Mrs. Smith died in a tragic accident. At the time of her death, she was still happily married to Mr. Smith; Joan was a teenager who had a rare condition in which she was born without any ovaries. Mrs. Smith died with a will that she had prepared shortly before her death devising the cryopreserved pre-embryos to her daughter. Joan requested the cryopreserved pre-embryos from the clinic, claiming them pursuant to her mother's will so that she can have them implanted to carry a child. When the clinic notifies Mr. Smith, he opposes such a transfer and does not like the idea of his daughter possibly carrying and raising a child that is genetically her brother or sister.

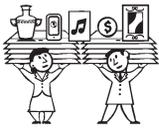
If Joan and her father cannot agree as to what should happen to the pre-embryos or whether or not Joan should be able to use them to have a child, either of them could transfer their interest in the pre-embryos or they could even ask for partition. Joan could demand possession of the pre-embryos as a co-owner of property, but then what would she do with them? Could she use them over the objection of her father? The answer should most definitely be a resounding no in this instance.

Mr. Smith is in a lawyer's office and he wants to know what to do. Surely the lawyer has an answer.

### An Extension of the Tenancy By the Entirety as The Solution

There are three different forms of concurrent ownership — tenancy in common, joint tenancy, and tenancy by the entirety. Of these three forms of ownership, the tenancy by the entirety is the most desirable starting point for crafting a solution.

A tenancy in common allows the undivided interests that are held to be freely alienable, devisable, and inheritable. The commonly owned property can also be partitioned at any time at



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the will of one or more concurrent owners. This form of cotenant relationship would not provide a workable framework in this context.

The joint tenancy is similar, but includes the key component of survivorship. Once joint tenants begin to die, those fractional shares are not devisable or inheritable due to the survivorship component. However, a severance of the joint tenancy may occur during a joint tenant's lifetime that defeats the right of survivorship. If that situation occurs, then that fractional share that has been severed does become devisable and inheritable just as a share in any other tenancy in common.

A better starting point is the tenancy by the entirety.

*During the lives of the gamete providers, those individuals should be given the autonomy to determine how the pre-embryos will be used, transferred, and disposed. And as long as one of the providers is alive, that individual can make decisions regarding the fate of the cryopreserved pre-embryo according to their own wishes and the wishes of the other gamete provider who is now deceased. However, once both individuals are deceased, any pre-embryos remaining in the cryopreserved state are sitting at fertility clinics and storage banks with a fate that must be determined.*

### **Why do these characteristics of the tenancy by the entirety work so well when discussing the pre-embryo?**

The tenancy by the entirety is another form of concurrent ownership that is a special form of joint tenancy only available to married couples, save a couple of exceptions such as Hawaii, that recognizes this form of concurrent ownership for life partners.<sup>4</sup> The tenancy by the entirety is similar to the joint tenancy, but with three important differences: the individual undivided interests cannot be transferred without the consent of both spouses; partition is available by agreement only; and the relationship can only be severed by a divorce, which will then result in a tenancy in common.

A modified tenancy by the entirety for pre-embryos would still include the non-severable right of survivorship and the inability to transfer the pre-embryo for adoption or donation to research absent an agreement by both parties; but would also include no partition under any circumstances and the pre-embryos would not be devisable or inheritable at the death of either party.<sup>5</sup>

The tenancy by the entirety can resolve issues during the lifetime of the parties relating to severance and partition to make the pre-embryo context more manageable. An undefeatable right of survivorship as found in the tenancy by the entirety would eliminate the questions raised in the case of Mr. and Mrs. Smith. She could not defeat the right of survivorship in her husband and, at Mrs. Smith's death, her fractional share would immediately cease to exist, leaving nothing to pass through her will to Joan. Mr. Smith would then have 100 percent ownership in the pre-embryos. Joan would no longer be in the picture.

### **Additional Changes to the Tenancy by the Entirety**

#### *Extension to Unmarried Couples*

The tenancy by the entirety has only been recognized within the confines of marriage because it was believed that the husband and wife became one person.<sup>6</sup> However, in the context of ART, there are often times when pre-embryos are created outside of marriage. This form of ownership fits in this context because of the relationship between the male and female providers, as well as some of the particular characteristics of the pre-embryo. This form of concurrent ownership with unmarried gamete providers can be justified due to the "oneness" they essentially share as creators of the pre-embryos. Their individual contributions to making the pre-embryo are now so merged together and intertwined that they can no longer be singled out and identified. Additionally, the closeness and interdependence of the parties is analogous to the unified husband and wife traditionally used at common law. The relationship created in the process of making the pre-embryo is also one of a single unit, a joint action involving mutually dependent parties.

#### *The Final Death Disposition*

At the time of an individual's death, there must be a determination of what assets remain that must be disposed of either through the decedent's will or by the laws of descent and distribution. Probate courts only have jurisdiction to distribute property of the decedent. In determining what is subject to disposition at death, a categorization of probate vs. non-probate property occurs. The Restatement Third of Property defines the probate estate as consisting of "property owned by the decedent at death and property acquired by the decedent's estate at or after the decedent's death."<sup>7</sup> Probate property "refers to assets subject to administration under applicable laws relating to decedents' estates."<sup>8</sup> Property owned at death is described as property that the decedent had actual ownership of and not merely ownership in substance.<sup>9</sup> Ownership in substance is different from actual ownership because true legally recognized ownership of the property. However, ownership in substance refers to property that the decedent did not own, but over which the decedent had sufficient control, such as through the power to become the owner or to be treated as the owner for some purposes.<sup>10</sup>



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The pre-embryo could very easily be viewed as something that the decedent has ownership in substance rather than actual ownership. This helps alleviate the idea of the pre-embryo as pure property. While many people would accept the idea of actual ownership of cells, tissue, even reproductive material such as sperm, the concept of actual ownership of the pre-embryo becomes more troubling. However, if ownership in substance is the principle used in that context, the gamete providers would not have actual ownership or legal title to the pre-embryos as they would for a piece of land or for a car. However, they could enjoy ownership in substance, which acknowledges their rights to exercise control over the pre-embryos. If there is no actual ownership of the pre-embryos and only ownership in substance, then the pre-embryos would not be within the parameters of a decedent's probate estate. As defined by the restatement, the probate property is only that which the decedent enjoyed actual ownership in.<sup>11</sup>

As with any tenancy by the entirety, when the first provider dies, nothing passes through that individual's will or by intestate succession. However, there also needs to be a mechanism in place to prevent any pre-embryos from passing through the will of the survivor or by intestate succession if the survivor dies intestate. Basically, the parties are forced to make a disposition or direct the ultimate disposition of the pre-embryos during life. If the parties had expressed a joint desire for the pre-embryos to be donated to scientific research or to another individual for implantation by inter vivos agreement, then that agreement would be honored. If such disposition does not occur, then the default is destruction of the pre-embryos. This is the important final piece to put into place. While this may seem like a harsh result at first glance, it would actually avoid many of the more complicated problems that would otherwise arise upon death that the legal system is not equipped to handle.

There have been very few instances where a court has had to make a determination of the disposition of reproductive material at death and it has been in the context of sperm rather than a pre-embryo. Determining how to handle a pre-embryo will prove to be even more of a dilemma without guidance. Two reported California cases have addressed the issue of how to treat cryopreserved sperm at death. In *Hecht v. Superior Court*, although the court seemed reluctant to discuss the sperm in terms of "property," the court determined the decedent's interest in his cryogenically preserved sperm was "property" that could be within the jurisdiction of the probate court.<sup>12</sup> The court cited to the American Fertility Society's ethical statement that "it is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such dispositions are within medical and ethical guidelines."<sup>13</sup> The court concluded that the sperm was a unique "property." The court could not have properly ordered the sperm destroyed by applying the provisions of the will.<sup>14</sup> Additionally, in the case

of *In re Estate of Kievernagel*,<sup>15</sup> the court agreed with the *Hecht* court finding that the gametic material is to be a unique type of property and, thus, not governed by the general laws relating to gifts of personal property or the transfer of personal property upon death.<sup>16</sup> At the time of his death, he still had an ownership interest that gave him decision-making authority as to the use of his gametic material for reproduction.<sup>17</sup>

While the courts have found it somewhat possible to address the question raised with regard to sperm alone, once the egg and sperm are joined to form the pre-embryo — which has the potential to continue developing into a human child that is the genetic product of two deceased individuals — the pre-embryo cannot be treated exactly the same as sperm or eggs separately, or, even, the same as other body tissue and organs. Both parties had an interest in the pre-embryo and the law must consider the interests of both parties.

The process as proposed would basically work as follows: (1) put in place a tenancy by the entirety form of concurrent ownership with the modifications explained in this article; (2) during lifetime, the parties would not be able to effect a severance or demand partition of the pre-embryos; (3) upon the death of the first provider, that provider's interest would pass to the survivor; (4) the survivor's ability to use or dispose of the pre-embryos would still be impacted by express written desires or objections of the decedent made during his or her lifetime; (5) upon the death of the survivor, if no inter vivos disposition has been made, the remaining pre-embryos will be discarded.

The proposed scheme coupled with clear statements of intent of the parties placed in a modified tenancy by the entirety framework can create the best possible formula for dealing with disposition at the death of the providers. This framework has already established that the original survivorship component would work upon the death of the first provider, leaving the second provider with complete possession and ownership of the pre-embryo. However, as recognized in *Hecht*, the intent of the provider must be considered even after death. This may limit the dispositions allowed at the hands of the surviving provider. However, it does eliminate the possibility of a multitude of fractional shares of ownership from becoming involved.

### Can Mr. Smith's problem be solved with this framework?

If this new framework were adopted, a lawyer could provide Mr. Smith with a relatively clear answer to his problem. The first issue would be that any interest his daughter is claiming under Mrs. Smith's will is invalid. With the non-severable right of survivorship in place, Mrs. Smith could not have done anything during her lifetime to destroy the right of survivorship. Additionally, using the traditional common law rules of tenancy by the entirety, Mrs. Smith could also not make a transfer of her interest in the pre-embryo without the consent of Mr. Smith. Therefore, at the time of Mrs. Smith's death, 100-percent ownership resides with Mr. Smith. This result allows Mr.



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Smith to avoid the scenario where his daughter could possibly give birth to her biological sibling, making his biological child his grandchild.

Mr. Smith can also rest easy knowing that upon his death he would not have to worry about his daughter trying to claim the pre-embryos passed to her as part of her father's personal property in his will or through the laws of intestate succession if he died intestate. During the remainder of his life, he could make a disposition of the pre-embryos consistent with his deceased wife's wishes as expressed during her lifetime or know that the pre-embryos would be discarded upon his death. By preventing the pre-embryos from passing through Mr. Smith's probate estate or through the laws of intestate succession, even more troublesome problems are eliminated.

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Think about the situation already considered and layer onto it the fact that Mr. Smith remarries. At the time of his death, he is married to Mrs. Smith #2. If the pre-embryos were classified as property under the restatement's definition, for example, Mr. Smith's death without a will could lead to a complicated situation. Just using the Texas Probate Code for illustration, according to Section 38, if a person dies intestate with a surviving spouse, all real and personal property shall pass with the surviving husband or wife taking one-third of the personal estate and the balance going to the child or children of the deceased and their descendants. This would mean that Mrs. Smith #2 would have a one-third fractional share of the pre-embryos and

the remaining two-thirds would pass to Joan. The emotionally devastating dispute that could possibly arise between Mrs. Smith #2 and Joan defies comprehension. Keeping the pre-embryos out of Mr. Smith's probate property prevents these discussions from even starting.

### Conclusion

While no current system works in the context of a pre-embryo, establishing a modified tenancy by the entirety would do the best job of addressing potential problems to come. By extending the tenancy by the entirety relationship and further defining it in these unique circumstances, the best possible results could be achieved for all parties involved. While the ultimate possibility of destruction of the pre-embryos may seem to be a harsh result, it is a much more workable and humane decision than the potential science-fiction soap operas that could otherwise occur.

### Notes

1. Asimov, Isaac, *Isaac Asimov's Book of Science and Nature Quotations* (1988).
2. Unif. Parentage Act art. 7, §702 & cmt. (2002) ("A donor is not a parent of a child conceived by means of assisted reproduction," and, "[t]he donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation."); Tex. Fam. Code Ann. §160.702 (Vernon 2008).
3. See Fuselier, "The Trouble with Putting all of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes over Cryopreserved Pre-embryos," 14 Tex. J. Civ. Lib. & Civ. Rts. 143 (2009).
4. See Dukeminier, et al, *Property* (6th ed. 2006). (In 1997, Hawaii enacted legislation permitting a tenancy by the entirety to be created between "reciprocal beneficiaries," that is, unmarried persons who are prohibited from marrying one another).
5. The concept of partition is beyond the scope of this argument. See Fuselier, *The Wisdom of Solomon: Why We Can't Split the Pre-embryo*, *Cardozo Journal of Gender & Policy* (April 2011). The concepts of the pre-embryo in the probate process as well as issues involving partition are explored in depth in the article forthcoming this spring.
6. See reference above to recent legislation in states such as Hawaii allowing for recognition of such form of concurrent ownership outside the marriage context.
7. See Restatement 3d of Property (Wills & Don. Trans.) §1.1 (1999).
8. *Id.*, cmt. a.
9. *Id.*, cmt. b.
10. *Id.*
11. Cite to restatement definition here.
12. 20 Cal. Rptr.2d 275 (Cal. App. 1993).
13. See *Hecht* at 282.
14. See *Hecht* at 283-84.
15. 83 Cal. Rptr.3d 311 (Cal. App. — 2008).
16. *Id.* at 315.
17. *Id.* at 316.

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