

Embryos on separation

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Embryo storage laws and their relevance

- The maximum periods for which eggs, sperm or embryos can be stored are defined in law. Until July 2022, only patients who were “prematurely infertile” were permitted to extend storage beyond 10 years.
- On 1 July 2022, the law changed so that all patients can now extend storage up to a maximum of 55 years (effectively lifetime storage), subject to choosing that term and renewing their consent at least every 10 years (HFEA 1990 s.14 as amended by Schedule 17 of the Health and Care Act 2022).
- Given the extended storage period for embryos, it is likely that more separating couples will have embryos in storage and this is going to become an increasingly important issue for family lawyers.

The law on the use of embryos

- Consent of the gamete providers is the lodestar
- No power for the court to make orders in respect of embryos
- *Evans v The United Kingdom* (2007) No 6339/05

Withdrawal of consent to storage of embryos

- HFEA 1990, Schedule 3
- Guidance Note 5 of the HFEA Code of Practice (9th edition)
 - Consent to storage can be withdrawn at any time by a gamete provider
 - If no agreement between the gamete providers, a 12 month cooling off period is triggered during which time the embryos cannot be used in treatment or research
 - If, at the end of the 12 month period, there is no change of position, the embryos must be destroyed.

Consent of gamete providers should be checked at agreed intervals of storage and prior to any treatment taking place.

Implications for legal parentage

- Mother – will always be the woman who gives birth to the child regardless of whether or not her egg has been used (s33 HFEA 2008).
- If woman's egg is used but not the woman who carries the child has no impact on legal parentage (s47 HFEA 2008).
- Father/second legal parent – assuming no genetic relationship to the embryo:
 - If married/in a civil partnership with the Mother and cannot be shown 'does not consent' then will be a legal parent regardless of where treatment takes place (s35 and s42 HFEA 2008).
 - If Mother has remarried/in a civil partnership does not matter that embryos were created with a former partner.
 - If unmarried then issue is whether or not fall within provision of s36-37 or 43-44 HFEA 2008.

- Father – if a genetic relationship to the embryo and mother has not remarried/in a civil partnership or and no person to whom s36-37 or s43-44 applies then will be a legal parent by virtue of common law.

Practical tips and pitfalls

- Consent may be withdrawn at any point up until embryos used.
- Be careful when notify clinic.
- Consider a referral to a fertility counsellor – emotional consequences of decision.
- Consider whether mediation might help the parties reach a resolution.
- 10 family limit for donor gametes.
- Costs of storage.
- Availability of NHS funding.

- Only routes to extinguish legal parentage of former partner would be via adoption or a parental order by the parent using the embryos.
- Agreement or undertaking that will not seek to register on the birth certificate or seek a declaration of parentage.
- Agreement or undertaking that will not seek child maintenance either via the CMS or pursuant to Schedule 1 CA 1989.
- Risk of other parties seeking to bring a Schedule 1 claim.
- Nominal spousal maintenance or consent order pursuant to Schedule 1.
- Renewal of consent to storage.
- Exportation – must comply with HFEA Directive 0006.

Case Studies

Bob and Jane

Bob and Jane are unmarried. They have frozen embryos created in 2020 with Jane's eggs and Bob's sperm stored at a UK licenced clinic. In 2022 they separate. In 2024 Jane wants to proceed with treatment using the embryos as a single woman. Bob is happy for her to do so but he does not want to be a legal parent.

Harry and Sally

Harry and Sally are married. In 2019 they undergo IVF using donor eggs and sperm and conceive Lucy who is born in 2020. The remaining embryos created are frozen. In 2022 they separated but neither started divorce proceedings. In 2024 Sally wants to proceed with treatment using the embryos with her new partner, Frank. Harry does not want to be a legal parent nor does he want Sally to have another child who is genetically a full sibling to Lucy.

Reform

- Permit “donation” of embryos created with one of couple’s sperm to the other without conferring legal parentage or more generally to permit donation to a single person without conferring legal parentage.
- Reform s35 and s42 HFEA to change ‘lack of consent’ to refer to the issue of legal parentage rather than treatment.
- Provide for the court to determine ownership of embryos between parties.
- Permit embryo agreements to be determinative.

