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SEMINAL UPDATES IN INDIANA ART LAW

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Overview

- Legal and policy updates
- Case law updates – embryo disposition

Indiana's Abortion Law and ART

- IVF treatment is specifically exempted - IC § 16-34-1-0.5
- Life begins at fertilization – IC § 16-24-2-1.1
- No definition of pregnancy – does life begin before implantation?
- Cryopreserved embryos – should be exempted as product of IVF
- Must distinguish between embryos fertilized *ex vivo* and embryos fertilized *in vivo* – does the former constitute “life”?

ABA Model Act Governing Reproduction & Same-Sex Second Parent Adoption

- January 29, 2019
- Parentage sections track Uniform Parentage Act of 2000 (am. 2002)
- Second Parent Adoption – Same-Sex Couples
 - *Henderson v. Adams/Box.* - 7th Cir. 2017 – IN refused to allow non-birthing spouse on BC, said would have to legally adopt for parental rights
 - 7th Circuit – spouse of bio parent presumed to be second parent, both parents should be listed on BC
 - U.S. Supreme Court denies cert

Fertility Fraud

- Civil and criminal causes of action for fertility fraud in 2019 – IC § 34-24-5
- Woman, spouse, child can sue health care provider who knowingly/intentionally used own gametes without patient's written consent
- liquidated damages of \$10k or can sue for compensatory, punitive damages + attorney fees + treatment cost
- SOL for most – 5 years after discovery
- Crime = level 6 felony

CO – Protections for Donor-Conceived Persons & Families Law - 2022

- SB22-224 – CO is first state in U.S. to bar anonymous gamete donation and limit families created from one donor
- Effective Jan. 1, 2025
- Donors must agree to be open to children 18+, 10-family limit
- ART agencies licensed, must request donor updates, keep expanded records
- Requirement for educational materials from Dept. of Public Health and Environment

Freezer Failure Cases

- March 2018 – freezer failures at two major clinics (Pacific Fertility, San Francisco & University Hospitals, Cleveland) resulted in loss of thousands of eggs and embryos
 - Settlements and lawsuits in both cases
- Dec. 2019 – NJ becomes first state to regulate storage of human embryos – C.26:2A-23 – facilities must be licensed, criminal penalties for violation

Expansion of Surrogacy

- DC (2017), NJ (2018), NY (2021) allow compensated surrogacy
- Pre-birth orders allowed in NJ and NY
- Requirements for intended parents and surrogates
- Case law conundrums
- International surrogacy – infants denied citizenship, COVID-19 difficulties

Expansion of Surrogacy

- CO Surrogacy Reform (May 6, 2021) – CRS 19-4.5-102(2)
- Applies to gestational and genetic surrogacy
- Surrogate must be 21, have given birth, complete med and mental health evals, have attorney licensed in CO
- IPs must be 21, complete med eval, have attorneys, not required to be married/partnered/genetically related to child
- Parentage orders pre- or post-birth

Posthumous Reproduction

- Zhu – NY Supreme Court gave deceased man's parents full authority to determine ultimate disposition of son's sperm including for future procreation
- Son had not expressed preference while alive, but court relied on registration as organ donor, past statements he wanted a family of his own, cultural importance of continuing family legacy

Embryo Disposition Caselaw Update

- Bilbao v. Goodwin (Conn. Super. Ct. 2017). Adopted K approach to agreement said embryos destroyed if divorced – CT Supreme Court in 2019 affirmed K approach but found agreement was enforceable because there was consideration
- Matter of Marriage of Guardado (Wash.Ct.App. 2018) – balancing interests but looks more like contemporaneous mutual consent – H wanted embryo, W did not want child – embryo stored at H's expense, eventually parties awarded joint ownership

Embryo Disposition Caselaw Update

- In re Marriage of Rooks (Colo. 2018) – divorcing couple with 3 kids, W wants to use embryos – first consider agreement between parties, if none do balancing of interests – intended use of embryos, ability of party wanting embryos to have bio kids by other means, original reasons for undergoing IVF, hardship to party avoiding genetic parenthood
- Finkelstein v. Finklelstein (NY App. Div. 2018) – Supreme Court of NY – ex-husband’s revocation of consent sufficient to revoke his consent to IVF – embryo given to H to be disposed

Embryo Disposition Caselaw Update

- In re Marriage of Fabos and Olsen (Colo. Ct. App. 2019) – Parties signed agreement that didn't specify embryo disposition after divorce, said would be decided by court – appeals court said that trial court erred in weighing W's interest more heavily than H's
- Torres v. Torrel (Ariz. 2020) – K permitted either destruction of embryos following divorce or having a court settle issue, language suggest donation without a contemporaneous agreement to use them. W appealed, was given embryos. H appealed – AZ SC said that unless parties unilaterally agree what to do, could only opt to donate

Embryo Disposition Caselaw Update

- K.G. v. J.G. (2021) – Wife filed for declaratory judgment regarding rights under K for cryopreservation; H argued he had concerns about W’s fitness to parent and child support
 - SC of NY held that the husband’s arguments could not succeed because there were foreseeable consequences when H entered into IVF contract