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When IVF Clinic Forms Are Not Enough: Judicial Discretion Under New York Family Court Act §581-306

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A recent article published by The New York Times (NYT) highlighted a trial court-level embryo disposition dispute between a divorcing Brooklyn-based couple. The case has brought renewed attention to the enforceability of IVF clinic consent forms under New York law.

The dispute arose after the parties underwent IVF during their marriage, and the husband later, according to the NYT, revoked his consent with the IVF clinic to have the embryos transferred.

As is common in IVF clinics across the country, the clinic form reportedly offered several options regarding embryo disposition in the event of divorce, including that "[t]he embryos could be given to one party or the other, donated or discarded." The NYT article further stated that the parties had selected "option No. 1," and that "[w]ho got the embryos in the event of a breakup would be an issue for a New York divorce court."

However, the article later noted that the husband claimed "the embryos [were] to be donated to research...the option he and [wife] had chosen in an initial contract they signed when they first began IVF in 2021." These differing selections in clinic forms suggest the existence of multiple clinic forms, with potentially contradictory provisions governing embryo disposition.

Whether the parties executed one clinic form or multiple clinic forms, the central issue remains the same: the agreements apparently were not executed in compliance with New York Family Court Act §581-306, which requires each intended parent to have independent legal counsel prior to execution.

(Photo Credit: Tomasz Papuga - Fotolia)

The 'Millender/Rubin' litigation serves as a reminder of why practitioners should strongly consider advising their clients to seek out prenuptial agreements with embryo disposition clauses.

Significantly, New York Family Court Act § 581-306(d) states that "(d) An embryo disposition agreement or advance directive that is not in compliance with subdivision (a) of this section may still be found to be enforceable by the court after balancing the respective interests of the parties..."

This safety valve in the statute is important. It grants courts the authority to make decisions

beyond written agreements, including IVF clinic forms, and engage in a balancing analysis when the parties have not utilized the procedural requirements contemplated by the statute, such as hiring independent counsel.

While the New York Legislature appears to strongly encourage parties to contract regarding embryo disposition, it simultaneously preserves judicial discretion where those agreements are not executed in accordance with §581-306(a).

The recent Brooklyn dispute, as reported by the NYT, illustrates precisely how consequential this distinction is. The parties were not in compliance with §581-306(a) as they apparently did not have representation when executing the clinic forms. This, in turn, likely triggered the Court›s balancing analysis.

The Millender/Rubin Litigation: A Trial Court Case Study

Erin Millender, the wife seeking implantation of the embryos, and Adam Rubin, the husband opposing implantation, are the divorcing couple at the center of the recent NYT article. According to the article, the Brooklyn trial court ultimately awarded possession of the embryos to Millender, placing significant emphasis on her advancing age, infertility history, and diminishing opportunity for biological motherhood.

As the trial judge reportedly stated, "If there is anything that the court finds to be truthful and credible, it is plaintiff's sense of urgency in having children due to her advancing age." Thearticle noted that Millender's doctors stated the likelihood of retrieving more eggs at her age (44) was essentially impossible, making the existing embryos created with her husband's sperm her only opportunity for biological motherhood.

Following the trial court's decision in favor of Millender, Rubin filed a notice of appeal and requested a stay of the trial court's decision from the Appellate Division, Second Department, which subsequently ordered that the embryos remain cryopreserved and that no party take steps to "destroy or otherwise dispose of the embryos" pending determination of the appeal.

However, before the Appellate Division issued its stay of the trial court's order, which effectively restrained Millender from implanting the embryos, Millender proceeded with the embryo transfer and ultimately became pregnant. The Appellate Division had specifically directed the following: In the event that the Appellant (Rubin) did not perfect the appeal by March 4, 2026, the court could, on its own motion, vacate the stay "without further notice," or the respondent (Millender) could move to vacate the stay, on three days› notice.

New York Family Court Act § 581-306: A Statutory Framework for Enforceable Embryo Agreements

The New York Legislature provides practitioners and intended parents with specific guidance on preventing embryo disposition litigation under New York Family Court Act § 581-306. This statute, part of the Child-Parent Security Act, became effective in February of 2021, as an attempt to create bright-line rules around parentage and embryo disposition as the use of this reproductive technology increases and advances in the medical world.

The language in subdivision (a) specifically requires that any embryo disposition agreements be in writing, that each intended parent (the person who is intending to be the parent of the embryo) be represented by independent legal counsel, and, where the parties are married, that the transfer of legal rights and dispositional control over the embryos occur only upon divorce.

Subdivision (d) of the statute makes clear that if an embryo disposition agreement is not compliant with subdivision (a), that a court can use a balancing of the parties' interests test to make a decision on whether or not to enforce the agreement or make its own determination on the disposition.

Previous New York Case Law on Embryo Disposition

To fully understand the legal landscape on embryo disposition in New York, it is critical to understand the 1998 Court of Appeals opinion of *Kass v. Kass*, wherein Justice Judith Kaye's decision strongly encouraged parties to contract around the disposition of embryos. The court

explicitly stated that where parties have written out their intent for embryos, that "that decision must be scrupulously honored, and courts must refrain from any interference with parties' expressed wishes."

However, Kaye's decision also warned that "significantly" changed circumstances may complicate the enforcement of writings, as she noted in a footnote of the opinion: "Significantly changed circumstances also may preclude contract enforcement." *Kass v. Kass*. Perhaps, §581-306(d) may now serve as the modern statutory mechanism allowing courts to account for those changed circumstances referenced.

In the same year that §581-306 became effective (2021), a New York court revisited these principles in *K.G. v. J.G.* Although this case arose in the same year the statute became effective, it did not retroactively apply to the agreement. New York courts addressed this issue in *E.L. v. A.S.*, where it held that, "Family Court Act § 581-306 is *prospectively* applicable beginning on its effective date of February 15, 2021 and does not retroactively render the parties› Declarations of Intent unenforceable."

In *K.G. v. J.G.*, the Supreme Court of Suffolk County enforced a clinic form granting the wife the embryos, despite there being no attorneys on either side of the agreement and the husband's argument that circumstances had significantly changed.

The court rejected this argument, reasoning that the possibility of divorce, future co-parenting disputes, and even child support obligations *were* foreseeable circumstances that should have been contemplated when the parties originally executed the IVF agreement.

Taken together, *Kass* and*K.G.* demonstrate New York's longstanding preference for enforcing embryo disposition agreements to effectuate parties' intent and avoid litigation. However, the more recent enactment of New York Family Court Act § 581-306 (which became effective and applicable to agreements created after those discussed in*Kass* and*K.G.*) expressly permits courts to balance the parties' interests when agreements fail to satisfy statutory formalities. This statute may now provide the modern statutory mechanism through which courts account for the "significantly changed circumstances" contemplated in the *Kass* footnote.

Practice Considerations for Attorneys Handling Embryo Disputes

The Millender/Rubin litigation serves as a reminder of why practitioners should strongly consider advising their marrying clients, and already married clients, to seek out prenuptial agreements with embryo disposition clauses and standalone embryo disposition agreements if already married.

Furthermore, these agreements should fully comply with New York Family Court Act §581-306(a), to avoid a balancing of the interests analysis that comes with the non-compliance carve out of subdivision (d) of the same statute. Relying solely upon standard fertility clinic forms may, in fact, be an ill-advised path to take that could lead to litigation and heartbreak for both parties.

If such a dispute arises without properly compliant agreements, a balancing approach may apply where a trial court has the discretion to rely on many factors, including but not limited to advanced maternal age, urgency to procreate, the psychological/financial burdens associated with unwanted parenthood, and diminishing opportunity for parenthood. Had the parties instead entered into an embryo disposition agreement with independent counsel, the Court may have been far less likely, or arguably less able, to move beyond the parties' contractual decisions and engage in an equitable balancing of reproductive interests.

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