Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science

Andrea Messmer*

Introduction

Imagine that a couple learns they are unable to conceive a child naturally. After suffering this initial disappointment, the couple attempts to conceive a child by using the egg of the female, fertilized with the sperm of an anonymous donor through in vitro fertilization (IVF). After considerable expense, several eggs are fertilized successfully. The female becomes pregnant and the remaining embryos are frozen for several years. Unfortunately, the couple divorces and during the divorce proceedings, the husband seeks to use the remaining embryos to have a child with his new partner, over his former wife’s objections. Doctors also discover a rare genetic disorder affecting the child, but promising new treatments necessitate an analysis of the genetic material of the child’s mother and the anonymous donor. Further imagine that the anonymous donor decides several years after donating his sperm that he would like to develop a relationship with the individuals who were created through the use of his sperm.

While the facts above may initially seem imaginary, the issues they present are a reality currently faced by attorneys and judges. As the law surrounding ART evolves, numerous legal uncertainties in property, criminal, personal injury, health and family law have developed. The interim result has been the creation of a largely unsettled and non-uniform body of law.

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1 See Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. App. 2005) (stating “‘Natural’ procreation… may occur only between opposite-sex couples and with no foresight or planning”).
Attorneys, judges, law students and individuals encountering the complex legal issues associated with ART will be well served by the publication of Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science by Charles P. Kindregan, Jr. and Maureen McBrien. A practical handbook, the book contains ten chapters which discuss the different forms of ART in great detail, including intrauterine insemination, IVF and surrogacy, together with a description and analysis of the important statutory regulations and court decisions affecting these topics. Kindregan and McBrien's book also offers an extensive compilation of journal articles, cases and statutes at the end of each chapter, under the heading Selected Further Readings, for individuals seeking more information concerning a particular type of ART.

This book is a particularly important new resource because currently there is "no nationally recognized law on this subject." Although there are numerous splintered court decisions on issues affecting ART, the United States has no code of federal regulations which addresses ART. In addition, while attorneys practicing health law, family law, criminal law and personal injury law may have minimal knowledge of this growing and complex area of nontraditional family life, they must nonetheless confront some of the issues surrounding ART, such as the legal rights of sperm donors, the legality of ART contracts and child custody disputes concerning ART children. Especially well-suited for attorneys, judges and law students, the book can be easily picked up and read to gather answers to practical questions, whether in the form of additional background information on a particular type of ART, an analysis of seminal cases and statutes, in the additional research material located at the end of each chapter or in the glossary section at the end of the book.

Charles P. Kindregan is a Distinguished Professor of Research and Scholarship at Suffolk University Law School in Boston, Massachusetts. He teaches family law, ART, torts, financial issues in divorce cases, professional responsibility and law in film and literature. Since 2005, Professor Kindregan has been the Chair of the American Bar Association Committee on Assisted Reproduction and Technology within the

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3 Id. at xi.
4 Id.
5 Id. at xii.
8 Id.
Family Law Section. He is the co-author of *Family Law and Practice*, third edition (2003), which is comprised of four volumes of the *Massachusetts Practice Series* published by Thomson-West. Professor Kindregan is also a co-author of *Massachusetts Domestic Relations Rules and Statutes Annotated with Relevant Federal Statutes Annotated*, sixth edition, annually published by Thomson-West (2006). He has served as associate dean for academic affairs at Suffolk University Law School and is the founder of the Law School's Center for Advanced Legal Studies program. Professor Kindregan has authored over 100 law review articles and comments. He is a graduate of LaSalle University of Philadelphia (B.A., M.A.), Chicago-Kent College of Law-Illinois Institute of Technology (J.D.) and Northwestern University School of Law (L.L.M.).

Maureen McBrien is an attorney who practices domestic relations at Todd & Weld LLP in Boston, Massachusetts. Ms. McBrien is an adjunct professor at Suffolk University Law School, where she and Professor Kindregan co-teach a course entitled *Assisted Reproductive Technology*. Ms. McBrien has published in several journals and has co-authored articles with Professor Kindregan, predominantly in the area of domestic relations. She also volunteers with the New England Shelter for Homeless Veterans through the Shelter Legal Services Foundation, which provides legal services to indigent individuals. Before working at Todd & Weld, Ms. McBrien was a law clerk for the Justices of the Massachusetts Probate and Family Court. She is a graduate of Gettysburg College (B.A.) and Suffolk University Law School (J.D.). While at Suffolk Law, Ms. McBrien wrote an award-winning essay for the White, Inker & Aronson family law essay contest and was a member of the *Suffolk Transnational Law Review*.  

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9 *Id.*  
10 *Id.*  
12 *Id.*  
13 *Id.*  
14 *Id.*  
16 *Id.*  
17 *Id.*  
18 *Id.*  
19 *Id.*  
20 *Id.*  
21 *Id.*
What is Assisted Reproductive Technology?

Kindregan and McBrien define ART as "any technology that is employed to conceive a child by means other than sexual intercourse". In 1981, ART began to be used in the United States as a medical procedure to assist women in conceiving children. Today, infertility, defined as the inability to become pregnant after trying for one year with unprotected intercourse, affects approximately 13-14% of "reproductive-aged couples." ART encompasses a wide variety of ways to conceive a child, including IVF, intrauterine insemination, cryopreserved embryos and surrogacy. It also encompasses both old and new forms of assisted conception. Intrauterine insemination is widely considered the oldest form of ART, having been used in the United States since the late 1800s, while embryo donation is considered one of the newest forms of ART.

Although all forms of ART involve medical risks, some of the most common risks include multiple births, increased rates of caesarean section, premature delivery and low-birth weight babies. The effects of ART may also force a woman to be placed on

22 CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, xii (2006); but see Assisted Reproductive Technology: Home, Centers for Disease Control, available at http://www.cdc.gov/art. (last visited Mar. 11, 2007). (stating ART "includes all fertility treatments in which both eggs and sperm are handled"). The Centers for Disease Control also note that a fertility procedure in which only sperm is involved is not a form of ART. See Assisted Reproductive Technology: Home, Centers for Disease Control, available at http://www.cdc.gov/art. (last visited Mar. 11, 2007).


25 See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, 29-191 (2006). Other types of ART include GIFT (gamete intrafallopian transfer) and ZIFT (zygote intrafallopian transfer). Id. at 82. See also NAT'L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL, ASSISTED REPRODUCTIVE TECHNOLOGY: SUCCESS RATES, NATIONAL SUMMARY & FERTILITY CLINIC REPORTS, 11, (2004) available at http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf. (last visited Mar. 12, 2007). With GIFT, a laparoscope is used to transfer sperm and unfertilized eggs into a female's reproductive organs by an incision in the female's stomach and with ZIFT, the female's eggs are fertilized in a laboratory and then the eggs are transferred, also using a laparoscope into the female's reproductive organs. Id.


27 LA Schieve, Ph.D, G Jeng, Ph.D. & LS Wilcox, M.D., Use of Assisted Reproductive Technology –
bed rest or remain in the hospital to decrease the risk of giving birth to a premature infant.28 Premature infants may have significant medical needs and may experience “lifelong handicaps.”29 In particular, in 2004, out of 31,758 pregnancies using multiple ART cycles involving fresh non-donor eggs or embryos, 33.5% of the pregnancies involved multiple fetuses.30

In addition to these risks, there is a significant financial commitment required to pursue ART. Some health insurance plans, such as those found in Massachusetts, cover particular ART procedures under medical insurance, which helps to alleviate the financial burden.31 ART also requires an emotional commitment by the couple. Some types of ART, such as IVF, may require multiple cycles, and failure of the egg and sperm to fertilize is not uncommon.32

Despite the risks and the financial cost associated with ART, this technology has had a profound impact on both nontraditional and traditional families.33 For marriages involving a man and a woman, ART has allowed families that were formerly

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<td>29 See id.</td>
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<td>30 See National Center for Chronic Disease Prevention and Health Promotion of the Centers for Disease Control and Prevention in consultation with The American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, Assisted Reproductive Technology, Success Rates, National Summary &amp; Fertility Clinic Reports, 30, Figure 10, available at <a href="http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf">http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf</a>. (last visited Mar. 12, 2007). Nondonor eggs are eggs that are provided by the female and do not involve an anonymous donor. See generally id.</td>
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<td>31 MASS. GEN. LAWS ch. 176A § 8K (2004); MASS. GEN. LAWS ch. 176B § 4J (2004); MASS. GEN. LAWS ch. 175, § 47H (2004). In Massachusetts, there is health insurance “coverage for medically necessary expenses of diagnosis and treatment of fertility” as long as the health insurance plan includes other pregnancy-related benefits. See also David S. Guzick, Should Insurance Coverage for In Vitro Fertilization Be Mandated, 347 New Eng. J. Med. 686 (2002); Thomas D. Flanigan, Assisted Reproductive Technologies and Insurance Under the Americans with Disabilities Act of 1990, 38 Brandeis L. J 777, 778-79 (2000).</td>
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infertile to become pregnant and have a child. For more nontraditional married individuals, such as same sex couples, ART has allowed for conception of a child. ART has thus added another option to both types of marriages where adoption was formerly the only option for childlessness. Although the types of ART vary considerably, some methods give both traditional and nontraditional couples the opportunity to use their own genetic material to conceive the child.

A Synopsis of Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science

Encompassing ten chapters, Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science guides readers through the complex legal issues associated with ART in a clear, easy-to-understand manner. It also includes a comprehensive glossary, which is particularly useful to practitioners becoming familiar with ART terminology for the first time. The inclusion of checklists, as well as information regarding the laws of each state, is especially useful for attorneys and judges seeking to differentiate between particular types of ART, such as surrogacy. The checklists and state law information also provide valuable suggestions on future steps to be taken to resolve these legal

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36 See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, 30, (2006); see also James v. Jacobson, 6 F.3d 233 (4th Cir. 1993). The Jacobson Court noted that by using intrauterine insemination, the husband's sperm is placed in the female reproductive system using any method besides a penis. Id. at 235. However, intrauterine insemination may also involve the use of semen from a donor that is not the woman's husband and thus, the husband's genetic material is not passed onto the child. See Parentage of J.M.K., 119 P.3d 84D (Wash. 2005). IVF also allows spouses the opportunity to use their genetic material because the egg is fertilized outside the woman's reproductive system by the sperm and the zygote is then placed inside the uterus of the intended mother or the female that is acting as the surrogate. See J.B. v. M.B., 783 A.2d 707, 709 (N.J. 2001).

issues. Most chapters also include bolded, italicized sentences in the middle of a page, followed by advice related to the legal issues, which allow a reader to quickly recognize the legal issues associated with that form of ART. Although primarily intended for practitioners and judges, this book is also an excellent guide for individuals considering ART, as it provides insight into the legal issues that future parents may encounter in an easy-to-read manner, with an absence of legalese.

In the first chapter, Kindregan and McBrien discuss historical events that have led to the evolution of the notion of family. In particular, the authors describe several laws that have impacted the traditional view of family, such as the distinction between civil and religious marriage, the enactment of the married women’s property acts and the elimination of the fault requirement for divorce. Nontraditional families have also gained greater recognition in modern society through several laws, including the requirement that children born out of wedlock be treated the same as marital children, the legal validity of contracts concerning property between unmarried individuals cohabitating, the legal recognition of marriage between same-sex couples and the right of same-sex couples to receive the benefits of marriage. In introducing ART, Kindregan and McBrien note that the issues involved with this technology are “politically controversial and often mixed with religious, moral, medical, political, social, and legal disagreement.” The authors state that the lack of uniform laws concerning ART and in turn, the lack of uniformity in judicial decisions, is due, in part, to legislative leaders’ inability to unite the diametrically opposed spheres of medicine, religion, law

38 See, e.g., id. at 88-90, 146-182, (2006).
41 See, e.g., MASS. GEN. LAWS ch. 208 § 1A; ch. 209 § 1; Reynolds v. United States, 98 U.S. 145, 161-62, 166-67 (1878) (holding that male who married two women could be convicted of polygamy, despite his religion’s recognition of polygamy); Coraccio v. Lowell Five Cents Savings Bank, 612 N.E.2d 650, 654-55 (Mass.1993) (emphasizing husband could not encumber his wife’s interest in a tenancy by the entirety).
42 Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding “once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother”); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 931 (Mass. 2003) (noting same-sex couples may be issued license to marry); Bahr v. Lewin, 852 P.2d 44 (Haw. 1993) (emphasizing same-sex and married couples should be treated equally in terms of benefits); Marvin v. Marvin, 557 P.2d 106, 109, 113, 116 (Cal. 1976) (stating that agreements between unmarried cohabiting individuals will fail if they “rest upon a consideration of meretricious sexual services”).
and politics into statutes to guide attorneys and judges.\(^\text{44}\)

In chapters two through five, Professors Kindregan and McBrien discuss specific forms of ART, including intrauterine insemination, IVF, cryopreserved embryos and surrogacy. This format is particularly helpful to practitioners because they may quickly access the specific chapter, review nearly all the statutes, judicial decisions and law review articles on a finite topic, and thereby efficiently research their legal issue. In the second chapter focusing on intrauterine insemination, also referred to as artificial insemination, the authors state that some courts make a distinction between known and anonymous sperm donors when faced with disputes over the parental status of a sperm donor.\(^\text{45}\) For known sperm donors, the parties' intent concerning whether the donor is to assume a role in the upbringing of the future child is paramount.\(^\text{46}\) It is less likely that anonymous donors, which are donors whose identity is unknown to the female receiving the intrauterine procedure, will be accorded the responsibilities and rights associated with a legal father because there is no prior relationship between the donor and recipient.\(^\text{47}\) It would seem incongruous that the female recipient intended an unknown individual to have a relationship with the conceived child.\(^\text{48}\) Although the identity of an anonymous donor will often remain unknown to the female recipient, the donor's identity may be discovered if there is a dire need for this information.\(^\text{49}\) For instance, there are several cases where courts have allowed the release of the donor's identity if it

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\(^{44}\) See id. at 24-25; see also Prato-Morrison v. Doe, 103 Cal. App. 4th 222, 232 n.10 (2002) (stating, "[w]e join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of artificial reproduction"); In re Marriage of Buzzanca, 61 Cal. App. 4th 1410, 1428 (1998) (noting, "we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction").

\(^{45}\) In re Interest of R.C., 775 P.2d 27, 33-34 (Colo. 1989). This case discussed in greater detail the reasoning behind the distinction for anonymous and known donors. Id. This case stated, "[W]omen are not likely to use donated semen from an anonymous source if they can later be forced to defend a custody suit and possibly share parental rights and duties with a stranger." Id. at 33.


could positively affect the health of the child.\textsuperscript{50}

In chapter three, which is devoted to IVF, Kindregan and McBrien discuss the difference between this form of ART and intrauterine insemination, noting that the later focuses on the use and consent associated with sperm, while IVF places greater emphasis on the egg being fertilized by the sperm.\textsuperscript{51} The authors also provide an introduction to cryopreservation, which is the storage and freezing of embryos for future use.\textsuperscript{52} Cryopreservation of embryos may be used when a couple undergoing IVF does not use all of their fertilized eggs and opts to store the remaining eggs for later use. Kindregan and McBrien also provide further information concerning cryopreserved embryos in the fourth and seventh chapters.

In chapter five, Kindregan and McBrien provide a comprehensive overview of the legal issues concerning surrogacy, which occurs when a female agrees to serve as a birth mother for another individual or couple’s child.\textsuperscript{53} This female may or may not receive compensation and may or may not be the genetic mother.\textsuperscript{54} Similar to the other types of ART discussed in the book, the law concerning surrogacy is evolving.\textsuperscript{55} One of the most complex legal issues surrounding surrogacy is the determination of a child’s legal parents because a child may have a genetic mother, a birth mother, a genetic father, an intended mother and an intended father, with all of these classifications representing separate individuals.\textsuperscript{56} The authors discuss three tests that courts have relied on to resolve the issue of legal parentage: (1) “giving birth;” (2) “intent of the parties;” and (3) “genetic relatedness of the parties.”\textsuperscript{57} The authors also include a compilation of the case law, and statutory sections representative of the 50 states and several countries, that courts have reviewed in an attempt to define legal parentage.\textsuperscript{58}

\textsuperscript{50}See Johnson, supra note 50, at 1067.
\textsuperscript{51}See Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1140 n.10 (Mass. 2001) (explaining ART does not involve procedures in which only sperm is involved and procedures that increase egg production through medication).
\textsuperscript{52}See Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1259 (Ariz. 2005) (stating cyropreservation may have financial incentives because egg is already fertilized and is stored until it is transferred into the female’s reproductive organs, eliminating repeated fertilizations). An embryo results after the fertilization of the egg and sperm. Id. at 1258.
\textsuperscript{53}U.P.A. § 801(e) (amended 2002).
\textsuperscript{54}See Id.
\textsuperscript{56}Id. at 136, 145.
\textsuperscript{57}Id. at 145; see also Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (describing intent of the parties’ test).
\textsuperscript{58}KINDREGAN, supra, at 146-187.
In chapter seven, the authors describe the legal issues concerning posthumous reproduction, which involves the conception of a child "after the death of one or both of the genetic parents." Kindregan and McBrien note that prior to ART, the legal issues associated with posthumous children predominantly concerned the inheritance rights of a child conceived after the death of his or her parent. In particular, children born after the genetic father died were presumed to be born within the nine months of their father's death and were thus viewed as lawful heirs and accorded protection under inheritance statutes.

It is likely that the laws of inheritance in most states will not protect children born posthumously using ART because children may be born several years after the death of their parent. In recognition of this fact, Kindregan and McBrien explore a number of provisions under the Restatement of Property (Third), the Uniform Probate Code and the Uniform Parentage Act, along with state laws concerning posthumous reproduction of children from ART, to determine the rights and liabilities associated with posthumous reproduction. The authors also examine several recent cases reviewing the effects of the Social Security Act on posthumously conceived children's rights.

In chapter seven and chapters two through five, the authors provide a comprehensive overview of four types of ART, as well as a consideration of the legal issues surrounding each topic. By reviewing these chapters, lawyers and judges facing issues concerning ART will quickly garner the current case law and statutes, which will, in turn, provide insight into resolving their current dispute.

59 Kindregan, supra, at 219.
61 See id.
63 See Kindregan, Jr. & McBrien, supra note 3 at 228, 230; see also Susan N. Gary, Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now, 19 Prob. & Prop. 32, 34, 26 (Mar./Apr. 2005); Brianne M. Star, A Matter of Life and Death: Posthumous Conception, 64 La. L. Rev. 613, 637 (Spring 2004).
The Vital Need for Consent

Obtaining the written consent of the parties involved in an ART procedure is an essential step prior to beginning any form of assisted reproduction, and is an overarching theme throughout Kindregan and McBrien's book. Written consent of both parties involved in the ART procedure is particularly important because it may aid a court in determining the intent of the parties involved. It is strongly recommended that intended parents establish written consent, with the specific notation that they possess the intent to be the parents of the child born through ART.

Although Kindregan and McBrien acknowledge that courts may not legally recognize agreements memorializing the consent of the parties, they validly point out that judges and lawyers may review such agreements when considering issues such as custody, parentage, consent and visitation. The importance of consent agreements is also rooted in the doctrine of informed consent, which must be obtained for adults prior to receiving medical treatment, except in the case of an emergency. The consent should stipulate whether it applies for solely the first ART treatment or for all future ART treatments, as well as how either party may withdraw his or her consent. Similarly, Kindregan and McBrien recommend the creation of a written contract for parties using egg and sperm donors and surrogacy. This contract should include a statement concerning each party's rights if the contract is breached and if the intended result of the ART procedure, such as pregnancy, does not occur within a specified period of time.

Examples of Common Legal Issues Surrounding ART

Several of the legal issues associated with ART, comprehensively addressed throughout Kindregan and McBrien's book, are considerably noteworthy and will likely

65 KINDREGAN, JR. & MCBRIEN, supra note 3 at 241, 295, 365-66.
66 Id. at 300. See also Sperm Used for In Vitro Fertilization Without Father's Permission: Plaintiff Said He Made It Known He Did Not Want More Children-$108,000 Verdict, MASS. LAW. WKLY., Mar. 22, 2004, at B5.
67 KINDREGAN, JR. & MCBRIEN, supra note 3 at 300.
68 Id. at 312.
69 Id. at 265.
70 Id. at 266.
71 Id. at 295, 306 (In Fla., Va., Ill., N.H. and Nev., agreements concerning surrogacy are legally recognized). See also ILL. COMP. STAT. ch. 750 § 47 (2004); VA. CODE ANN. § 20-159 (2004); FLA. STAT. ch. 742.15 (2003); N.H. REV. STAT. ANN. § 168-B:16(b) (2003); NEV. REV. STAT. ANN. § 126.045 (2003).
72 KINDREGAN, JR. & MCBRIEN, supra note 3 at 297.
be faced by practicing family law attorneys and estate planners. As noted previously, there is no uniform law in the area of ART, however, Kindregan and McBrien offer several suggestions when attorneys and judges are facing the decisive issues of divorce and tax planning in the context of ART.

Kindregan and McBrien state that several laws are affected as a result of cryopreservation of embryos, such as tax laws associated with selling gametes, and divorce laws after a decree is entered and the couple has stored embryos. Turning first to the tax issues, it should be noted that infertility clinics compensate egg donors for their services to retrieve eggs. These services often involve the patient’s ingestion of medications to stimulate egg production, as well as appearance for frequent medical appointments to retrieve the eggs from the female’s reproductive organs. Several critics disagree with the classification of services by the infertility clinics and argue that donated eggs are property.

Critics favoring the property classification note that an egg donor’s time commitment and effort to harvest mature eggs results in a product (an egg), which is later owned and possessed. These critics also rely on case law from the Tax Court. In Green v. Commissioner, the Tax Court held that the donation of blood plasma was “the sale of a tangible product.” Legal scholars advocating for the property classification often analogize this case involving blood plasma viewed as property as further support for donated eggs as property. If their eggs are treated as property, the donors may qualify for favorable tax treatment, including capital asset status. On the contrary, other legal scholars argue that egg donors are compensated for their services because infertility clinics award compensation regardless of whether the eggs are successfully...

75 See id. at 922-23.
76 See id. at 929.
77 Id.
78 74 T.C. 1229 (1980).
79 See id. at 1234. The court noted that the petitioner did not undergo special treatment to donate the blood plasma. Id.
81 Id.
Thus, the monetary award reflects the donor's time and efforts to donate eggs and not the end product. The law still remains unsettled in this area.

Likewise, there is no definitive law concerning how a divorce impacts extra cryopreserved embryos. Despite the lack of judicial precedent and statutory law, Kindregan and McBrien suggest several ways to resolve embryo disputes after divorce. In some states, such as New Hampshire and Florida, individuals using IVF are required to create an agreement stating what should happen if the parties divorce. The authors suggest that these provisions may be reviewed by a court in determining the proper course of action for the disposal or re-use of the embryos. Therefore, Kindregan and McBrien recommend that parties undergoing IVF create a contract to describe their preferences for future use of extra embryos.

In other states such as Louisiana, the destruction of embryos is not permitted. Kindregan and McBrien note that other states could follow Louisiana's lead and adopt a similar bright-line rule. If there is no statutory provision concerning excess embryos and no contract made by the couple prior to undergoing IVF, the authors note that courts may balance the parties' intent and examine the individual's desire to have additional children through the use of extra frozen embryos. The courts have looked favorably

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82 Id. at 931-32.
83 Id.
85 See id. at 96-97.
86 See id. at 96; see also FLA. STAT. § 742.17 (2005); N.H. REV. STAT. ANN. §§ 168-B:13 to 168-B:15 (2004).
87 CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, 96 (2006); see also Kass v. Kass, 696 N.E.2d 174, 176-77 (N.Y. 1998). In Kass, the court enforced the contract made by the couple prior to their divorce regarding the future use of the embryos. Id. at 178, 180. The court also emphasized the importance of the freedom to contract and noted that this freedom should be preserved through the court's legal recognition of the agreement. Id. at 180. See also Karissa Hostrup Windsor, Disposition of Cryopreserved Preembryos After Divorce, 88 IOWA L. REV. 1001, 1025, 1032 (2003); John A. Robertson, Prior Agreements for Disposition of Frozen Embryos, 51 OHIO ST. L.J. 407, 409-11 (1990).
89 See id.; see also LA. REV. STAT. ANN. §§ 9:121 to 9:130 (2004).
90 Davis v. Davis, 842 S.W.2d 588, 603-04 (Tenn. 1992). The court held that when there is a dispute concerning the future course of action regarding frozen embryos, judges should look to the preferences of the parties creating the embryos, followed by an agreement created by the parties and if there is no agreement, judges should consider the parties' interests in future
on the party that is not seeking to have additional children, thereby preventing the
gamete donor from involuntarily becoming a parent. The authors caution that these
are only recommendations, as the law is also unsettled in this area in most
jurisdictions.

Conclusion

Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science by
Charles P. Kindregan and Maureen McBrien is an innovative, important and
comprehensive resource for practitioners and judges facing the legal issues associated
with ART. Although the laws surrounding the different types of ART are unsettled and
non-uniform, this book provides considerable insight into these evolving legal issues as
well as suggested solutions for resolving the complex legal questions which arise from
the practice of ART. The authors also provide a wealth of objective information and
created perhaps the single greatest resource concerning the different types of ART,
complete with the leading statutes, case law and law review journals neatly organized in
source. Many current practitioners face a burden in light of the complex legal issues and
the splits of authority regarding ART. Kindregan and McBrien's book will serve as an
invaluable, cutting edge resource in this ever expanding area of the law.

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91 A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000). In A.Z., the Massachusetts Supreme
Judicial Court allowed the party without an interest in further procreation to prevail. Id. at 1058-
59; see also J.B. v. M.C. & C.C., 783 A.2d 707, 719-20 (N.J. 2001). The J.B. court also looked
favorably on the party that sought to avoid conception by using the extra frozen embryos. Id. at
719-20.

92 Charles P. Kindregan, Jr. & Maureen McBrien, Assisted Reproductive