WHEN CONSENT CHANGES: CRYOPRESERVED EMBRYOS AND THE LIMITS OF REPRODUCTIVE AUTONOMY

Parwani Singh, BA LLB (Hons.), National Law Institute University, Bhopal

Bhoomi Agrawal, BA LLB (Hons.) National Law Institute University, Bhopal

ABSTRACT

The use of cryopreserved embryos through In Vitro Fertilisation (IVF) has raised difficult legal questions, particularly when couples separate or one of them becomes medically incapacitated. While the Assisted Reproductive Technology (Regulation) Act, 2021 provides for consent and its withdrawal before embryo transfer, it does not clearly address situations where consent changes or can no longer be obtained. This article examines the legal status of cryopreserved embryos and the conflict between prior consent and present reproductive choice. It also looks at how Indian and international courts have approached such disputes. The article argues that divorce and incapacity require different approaches and proposes an Advance Reproductive Directive, along with judicial guidelines and embryo disposition agreements, to provide clarity in cases where the future of cryopreserved embryos becomes uncertain.

Introduction

"Biology creates the possibility of human life; intent gives it purpose; but time often alters the promises we make to one another." Assisted reproductive technology has changed how we understand parenthood, and In Vitro Fertilisation (IVF) acts as the centre of that change because it allows embryos to be created outside the human body and be kept through cryopreservation for a significant amount of time without being damaged. That possibility creates a legal problem which the traditional law was never built to answer about what happens to these embryos once the people who created them can no longer agree on their future.[1]

There are two situations. In the first, a couple undergoes IVF, creates several embryos, then decides to divorce each other. Now, one spouse wants to use them, while the other refuses, unwilling to become a genetic parent against their present wishes. In the second, the couple undergoes IVF, but before any decision is taken about the embryos, one spouse is left medically incapacitated and cannot communicate a decision of any kind. In the first situation, both people can speak, and the trouble is that they disagree while in the second, one of them cannot speak at all.

The Assisted Reproductive Technology (Regulation) Act, 2021,[2] takes an important first step towards addressing this issue. It regulates the storage and use of embryos, requires written consent at different stages of the process, and allows either member of a commissioning couple to withdraw consent before the embryo is transferred to the uterus. What the Act does not address is what happens when consent later changes, conflicts, or can no longer be obtained.[3] Indian law therefore lacks a clear framework for resolving such disputes. This piece proposes a combination of judicial guidelines, embryo disposition agreements, assessment of prior reproductive intent, and an Advance Reproductive Directive to protect reproductive autonomy in cases of divorce or incapacity.

IVF, cryopreserved embryos, and their legal status

Section 2(1)(f) of the ART Act defines an embryo as a developing organism from fertilisation

[1] I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP. 13, 13-14 (2016); Kindregan, Jr., Charles P. and McBrien, Maureen, Embryos in Divorce (Suffolk Univ. L. Sch. Research Paper No. 12-21, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2060274.
[2] Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021 (Ind.).
[3] See Soumya Kashyap & Priyanka Tripathi, *Assisted Reproductive Technology (Regulation) Act 2021: Critique and Contestations*, 16 ASIAN BIOETHICS REV. 149, 150-151 (2024).

until the end of fifty-six days and the act separately defines a zygote.[4] The Act regulates embryos rather than treating them as legal persons. Clinics must obtain written consent before use, either party may withdraw consent before transfer, and commercial sale or use is prohibited. An embryo is therefore not something either party may freely own or dispose off.

A. Not ordinary property

An embryo may appear to be property because it contains the couple's genetic material and its creation and storage involve costs. But property law focuses on ownership, possession and disposal, while embryo use may result in the birth of a child. Treating embryos as matrimonial assets that can be divided like other property overlooks these distinctive consequences.[5] The ART Act's prohibition on sale and regulation of transfer also weighs against an ordinary-property approach.

B. Not a legal person

Treating an embryo as a legal person creates a different difficulty. The ART Act distinguishes embryos from children born through assisted reproduction. Full legal personhood could risk placing the embryo's interests above the reproductive choices of the people who created it. In *LePage v Center for Reproductive Medicine*,[6] an Alabama court treated cryopreserved embryos as "unborn children" under the state's wrongful-death law. Indian law has not adopted this approach, and this article argues against doing so.[7]

C. An Embryo as a Separate Legal Category

A more workable approach is to treat a cryopreserved embryo as sui generis: neither ordinary property nor a legal person, but a biological entity requiring distinct protection.[8] Because an embryo results from a joint reproductive decision, its use should primarily depend on consent,

[4] Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, § 2(1)(f) (Ind.).
[5] See Jessica Wilen Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 159, 161-163 (2005); see also Mollie Cornell & Teresa Baron, *The Law and Ethics of a Property Rights Approach to Frozen Embryo Disputes*, 44 LEGAL STUD. 332, 332-335 (2024).
[6] *LePage v. Center for Reproductive Medicine*, P.C., 2024 WL 656591 (Ala. Feb. 16, 2024).
[7] See Gerard Letterie & Dov Fox, *Legal Personhood and Frozen Embryos: Implications for Fertility Patients and Providers in Post-Roe America*, 10 J.L. & BIOSCIENCES, no. 1, 1-3 (2023); see also Judith Daar, *Legal Liability Landscape and the Person/Property Divide*, 1 F&S REP. 61, 61-62 (2020).
[8] See Alyssa Yoshida, *The Modern Legal Status of Frozen Embryos*, 68 HASTINGS L.J. 711, 717-20 (2017); see also Jodi L. Bender, *Snowflakes in Texas? Enacting Legislation to Allow for Embryo Adoption*, 16 TEX. WESLEYAN L. REV. 413-436 (2010).

not ownership or personhood. Any agreement about its future deserves serious consideration. However, Section 22(4) of the ART Act makes it clear that consent is not permanent, as either party can withdraw it before the embryo is transferred.[9] When there is no clear agreement, or when one party later changes their mind, the issue is therefore not really one of ownership. It is about whose reproductive choice should prevail and how much importance should be given to the earlier consent compared to the later decision.

Consent is not a single event

Consent in IVF is rarely a single event, and treating it as one miss how the process actually works, since it involves separate decisions about creating the embryo, storing it, and, eventually, using it, each of which the ART Act addresses on its own terms. Section 22(1) requires written informed consent before treatment even begins, section 22(3) asks for specific written consent to create or use an embryo, and section 22(4) allows either party to withdraw before transfer.[10] Read together, these provisions already suggest that Indian law treats consent as something that continues rather than something frozen the moment it is first given.[11]

This does not mean that the earlier consent given by the parties has no value. If a couple voluntarily decided to undergo IVF and had also agreed about what should happen to their embryos, that agreement can still be important in understanding what they intended at that point. It can provide useful evidence of their reproductive choice and the decision they had made together. However, the existence of earlier consent cannot by itself settle a later dispute. The court would still have to consider whether that consent continues to reflect the person's reproductive choice at the time when the dispute arises. It would also have to look at whether the person is still capable of expressing their wishes or has lost that ability. Therefore, the important question is not simply whether consent was given in the past, but whether that consent can still be relied upon when the embryo is to be used. This becomes particularly important in cases of divorce and incapacity, because in a divorce the person may still be capable of changing or withdrawing their decision, while in cases of incapacity they may no longer be able to communicate what they want. This is where the two situations begin to require

[9] Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, § 22(4) (Ind.).
[10] *Id.* §§ 22(1), 22(3), 22(4).
[11] See Ellen Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 918, 924-926 (2000); see also Guido Pennings, *The Validity of Contracts to Dispose of Frozen Embryos*, 28 J. MED. ETHICS 295, 995-998 (2002).

different approaches.

Two situations, one underlying problem

This distinction becomes clear when the Delhi High Court dealt with the wife of an Army soldier who had suffered a traumatic brain injury and was left in a persistent vegetative state after the couple had already begun IVF together.[12] Neither the requirement under Section 22(1) nor the condition under Section 22(2) could be fulfilled in the usual manner because the accident had happened unexpectedly and the wife could no longer give the required consent herself. The Court therefore considered the husband's earlier and voluntary participation in the IVF process and held that it was sufficient to meet the requirement of Section 22. It also held that the wife's consent could be relied upon in place of the husband's consent wherever his consent would otherwise have been necessary. While this decision dealt with the facts before the Court, it also raises an important question for future cases. If a person loses the capacity to give consent, should their earlier participation in the IVF process be treated as enough to replace their present written consent? Or should the law provide a way for people to decide in advance what should happen to their embryos if they later lose the ability to make that decision themselves?[13]

Divorce presents a different situation because, unlike a person who has lost capacity, the former spouse is still capable of expressing their wishes. They may clearly withdraw their consent or change their earlier decision about what should happen to the embryos. Giving importance to this later decision is also supported by constitutional principles. In *Suchita Srivastava v Chandigarh Administration*, the Supreme Court recognised reproductive choice, including the right not to procreate, as part of the right to personal liberty under Article 21.[14] Similarly, *Justice K.S. Puttaswamy (Retd.) v Union of India* recognised decisional autonomy in matters relating to family and procreation.[15] These decisions make it difficult to ignore a person's present reproductive choice simply because they had given consent at an earlier stage.

The two situations therefore require different approaches. Earlier consent may carry greater

[12] *Ms. X v. Union of India*, W.P. (C) No. 4469 of 2026
[13] See Lisa Cherkassky, *Incapacitous Patients, Assisted Reproductive Technology, and the Importance of Informed Consent*, 43 LEGAL STUD. 676, 679-683 (2023); see generally Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction Be Legally Permissible Without the Deceased's Prior Consent*?, 5 J.L. & BIOSCIENCES 329, 329–332, 337–340 (2018).
[14] *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1, ¶ 22 (Ind.).
[15] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (Ind.).

evidentiary weight where a person has lost capacity and cannot communicate a change. In divorce, a later, clearly expressed choice may conflict with the parties' earlier agreement. Indian courts have not yet established a general rule: Parveen and subsequent interim orders address particular facts but do not provide a comprehensive framework.

International experience

Other jurisdictions have delt with the divorce version of this problem for decades, and their approaches settle into three broad models. The first treats a couple's prior written agreement as controlling in *Kass v Kass*, the New York Court of Appeals gave substantial weight to the couple's own agreement, and *Litowitz v Litowitz* enforced a disposition agreement's fixed timeline even though neither party's preferred outcome was achieved.[16] The second gives the right not to procreate priority over any earlier agreement: *A.Z. v B.Z.* refused to enforce an agreement that would have compelled unwanted parenthood, and *J.B. v M.B.* reached the same result even where an agreement existed, on the reasoning that no one should be held to an earlier promise to become a parent against their will.[17] The third balances the parties' circumstances directly rather than starting from a contract: *Davis v Davis* weighed the interest in becoming a genetic parent against the interest in avoiding it, *Reber v Reiss* did the same where one party's only realistic chance at a genetically related child was at stake, and *In re Marriage of Rooks* combined contractual analysis with a wider look at both parties' situations.[18] None of these cases touches the incapacity scenario since in each of them both parties could still speak for themselves. Indian law need not adopt any single model wholesale; it can take the workable part of each, respecting a genuine prior agreement where one exists, protecting the right not to become a genetic parent where enforcing an agreement would override it, and weighing individual circumstances where neither answer is clear enough on its own.[19]

[16] *Kass v. Kass*, 91 N.Y.2d 554 (1998); *Litowitz v. Litowitz*, 146 Wash. 2d 514, 48 P.3d 261 (2002).
[17] *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000); *J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707 (2001).
[18] *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012); *In re Marriage of Rooks*, 2018 CO 85, 429 P.3d 579 (Colo. 2018); See Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L.J. 179, 182-185 (2014).
[19] See Michael T. Flannery, *"Rethinking" Embryo Disposition Upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 237-242 (2013); see also Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 432-436 (2019); see also Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 531-558 (2018).

The emerging Indian position

Indian courts are only now beginning to encounter this problem, and 2026 alone has produced several relevant orders. *Samiksha v Union of India* is particularly telling: the petitioner's husband had already withdrawn his consent and was seeking destruction of the couple's embryos, while the clinic holding them was about to close, creating an immediate risk that the dispute would be resolved by accident rather than by law.[20] The Delhi High Court could do no more than direct preservation of the embryos pending final adjudication, leaving the underlying disposition question entirely open. *Shewta Tuteja v Union of India*, went further on a narrower question, holding that the ART Act's age limit applies to the initiation of treatment and not to the continuation of a process already begun through cryopreservation.[21] Neither order, nor the case of Parveen discussed above, produces a general rule for disposition. What they show, together, is a set of courts issuing case-by-case interim relief because no forum-neutral instrument exists for parties to consult, and no standing rule exists for judges to apply, exactly the gap the proposal below is meant to fill.[22]

A novel proposal: the advance reproductive directive

Indian law already has a working model for exactly this kind of problem, only not in the field of reproduction. In *Common Cause v Union of India*, the Supreme Court recognised a person's right to execute a living will, a written advance directive stating what medical treatment they do or do not want, in case they later lose the capacity to decide for themselves.[23] Made while the person is still fully capable, witnessed and formally recorded, the directive takes legal effect at exactly the moment the person can no longer speak for themselves.[24]

The same idea, transplanted, could close the gap in the ART Act. This writeup proposes that the Act be amended to permit an Advance Reproductive Directive: a written, witnessed statement specifying what should happen to a couple's embryos in defined future situations,

[20] *Samiksha v. Union of India*, W.P. (C) No. 7814 of 2026 (Del. H.C.) (Ind.).
[21] *Shewta Tuteja v. Union of India*, W.P. (C) No. 6103 of 2026, 2026 SCC OnLine Del 4606 (Del. H.C. May 25, 2026) (Ind.); Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, § 21(g) (Ind.).
[22] See also Richa Mishra & Sahil Thakral, *Legal Subtleties of the Indian Assisted Reproductive Technology Act of 2021*, 37 NAT'L MED. J. INDIA 272, 272-274 (2024); see also Jaydeep Tank et al., *Voices from Health Care Providers: Assessing the Impact of the Indian Assisted Reproductive Technology (Regulation) Act, 2021 on the Practice of IVF in India*, 73 J. J. OBSTET. GYNAECOL. INDIA. 301, 302-307 (2023)
[23] *Common Cause (A Registered Society) v. Union of India*, 2023 SCC OnLine SC 99 (Ind.).
[24] See Roop Gursahani et al., *Advance Care Planning in India: Current Status and Future Directions: A Short Narrative Review*, 180 Z. EVID. FORTBILD. QUAL. GESUNDHWES. 64, 64-66 (2023).

separation or divorce, one party's incapacity, or death. The directive should ordinarily be executed before or during the ART process itself, at the point when clarity is genuinely possible, rather than only once embryos already exist and a dispute has begun to take shape.

Practical Solutions for Divorce and Incapacity

Although an Advance Reproductive Directive offers a long-term solution, legislative amendment may take time. In the meantime, courts can use the existing legal framework to address three situations: divorce where the parties disagree, incapacity where the capable spouse wishes to proceed, and incapacity where the capable spouse refuses. These proposals aim to protect reproductive autonomy without creating an entirely new legal system.

A. Divorce: The Biological Estoppel and Non-Parentage Deed

In divorce cases, one spouse may wish to use the embryos while the other no longer wishes to become a genetic parent. The objection concerns not only implantation but also the possibility of legal, financial and emotional responsibilities arising from a child born against that spouse's wishes.

A possible solution is the creation of a Embryo Disposition and a Parental Responsibility Agreement, which could be incorporated into the existing matrimonial settlement process. Rather than creating a new court or requiring judges to balance subjective moral burdens in every case, High Courts could, through their administrative and supervisory powers under Article 227 prescribe a standard form and procedure for dealing with such issues.[25] Where a matrimonial proceeding is already pending, the settlement could be placed before the court under Order XXIII Rule 3 of the CPC, subject to the requirement that the compromise itself is lawful.[26]

The purpose of it would be to separate the right of one spouse to seek implantation from the question of whether the other spouse should consequently be subjected to unwanted parenthood. Before or during divorce proceedings, the parties could therefore execute a standardised deed recording their respective positions concerning the embryos. Where the objecting spouse voluntarily agrees to the transfer, the deed could provide for the legal

[25] INDIA CONST. art. 227.
[26] Code of Civil Procedure, No. 5 of 1908, Order XXIII, r. 3 (Ind.).

consequences of that decision and record that the spouse does not intend to assume parental responsibilities merely because the other spouse later uses the embryos. The mechanism would therefore address the central fear of forced parenthood. The spouse wishing to use the embryos would be able to proceed without leaving the other spouse uncertain about the future consequences of that decision. At the same time, the arrangement would have to remain subject to the statutory rights of any child subsequently born and could not be used to contract out of rights which the law independently confers upon a child.

B. Incapacity: Where the Capable Spouse Wants the Child

In incapacity, one spouse may be unable to give current consent while the capable spouse wishes to proceed with transfer. The central question is whether the incapacitated person's earlier reproductive intention can be established and relied upon.

A possible solution is a specially authorised trust accompanied by independent medical and judicial authorisation. Here, the starting point should be evidence of the incapacitated person's own reproductive intention before the loss of capacity. Signed IVF consent forms, joint medical consultations, treatment records, correspondence between the spouses and other evidence of voluntary participation may help establish whether the couple had actually undertaken the reproductive process together.

The healthy spouse could approach the competent court seeking a narrowly defined authority concerning the embryos. The purpose would not be to transfer the incapacitated person's entire decision-making authority to the spouse, but to allow the court to determine whether the evidence demonstrates a continuing reproductive intention which should be respected.

Where both spouses voluntarily began IVF intending to become parents, and there is no evidence that the incapacitated spouse withdrew that intention while capable, the court may treat prior consent as evidence of continuing choice. This inference must remain rebuttable: evidence of later disagreement, withdrawal, separation or another clear change of position should prevent earlier participation from being conclusive.[27]

A further safeguard would be necessary where the capable spouse seeks to proceed because the

[27] See Costanza Raimondi et al., *Posthumous Assisted Reproduction and Post-Mortem Paternity*, 8 FRONTIERS REPROD. HEALTH 1783702 (2026); see also ESHRE Task Force on Ethics and Law, *ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction*, 21 HUM. REPROD. 3050, 3050-3052 (2006).

embryos represent the couple's only realistic opportunity for a genetically related child. The court should consider the medical evidence, the previous wishes of the incapacitated spouse and the interests of the capable spouse before granting authorisation. An independent medical or ethical assessment could assist the court where questions arise regarding the medical feasibility of implantation or the continuing viability of the embryos. The question of inheritance and financial responsibility also requires some attention. The purpose of allowing implantation should not be to create an indirect means of exploiting the property of an incapacitated spouse. Where necessary, the court may therefore address the estate separately and ensure that the reproductive decision is not being used merely as a means of creating succession claims.[28] However, any such protection must remain consistent with the statutory status and rights of a child subsequently born through ART.

The objective, therefore, is not to treat the incapacitated spouse as though they have permanently consented to every future reproductive decision. It is to provide a judicial mechanism through which their last ascertainable reproductive intention can be identified and respected when they can no longer express it themselves.

C. Incapacity: Where the Capable Spouse Does Not Want the Child

The reverse situation arises when the incapacitated spouse cannot express a view but the capable spouse no longer wishes to proceed. Relatives may seek preservation or implantation in the name of continuing the family line, raising questions about who may make reproductive decisions.

The capable spouse should be able to invoke decisional privacy and reproductive choice, recognised in *K.S. Puttaswamy* and *Suchita Srivastava*. The burden of raising and caring for a child alone is not a temporary consequence of embryo transfer; it creates a lifelong relationship involving emotional, social and financial responsibilities. The law should therefore be cautious about permitting that consequence where the only presently capable spouse expressly refuses it.

The court should also prevent third parties from acquiring an independent reproductive decision-making role merely because one commissioning spouse has become incapacitated.

[28] See Usha Ahluwalia & Mala Arora, *Posthumous Reproduction and Its Legal Perspective*, 2 INT'L J. INFERTILITY & FETAL MED. 9, 10-12 (2011).

They may provide evidence of that person's earlier wishes, but reproductive autonomy is personal; a family's desire to continue its lineage cannot replace the consent of the people who created the embryos.[29]

Where the capable spouse clearly refuses implantation, the other spouse's incapacity should not empower relatives to compel reproduction. If no prior directive addresses post-incapacity use, the court should consider whether any identifiable reproductive intention supports continued storage. Where there is no such direction and the capable spouse refuses to proceed, the embryos may be dealt with under the applicable statutory storage and disposition framework rather than preserved indefinitely.

This would be preferable to characterising the embryos simply as medically futile. The issue is not that the embryos have no biological value, but that the legal system lacks a continuing reproductive intention authorising their use. The distinction matters because the objective is not to declare the embryo worthless; it is to prevent the law from converting an absence of consent into an obligation to reproduce.

Taken together, these mechanisms provide a practical layer beneath the Advance Reproductive Directive. The directive remains the preferred mechanism because it allows individuals to decide for themselves before incapacity or marital breakdown occurs.

Conclusion

Cryopreserved embryos create a legal problem that cannot be answered simply by asking who owns them. They lie somewhere between property, potential life and reproductive choice, which makes consent the most important part of deciding their future. The difficulty becomes even greater when that consent changes after divorce or can no longer be expressed because one party has lost capacity.

The ART Act recognises written consent and permits withdrawal before transfer, but does not clearly resolve later disagreement or incapacity. Recent Indian cases show courts granting case-specific relief without a consistent framework for final disposition.

The Advance Reproductive Directive proposed in this article offers a way of addressing this

[29] See Jessica Knouse, *Reproductive Indeterminacy and Rights Discourse in Frozen Embryo Disputes*, 42 COLUM. J. GENDER & L. 112, 112-117 (2022).

problem before it reaches the courtroom. It would allow people undergoing IVF to decide in advance what should happen to their embryos in situations such as divorce, incapacity or death. Until legislative reform, courts could consider embryo disposition agreements in divorce, evidence of prior reproductive intention in incapacity cases, and the capable spouse's right not to procreate.

At the end reproductive autonomy should work in both directions. The law should protect a person's choice to become a genetic parent, but it should also protect the choice not to become one. A cryopreserved embryo should therefore not become a source of indefinite conflict simply because the law has no answer for what happens when consent changes or falls silent. The better approach is to give people the opportunity to decide in advance, provide courts with clear principles when they have not, and ensure that neither choice is treated as less important than the other.