

## What to know about frozen embryos, IVF post-Dobbs



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### Key Points

Ohio courts have always treated frozen embryos as property, but some courts see a new reality.

A Ninth District Court of Appeals decision ruled embryos are life or the potential for life despite treating them as property.

Here's how Ohio views frozen embryos.

Are frozen embryos considered life?

That's the question some states are asking as a movement calling for the legal personhood of embryos has gained traction across the country with victories in states like Louisiana and Alabama, the latter where in vitro fertilization was temporarily halted. Other states have pending legislation that could cement personhood.

The Southern Baptist Convention recently entered the debate, condemning in vitro fertilization, the process of combining a sperm and egg in a laboratory and transferring the fertilized egg to a uterus to cause pregnancy. The church said the process routinely creates more embryos than can be implanted, which leads to the destruction of what it considers to be human life, Reuters reported.

Recently in Ohio, Ninth District Court of Appeals Judge Donna Carr ruled in a divorce case that frozen embryos are "life, or the potential for life," though legal experts say the court still treated embryos as marital property.

Reproductive freedom advocates are concerned such a decision could limit access to IVF and other medical care.

For legal experts, this ruling emphasizes Ohio's complicated relationship with frozen embryos, which state law views as property.

### Why are embryos considered property in Ohio?

Ohio treats embryos as property, not life, which means a person who owns an embryo can do what they want with it — gestate, destroy, donate or give it away for research.

This has been the precedent for much of Ohio's history, said Tracy Thomas, a professor of constitutional law and gender equality law at the University of Akron.

"Historically, it wasn't a thing at all," she said about the personhood debate. "It's genetic material, but even disconnected from that, they treated it like an organ donation."

Frozen embryos most often appear in divorce cases, where one or both parties are seeking ownership of the embryos produced during their relationship. Instead of diving into a custody dispute, Ohio courts historically have distributed the embryos as property.

### How do courts treat pre-IVF contracts?

Before undergoing IVF, patients sign a pre-IVF agreement, which describes what happens to frozen embryos if one or both parents die or in the event of a divorce, Thomas said.

"The whole point of contracts is to leave no open question and to avoid litigation," Thomas said. "It's so you supposedly have the best idea of what you want to happen in a [divorce or death]."

Contracts should specify who can use the frozen embryos, or the parties agree to destroy or donate to another couple or research, she said.

If there is no contract or an ambiguous contract, the courts decide on how to proceed.

### What did the Ninth District Court of Appeals' ruling say about frozen embryos?

A recent Summit County case in the Ninth District Court of Appeals lacked a clear contract, so the judges balanced the interests of the divorcing wife and husband when they couldn't agree on how to distribute the embryos, Thomas said.

The husband wanted the embryos to be used by other couples, but not by his wife, as he didn't want to have biological children with her, according to the ruling. The wife wanted to use the embryos.

In the decision giving the wife all 14 embryos, Carr wrote that the chances of achieving pregnancy "will only decrease" as the wife ages.

The decision, Thomas said, protects the wife's reproductive freedom as she wants to become pregnant.

Carr also said the husband "should still have a say in what role, if any, he will play in the child's life." The wife said in a hearing "she would abide by Husband's wishes."

This decision, Thomas said, can be broken into two parts. First, the court ruled on intent, which is a property issue. Second, the husband is granted the ability to opt out of parenting.

"What [the court] seems to be doing is going back to intent, and there's two points of intent in IVF," Thomas explained. "[The court] can convert him from an intended parent to a sperm donor with no legal obligation."

## **What have other courts said about pre-IVF contracts?**

Other appellate cases have upheld pre-IVF contracts, Thomas said, but those cases involved clear contracts that explained how the embryos would be divided.

In a 2009 judgment written by Fifth Appellate District Court Judge John Wise, the court ruled that lower courts have neither the authority nor the jurisdiction to interfere with contracts. Two years later in 2011, the First Appellate District Court also upheld a pre-IVF contract.

## **Did U.S. Supreme Court's Dobbs ruling change how states treat embryos?**

The U.S. Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overturned federal abortion protection, removed language calling frozen embryos the potential for life, Thomas said. This allowed states to determine how they treat embryos; Alabama now views embryos as "extrauterine children."

A 2022 ruling from the Eleventh Appellate District Court in Portage County acknowledged this ambiguity when Judge Cynthia Westcott Rice wrote that while *Dobbs* "may change this statement of law, no Ohio statute has been codified to extend frozen embryos statutory personhood."

## **Does Ohio's constitutional amendment protect IVF treatments and medical care?**

Karen Thompson of Pregnancy Justice said the Ohio Revised Code defines an unborn human beginning life at fertilization, which could mean frozen embryos are seen as life, not property. This, combined with the Ninth District Court of Appeals ruling, has potential to limit IVF treatments and medical care, she said.

Despite this concern, some, like the University of Akron's Thomas, said the Ohio Constitution's reproductive freedom amendment, approved by Ohio voters in 2022, should protect a woman's right to abortion and IVF.

"I think our new constitutional standard is pretty clear that this is not life, and at most, it could be the potential for life," Thomas said. "Reproductive freedom in Ohio says you have the right to conceive, not just to not have pregnancy."

## **Are there any efforts in Ohio to protect access to IVF, assisted reproductive medical providers?**

A recent bill in Ohio, HB 502, would protect access to assisted reproductive medical care, including IVF, and protect providers from damages and criminal charges in the event of injury or death of human reproductive material.

The bill, sponsored by Rep. Beryl Piccolantonio, D-Columbus, and Anita Somani, D-Columbus, would not protect providers from negligence, misconduct or reckless disregard for the loss of life or property.

This bill remains in committee.

## **Is there a movement to grant personhood to embryos in Ohio?**

An effort to move away from the property determination came in the Ohio State House in 2021 when Rep. Gary Click, R-Fremont, introduced House Bill 704. The bill would grant personhood starting at conception. The bill remains in committee.

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