

**Health & Science**

Who gets the embryos? Whoever wants to make them into babies, new law says.

FERTILITY FRONTIER | Critics decrying forced parentage say the Arizona law is an attack on personal freedom.

by **Ariana Eunjung Cha** July 17

When their marriage fell apart, the most contentious issue between Ruby Torres and John Joseph Terrell was the fate of their frozen embryos. There were seven in storage, created with her eggs and his sperm before Torres underwent chemotherapy and radiation treatment for breast cancer.

Torres, 37, wanted to use the embryos to have a baby. In divorce proceedings, she told the judge that the embryos probably represented her only chance to have biological children. Terrell protested that he had no interest in having a child with Torres.

With the number of frozen embryos in the United States soaring into the millions, disputes over who owns them are also on the rise. Judges have often — but not always —

ruled in favor of the person who does not want the embryos used, sometimes ordering them destroyed, following the theory that no one should be forced to become a parent.

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Arizona, however, is taking the opposite approach. Under a first-in-the-nation law that went into effect July 1, custody of disputed embryos must be given to the party who intends to help them “develop to birth.”

“Most people believe that frozen embryos should have a chance at life,” state Sen. Nancy Barto, a Phoenix Republican, said in introducing the bill inspired by Torres’s case.

The legislation could dramatically alter the practice of fertility medicine, as well as the debate over when life begins. It is already fueling an argument by some conservative groups that frozen embryos are not mere tissue over which people may exercise ownership rights but human beings who should be accorded rights of their own.

The Thomas More Society, an antiabortion group, is assisting in cases across the nation, asking judges to consider the embryos “children” and to make decisions based on their best interest. The society argues that a person who creates an embryo in preparation for in vitro fertilization has “voluntarily exercised his procreational rights” and that the resulting embryos “cannot be legally terminated at the whim of others.”

Abortion rights advocates say any legal endorsement of those arguments, if upheld, would effectively gut the right to an abortion. If a days-old embryo in a freezer has a right to life, why not a days-old embryo in utero?

Rich Vaughn, chair of the American Bar Association’s committee on fertility technology and founder of the

International Fertility Law Group, called the legislation “flawed” and said it could have potentially disastrous consequences for reproductive freedom and personal choice.

“The new law is in fact an end around aimed at establishing the ‘personhood’ of unborn embryos,” which is an important goal of antiabortion campaigners, he said.

Many other health, patient-advocacy and legal organizations have expressed similar views. In a letter to the Arizona House of Representatives, Barbara Collura, president of the national infertility group Resolve, wrote that it could be “exceedingly painful” to have children born against one’s wishes.

Judges in numerous states, including Massachusetts, Tennessee, New Jersey and California, have been swayed by that argument.

When [Mimi Lee](#) and [Silicon Valley investment executive Stephen Findley](#) split in 2013, they argued bitterly about what to do with the five embryos they had created. Lee, a Harvard-educated doctor and musician, wanted to use

them, arguing that she had been treated for cancer and was unlikely to be able to have children any other way.

Findley refused, arguing that he would feel obliged to participate in the resulting child's life and that he feared "18 years of interaction" with his ex-wife.

California Superior Court Judge Anne-Christine Massullo ruled in November 2015 that the embryos should be destroyed.

In Colorado, [Mandy and Drake Rooks are fighting over six embryos](#). Mandy Rooks wants them preserved for future use, while Drake wants them to be discarded. After a lower court ruled in favor of Drake Rooks, Mandy Rooks appealed. The state Supreme Court heard oral arguments in January focused on balancing the procreative rights of the two, and a decision is expected later this year.

Decisions in other major cases have gone in [different directions](#). In Illinois and Pennsylvania, embryos have been awarded to women because they could otherwise not reproduce. In others, embryos have been ordered to be

donated to research or to remain frozen indefinitely until a time when there is “mutual agreement.”

Many of these disputes, including the Rooks case, have become entangled in the stormy politics of abortion.

Attorneys claim the right not to procreate is protected by the Constitution, citing *Roe v. Wade* and rulings that protect people’s access to contraception. With conflicting rulings in various states, many predict the issue will ultimately be decided by the U.S. Supreme Court.

In the Arizona case, Maricopa County Superior Court Judge Ronee Korbin Steiner had to balance Torres’s probable inability to have a child without the embryos with Terrell’s desire to not be a father.

The couple had been dating off and on in 2014 when Torres was diagnosed with a severe form of breast cancer.

Things got intense quickly. During an impulsive few weeks in July, the couple went to the Bloom Reproductive Institute in Scottsdale, where doctors retrieved 14 eggs from Torres’s body and fertilized them with Terrell’s sperm. Seven embryos were formed and frozen.

Four days later, the couple married.

In testimony in family court, Terrell said that he loved Torres at the time but argued that theirs was not a “full relationship” because they saw each other only occasionally. He said he married her because she needed health insurance. He said providing sperm for the embryos seemed “like an honorable thing just to do for her.”

“She had called me and she was in tears” over the cancer diagnosis, Terrell told the judge. “And the way I understood it, she — it was basically a death sentence.”

Through his attorney, Claudia Work, Terrell declined a request for an interview.

Torres remembers things differently. She said she was a new lawyer and he was working nights at a Veterans Affairs hospital, so they didn’t see much of each other except on weekends. But Terrell was supportive during her double mastectomy and radiation treatments, she said.

Three years after those treatments, Torres said her doctors cleared her to try to become pregnant. She found out

around that time that Terrell had been having an affair with another woman, and they agreed to divorce.

“I thought we had a good marriage,” she said in an interview with The Washington Post, “but maybe it was something that I created in my mind.”

At first, the split was relatively amicable. A mediator helped them sort through the kitchen appliances and the workout equipment. They got stuck on two things — the dog and the embryos. And so, a few months later, they found themselves in court.

Steiner, a former public defender in private practice who was appointed to the bench by Arizona Gov. Doug Ducey (R), who is known for his antiabortion stance, resolved the dog issue in about two seconds by ordering it returned to Torres. The embryo situation was more complicated.

Some courts consider embryos property — or “chattel” in legal terms — but figuring out what to do with them was not as easy as dividing them up evenly between the warring couple like other assets. Yet since they weren’t children

who had been born, they were not subject to child custody laws, either.

“I’ve researched the heck out of it,” the judge said at last, adding, “They are not people, but they are special because they’re somewhere between a bunch of cells and the potential of being a person, so I do respect it.”

Torres offered every concession she could think of: She said Terrell would not bear any responsibility for the child, financial or otherwise. But if he wanted to be an active parent, she would accommodate that, too. At one point, she even suggested that she could pay him for use of the embryos, offering to turn over her entire retirement account.

“I offered anything and everything he could possibly want,” Torres said in the recent interview.

Terrell was resolute. “It’s like a ticking time bomb,” he said in court, because of “child support or that child when coming of age coming for me.”

And so, in August, the judge made the decision for them. She said Torres had no right to use the embryos. But, in a

surprising twist, the judge said they should not be destroyed. Instead, they should be put up for donation.

Torres could not bear her own baby — but a stranger could.

She was shocked by the order. “So both of us would have a child out there,” she said. “We just wouldn’t be raising the child, and 18 years down the road if she or he wanted to find us he or she can and probably will.”

Torres is appealing the decision. Oral arguments were made in June, and a ruling is expected any day.

News of the controversial ruling soon reached the Arizona legislature. Barto said she wanted to help people in Torres’s situation. If someone selects Torres’s embryos, Barto told fellow legislators, “there will be children out there that Ruby will never be able to meet or care for” and the children “will never be able to know their genetic history.”

But the state senator also recognized the rights of those who don’t want their embryos used. The bill provided a resolution to the possibly messy financial obligations by providing that they would not be liable for child support.

Some of the other lawmakers vehemently objected.

“The legislature should not come between a woman, her doctor, her faith and her family,” argued Sen. Steve Farley, a Tucson Democrat, according to the local [Daily Courier](#).

Fertility doctors, consumer advocacy groups and other organizations also weighed in.

The Center for Arizona Policy, a conservative lobbying group that has successfully pushed antiabortion legislation in the state, supported the measure, saying the bill would “lead to more consistent rulings.”

The American Society for Reproductive Medicine, which represents doctors, nurses and other professionals who work on fertility issues, opposed the measure, arguing that it would have a profound impact on reproductive medicine.

To protect patient choice, the measure would force clinics to ship embryos out of state for storage, increasing the risk of accidents, the society argued. It said the measure would hurt stem-cell research — which many believe is critical for progress in [treatments for Parkinson’s](#), Alzheimer’s and a host of other diseases and conditions — because scarce

embryos would be tied up in legal battles and not be available to be donated to science.

The Arizona legislature made quick work of the bill. The Senate passed it 18 to 12 in February, the House 33 to 25 in March. It was signed into law on April 3.

The law cannot be applied retroactively and therefore should not directly affect the Torres case. In a friend-of-the-court brief, the Academy of Adoption and Assisted Reproduction Attorneys urged judges in the Arizona Court of Appeals, where their case now stands, to balance the interest of each former spouse.

“In these cases, the parties do not have equal claims: the constitutional protection against compulsory parenthood is in most situations greater than any procreative interest in pre-embryos,” the group wrote.

Work, Terrell’s attorney, said she believes the new law “was rushed into effect through emotion” and is unlikely to stand up to legal challenge.

“People have the right to change their minds,” Work said. “And you cannot undo a child.”

Torres, meanwhile, is running out of time.

During her cancer treatment, she learned she has genetic mutations that put her at high risk for uterine cancer. She says her doctors are urging her to have a hysterectomy as soon as possible.

“At this point, I am questioning whether it will work out for me,” she said. But she supports the law and hopes her court case will set a precedent for future disputes, saying she is “trying to make changes for somebody else. . . . There may be hope for somebody who is younger than me.”



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