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COMMENTARY: Updated approach needed on reproductive technology law

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Thanks to new reproductive technologies, choice plays a central role in the establishment of families and the creation of children more than ever before. However, recent legal disputes in Alberta demonstrate that the courts will not always enforce that choice.

In two recent Alberta cases, the courts refused to enforce contracts setting out the rights of individuals who chose to use reproductive technologies. In doing so, the courts significantly restricted the autonomy that reproductive technologies offer to a rising number of Canadians who rely on them to create a family.

Caufield v. Wong, [2005] A.J. No. 428, involved a dispute between two friends over their frozen embryos. The woman had asked her male friend to assist her in becoming pregnant. Together they made use of the in vitro fertilization process.

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At the discretion of the donors, embryos may be kept frozen at the medical facilities for future use. But clinics, like the one used by Caufield and Wong, require that couples sign a contract preventing either one of them from using the frozen embryos without the other's consent.

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Wong and Caufield's first attempt at implantation was successful. But, soon thereafter, disputes arose over the remaining frozen embryos and the custody of their children. The court ordered that the parties share joint custody of the children, but it declined to enforce their contract, holding that the frozen embryos belonged exclusively to the mother.

What makes this result highly controversial is the fact that Caufield wanted to attempt future pregnancies using the "couple's" frozen embryos, while Wong was more than certain he did not wish to have more children with her.

The court accepted that Wong is the father of the children created using the in vitro fertilization process, but awarded him no decision-making power over the remaining embryos. By depriving him of any right to the frozen embryos, he lost the opportunity to decide whether or not he would become a father again, and, in particular, a father to Caufield's children.

In another Alberta case, the court refused to enforce a contract determining the parental rights and obligations of Jane and John Doe. In February, in *Jane Doe v. Alberta*, [2007] A.J. No. 138, Jane Doe asked the Alberta Court of Appeal to allow her to exclude John Doe, her live-in partner, from any parental rights and obligations over the child she had recently given birth to through artificial insemination by an anonymous donor.

As a professional, Jane Doe was capable of financially supporting herself and her child. She opted to enter into a legal agreement with John in order to maintain her single parent status. Both parties signed a contract that prevented John from legally becoming the child's father in order to do away with future battles over child support or custody. Declaring this agreement unenforceable, the Alberta Court of

Appeal effectively denied Jane Doe the right to decide what would be in the best interest of both herself and her child.

In both cases, the courts refused to enforce the parties' rights to choose whether or not to be a parent, and, in the *Doe* case, the right to create an alternative family. Both decisions suggest that courts remains wary of enforcing contracts in the family law setting, preferring the wisdom of third party judges to the first-hand wisdom and knowledge of parents.

The use of reproductive technologies to create families may necessitate a shift in the way family law applies to these alternative families and their decision-making processes. Families can now be "planned" in ways that were unimaginable to previous generations.

Reproductive technologies allow individuals to become parents only when true intention exists. The *Caufield* and *Doe* decisions are sending the message that individuals who choose to employ reproductive technologies either cannot or should not be entrusted to make the right decisions, both for themselves and their children.

For now, the *Caufield* case remains Canada's only decision on the disposition of *in vitro* embryos as between a couple.

The *Doe* case also remains law, as the Supreme Court of Canada recently denied Jane Doe leave to appeal her case. Canada's highest court passed up an opportunity to review current thinking and create a new approach to the law governing reproductive technology.

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