

# Now & Next

## Healthcare Alert

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### Recent cases and legislative developments impacting IVF services

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While efforts to preserve access to IVF services continue on a national level, questions of liability for IVF providers remain open.



#### What's the impact?

- The *LePage* ruling produced an immediate effect on IVF services in Alabama due to concerns that providers could be held civilly liable for the wrongful death of a minor, including extra-uterine embryos, due to wrongful acts, omissions, or negligence.
- Without federal legislation that preserves access to IVF services and addresses the liability implications for providers delivering these services, states are free to make determinations around these issues.
- The *LePage* ruling may bring embryo disposition questions into focus for states like Alabama that have "fetal personhood" laws, and as a result, these states may extend abortion bans or other laws to apply to extrauterine embryos.

In the wake of the Alabama Supreme Court's February 2024 decision, *LePage v. Center for Reproductive Medicine*, there have been efforts by other states and the federal government to

address access to in vitro fertilization (IVF) services. The *LePage* ruling raised liability considerations in connection with the handling, storage, and destruction of embryos by IVF clinics, as well as related service providers such as tissue banks and laboratories. Although subsequent legislation has been passed in Alabama to address IVF provider liability, and there have been efforts to preserve access to IVF services on a national level, questions of liability for IVF providers and those providing related services remain open.

## **Alabama Supreme Court ruling—the *LePage* case**

In *LePage*'s decision, the Supreme Court of Alabama held that extrauterine embryos (i.e., embryos created outside of the uterus through IVF) are considered children under the state's Wrongful Death of a Minor Act (the Act).

In *Lepage*, three couples sued The Center for Reproductive Medicine (the Center) after an unauthorized patient accessed the Center's tissue bank, attempted to remove the couples' frozen embryos, and dropped them, resulting in the destruction of the embryos. The trial court dismissed the couples' wrongful death claims upon a finding that cryopreserved embryos did not meet the definition of "child" under the Act. On appeal, however, the Alabama Supreme Court reversed the trial court's decision, finding that the Act applies to all children, born and unborn, and does not differentiate between extrauterine embryos and those in utero. Specifically, the Court identified that "an unborn child is a genetically unique human being whose life begins at fertilization and ends at death" and, determined that there is no exception in the Act for "unborn children who are not physically located 'in utero.'"

## **Liability and other implications under state law**

The *LePage* decision raised immediate legal, practical, and ethical questions for IVF service providers located in Alabama, performing services for Alabama patients, or that otherwise could be implicated by the law based on some nexus to Alabama IVF treatments, which, as a result of the ruling, could face civil liability under the Act in connection with the destruction of embryos.

Following the decision, IVF service providers halted services due to the uncertainty and potential liability surrounding the handling, storage, and destruction of embryos. In an effort to address these concerns, on March 6, 2024, the Alabama legislature passed a [law](#)<sup>1</sup> that extended criminal and civil immunity to IVF providers, which was viewed as a protective measure for IVF providers. On the one hand, the statute is broad, appearing to provide immunity under law for **any** loss attributed to an embryo "when providing services related to IVF." On the other hand, there is some uncertainty as to the intended scope of the broader immunity protection for "manufacturers of goods," which are not afforded civil immunity. Further, the language of the

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<sup>1</sup> Ala. Sen. Bill 159 (2024).

law is vague in its reference to protecting persons that provide "services related to IVF" and may not provide protection for other service providers in this space, such as companies that store, transport, or handle embryos where the ultimate service relates to embryo destruction (e.g., transporting out of state for use in research or other disposition).

The implications raised by the *LePage* case and subsequent developments may reach beyond Alabama, as some states may focus on efforts to either preserve IVF access and services, and others may seek to expand greater protections to embryos.

## **IVF and fetal personhood laws**

For example, states that have fetal personhood laws afford the same rights of personhood to unborn fetuses and a number of states provide other protections to embryos, typically in the context of an abortion ban and pregnancy. Generally, it appears that in states where personhood rights or special rights are afforded to embryos, disposition, destruction, and transport are not explicitly prohibited acts and do not yet specifically address embryos outside of the abortion context. However, like Alabama, these states could potentially interpret their wrongful death or other laws as applying to extrauterine embryos, putting IVF clinics in a position of potential liability. The threat of civil or criminal penalties in connection with embryo loss and destruction would likely lead providers to pause or halt IVF services while they assess legal implications of practices related to embryo storage, testing, and transfer. The increased risk of liability could lead to increased costs and expenses for IVF clinics, resulting in higher costs for patients.

## **Measures to protect IVF services**

On the other hand, states have implemented measures to protect IVF services and providers and clarify that embryos are not afforded protection. New York has long held that "unborn children have never been recognized as persons in the law in the whole sense,"<sup>2</sup> and that there is no cause of action under New York law for wrongful death of an unborn child.<sup>3</sup> The [New York Reproductive Health Act](#) codified the protections of *Roe* to ensure access to abortion. Colorado's [Reproductive Health Equity Act \(2022\)](#) states that "every individual has a fundamental right to use or refuse contraception; every pregnant individual has a fundamental right to continue the pregnancy and give birth or to have an abortion; and a fertilized egg, embryo, or fetus does not have independent or derivative rights under the laws of the state." Other states may take similar action, which would likely be comparable to protections afforded to abortion-care providers operating in those states (e.g., that the provider cannot be extradited, the state will not cooperate with foreign states' disciplinary actions related to reproductive services, etc.).

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<sup>2</sup> *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 200, 286 (1972).

<sup>3</sup> *Endresz v. Friedberg*, 24 N.Y.2d 478, 482, 248 N.E.2d 901, 902-03, 301 N.Y.S.2d 65, 68 (1969).

## **IVF under federal law**

On a federal level, there have been efforts to protect IVF services, most recently through a Democrat-sponsored bill, [The Right to IVF Act](#), which was blocked by Senate Republicans. The Right to IVF Act would have provided a statutory right for individuals to access IVF treatment and protected IVF service providers, with the goal of removing barriers to treatment. The bill also included provisions to increase access to IVF treatment for military members, veterans, and their families.

The legal landscape associated with IVF treatment is still evolving and IVF providers, especially in states like Alabama that have fetal personhood laws, should stay apprised of any developments.

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