

The Sofia Vergara embryo trial could change men's rights forever

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Sofia Vergara/Getty Images

[SOFIA VERGARA](#)

“Modern Family” bombshell [Sofia Vergara](#) and financier Nick Loeb’s efforts to have a child through in-vitro fertilization led to more than just their breakup — it’s now a potential landmark court case.

In 2013, the then-golden couple twice had an egg, fertilized by his sperm, placed into a surrogate.

But both procedures failed, and the stress over the process — along with what to do with their remaining two frozen female embryos — caused the couple's May 2014 breakup.

Now, as the former twosome's continuing battle over the frozen embryos heads to court in January, legal experts say the case's outcome could result in precedent-setting law.

"Right now, there's no legislation addressing our new reproductive frontier," said Manhattan lawyer Martha Cohen Stine, who is not involved in the case but who advises couples in similar situations.

Surprisingly, Loeb, the 41-year-old son of a former US ambassador to Denmark who tried to make a name for himself with his fried-onion condiment Onion Crunch, did what many celebrities try to avoid at all costs after his breakup with the 44-year-old sex symbol.

He went public — very public.

"As we began to discuss other potential surrogates, it became clear once more that parenthood was much less urgent for her than it was for me," Loeb wrote in an opinion piece for the New York Times.

"We had been together for over four years. As I was coming on 40, I gave her an ultimatum. When she refused, we split up."

A few months later, Loeb sued the Colombian-born star to block her from destroying the embryos.

Vergara, who has an adult son, countered through her lawyer that she didn't want to discard the embryos, but also wouldn't allow Loeb to bring them to term with another surrogate.

"Vergara, who has happily moved on with her life, is content to leave the embryos frozen indefinitely, as she has no desire to have children with her ex, which should be understandable given the circumstances," the actress' lawyer, Fred Silberberg, told "E! News" last year.

But Loeb said in his Times piece, "Many have asked me: Why not just move on and have a family of your own?"

“I have every intention of doing so,” he wrote. “But that doesn’t mean I should let the two lives I have already created be destroyed or sit in a freezer until the end of time.”

In May 2015, Vergara tried to put the matter to rest with her only on-camera interview about her frozen embryos.

“I’ve been working very hard for 20 years to get to this point where I am. I don’t want to allow this person to take more advantage of my career and try to promote himself,” she said of Loeb.

A contract the couple signed at the fertility clinic that required an agreement between the two to determine the future of the embryos should have been the final word on the dispute, she argued.

“There’s nothing to talk about. You know, there’s papers signed,” Vergara said.

She was wrong.

Los Angeles County Court records show that the embryo battle has only heated up, with Loeb’s lawyers asking a judge to fine Vergara for refusing to sit for a deposition.

The trial, scheduled to start Jan. 23, will likely focus on whether the contract stating that the embryos “could only be brought to term with both parties’ consent” is valid.

“The result of their case will shed some insight as to how the courts decide to treat contractual agreements between partners choosing at one time to freeze their embryos and then later disagreeing as to whether those embryos should be allowed to survive,” noted family law expert Catie E. Young.

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Nearly 40 years after the first co-called test-tube baby, most states still don’t have laws governing the custody of frozen embryos.

The courts tend to treat the intensely personal matter like a business dispute, deferring to clinic contracts instead of ruling on what may become the next hot-button social issue.

Stine, who advises clients to settle the custody of potential frozen embryos in their prenuptial agreements, said the courts are clearly lagging behind the science.

She found that a 1998 lawsuit is still New York state's leading case law in determining custody of frozen embryos — and even a prenup may not be the proper document to settle potential disputes over fertility issues.

“Prenups address the disposition of property and spousal support. They don't address custody or child support for an unborn child. These issues are based on the best interests of the child, and you can't determine the best interests of an unborn child,” Stine acknowledged.

“I think a prenup could validly address the disposition of a frozen embryo upon separation or divorce, but there's no legislation and very little case law. That's the problem.”

A bill sponsored by state Sen. Liz Krueger (D-Manhattan), which is pending in the Legislature, would require couples to sign a written form dealing with the disposition of embryos before they have any reproductive procedures such as implantation in a surrogate.

Courts, including in Pennsylvania and Illinois, have given preference to the so-called “last-chance doctrine,” where one side is awarded custody over the other's objections if the frozen embryos are their only reproductive option.

“We had a case where the man had testicular cancer and could no longer have children, so they took the sperm out before radiation, and it was the guy's only chance,” Manhattan divorce lawyer Joshua Forman recalled.

In another case Forman recently handled, a female client in her late 30s tried to have children with her husband, who was in his 40s, several times before they froze embryos.

The woman, a lawyer, wanted to keep the embryos after the two split, while her ex, who worked in finance, was adamant that they be destroyed.

“What we wound up settling for is donating the embryos, but because she donated them, she got on the list for [other] donated embryos and he paid for the cost,” Forman said, explaining that while his client couldn’t use their fertilized eggs, she could use someone else’s.

“I definitely see this as being the next lightning-rod issue,” Forman said.

Trashing frozen embryos went against the religious beliefs of one New York woman, Maureen Kent, whose 1998 divorce suit against Steven Kass continues to be the precedent-setting case on the issue.

“I’m a practicing Catholic,” Kent, now 58, told The Post.

The insurance agent’s 1998 suit against her ex to preserve their frozen embryos was the first to reach the state’s highest court.

“I think morally, ethically, that was the right thing to do,” Kent said about her five-year quest to save the embryos.

Her ex had objected to “the burdens of unwanted fatherhood,” according to court papers.

Kent, who is single and never had children, ultimately lost the battle after the Court of Appeals upheld an agreement she had signed with Kass to donate the embryos to research if they split up. She was shocked to learn that her decades-old case is still the guiding law.

Stine explained the ruling by saying, “Having a frozen embryo in a lab is not the same thing as having a fetus growing inside your womb.”

The Court of Appeals was also sensitive to Kass’ fears.

“He was concerned he would get a call in five years, 10 years and [hear], ‘You’re responsible for triplets,’ ” recalled Kass’ former lawyer, Linda Armatti Epstein.

Under current New York law, biological parents can’t waive financial responsibility for their children — no matter how they’re conceived.

Stine said the existence of the clinic contract allowed the high court to essentially duck a very difficult decision.

“The courts don’t like to force procreation in general, [so] they are probably not going to force a divorcing person to have a child with his or her soon-to-be ex-spouse,” Stine said.

A California interior designer, who would only give his first name, Ezra, shared Kass’ concerns when he divorced his neuroscientist wife of 10 years this past spring.

Instead of going through a costly trial, he caved to her demands to use their frozen embryos if she wanted to have a child in the future — on the condition that she take sole responsibility for the kid.

But the agreement still haunts the 37-year-old. That’s because laws in many states, including California and New York, may not recognize it.

Both states allow people to make voluntary arrangements addressing the fate of frozen embryos. They don’t allow spouses to sign off on the future of their unborn children.

California law shields only sperm donors, not spouses, from parental responsibility, said Young.

Ezra declined to give his last name because he’s still finalizing the agreement with his ex.

“If she wants to have her own genetic kid and [our embryos] are the only option, ethically, I don’t feel like taking that choice from her,” Ezra said.

“But I made it clear that I didn’t want to be part of that future family, nor did I want her to come back to me in 20 years and say, ‘You owe me all this alimony for children you never knew about,’ ” he said.

He’s hoping that another former couple, perhaps Vergara and Loeb, will help answer what is a troubling question.