

# On the Protection of Reproductive Embryos in Vitro by the Personality Rights Law

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**Abstract:** Reproductive embryos in vitro are formed by infertile couples for the purpose of breeding children. It has the potential to develop into life and carries the personality interests and spiritual values of donor couples. At present, there are many judicial disputes related to reproductive embryos in vitro, but legislation has not clearly stipulated the right attribute and protection path of them, resulting in different court decisions. Based on this, considering that the reproductive embryo in vitro does not have life consciousness before being implanted into the mother, but includes the life, health and general personality rights of the donor couple, it is appropriate to identify it as a special object of rights with personality attributes greater than the attributes of Object - "personality object", which should be included in the protection category of the personality right law and be specially stipulated. The rights enjoyed by the donor couple on the reproductive embryos in vitro belong to the personality rights and interests. When the personality rights and interests are violated, they can not only request protection according to the general provisions for the protection of personality rights, but also claim compensation for mental damage according to the specific things infringing personality, so as to realize the direct protection of the donor couple and the indirect protection of the embryo.

**Keywords:** Reproductive Embryos in Vitro, Personality Object, Protection of Personality Right Law, Personality Attribute.

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## 1. Introduction

The 20th National Congress of the Communist Party of China emphasized that the new era and new journey should adhere to the path of human rights development in China, actively participate in global human rights governance, and promote the comprehensive development of human rights cause. Currently, with the liberalization of China's "three child" policy and the mature development of medical assisted reproductive technology, infertile couples often choose in vitro fertilization to synthesize reproductive embryos in vitro for the purpose of conceiving their children. At this time, the embryos do not yet possess personality awareness, and are generally frozen and stored in a hospital. When conditions are available, the hospital will implant them into the maternal uterus to conceive the fetus. From this perspective, reproductive in vitro embryos are different from in vitro embryos used for medical and scientific research activities as stipulated in Article 1009 of the Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code"). In addition to containing the genetic material of the donor husband and wife, they also represent the hope of the donor husband and wife to conceive children, and contain the strong spiritual sustenance and personality emotions of the donor husband and wife. Moreover, in general, reproductive embryos in vitro are implanted into the mother's body to conceive the fetus, which has the potential to develop into life, and should be specially protected.

However, at present, the Civil Code does not explicitly stipulate the right attributes and protection paths of reproductive embryos in vitro. This article, by combing the views of the practical and theoretical circles on the right attributes of reproductive embryos in vitro, proposes that reproductive embryos in vitro should be a personality property right attribute from the perspective of respecting and safeguarding human rights, and recommends that they be

included in the protection scope of the personality rights law from the perspective of emphasizing the protection of personality attributes, And make some special provisions when applying the protection of personality rights law.

## 2. Practical and Theoretical Disputes on the Right Attributes of Reproductive Embryos in Vitro

To achieve effective protection of reproductive embryos in vitro, the first step is to clarify their right attributes. As for the right attribute of reproductive embryos in vitro, there is no direct provision in Chinese law. Different courts have different definitions in judicial decisions, and there are also endless disputes in theoretical circles.

### 2.1. The Subject Right Attribute

#### 2.1.1. Viewpoints of the Practical Community

In judicial decisions, courts have defined the right attributes of reproductive embryos in vitro from the perspective of the subject's right attribute, arguing that embryos in vitro have both personality and personal attributes, and should be included in the protection of personality rights and parental rights. For example, the People's Court of Luohu District held that the reproductive embryos in vitro of donor couples used in vitro fertilization for reproductive purposes have potential life characteristics, bearing personality and ethical characteristics. And there is a close bioethical connection with the donor couple due to the presence of genetic material from both spouses of the donor, the donor couple was judged to have the right to supervise and dispose of embryos in vitro[1]. The People's Court of Jinjiang District believes that embryos possess biological characteristics, have a higher moral status and ethics than non-living organisms, and should be particularly respected and protected[2].

## 2.1.2. Theoretical Perspectives and Analysis

There are two types of scholars in China who support the subject right attribute of reproductive embryos in vitro. One is to adhere to the subject right attribute of embryos, and the other is to adhere to the subject right attribute of donor couples. The first category scholars argue that the implantation of a reproductive embryo into a mother's body constitutes the formation of a fetus, which should be protected equally with the fetus. Although it is not implanted into the mother's body and does not have a sense of personality, it has the potential to form life itself. Due to respect for human dignity, it should be treated as a special legal subject for protection[3]. Another group of scholars who insist on the subject right attribute of the donor husband and wife regards the reproductive embryos in vitro as a part of the donor body, with only a slight shift in physical position and a temporary separation from the donor body, eventually returning to the mother's body to conceive the fetus, advocating protection of the donor's personal rights[4]. Supporting the subject right attribute is indeed conducive to reflecting the legal respect for human dignity and protection of life safety. However, reproductive embryos in vitro have not yet shown signs of life, making it difficult to define them as "person" in law. Moreover, it is obviously unreasonable to treat reproductive embryos in vitro as part of the donor body, as sperm and eggs are separated from the donor body.

## 2.2. The General Property Right Attribute

### 2.2.1. Viewpoints of the Practical Community

In judicial practice, some courts believe that reproductive embryos in vitro do not belong to the category of "person" in the civil law, and thus identify them as general objects, as the object of ownership, as the subject of a custody contract, or directly define them as entrusted custody. Some parties even state embryos that cannot be implanted into the mother's body as "medical waste"[5]. For example, the People's Court of Wuhou District believes that embryos formed through medical technology have the characteristics of "matter" before being implanted into the mother's body and become life, belonging to the category of "matter". Since the embryos originate from the body of the donor husband and wife, the relevant rights of the embryos should belong to the donor husband and wife[6]. The People's Court of Jiangnan District believes that frozen embryos are "stored objects", and the donor couple, as custodians, have the right to receive the "stored objects" at any time[7].

### 2.2.2. Theoretical Perspectives and Analysis

Scholars who support the general property right attribute define reproductive embryos in vitro as "matter" in civil law. According to this theory, a reproductive embryo in vitro is a new substance synthesized from sperm and eggs that are separated from the human body, and even if returned to the body, it is not a pathogen. Therefore, it should be protected as a general object in civil law, and the donor couple should be regarded as the joint owners of the "object". If one party dies, the other party has full ownership. For example, some scholars argue that a reproductive embryo in vitro is just a group of unformed cellular tissue, and its potential for adult development does not necessarily make it a bearer of rights and obligations in civil law, and its nature is not different from other human tissues[8]. Although supporting the general property right attribute is conducive to measuring the property

value of reproductive embryos in vitro, treating them as the property of the donor couple completely ignores the potential for life of reproductive embryos in vitro, and cannot effectively protect the dignity of life implied after reproductive embryos in vitro and the personal interests of the donor couple.

## 2.3. The personal property right Attribute

### 2.3.1. Viewpoints of the Practical Community

In judicial practice, a large number of judicial decisions define reproductive embryos in vitro from the perspective of the property right of personality. For example, the Jinjiang District People's Court of Chengdu believes that reproductive embryos in vitro have potential life characteristics, and are a transitional existence between person and matter. They not only contain genetic material from the donor couple, but also bear the emotional and other personal interests of the donor couple, claiming that the donor couple enjoys legal civil rights and interests in the embryo[9]. The Intermediate People's Court of Sichuan Province holds that although reproductive embryos in vitro have the potential to develop into life in a certain environment, they do not possess the characteristics of "person" before being implanted into the mother. Therefore, reproductive embryos in vitro are defined as special objects with the potential to develop into life. The donor couple naturally has the right to freeze the embryos, but the ownership of the embryos by the donor couple is not only in the sense of complete property, it is a right with personal elements, including parental right, which makes the rights of embryos exclusive[10]. The People's Court of Shizhong District believes that embryos are a transitional existence between person and matter, with the potential to breed into life, and have a higher moral status than non-living organisms. They should be specially respected and protected, because they bear the personal interests of the mother's grief and spiritual comfort[11].

### 2.3.2. Theoretical Perspectives and Analysis

Most scholars in the field of legal theory support the definition of reproductive embryos in vitro as the personal property right attribute. They believe that although reproductive embryos in vitro have the potential to develop into "person", they are not "person" in themselves, and therefore do not have a dominant position. They should be defined as personality object that contain human interests, [12] and subject to certain restrictions when applying property law. In this regard, reproductive embryos in vitro need to be preserved in a special manner before being implanted into the mother, and the success rate of surgery for implantation into the mother is not 100%. During this process, there is a risk of embryo damage or elimination, so it is indeed difficult to define them as "person" before they become a fetus with biological characteristics. It is difficult to achieve special protection for reproductive embryos in vitro and respect and protect the personal interests of donor couples by defining it as a "personality" object that has a personality attribute greater than that of the matter, and to include it in the protection of personality rights. Some special provisions should be made when applying the personality rights law.

## 3. Feasibility of Applying Personality Rights Law Protection

At present, the phenomenon of personification of matter is

relatively common, and it has been affirmed by legislation and justice that certain things bear the strong personal interests of the obligee. However, reproductive embryos in vitro not only have the possibility of developing into life, but also bear the personal interests of the obligee. Therefore, they can be included in the scope of protection of personality rights law from both the perspective of "person" and "matter". words in a paper title.

### **3.1. The Proper Status of Reproductive Embryos in Vitro**

Reproductive embryos in vitro are formed by donor couples using their own sperm and eggs. Although different from traditional methods of pregnancy, they are still the way for donor couples to conceive their children. In the eyes of donor couples, reproductive embryos in vitro have the same status as ordinary fetuses, and are both unborn "children" with the possibility of developing into life. Despite this low possibility, reproductive embryos in vitro still represent "life". It contains the strong personality attributes of the donor couple. Although a large number of cases in judicial decisions have not overlooked the potential of reproductive embryos in vitro to develop into life, most decisions still regard embryos as the scope of protection of "matter". Moreover, although most judgments regard it as a "matter", they all believe that it is not a "matter" in the general sense of civil law. For example, the People's Court of Jinjiang District believes that reproductive embryos in vitro contain the genetic material and emotional sustenance of both donor couples, and have a close bioethical relationship with the donor couple. The donor couple is their natural right holder, which is different from ordinary things and has special significance for the donor couple[13]. From this perspective, the essence of judicial decisions to protect reproductive embryos in vitro as "matter" is still to protect the personal rights and spiritual interests of the donor couple implicit in them through "matter", which can also achieve the effect of indirect protection of embryos. Therefore, reproductive embryos in vitro do not have a sense of life before they are implanted into the mother, so it is not appropriate to define them as "person" and should be defined as "matter". However, they should be defined as personality things with personality attributes that are far greater than property attributes. Their due status determines that reproductive embryos in vitro should be included in the protection scope of personality rights law.

### **3.2. Reproductive Embryos in Vitro Involve Specific Personality Rights**

Under the protection system of "person" in civil law, reproductive embryos in vitro may include specific personality rights such as life and health. First, reproductive embryos in vitro include the right to life. The right to life in the Civil Code includes life safety and dignity. For donor couples, the in vitro embryos synthesized from their sperm and eggs contain their genetic material, which is a manifestation of their continued life and represents life dignity. Moreover, the implantation of defective reproductive embryos in vitro into the mother's body by medical institutions may pose a threat to the safety of the mother's life. As far as reproductive embryos in vitro are concerned, they are a manifestation of human existence and ultimately will be implanted into the mother to develop into life. They should also be given special respect and protection[14]. Secondly, reproductive embryos in vitro include the right to health. The

right to health stipulated in the Civil Code includes physical and mental health. For donor couples, reproductive embryos in vitro are the limited results of surgical procedures such as sperm extraction and eggs extraction, which carry the spiritual sustenance of both parties and provide indispensable emotional comfort. If an embryo is accidentally damaged or lost, or any other situation occurs that prevents the couple from implanting the embryo, it will inevitably cause indelible damage to both the body and heart of the donor couple, impairing their right to health. Unlike in vitro embryos used for medical treatment and scientific research, reproductive embryos in vitro carry the emotional sustenance and spiritual comfort of a donor couple's pregnant fetus to continue their own life and dignity. Therefore, reproductive embryos in vitro should be considered as personality objects with bioethics, and the donor couple should have natural and natural rights over them, which should be included in the protection category of personality rights law.

### **3.3. Reproductive Embryos in Vitro Involve General Personality Rights**

In addition to specific personal rights, the Civil Code stipulates that the obligee also enjoys other general personal rights based on personal freedom and dignity. First, reproductive embryos in vitro involve human freedom. The personal freedom stipulated in the Civil Code guarantees the freedom of reproduction of the donor couple. How, where, and when to give birth are the freedom of both spouses. For example, the People's Court of Siming District held in a case that whether to conduct embryo transfer should first respect the mother's right of choice, and only when there is conclusive evidence that embryo transfer will have a serious adverse impact on future generations can the mother's right of reproductive choice be denied[15]. Secondly, reproductive embryos in vitro include human dignity. As far as donor couples are concerned, almost all judgments in judicial decisions have determined that reproductive embryos in vitro contain human dignity. For example, the People's Court of Yuexiu District believes that reproductive embryos in vitro contain the genetic genes of the mother, bearing the personal dignity and emotional sustenance of the obligee, and medical institutions should return the embryos[5]. The People's Court of Xiangzhou District believes that reproductive embryos in vitro contain genetic material and information, have the specificity and uniqueness of genes, have the potential to develop into human life, and contain human dignity and ethical values[16]. Therefore, based on the close connection between reproductive embryos in vitro and human liberty and human dignity of the obligee, reproductive embryos in vitro should also be included in the protection scope of personality rights law.

## **4. Specific Countermeasures for the Protection of Reproductive Embryos in Vitro by the Personality Rights Law**

As mentioned earlier, reproductive embryos in vitro are special personality objects with a stronger level of personality attributes than the level of property attributes. Therefore, including them in the protection scope of the property law cannot present their personal rights and abilities, and it is advisable to include them in the protection scope of the personality rights law. However, reproductive embryos in

vitro and natural persons have different personality rights and interests, and they have the possibility of developing into life, and the rights are for both the donor and the spouse, so special provisions should be made for them.

#### **4.1. Special Provisions for the Protection of Reproductive Embryos in Vitro**

By defining reproductive embryos in vitro as personality object and focusing on protecting their personality attributes, they are included in the protection scope of the personality rights law of the Civil Code, which can indirectly achieve special protection of reproductive embryos in vitro by protecting the personality rights of donor couples. However, when incorporating reproductive embryos in vitro into the protection of personality rights law, several issues should be specifically stipulated. Firstly, the right to personality cannot be abandoned, but reproductive embryos in vitro have not only personality attributes, but also material attributes. Therefore, it should be clearly stipulated that reproductive embryos in vitro cannot be abandoned at will, and can be abandoned under special circumstances. Bioethics is the bottom line of human behavior, which must be particularly respected and protected. Generally, it cannot be arbitrarily violated or abandoned. However, donor couples should be allowed the right to choose to give up under special circumstances such as defects in reproductive embryos in vitro that can easily lead to fetal disability, inability to survive after implantation, or maternal death[17]. Secondly, it should be clear that the donor husband and wife jointly own reproductive embryos in vitro. When there is a conflict of reproductive rights between the donor husband and wife that cannot be negotiated, in addition to damaging the embryo, special protection of the mother should be emphasized first[18]. However, if there is a special situation where the father loses fertility after providing sperm, it should be inclined to protect the personality rights of the man. Finally, personality rights cannot be transferred or inherited. The personality rights enjoyed by donor couples on reproductive embryos in vitro should be exclusive and should not be transferred or inherited. Corresponding claims based on personality rights cannot be transferred or inherited. However, there are two rights holders for reproductive embryos in vitro, and the process from embryo formation to embryo transfer surgery is a lengthy one. During this process, one of the rights holders may die at any time. Therefore, it is advisable to provide that the other party directly obtains exclusive rights upon the death of one party, and that the mother's wishes should be respected when the mother still requires the implantation of embryos and the father has not expressed a contrary intention before birth[19]. In the event of the death of both parties, based on the protection of the spiritual rights and interests of their close relatives and the special protection of embryos, their close relatives should be granted corresponding guardianship and custody rights.

#### **4.2. Relief Methods for Reproductive Embryo in Vitro Protection**

Incorporating reproductive embryos in vitro into the protection of personality rights law, when the right holder's personality rights to reproductive embryos in vitro are violated, the general provisions on the protection of personality rights are of course applicable. The newly added prohibition system of personality rights in the Civil Code reflects the personal validity of rights and the right to claim

personality rights. The infringement of the personality rights enjoyed by donor couples on reproductive embryos in vitro is generally more harmful and difficult to reverse. Therefore, the prohibition of personality rights is of course applicable to the protection of reproductive embryos in vitro to prevent irreparable damage[20]. In addition, when another person infringes upon the personality rights and interests enjoyed by the obligee on the reproductive embryo in vitro, causing serious mental damage, the donor couple can request the infringer to bear compensation for mental damage based on the first paragraph of Article 1183 of the Civil Code. The infringers here not only include external personnel such as medical institutions, but also include the mental damage caused by one spouse's unauthorized destruction of the embryo to the other party[21]. Moreover, reproductive embryos in vitro also belong to the category of "matter", and their protection can also be referred to the second paragraph of Article 1183 of the Civil Code. Although this article is located in the tort liability section of the Civil Code, substantive rights are indeed corresponding to personal rights, which can effectively protect the personal and spiritual interests implied after reproductive embryos in vitro. Moreover, when applying the second paragraph of Article 1183 of the Civil Code to reproductive embryos in vitro, it should be clearly stipulated that, because reproductive embryos in vitro are closely related to the personality rights of the obligee, once the fact of infringing the obligee's reproductive embryos occurs in vitro, regardless of whether the infringer intentionally or through gross negligence, he or she should bear the liability for mental damage compensation. In addition, it should be clear that the destruction and loss of reproductive embryos in vitro will directly lead to the loss of personal rights and serious mental damage to the obligee. The infringer should bear a heavier liability for mental damage compensation than the infringement of other personal rights and interests or personality specific objects, in order to punish the infringer and achieve comfort and relief for the obligee.

### **5. Conclusion**

The theory of the subject right attribute regards reproductive embryos in vitro as fetuses that have life once they are born and enjoy the rights they should have as natural persons, or regards reproductive embryos in vitro as a part of the body of the donor couple, advocating special protection through the personal rights of the donor couple. From the perspective of human rights doctrine and embryo protection, it is of great significance. However, it is divorced from the category of natural person subjects currently protected in China, and there is also a lack of applicable systems. Adhering to the attribute of subject rights may lead to chaos in the entire civil law system[22]. The theory of general property right attributes regards reproductive embryos in vitro as pure property rights objects, which can effectively solve the issue of embryo regulation and inheritance, but desecrates the potential for life and personality attributes implied behind reproductive embryos in vitro. Defining a reproductive in vitro embryo as a personality object and including it in the protection category of the personality rights law has appropriate applicability. On the one hand, it emphasizes the possibility that it will become life in the future, and should not be arbitrarily discarded, damaged, or disposed of. On the other hand, it indicates that it is a category of objects in the civil law system, but there is a strong personality attribute hidden behind the donor couple, and it emphasizes that the

personality attribute above it is greater than the attribute of the object. Once an infringement occurs, Both the general provisions on the protection of personality rights can be applied, and the application of Article 1183, paragraph 2, of the Civil Code can be consulted to request compensation for mental damage. Of course, as a special and complex human entity, reproductive embryos in vitro require special regulations when applying the protection of personality rights law, such as the division of embryos after the dissolution of the donor couple's marital relationship, the supervision and disposal of embryos after the death of both spouses, and so on. All of these require further detailed research and regulations in the future.

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