

How Amendment 2 (Art. III, §38(d)) Cripples Missouri Laws Protecting the Unborn

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Amendment 2 of 2006, now embodied in the Constitution of Missouri as Article III, §38(d), was advertised as a legal guarantee of scientific research into the curative powers of stem cells. It covered both unethical embryonic stem cell research and also legitimate adult stem cell research. However, the coverage of Amendment 2 extends much further than the science of stem cells. Its provisions cripple several protections of unborn babies that are found in Missouri's statute books, especially those found in §§ 188.036 and 188.037, Revised Statutes of Missouri (RSMo). This paper offers a detailed analysis of the Amendment's effects on humans produced by fertilization. The Amendment's effects on humans produced by cloning are discussed in a separate paper.

1. Experimenting Upon Naturally-Conceived Babies

Section 188.037, RSMo. (Revised Statutes of Missouri), prohibits experimenting on a living unborn child or a child aborted alive, except as necessary to protect or preserve the life and health of the child. However, if a researcher desires to conduct an experiment on a living unborn child or on a child aborted alive for a purpose relating to stem cell research or stem cell therapies and cures, then Art. III, §38(d) of the state constitution supersedes §188.037 and renders it unenforceable in that instance. "Stem cell research" under §38(d) means "any scientific or medical research involving stem cells." §38(d), subsec. 6(15). Equally broad is the definition of "stem cell therapies and cures": "any medical treatment that involves or otherwise derives from the use of stem cells, and that is used to treat or cure any disease or injury." *Id.*, subsec. 6(16). The broader are the parameters of the research that may be included within these definitions, the narrower will be the protections granted to the unborn from being killed as subjects of such activities.

Subsections 2(7) and 7(i) of Art. III, §38(d) forbid any governmental action that would "prevent, restrict, obstruct, or discourage any stem cell research or stem cell therapies and cures," unless the restriction is found in federal law or elsewhere in §38(d). Accordingly, we examine federal law for any protections first, then we turn to the other provisions of §38(d).

Federal law provides some protection against experimenting on living unborn children so long as they remain alive. First is the Dickey-Wicker Amendment to the annual appropriations of the Department of Health & Human Services, which provides that no federal funds may be used for research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under certain regulations of the Department. (The Amendment is not permanent, and if the anti-life partisans in Congress grow strong enough, it may not be included in future appropriations bills.)

Second are the Department's "human subject" research regulations, which apply if the research or program that would use the children (i) is funded by federal money (45 CFR § 46.101(a)(1)), or (ii) falls within the ambit of regulation by federal agencies in the normal course, e.g., pharmaceutical experiments that fall within the purview of the FDA (45 CFR §46.102(e)). If the regulations apply, they allow the research to be performed, but only under the following conditions:

"The risk to the fetus is caused solely by interventions or procedures that hold out the prospect of direct benefit for the woman or the fetus; or, if there is no such prospect of benefit, the risk to the fetus is not greater than minimal and the

purpose of the research is the development of important biomedical knowledge which cannot be obtained by any other means; and

“No inducements, monetary or otherwise, will be offered to terminate a pregnancy, and individuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.”

45 CFR §46.204(b), (h), & (i).

The Dickey-Wicker Amendment also states that no federal funds may be used for research in which human embryos are created, destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under §498b of the Public Health Service Act (42 U.S.C. §289g[b]). Section 498b requires that regulations that apply to research using fetuses that are to be aborted must be the same as those that apply to fetuses that are to be carried to term. The regulations described above appear to fulfill that requirement.

The Federal Government has left unregulated privately-funded research on still-living unborn humans, unless the research otherwise falls within federal regulation. (An example would be pharmaceutical research, which the FDA regulates. See 21 CFR §§50.1, 56.101.)

Accordingly, many living unborn children or children aborted alive on which unethical medical researchers wish to experiment for “stem cell research” or “stem cell therapies and cures” will not be protected by federal law. Their only protection, if any, will be found in Art. III, §38(d) itself.

When the reader turns to §38(d) itself, she finds two provisions that unethical researchers might claim as providing protection for living embryos. First, researchers might point to subsection 2(2) of §38(d), which states in relevant part, “(2) No human blastocyst may be produced by fertilization solely for the purpose of stem cell research.” However, the word “solely” is a key word. Fertilizations do not occur the natural way “solely” for research. Therefore, subsection 2(2) offers no protection.

There is another loophole in subsection 2(2). One must keep track of the difference between “stem cell research” and “stem cell therapies and cures” as those phrases are defined in §38(d). (See the definitions described above.) Only fertilizations solely for “stem cell research” are forbidden in subsec. 2(2). It is not forbidden to produce humans by fertilization for “stem cell therapies and cures.” The two terms have different meanings because of the differing definitions attached to each in subsections 6(15) and 6(16) of §38(d).

Second, unethical researchers might quote subsection 2(3), which states in relevant part, “No stem cells may be taken from a human blastocyst more than fourteen days after cell division begins” Here, the key is knowing what a “blastocyst” is. Under the definitions of §38(d), a human is a “blastocyst” only until implantation. §38(d), subsection 6(1). Once a blastocyst implants, it is no longer a blastocyst, and at that point, subsection 2(3) would no longer apply. Thus, subsection 2(3) offers no protection for unborn babies after implantation. Any type of stem cell-related experiment could be done on a living aborted or soon-to-be-aborted baby (unless the federal regulations described above apply).

Alert readers may remember that Amendment 2 prohibits implantation of certain humans into a uterus. However, only those humans who are produced by means other than fertilization are described in the prohibition. “Cloning” is prohibited by subsec. 2(1) of Art. III, §38(d), but “cloning” is defined as implantation in a uterus of “anything other than the product of fertilization of an egg of a human female by a sperm of a human male

. . .” Subsec. 6(2) of Art. III, §38(d). Thus, implantation of humans produced by fertilization is not prohibited, and subsec. 2(3) offers no protection for them after implantation.

Nothing else in §38(d) even pretends to protect unborn children from being experimented upon for “stem cell research” or “stem cell therapies or cures.” Therefore, the section itself does not provide any protection for living unborn children or those who might be aborted alive.

The conclusion, then, is this: In the instance when a researcher wants to conduct research in any way related to stem cell research or stem cell therapies and cures, §188.037 has been superseded and cannot prevent it. If the research uses federal money or comes within the purview of federal regulations (so long as the Dickey-Wicker Amendment is re-enacted every year and the HHS regulations on human subject research remain unchanged), then the unborn child is protected. But if the research does not fall under federal regulation, or if the federal laws are weakened, then the unborn has no federal shield against the researcher’s violence. Nothing in §38(d) itself provides the unborn with any protection. Hence, living unborn children are vulnerable to experimentation related to stem cell research and stem cell therapies, §188.037 notwithstanding.

2. Experimenting Upon IVF Babies

It is uncertain that the protection of §188.037 applies to unborn IVF babies who have not been implanted in the womb. The statute describes the subject of the prohibition in two places as a “fetus or child aborted alive.” Killing an IVF embryo that has not been implanted into a womb is not an “abortion” under §188.015(1). (“Abortion” is defined there as either the intentional destruction of the life of an unborn in his or her mother’s womb or the intentional termination of the mother’s pregnancy. IVF embryos who have been frozen before implantation are not in the womb and do not make their mothers pregnant.) Does “aborted alive” apply to “fetus” as well as “child”? Such a construction would seem to make either “fetus” or “child” redundant, violating the rule of construction that every term of a statute is to be construed so that it is effective and not mere redundancy. Moreover, the statute prohibits experimentation upon the subject “either prior to or subsequent to any abortion procedure.” If there is no abortion procedure at all, does the statute apply? Perhaps not. Only an authoritative ruling by an appellate court will be able to tell us for sure.

Assuming that §188.037 applies to IVF babies who have not been implanted, Art. III, §38(d) cancels the enforceability of §188.037 for IVF babies who are desirable for “stem cell research” or “stem cell therapies and cures,” just as it does for naturally-conceived babies. The reader should review the previous section for a description of the legal mechanisms at work.

One legal difference between IVF babies who are not yet implanted and naturally-conceived babies is that federal protection is slightly narrower for the IVF babies. The reason lies in the differences between the coverage of the Dickey-Wicker Amendment on one hand and the HHS regulation cited in part 1 above on the other. The Dickey-Wicker Amendment applies to both IVF embryos and naturally-conceived embryos. It defines a “human embryo” that is to be protected as follows:

(b) For purposes of this section, the term ‘human embryo or embryos’ includes any organism, not protected as a human subject under 45 CFR 46 as of the date of the enactment of this Act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells.

H. R. 1105, Omnibus Appropriations Act, 2009, §509(b). However, the Dickey-Wicker Amendment affects only that research which is financed by the federal government. It does not affect privately-funded research.

The HHS regulations that govern research on human subjects, on the other hand, do reach one group of embryos that the Dickey-Wicker Amendment does not, and that is the group of embryos that may be involved in research that otherwise falls within the purview of federal regulation. Pharmaceutical research has been mentioned as an example above. The HHS regulations that govern this set of human beings discriminate between fetuses who are conceived in the normal way, who are protected, and unimplanted IVF embryos, who are not. A “fetus” is defined as “the product of conception from implantation until delivery.” 45 CFR §46.202(c). If no implantation has taken place, there is no protection under the regulations.

The late President’s Council on Bioethics agreed with this reading of the regulations. (The Council was created by President George W. Bush. President Obama abolished it in June, 2009. “Obama Plans to Replace Bush’s Bioethics Panel,” New York Times, June 18, 2009, p. A24.). The Council reported that federal agencies do not consider IVF babies that have not been implanted into a womb to be covered by the HHS human-research regulations. “Entities and individuals that conduct human subjects research are regulated under federal regulations, as well as by the policies and procedures of the institutions at which federally funded research is conducted. (Ex vivo embryos, however, are not considered ‘human subjects’ for these purposes.)” Pres. Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies*, p. 131 (March, 2004).

In any event, the reader should remember that privately-funded research that falls outside of normal federal regulation is not covered by any federal law or regulation that protects human embryos. In this respect, there is no difference between unimplanted IVF embryos and embryos conceived in the normal manner.

For those human beings conceived by IVF but not yet implanted who may be caught in privately-funded research, then, we turn to the terms of Art. III, §38(d) itself to determine if any protections exist. The two provisions that unethical researchers might claim as providing protection for living IVF embryos begin with subsection 2(2) of §38(d), which states in relevant part, “(2) No human blastocyst may be produced by fertilization solely for the purpose of stem cell research.” It is possible that this will prevent scientists in research laboratories from creating some humans by IVF. If they are clever, they may be able to assert additional purposes for utilizing IVF in addition to the purpose of stem cell research. In such cases, they evade the statute, which clearly prohibits creating humans “solely” for the one purpose described therein. Even creating IVF embryos for the purpose of obtaining stem cells for transplantation or another therapy would overcome the prohibition, for “stem cell research” and “stem cell therapies and cures” are different purposes in Amendment 2. §38(d), subsecs. 6(15) & 6(16). Moreover, the statute would have no practical effect on the use of IVF embryos created in fertility clinics, who are created primarily for reproductive purposes, not for research. Thus, subsec. 2(2) will provide quite limited protection for IVF embryos.

Second, subsection 2(3) of §38(d) may offer greater protection for unimplanted IVF babies than for those who may be implanted into a womb, at least for a little while. That provision states, “No stem cells may be taken from a human blastocyst more than fourteen days after cell division begins” Recall that under the definition of “blastocyst” in §38(d), implantation of an embryo ends its status as a blastocyst. Subsec. 6(1), §38(d). But that is not the only way an embryo outgrows the blastocyst stage. Under subsec. 6(1) of §38(d), a “blastocyst” is comprised of “a small mass of cells that results from cell division, caused either by fertilization or somatic cell nuclear transfer, that has not been implanted in a uterus.” It will only take a few short weeks for a blastocyst to develop into a human embryo with head, arms and legs, one that is noticeably beyond constituting a “small mass of cells.” If there is any doubt about whether that human being would be considered a protected “blastocyst” at such a stage, subsec. 7 of the §38(d) says all terms of §38(d) are to be construed in favor of stem cell research. This means that if scientists tie their programs in with stem cell research of any type, the term “blastocyst” must not be interpreted to stand in the way of growing an IVF baby to any age within an artificial womb, then taking its stem cells or any other tissue. If it kills the

human embryo to obtain stem cells, so much the worse for the new human. Section 38(d) has no deadline for taking stem cells from a human being that develops past the blastocyst stage.

Finally, subsec. 2(3) prohibits only the taking of stem cells. Removal of other tissues besides stem cells is not mentioned. If any such tissue has some relevance to stem cell research or stem cell therapies, subsec. 2(3) offers no protection at all, at any stage of development.

Hence, in connection with such stem cell research and stem cell therapies, unimplanted IVF embryos in federally-funded research will find protection from destruction. However, because of Art. III, §38(d), neither §188.037 nor any other provision of Missouri law protects an unimplanted IVF embryo from experimentation and research if federal funds are not involved.

3. Abortions Performed For The Purpose Of Obtaining Tissue

Missouri law provides that no abortion may be performed if the abortionist knows that the child was conceived for the purpose of providing organs or tissue for transplantation and that the abortion is intended to carry out that purpose. §188.036.1, RSMo. Both the conception and the abortion have to occur with the same purpose—providing organs or tissue for transplantation into the woman or another person. It is expected that instances of such purposes will be extremely rare. Creation of an IVF baby for such a purpose is a type of conception, to be sure, but no “abortion” will be performed unless the IVF baby is implanted into a woman’s womb. The destruction of IVF babies outside the womb is neither the destruction of life in the womb nor the termination of a pregnancy, so it falls outside the definition of “abortion” under §188.015(1).

But because it is possible that an IVF child would be conceived, then implanted, with a purpose to provide fetal organs or tissue for the woman or another person, an analysis of the statute is provided here.

It was noted above that subsections 2(7) and 7(i) of Art. III, §38(d) forbid any governmental action that would “prevent, restrict, obstruct, or discourage any stem cell research or stem cell therapies and cures,” unless the restriction is found in federal law or elsewhere in §38(d). These provisions supersede any state statute to the contrary.

There are no federal restrictions on performing abortions for the purpose of obtaining fetal tissue for transplantation. The federal government prefers to attack the problem on the receiving side, not the supplying side. It is the buyer who is targeted by the applicable federal laws, not the abortionist as under the Missouri law. (The federal laws are discussed below.) Thus there is no federal bar to performing the abortion notwithstanding §188.036.1 if stem cell therapies or cures are involved.

In §38(d), the prohibition against producing a human blastocyst by fertilization “solely for the purpose of stem cell research,” subsection 2(2) of §38(d), would not apply, because the purpose being considered here is abortion for transplantation, which would fall under the separate category of “stem cell therapies or cures.” See the definitions of “stem cell research” and “stem cell therapies and cures” in subsections 6(15) & 6(16). Subsec. 2(2) of §38(d) offers no defense for an IVF child.

Another part of §38(d) prohibits taking stem cells from a human blastocyst more than 14 days after cell division begins. Subsection 2(3) of §38(d). Here, the key is knowing what a “blastocyst” is. Under the definitions of §38(d), a human is a “blastocyst” only until implantation. §38(d), subsection 6(1). Once a blastocyst implants, it is longer a

blastocyst, and at that point, subsection 2(3) would no longer apply. Thus, subsection 2(3) offers no protection for unborn babies after implantation against abortions for transplantation.

This is not as idle a fear as we might hope. Robert P. George, Ph.D. of the President's Council on Bioethics pointed out that the cloners may not be aiming only at using stem cells from cloned persons. They may be aiming at developing transplantable organs that are developed using stem cells from older unborn babies. Professor George wrote late in 2005, "[B]ased on the literature I have read and the evasive answers given by spokesmen for the biotechnology industry at meetings of the President's Council on Bioethics, I fear that the long-term goal is indeed to create an industry in harvesting late embryonic and fetal body parts for use in regenerative medicine and organ transplantation." (R. George, "Fetal Attraction," *The Weekly Standard*, October 3, 2005.) See also, J. Appel, "Are We Ready for a Market in Fetal Organs?" *Huffington Post*, March 17, 2009 (http://www.huffingtonpost.com/jacob-m-appel/are-we-ready-for-a-market_b_175900.html) ("Someday, if we are fortunate, scientific research may make possible farms of artificial "wombs" breeding fetuses for their organs . . ."); F. Macrae, "Use aborted foetus organs in transplants, urges scientist," *London Daily Mail Online*, March 11, 2009 (<http://www.dailymail.co.uk/sciencetech/article-1161085/Use-aborted-foetus-organs-transplants-urges-scientist.html>); W. Saletan, "The Organ Factory," *Slate*, July 25-29, 2005 (<http://www.slate.com/id/2123269/entry/2123270/>) (five-part series—all five installments are highly recommended to readers for description of research trends and goals).

Thus, under Art. III, §38(d), the statute, §188.036.1, cannot stand in the way of abortions of unborn babies who were conceived for the purpose of obtaining tissue for transplantation in connection with stem cell therapies or cures.

4. Using Fetal Tissue From Aborted Babies For Transplantation

Section 188.036.2 forbids the utilization of fetal organs or tissue for transplantation if the person knows that the abortion was procured for that purpose. §188.036.2, RSMo. After the adoption of Article III, §38(d) of the state constitution, this provision is not enforceable if the transplantation is related to stem cell research or stem cell therapies, unless prohibited by federal law or by other provisions §38(d) itself.

There are certain federal restrictions on transplanting the organs and tissue of aborted babies (here, "human fetal tissue"). A couple of side issues must be addressed before describing those restrictions. First, we are dealing with abortion statutes for now. The treatment of cloned humans or IVF humans who have never been allowed to implant in a womb, and thus who are never "aborted," is a separate question not addressed here. Section 188.036.2 does not protect them because an abortion is not involved, unless they are implanted within a womb.

Second, all of the federal statutes mentioned here require that the transfer of fetal tissue "affect interstate commerce." That does not mean that the tissue has to be shipped across state lines. It is sufficient that the transfer occur as part of the national economy. It is almost impossible for any contemporary transaction not to affect interstate commerce, so that requirement will not be further mentioned.

Under federal law, no one can solicit for, or knowingly receive, fetal tissue for the purpose of transplantation into another person (such as with "stem cell therapies") if the tissue is obtained pursuant to an abortion and either (i) it is donated to go into a specific third person or a relative of the donating individual, or (ii) the person who solicits or knowingly acquires, receives, or accepts the donation has provided valuable consideration for the costs associated with such abortion. 42 U.S.C. §289g-2(b). This is substantial protection. Unfortunately, the federal statutes leave it open for a mother to donate an aborted child's tissue (including stem cells) for transplantation into a non-relative that

she does not select or agree to, so long as the abortion is not paid for by the donee or by anyone soliciting the donation. To that extent, there is no federal protection for the unborn human.

Another federal statute imposes informed consent requirements on a mother's donation of her unborn's organs and tissues for research into transplantation of fetal tissues conducted by the government. 42 U.S.C. §289g-1. The woman must certify that the donation is voluntary, that there are no restrictions on who may receive the transplanted tissue, and she has not been informed of the identity of such a recipient. 42 U.S.C. §289g-1(b)(1). The abortionist must attest, among other things, that he has not changed how or when the abortion is being done on account of the donation and that he has disclosed his own interest, if any, in the research to be done. 42 U.S.C. §289g-1(b)(2). There is little substantive protection for the unborn child here.

Nothing in §38(d) would help that unborn child, either. The discussions in point 1 above of two prohibitions relating to "blastocysts," subsecs. 2(2) and 2(3) of §38(d), apply to this point as well.

Consequently, a child may be aborted and his or her tissue used for transplantation or research on transplantation, notwithstanding §188.036.2, if such use is in connection with stem cell therapies or cures and the procedural requirements of the federal statutes mentioned above are satisfied.

5. Offering Inducements For Obtaining Tissues From Unborn Babies

Missouri law provides that no one shall offer any inducement to a woman or prospective father of an unborn child to conceive the child for use of its organs or tissue or to have an abortion for this purpose. §188.036.3 & .4, RSMo. Unlike the statute discussed in point 3 above, this statute is aimed at the recipients of the tissue, not at the abortionist. Using the tissue for research is forbidden, not just using the tissues for transplantation. The intent is prescribed in "either/or" terms—if one offers such compensation either for the conception of the child, or else for the abortion of the child, one violates the statute. Continuing the theme, §188.036.5 forbids anyone from purchasing or selling fetal tissue or organs resulting from an abortion. It is not considered buying or selling if a recipient of fetal tissue pays for the expenses of burial or other final disposition of the fetal remains and for a pathological examination, autopsy or postmortem examination of the fetal remains. Id.

Again, these statutes are superseded by Art. III, §38(d) of the Missouri Constitution, if the transaction is related to stem cell research or stem cell therapies or cures. Once more, federal law must be reviewed for any obstacle to the acts that subsecs. 3-5 of §188.036 describe.

Federal law does not allow anyone to buy human fetal tissue, although one is allowed to pay for the expenses of transportation, implantation, processing, preservation, quality control, and storage of such tissue. 42 U.S.C. §289g-2(a) & (e)(3). Federal law also makes it illegal to solicit for or receive fetal tissue if the pregnancy was initiated to provide it. 42 U.S.C. §289g-2(c)(1). Furthermore, as noted in point 4 above, it violates federal law if a prospective donee of transplanted fetal tissue solicits and pays for an abortion to obtain the tissue. 42 U.S.C. §289g-2(b). However, there is no federal bar to solicit or pay for an abortion to obtain tissue for the purpose of research, so long as the pregnancy was not initiated for the purpose of providing such tissue. Compare 42 U.S.C. §289g-2(c)(1). To that extent, there is no federal proscription on offering an inducement to have an abortion in order to produce transplantable fetal tissue.

As the discussions in points 1, 4 & 5 above have made clear, no provisions of §38(d) would offer protection in this situation, either. Thus, in the limited circumstances in which the federal statutes described above do not apply,

§188.026.3, .4, and .5 are overridden by Art. III, §38(d) when any fetal tissues or organs are sought in connection with stem cell research or stem cell therapies or treatment.

6. The Use of State Money for Cloning and ESCR

One of the most controversial issues in Jefferson City since the enactment of Art. III, §38(d) is the appropriation of state money toward purposes that may encompass cloning or ESCR. Subsection 5 of §38(d) states, “No state or local government body or official shall eliminate, reduce, deny or withhold public funds . . . to a person that (i) lawfully conducts stem cell research. . . .” It has been the position of Missouri Right to Life that the quoted language meant that any appropriation to Missouri Technology Corp. or the Life Science Research Board or any other appropriation for human life sciences research would result in funding cloning or embryonic stem cell research.

One judicial decision has been rendered to date on the subject, Missouri Roundtable for Life v. Sarah Steelman, case #08AC-CC00517 (Cole County Circuit Court, January, 2009). In that case, Judge Richard Callahan held that the pro-life limitations in the statute that governs the Life Science Research Board do not govern appropriations by the Legislature. Pursuant to Article IV, §23 of the Missouri Constitution, the limiting restrictions of §196.1127 do not affect any appropriations bills the Legislature will ever pass. He further ventured an opinion that §38(d) does not require the Legislature to fund any stem cell activities. He stated that it only “prohibits the legislature from eliminating, reducing, denying or withholding from a person who is lawfully engaged in stem cell related activities funds that the person would otherwise be entitled to receive for non stem cell activities, for the purpose of creating disincentives for that person to engage in the lawful stem cell activities.” Judge Callahan’s decision is on appeal. Because his decision runs counter to the opinion of several pro-life groups and their attorneys, the opinion of the Court of Appeals is anxiously awaited.

7. Section 1.205, IVF Babies, and Amendment 2.

Under §1.205, RSMo., Missouri law is to be construed to acknowledge on behalf of an unborn child at every stage of development all the rights, privileges, and immunities available to other persons, citizens and residents of Missouri. §1.205.2. Moreover, the life of each human being begins at conception. §1.205.1(1). It would appear to this writer that IVF babies, who by definition are conceived through fertilization, are conceived, and therefore their lives and health are protected from the moment of “conception” by this statute.

Unfortunately, Amendment 2 of 2006, now Article III, §38(d) of the Missouri Constitution, affects IVF babies. The protection of §1.205 is lost when it comes to killing IVF babies for stem cell research and stem cell therapies.

The discussion here relates only to IVF babies. A related paper, “How Amendment 2 (Art. III, §38(d)) Dehumanizes Persons Produced by Cloning,” addresses the lack of legal protections for human beings created by means other than fertilization.

The basic rule of §38(d), as recited above, is that state and local government may not “prevent, restrict, obstruct, or discourage any stem cell research or stem cell therapies and cures,” unless the restriction is found in federal law or elsewhere in §38(d). Subsections 2(7) & 7(i), Art. III, §38(d).

As noted in point 2 above, federal law provides no protection for the IVF babies, unless the research that involves them is financed by the federal government or when a federal agency would have jurisdiction over the research anyway if human embryos were not involved.

Turning from federal law to §38(d) itself, three purported restrictions on unethical use of embryos deserve some note. The first two, subsecs. 2(2) and 2(3) of §38(d), have been discussed in point 2 above, and the reader's attention is respectfully directed to that discussion.

The third one, subsec. 2(4), provides, "No person may, for valuable consideration, purchase or sell human blastocysts or eggs for stem cell research or stem cell therapies and cures." The proscription is much narrower than it first appears. The Amendment excludes from the meaning of "valuable consideration" all of the following: "reimbursement for reasonable costs incurred in connection with the removal, processing, disposal, preservation, quality control, storage, transfer, or donation of human eggs, sperm, or blastocysts, including lost wages of the donor." Subsec. 6(17), §38(d). One is hard pressed to think of expenses that are not excepted under this statute. One must also recognize, however, that payment for embryos or blastocysts might not be solely for expenses, but recompense for the pain and discomfort suffered by a woman who undertakes enhanced egg production, endures egg harvesting, and undergoes then the procedures to make IVF succeed. Section 38(d) prohibits payment for these items, and that may be significant.

Federal law exempts many of the same things from its definition of "valuable consideration" as §38(d) does. One difference: the federal statute does not except "lost wages of the donor" from its prohibition of paying for human tissue from 42 U.S.C. §289g-2(a) & (e)(3). Federal law trumps state law, even a state constitutional provision. Therefore, it will not be lawful to repay lost wages to a donor of a blastocyst or eggs, notwithstanding the allowance for such wages in subsec. 6(17). It is difficult to say whether the prohibition of subsec. 2(4) will result in protection of significant numbers of IVF babies.

There are additional regulations of scientists' activities in §38(d), but only those mentioned above appear to bear on the abuses of IVF embryos. One must conclude that insofar as any activities related to stem cell research or stem cell therapies and cures are involved, §1.205 is superseded and cannot offer a little human being any legal assistance.

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