GUARDIANSHIP AND THE IVF HUMAN EMBRYO

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[*This article examines the suggestion, contained in the report of the Senate Select Committee on the Human Embryo Experimentation Bill 1985, that the appropriate legal model to apply to the in vitro human embryo is guardianship. We point out that the Committee majority failed to consider alternative protective models that are at least as plausible, and in one case more applicable, given the Committee's aims. We argue that there are serious problems that beset any attempt to apply the guardianship model to embryos. The dissenting minority's proposal, to recognize the rights of the responsible decision-makers, is then analysed. We argue that this approach is also problematic, and so fails to provide a satisfactory alternative.*]

INTRODUCTION

Human Embryo Experimentation in Australia, the report of an Australian Senate Select Committee set up, following the tabling of Senator Harradine's Bill,[1] to inquire into and report on the status of the human embryo,[2] was released on 9 October 1986. The report contains majority and minority opinions, opinions which differ in their approach to the moral status of the human embryo. Briefly, the minority report argues that the embryo's status depends on the decisions made about it by the couples concerned, whereas the majority takes the view that the embryo has an inherent status which precludes all forms of destructive research.

This paper will examine the (explicit and implicit) legal models employed in the two reports, and some possible alternatives not considered. Briefly, the course adopted is as follows: we begin by examining the recommendation of the Committee majority (the Committee) that 'the most appropriate model to indicate the respect due to the embryo' is the model of legal guardianship.[3] It is argued that this is not so: that the Committee's attraction to the guardianship model stems in part from a failure to consider alternatives that are more fruitful even from its own point of view, and in part from a failure to recognize the legal and philosophical shortcomings of extending the concept of guardianship to the IVF human embryo. We then turn to the minority report, and show that, although it is able to demonstrate a further serious problem for the guardianship model, it does not provide an attractive alternative.[4]

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1 The Human Embryo Experimentation Bill 1985.

2 Senate Select Committee on The Human Embryo Experimentation Bill 1985, *Human Embryo Experimentation in Australia* (1986), (Except where otherwise indicated all paragraph references in subsequent footnotes are to this report.)

3 Para 3.42.

4 We have previously addressed some of these questions, from a different perspective, in

WHY GUARDIANSHIP?

The Committee introduces legal guardianship to serve a particular purpose: to provide a legal model for its position that the inherent capacities of the fertilised egg are sufficient to command respect. According to the Committee, such respect implies a duty not to frustrate the embryo's further development. It then introduces the notion of guardianship as the appropriate legal concept for protecting the embryo from destructive research. As the report puts it, '[i]n any guardianship, the welfare of the ward is paramount', and therefore 'it would be beyond the role of a guardian to permit destructive non-therapeutic experimentation'.[5] No less importantly, the legal implications of guardianship are clear: it is, says the Committee, 'a well understood notion in our legal system'.[6]

These remarks show why, from the Committee's point of view, guardianship fits the bill. However, they are not sufficient to show why the Committee should have settled on guardianship as a legal model. To justify that choice, it must be shown that guardianship is superior to any available alternatives. The Committee recognizes this and bases its case for guardianship on the unsuitability of the only apparent alternative:

> There are two basic ways in which society can regard any role which persons may have vested in them with regard to the fate of the embryos which result from the in vitro fertilisation of their gametes. One is akin to property rights and the person in whom the property rights are vested may be considered to have primary rights to the treatment and disposal, including destruction, of that embryo. The other is that of guardianship in which case the embryo is not regarded as property but as a distinct entity in the care for the time being of the guardian.[7]

Given this choice, the Committee opts, without much elaboration, for the view that ownership concepts should not apply to the embryo. In choosing thus it rejects the view accepted by the National Health and Medical Research Council. The NH&MRC guidelines allow that not only sperm and ova, but also the 'resultant embryos' (at least, those prior to the stage of implantation), 'should be considered *to belong* to the respective donors'.[8]

This difference of opinion is, in one sense, inevitable. It reflects a more basic disagreement about the moral status of the pre-implantation embryo. In contrast to the Senate report, the NH&MRC does not accept that the pre-implantation embryo is to be accorded the same moral status as a conscious human being (a human subject, or person).[9] But both the Senate report and the NH&MRC agree that property concepts are inappropriate when dealing with entities which have the same moral status as human subjects. It is a universally recognized principle within our society that no person can be the property of another, so, having concluded that the embryo should be regarded as if it were a human subject (for

Kasimba, P. and Buckle, S., 'Embryos and Children: Problems Raised by the Majority Report of the Senate Select Committee on Human Embryo Experimentation' (1988) 2 *Australian Journal of Family Law* 228. See also Kasimba, P., 'Regulating IVF Human Embryo Experimentation: The Search for a Legal Basis' (1988) 62 *Australian Law Journal* 128; Buckle, S. 'Arguing from Potential' (1988) 2 *Bioethics* 227; Buckle, S., 'Biological Processes and Moral Events' (1988) 14 *Journal of Medical Ethics* 144.

5 Para 3.44.

6 Para 3.34.

7 para 3.35.

8 NH&MRC Supplementary Note 4, quoted at Para 3.36.

9 As noted at Para 3.40.

the purposes of biomedical ethics), the Committee has no option but to reject property as a model for assigning rights and duties regarding embryos.

The Senate Committee's position is in this respect similar to the one taken by the Waller Committee,[10] which also rejected property as a model. However, the latter Committee had not specified exactly what sort of model should be employed. It had said, rather circumspectly, that the relationship between the biological parents and the embryo produced should be regarded as 'in some ways analogous' to the relationship of parents to a child after its birth.[11] In contrast, the Senate Committee identifies only two main options, and, having rejected one, can opt only for the other. It therefore concludes:

> Thus, the preferred model is to regard the embryo not as 'property belonging to', but as an entity enjoying the protection of a guardian. Under this model the property rights of gamete donors are exhausted on fertilisation when a genetically new human life organised as a distinct entity oriented towards further development comes into being. At that point guardianship arises and would be ordinarily and properly exercised by the intending social parents.[12]

If the available options are thus limited, the Committee's conclusion (given its view on moral status) cannot be faulted. However, it will be argued in the following section that several alternative models are available, and that at least one of these would be a more suitable vehicle for the Committee's ambitions.

ALTERNATIVE PROTECTIVE MODELS

Guardianship is one of several institutions that have evolved to transfer to others the exercise of legal rights and duties of certain members of society who are regarded as incapable of making responsible choices for themselves.[13] Another such institution is custody. Although not without definitional problems, custody '[i]n its broadest sense . . . means the sum total of the rights which a parent could exercise over his child'. In a narrower sense, it refers to 'the power of physical control over the child's movements, and sometimes to . . . residual rights not more specifically dealt with'.[14] This sense of custody is embodied in the Family Law Act 1975 (Cth).

Since custody precludes a custodian from authorising the destruction of his/her charge — a crucial consideration for the Committee in reaching its conclusion — the Committee's failure to canvass it as an alternative is an obvious oversight. Admittedly, custody orders normally presuppose a particular legal situation — they are normally sought where there has been a family breakdown — but this is not a serious problem, since parents can seek custody in most cases where the child is not with them. If we extend this to the case of the IVF embryo, at least those embryos frozen and stored at an IVF clinic could be regarded as in the custodial care of their biological or social parents. However, the shortcomings of such a scheme are clear: as the term implies, custody commonly includes the

10 Victoria Committee to Consider the Social, Ethical, and Legal Issues Arising from In Vitro Fertilization (The Waller Report), *Report on the Disposition of Embryos Produced by In Vitro Fertilization* (August, 1984), quoted at Para 3.39.
11 Waller Report, Para 2.8.
12 Para 3.41.
13 Cretney, S. *Principles of Family Law* (4th ed. 1984) 289-93.
14 Ibid. 297-8.

right of physical control over, or access to, the object of custody. Thus a custodian could, in the IVF embryo case, either transfer its storage to his or her own home or be granted sole access to where it is stored. But, since the embryo is at this stage invisible to the naked eye and needs expert care for its survival, the exercise of any such powers could only endanger its developmental prospects. Custody is therefore not well suited to perform the desired legal role.

Another possible model is court wardship, 'an ancient jurisdiction . . . designed to protect and assist all children under the age of eighteen'.[15] Under this model, the IVF embryo would be made a ward of court and all decisions regarding its fate would have to be made or authorised by the court. As this institution also emphasises the paramountcy of the interests of the ward, it also is capable of serving the purpose the Committee intends, the protection of the IVF embryo from destructive research. A possible objection to the use of this model is the argument that wardship cannot apply to unborn children, an argument that has in fact been upheld in the recent English decision of *Re F (in utero)*,[16] where the Court of Appeal held that it had no power to ward a child *en ventre sa mere*. Interestingly, the Court argued that to concede such jurisdiction would create an undesirable clash of interests of the mother and the unborn child, and that any orders against the mother would be difficult to enforce.[17] As we shall see, this is a problem shared by guardianship as well, so it would be hasty to rule wardship out on this ground alone. Given the Committee's approach, it deserves to be considered as an option, as indeed does any model that derives from principles designed to protect children.

Mention can also be made of the model of care orders which are made under specific legislation committing the care of children to certain individuals or institutions. In Victoria, for instance, the Community Services Act 1970 creates the Department of Community Services and provides that the Director-General shall act as guardian of a child committed to the care of the Department. The Act seeks to promote the welfare of children under the age of 15 years principally by providing care and protection to those who need it. This model could also be applied to the IVF embryo, although once again refinements would be necessary to adjust the model to take into account the special nature of such a ward.

Given the Committee's premises and aims, one model in particular recommends itself as a workable model. Restated, these premises include the view that the IVF human embryo is a human subject; that it therefore cannot be used for destructive research; and that an appropriate legal model for assigning legal rights and duties concerning the IVF embryo must achieve at least this much. Complications would be minimised if it was simply argued that the embryo should be regarded as a child enjoying the rights and duties that are owed to children by parents. Parents have automatic stringent duties with respect to their children, and parenthood is a more direct route to this end than guardianship because guardians are said to be *in loco parentis* to their wards.[18] Since the report

[15] Hayes, M. and Bevan, V., *Child-Care Law A Practitioner's Guide* (1986) 81.
[16] [1988] 2 All E.R. 193.
[17] *Ibid.* 196.
[18] According to Bromley, 'in common parlance the concepts of parent and guardian are quite

effectively regards IVF embryos as children, it is surprising that, instead of seeking a secondary concept that itself relies on parenthood, the Committee did not directly invoke the model of parenthood to guarantee the protection of the embryo. This should not be taken to suggest that a parenthood model would be free of problems. The principal difficulty connected with it, however, is a difficulty shared with all the other proposed models: parental rights and duties, no less than the rights and duties of guardianship, custody, *etc.* are recognized to commence when a child is born.[19]

PROBLEMS WITH GUARDIANSHIP

The Committee claims that guardianship is 'a well understood notion in our legal system'. The situation is not, however, quite so perspicuous. The concept of guardianship is increasingly lacking in both clarity and legal importance. In this section we will examine some of these problems, including the meaning and relevance of guardianship in Family Law as well as its suitability as a basis for determining legal rights and duties in the IVF human embryo situation.

As has been pointed out by one legal commentator, the term's meaning has shifted: 'Today . . . in its most common meaning [the word "guardian"] describes a person who has been appointed either by a parent under a deed or will or by a court of competent jurisdiction to stand *in loco parentis* to a child'.[20] It seems unlikely that this is the concept the Committee has in mind, since the individuals it proposes to invest as guardians will in many cases be the biological parents, and in all other cases will be the future legal parents. Therefore, they will not stand *in loco parentis* to the future child precisely because they will be its *parents*. Nevertheless this notion cannot be completely set aside because, although it would be unwieldy in the extreme to make every IVF case a subject of a specific court order, it would be possible to make investiture as legal guardian of any relevant IVF embryo a part of the process for all intending IVF parents. But it also seems clear that, as already pointed out, such matters could be more neatly handled by extending parenthood to cover all IVF embryos.

A further problem is that there has developed a confusion, fostered by the courts, between guardianship and custody — a confusion which even found its way into s. 61 of the Family Law Act 1975, remaining there until the Act was amended in 1983.[21] This can serve as one indication of the fact that, in the courts, guardianship has not been understood to be very clear. It has even been stated there that guardianship is not a term of art 'of invariable content'.[22] Rather, it has been treated as a passing institution. This is illustrated clearly by the remarks of Stephen J.:

distinct, for the rights and duties of the former arise automatically and naturally on the birth of the child, whilst the latter voluntarily places himself *in loco parentis* to his ward and his rights and duties flow immediately from this act' Bromley, P. *Family Law* (6th ed. 1981) 361.

[19] *Infra* 144.

[20] Bevan, H. *The Law Relating to Children* (1973) 397.

[21] Finlay, H. *et al. Family Law, Cases and Commentary* (1986) 212-6.

[22] Stephen, J. in *Vitzdamm-Jones v. Vitzdamm-Jones* (1981) 148 C.L.R. 383, 419-20, cited in Finlay *et al.*, *op. cit.* 216.

> Certainly all matters of usual significance regarding the person of an infant are, in the Act [i.e. the Family Law Act, 1975], encompassed in the concept of custody. It is it which usually confers actual care and control and physical custody . . . Little if anything by way of rights over the person of an infant seems to be left to be dealt with by the concept of guardianship.[23]

The above situation changed with the 1983 amendment: it introduced s. 60A (now s. 63E) of the Family Law Act 1975, where guardianship is defined as relating to 'responsibility for the long-term welfare of the child' but not 'daily care and control' of the child.[24] This, however, differs from the common law position, where the guardian, usually the parent, had custody. So we need to ask which notion of guardianship the Committee has in mind: the role it attributes to the guardian seems to resemble the common law position, and yet statutory law, which prevails over common law, would not equate a parent with a guardian. These are, once again, not insurmountable difficulties, but they do help to show the need for further clarification of the legal situation before guardianship could be expected to perform satisfactorily in the role proposed for it by the Committee.

THE PROBLEM OF EXTENSION

In applying the concept of guardianship to embryos, the Committee relies on an analogy between embryos and children. In fact, their recommendations amount to regarding embryos *as children*, albeit children of a special kind. By so doing they raise a number of problems, both legal and philosophical. The legal problems arise because the courts have tended to exclude the unborn from the purview of the institution of legal guardianship. The philosophical problems concern the intelligibility, and implications, of treating embryos as children. In this section we will discuss these two kinds of problem.

Before doing so, however, it should be noted that these problems are not unique to the guardianship model: they are common to all models which depend on the analogy, and so to all the alternative models to which the Committee could appeal. This section will therefore show both a specific problem for the attempt to apply guardianship to embryos — the actual legal authority and opinion which stand in the way of an extension of the institution to cover the unborn, and especially early embryos — and also more general problems for the very attempt to find an *appropriate* legal model for the treatment of embryos on the basis of an analogy with children.

(i) *Legal Difficulties*

If guardianship is 'well-understood' it is because it applies to minor children. Both common law and statutory law affirm this proposition. What has perhaps not been clear is when one begins being a child for guardianship purposes. Section 63F(2) of the Family Law Act 1975 defines a child as one who has not attained the age of 18 and is unmarried. But when is the beginning? One possible avenue might seem to be by appealing to the common meaning of 'child', but it

[23] *Ibid.*
[24] See also Children (Guardianship and Custody) Act 1984 (Vic.) s. 9.

is not clear that this would be of much help: the common meaning itself lacks precise boundaries. Since, in ordinary speech, it is possible to employ terms such as 'the unborn child', we can see that the ordinary meaning of 'child' does embrace stages of development prior to birth. One legal writer implicitly accepts a broader notion of this kind by stating that a parent's power to appoint a guardian applies to a child *en ventre sa mere*.[25] But it is not clear that such an extension is plausible if it is taken to include not only late stages of prenatal development but also the very earliest stages, including the just-fertilised egg. Although it is commonly accepted that a developed foetus can reasonably be described as an 'unborn child', it is not the case that the earliest embryos can similarly be so described. Furthermore, there is some authority in opposition to extensions of this kind. For instance, in the New South Wales case of *K. v. Minister For Youth and Community Services*[26] the most essential role of a guardian to represent a ward in court proceedings was refused where the alleged ward was a foetus.

A more direct example is provided by the judgment of Justice Lindenmayer in *In The Marriage Of Diessel.*[27] The relevant issue there was whether a child *en ventre sa mere* was 'a child of the marriage' under the age of 18 years within s. 63 (now s. 55A) of the Family Law Act. This section requires that a decree nisi of dissolution of marriage cannot be made absolute unless proper arrangements for the child's welfare have been made or, in their absence, that there are circumstances which the court can consider. After canvassing the problems of defining 'child' by appealing to its ordinary meaning, and also the problems inherent in bringing an unborn child within the ambit of the Family Law Act, Justice Lindenmayer held that because the unborn child did not have a separate existence from its mother, it could not satisfy the criteria set down by s. 63 — for example, measurement of age and specification of sex. He concluded that 'child' should refer 'only to human beings having a separate and independent existence at the time of consideration by the court, and not including children *en ventres ses meres* at that time'.[28] The difficulties envisaged by Justice Lindenmayer apply equally, perhaps more, strongly to the case of IVF embryos: for example, how would guardianship of IVF embryos be settled in the event of a marital breakdown?

The analogy between embryos and children, and the consequent appeal to guardianship as an appropriate model for interpreting rights and duties in the IVF case, can be traced to a submission to the Senate Select Committee. If that submission is examined, some unexpected differences emerge. The author of the submission, Justice Demack, wrote:

> In my opinion the correct way to analyse the situation is to recognise that there are, and always will be, human beings on whose behalf consent to a great variety of procedures may be given by

25 Bevan, H., *op. cit.* 398.
26 (1982) 8 Fam. L.R. 250.
27 (1980) 6 Fam. L.R. 1.
28 *Ibid.* 7. The decision has been criticised for its approach and reasoning which, it has been suggested, may not appeal to another court — see Finlay, H., *Family Law in Australia* (3rd ed. 1983) 198. The controversy surrounding the legal status of the unborn child has been examined elsewhere — see Kasimba, P., *op. cit.* 128.

> others. So, by the Statute 12 Charles II, C. 24, the father of a child yet unborn could by his will, appoint a guardian of that child who would then manage the property of the unborn child.[29]

After observing that couples seek IVF treatment only because they have sought, and so far failed, to establish a family of their own, Justice Demack goes on to conclude that he 'can see no reason why they should not be treated as guardians of that embryo which has been brought into existence in their attempt to establish a family.'[30] The similarities between Justice Demack's submission and the position adopted by the Committee are thus quite clear. However, there is also a significant difference: in sharp contrast to the Committee, Justice Demack concedes that embryo experimentation could be permissible if 'done as part of the investigation and treatment of a couple's infertility. For these purposes the questions of freezing embryos and disposing of embryos are best left to the decision of the parents.'[31]

It seems that employing the notion of guardianship does not guarantee the conclusions sought by the Committee. How is this possible? The answer seems to be this: Justice Demack's employment of the notion of guardianship focuses on the intending parents. It seeks to establish the rights of the intending parents, by according them the legal status and powers that normally attach to guardianship, rather than to restrict or diminish their position *vis-a-vis* their IVF embryos. The Committee's aim, on the contrary, is to determine the special legal responsibilities of the intending parents, to lay the protection of the IVF embryo squarely in their court.

This illustrates one difficulty inherent in the attempt to extend the role of the institution of guardianship. The notion of a guardian is complex, containing a number of different elements: the guardian has both duties *and* rights. There are therefore a number of different ways in which legal institutions like guardianship could be extended. Not only could they be employed in ways envisaged by the Committee; they could also be employed more in the manner envisaged by Justice Demack, as a way of securing the status of the intending parents. The simple appeal to the notion of guardianship will not settle what it is about guardianship that is important in such cases, and thus which of the various constituent elements are most important for determining the specific rights and duties that attach to the intending parents in particular cases. (The dissenting report's focus on the rights of the decision-makers implicitly underscores this point.)

A further cause of problems in this area is the rate of scientific development, which, among other things, results in a high degree of terminological innovation or refinement. The law needs to keep pace with these developments, or find ways of guaranteeing appropriate forms of flexibility to be able to adapt to changed circumstances. A good illustration of this problem is provided by the recent amendment to the Victorian Infertility (Medical Procedures) Act 1984. The Infertility (Medical Procedures) (Amendment) Act 1987 permits the approval, by

[29] Commonwealth of Australia, Senate, Select Committee on the Human Embryo Experimentation Bill 1985, Official Hansard Report, 16 May 1986, 2053.
[30] *Ibid.* 2054.
[31] *Ibid.*

the Standing Review and Advisory Committee on Infertility, of research that would destroy ova in the early stages of fertilisation before the syngamy stage, 22 to 23 hours after fertilisation has commenced. The amendment thus builds on the very recent understanding of fertilisation as a process occurring over time, and characterised by a number of distinguishable stages. In contrast, the common public conception of fertilisation is of a more-or-less instantaneous event, and, as a result, the amendment has been widely misunderstood.[32]

The Committee itself is not sufficiently aware of this point, and the difference it can make. Admittedly, it shows a sophisticated conception of fertilisation when it takes the word 'embryo' to refer to 'the entity which exists from the completion of the fusion of egg and sperm: that is, from the sequence of events described as fertilisation.'[33] In other remarks, however, it is evident that the more common conception of fertilisation intrudes. For example, it is treated as if it were uninterruptable (and therefore more-or-less instantaneous) when applied to the question of the embryo's moral status: 'the Committee, in using the term embryo to cover all stages from fertilisation onwards [Quaere: Inclusive or exclusive?], is content to rest with most other Committees of Inquiry in Australia and our colleagues in the Victorian Parliament'.[34] In view of the new understanding of fertilisation in the provisions of the Infertility (Medical Procedures) (Amendment) Act 1987 how is one to interpret the Committee's conception of guardianship? Most importantly, when do the guardians' responsibilities begin? Would destructive experimentation carried out prior to syngamy breach these duties?

(ii) *General Problems*

Since the primary concern of the Senate report is not with what the law is, but with what it should be, it might be thought that legal problems of the kind we have been considering are beside the point. However, there are two reasons, at least, for accepting their importance. In the first place, the legal institution of guardianship, and related institutions such as custody or wardship, do not just *happen* to apply to children. Quite the contrary: they are *designed* to apply to children, and therefore reflect both the special status of children and also their special needs. They are specialised institutions, adapted to specific tasks. They cannot therefore be easily extended to cover different kinds of case. The IVF embryo, whatever its moral status, introduces a sharply different situation from those envisaged in legislation concerned with the care and maintenance of children. Perhaps, to the extent that embryos and children have common interests, these problems can be overcome; but to allow that this is true may be of little value, because observations of this kind mask a host of difficulties. The central

[32] For example, a Standing Review and Advisory Committee decision pursuant to the Amendment was greeted in the popular press with headlines such as: 'All-clear for research on embryos' (*Age*, (Melbourne) 14 July 1988) and 'Vic go-ahead for embryo experiments' (*Australian*, 15 July 1988). The problem with these headlines, and with much of the debate that accompanied them, is that they beg the question addressed by the amendment: they regard a *fertilising* egg as identical to a *fertilised* egg, or embryo.

[33] Para 2.7.

[34] para 2.8.

problem is that it is not clear just what such common interests might be, or indeed whether it is possible that there *could be* any such interests. For example, it has been argued that very early embryos, lacking as they do any degree of consciousness, cannot properly be thought of as having interests at all.[35] This is an issue which cannot be settled here, but it is important to recognize that appeals to the interests of embryos are not as innocent as they may at first seem.

Secondly, it is also important to recognize that the law is not simply a disparate collection of rules, but a complex system which, to some degree at least, requires consistency between its specific rules and underlying principles. Thus a legal innovation or extension in one area will have implications for other areas of the law. Most notably, an extension of the notion of guardianship to cover IVF embryos could have profound ramifications for the legal understanding of natural pregnancies, especially with respect to the law of abortion. For instance, currently a father who is aggrieved by the decision of his pregnant partner to have an abortion cannot stop the abortion,[36] but if guardianship (as understood by the Committee) were to apply to IVF embryos, there would be a powerful reason for applying it also to naturally conceived *in vivo* embryos as well. The aggrieved father would in that case be supplied with a new legal avenue for contesting the abortion. Whatever the outcome of such a case, the law would not have remained the same. The extension of guardianship to IVF embryos would therefore have a notable impact on other areas of the law. Whether such impact would be for good or ill is not our concern here: the relevant point is that an examination of the likely impact is a necessary part of evaluating any proposal to extend the application of notions like guardianship. Legal innovations cannot be made in a legal vacuum.

THE RIGHTS OF DECISION-MAKERS: A PROMISING ALTERNATIVE?

In light of these very considerable difficulties confronting the attempt to provide a legal model for clarifying the status and claims of the IVF embryo, it is worth asking whether a fresh approach is possible. Perhaps by enlarging the context, or simply by changing the point of departure, these problems can be reduced or even avoided. This is just what the report of the dissenting minority of the Senate Committee aims to achieve, so it is appropriate at this stage to examine its approach and conclusions.

The dissenting report differs from the majority by shifting the focus of attention from the IVF embryo to the gamete donors or intending parents, and principally to the woman who will receive the embryo. It defends its approach by appealing to 'the pattern of medicine and health care accepted by the profession and the community.'[37] It therefore tends to regard infertility as an illness, and an IVF programme as a form of health care which, like any morally adequate treatment programme, must respect the overriding importance of the patient's

[35] The existence of embryo interests is denied, most notably, by Michael Tooley. See Tooley, M. *Abortion and Infanticide* (1983).

[36] *Attorney-General for the State of Queensland (ex rel Kerr) and another v. T.* (1983) 57 A.L.J.R. 285 and *C. v. S* [1987] 2 W.L.R. 1108.

[37] para D.6.

autonomy, or power of decision. The status of the IVF embryo — the central concern of the majority report — becomes a merely subordinate concern of the dissenting report, its value becoming a function of the woman's decisions.

This does not mean that the status of the embryo is treated as of no special account. The dissenting report agrees with the majority in ascribing to the fertilised egg the potential to develop into a human being, and that this potential is sufficient to mark it off from other kinds of human tissue. However, its interpretation of the meaning and significance of potential is quite controversial, and may even obscure the extent to which the embryo's status has been left out of account.[38] Fortunately, since the dissenting view can be spelt out without relying on that notion, such problems of interpretation can be avoided. The best course is to show why they believe the guardianship model has to be discarded, and how their approach affects the legal understanding of the IVF embryo.

According to the dissenting report, the guardianship model leads the majority report into an 'absolute contradiction': on the one hand it is committed to regarding the welfare of the ward as paramount, but on the other it is unwilling to compel a woman to accept an embryo into her uterus, even if the death of the embryo is the result. The dissenting report agrees that no woman can be compelled to accept an embryo she does not want, but argues that this must mean that 'the same rights for decision-making properly pertain throughout the IVF program, not merely at one stage in it'.[39] If a woman has the right to refuse the transfer of an embryo to her uterus, even if the embryo may subsequently die, then in like manner any 'intending social parents' have the right to decide what shall happen to any IVF embryos created either by or for them. The guardianship model therefore has to go.

There is a flaw in the minority's argument here, but it does not vitiate the anti-guardianship conclusion. The flaw is due to the conflation of two distinct rights-claims: it is one thing to have a right to refuse unwanted embryo implantation (even if the upshot is the embryo's death), but quite another to have the right to decide the embryo's fate — for example, the right to decide whether it will live or die. The former right is not a claim to power over the embryo, as is the latter, but a right of refusal: it merely recognizes my right to refuse to have the burden of the embryo's further development imposed on *me*. It is thus considerably weaker than the latter right. The importance of this difference is brought out by recognizing that, although the minority's larger position depends on the latter, much stronger, right, it need appeal only to the former to establish the case against guardianship.

When we turn to the minority's positive argument, however, problems begin to crowd in. This is because the stronger right, to decide the fate of the embryo, plays a central role, and creates difficulties that appear not to be understood. For while it is allowed that the IVF embryo is worthy of a (non-negligible) degree of respect in virtue of its potential, the minority's acceptance of the strong right of

[38] See Buckle, S., 'Arguing from Potential' (1988) *2 Bioethics* 227; but *cf.* Singer, P. and Dawson, K., 'IVF Technology and the Argument from Potential' (1988) 17 *Philosophy & Public Affairs* 87.

[39] Para D.49.

the possible parents effectively reduces the status of the embryo to an item of property. The problem is apparently half-recognized, because the minority rebuts the Committee's view that the NH&MRC recommendation — that IVF embryos 'should be considered *to belong* to the respective donors' — amounts to treating the embryos as property. We will argue, however, that the rebuttal is not persuasive.

The minority's argument is this: the phrase 'to belong to' does not indicate property rights because, in the first place,

> children have been said 'to belong to' their parents in common usage, and for a long time. This has been understood to mean not only who is their family, but who has responsibility for them — i.e. who makes decisions about them — and this does not imply that they are regarded as property.[40]

It is certainly true that the mere phrase 'to belong to' does not imply property: it is more general, and may indicate no more than a special relationship between two (or more) entities. It is also true that the point of determining to whom a child belongs is normally to determine who bears responsibility for the child. To this extent the quoted passage is accurate. It is not true, however, that being responsible for one's child means, without qualification, that one can make decisions about it. For there are some decisions that one is not empowered to make: most notably, decisions to harm the child. This might seem too obvious to mention, but it is just such constraints that the minority argument fails fully to comprehend.

This is clearly illustrated by the second half of the minority's argument. The NH&MRC's notion of belonging is, it holds, not a matter of property but of identifying the appropriate decision-makers:

> It addresses the question of who has the right to made (sic) decisions regarding the embryo rather than what sort of decisions are to be made . . . the question of who decides is separate from what is decided, and this dissenting report argues that first it is necessary to be clear who shall decide. The question of what can be decided is a separate and subsequent issue.[41]

Like the first half of the argument, this is a potent mixture of truth and error. It is true that the question of who decides is separate from what is decided, and also that it is necessary to be clear about who shall decide. But it is not true that it is *first* necessary to be clear about who shall decide, that the question of what is decided is a *subsequent* issue.

The above illustration of what parents are not empowered to do shows as much. While no one but parents are entitled to make certain kinds of decisions about or for their children, there are very distinct limits to what they can do, for the simple reason that acting outside these limits is wrong: for, although we might disagree on what it is to harm someone, we all recognize that it is wrong to harm children, and therefore that no one, not even parents, can rightfully harm them.[42] Is there anything about these limits that can justify classifying them as subsequent, or secondary, to the question of who can decide? If there is, it is very

[40] Para D.43.

[41] Para D.46.

[42] In practice, our society allows perhaps more scope for parents than is strictly justified, partly because of the difficulty of monitoring parental abuse of children, and partly because of the disutility of increased levels of state intervention.

elusive. The plausible options are that the two questions are fully independent, and so (for practical purposes) equal, or that it is the *limits* that have priority, not the deciders. This latter option is plausible because it can be argued that parents occupy the special position they do — as privileged decision-makers — because it is assumed that, in general, they are both most concerned and best placed to advance their children's interests. So, on this view, the primary consideration is the welfare of the child, with its implication that any special decision-making powers must observe strict limits. The parents' position as privileged decision-makers derives from regard for the child's welfare, and is limited by it. So, in opposition to the dissenting report, the question of who decides is most plausibly treated as 'subsequent'.

By failing to recognize the more probable pattern of dependence, the minority view unwittingly embraces exactly the model it aims to avoid — the model of property. For the pre-eminence of the decision-maker is precisely the feature that is central to, and indeed the point of, the modern notion of property. Although there may be limits on what an owner can do, these tend to be very limited because they are seen to be intrusions on the property-holder's right, and so only to be allowed in special cases of pressing necessity. The important thing is to preserve, as far as possible, an open domain for the unfettered exercise of the owner's right. This is, however, just what the dissenting report aims to secure. Its concerns are just those appropriate to a defence of property rights.

The problem for the dissenting report, then, is this. On the terms it shares with the Committee — that the IVF embryo has, because of its potential, an importance and uniqueness which sets it apart from other human tissue — it is very difficult to see why a property model is acceptable. (Its own argument against the property interpretation of 'belonging' shows that it too shares this unease.) On the other hand, if it were to be denied that, prior to implantation, the IVF embryo deserves any special regard, but may be regarded in the same terms as any other piece of human tissue, the dissenting report would avoid inconsistency, but at a price the wider community would be unlikely to accept. It could then no longer claim, as it does in its conclusion, that its view is 'in accord with . . . attitudes in our society'.[43] So, although it shows a clear failing of the guardianship model, the dissenting view is unable to proffer an acceptable replacement.

CONCLUSION

The Committee majority's proposal to explain the nature and extent of legal duties owed to the IVF embryo by means of the model of guardianship generates a number of problems which it then fails to recognize. The majority report relies too much on its account of the embryo's status — that it is to be regarded 'as a distinct entity in the care for the time being of the guardian'[44] — and has paid insufficient attention to the legal or philosophical complications likely to be generated by its proposal. The minority report, in contrast, although it also points

[43] Para D.132.
[44] Para 3.35.

out an important failing of the guardianship model, is unable to provide a satisfactory alternative. By effectively treating the IVF embryo as an item of property, it fails to distinguish the embryo's status from that of any other piece of human tissue.

In their different ways, the Senate majority and minority show the difficulties to be overcome if a satisfactory model for the IVF embryo is to be provided. They also show just how difficult it is to flesh out the suggestive but very general proposal which is contained in the Waller Report, and which underlies much of the Senate Committee's discussion, that 'the couple whose gametes are used to form the embryo in the context of an IVF programme should be recognized as having rights which are in some ways analogous to those recognized in parents of a child after its birth.'[45] The difficulties we have mapped out in this paper thus reflect, in part, the central unresolved problem of whether, or to what extent, the embryo's status can be regarded as analogous to that of the new-born child.

[45] Waller Report, Para 2.8.