



**In the  
Court of Appeals  
Second Appellate District of Texas  
at Fort Worth**

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No. 02-22-00343-CV

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CAROLINE MICHELLE ANTOUN, Appellant

v.

GABY ELIAS ANTOUN, Appellee

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On Appeal from the 367th District Court  
Denton County, Texas  
Trial Court No. 21-5535-367

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Before Kerr, Bassel, and Wallach, JJ.  
Concurring Opinion by Justice Kerr

## CONCURRING OPINION

I write separately only to follow up on the majority’s observation that it has been 17 years since our sister court in Houston “anticipat[ed] that the issue [of how to deal with frozen embryos] will ultimately be resolved by the Texas Legislature.” *Roman v. Roman*, 193 S.W.3d 40, 44 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). To date the legislature has not taken up this task, but I believe that it inevitably must.

In the wake of *Dobbs*, the Texas Human Life Protection Act of 2021 was vivified. See Tex. Health & Safety Code Ann. §§ 170A.001–.007; *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). With limited exceptions, abortions in Texas are now indisputably outlawed, reflecting legislative public-policy choices.

Section 170A.001(5) defines “unborn child” as “an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.” Tex. Health & Safety Code Ann. § 170A.001(5). I agree with the majority, though, that Appellant’s reliance on this definition to argue that frozen embryos are thus not property to be divided in a divorce is misplaced, for the reasons the majority capably laid out.

But that does not mean that a public-policy clash isn’t brewing. Frozen or not, embryos are human life—life that our law now protects from being aborted when growing within a mother’s body. But is that life also worthy of some protection when

it exists instead in suspended animation, in limbo? Ought that suspended life be treated as something more than the subject of lifeless property and contract law?<sup>1</sup>

These are questions for our elected representatives. I urge the Texas Legislature to grapple with them in light of, perhaps as on a continuum with, the policies that protect embryonic life when it is in a different location.

/s/ Elizabeth Kerr  
Elizabeth Kerr  
Justice

Delivered: July 13, 2023

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<sup>1</sup>An estimated 1 million embryos linger in cold storage at fertility clinics around the country. See Nat'l Embryo Donation Ctr., <http://www.embryodonation.org> (last visited July 5, 2023) (“That surplus [of frozen human embryos] is estimated at roughly 1,000,000 in the United States.”); Elissa Strauss, *The Leftover Embryo Crisis*, Elle (Sept. 29, 2017), <http://www.elle.com/culture/a12445676/the-leftover-embryo-crisis> (“There are an estimated one million frozen embryos in the United States right now.”); Daniel Nehrbass & Kimberly Tyson, *While IVF Is Allowed To Create Millions Of Frozen Embryos, Those Babies Need Adoption*, The Federalist (Jan. 7, 2020) <http://thefederalist.com/2020/01/07/while-ivf-is-allowed-to-create-millions-of-frozen-embryos-those-babies-need-adoption> (“Well more than 1,000,000 embryos are now in frozen storage in the United States, posing a looming social and moral crisis.”). And they can be astonishingly resilient: one baby girl, born in 2020, had spent 27 years in a tiny Siberia. See, e.g., Scottie Andrew, *Baby born from 27-year-old embryo believed to have broken record set by her big sister*, CNN (Dec. 1, 2020, 5:31 PM), <http://www.cnn.com/2020/12/01/us/baby-frozen-embryo-27-years-trnd/index.html>.