February 5, 2018

Senator Nancy Barto
Chair, Senate Health and Human Services Committee
Arizona Senate
1700 W Washington Street
Phoenix, AZ 85007

RE: SB 1393 - OPPOSE

Dear Chairman Barto and Members of the Senate Health and Human Services Committee:

I am the President/CEO of RESOLVE: The National Infertility Association, representing 7.3 million American men and women, including more than 137,000 Arizona residents, who face infertility. On behalf of men and women who are trying to have families, we strongly oppose SB 1393, a new application of "embryo personhood" legislation to the rules of property disposition in divorce.

Up to this day and in all 50 states, child custody laws have applied to children who were born and in existence. But this legislation would cause Arizona to depart from the rest of the country by making “in vitro human embryos” – frozen and the size of a single grain of table-salt – subject to new laws that draw from child custody standards and apply them to frozen embryos. As explained below, this would hurt people with infertility and we urge you to oppose SB 1393.

This bill inserts the AZ legislature into the extremely personal decision about how a couple builds their family. Its effect is to take away individuals’ rights to determine whether or not they have children – and to replace it with a government-mandated decision.

After medical treatment to overcome infertility and have children, couples sometimes will have remaining embryos that are cryopreserved or frozen. Ordinarily, the parents have given their medical providers a written, signed agreement containing their wishes about any future use of the embryos. If there is any dispute about the disposition of embryos in a divorce, as happens only rarely, the parties, their wishes, and the agreements they voluntarily entered into regarding the embryos are analyzed and judged by a court.

SB 1393, however, would override these written agreements. Instead, it would automatically be the law any party that alleges he or she plans to "allow the … embryos to develop to birth" will now be given the embryos.

We have to ask, why? Why should the "best chance" for an embryo to develop to birth be the government-imposed rule and the only criterion? We have seen related efforts before and recognize the attempt, once again, to treat embryos as if they are the same as children – as if they have "personhood" rights and interests, and, in the case of SB 1393, interests that trump what the parents previously agreed.

So, even if a couple agreed in writing several years ago that neither of them would use their embryos if they divorced, SB 1393 means that agreement can no longer be enforced or any judicial inquiry made. If an ex-spouse changes his or her mind, then the prior understanding, which may have been important in the decision to undergo reproductive treatment, will be completely negated.

Moreover, SB 1393, Subsection B, does not allow a court to consider any other factors in determining which ex-spouse gets frozen embryos. One spouse may be unfit to care for children, but if she or he claims an intent to use the embryos, the Court has no discretion: it must award the embryos to that spouse.

The results have to be examined unsentimentally.

First, take the perspective of genetic parents whose frozen embryos are given to their ex-spouse. When their ex starts having children, SB 1393 claims the genetic parent can simply not regard these children as "their" children (Subsection D). That's easy to say but horrid in practice; the bill's treatment of this situation is far too pat and simplistic. It could be exceedingly painful to have one's blood-related children being born against one's wishes and then being faced with the dilemma of whether to stay separate from one's actual children versus take on lifelong financial support and childrearing.

Second, think about what could happen in cases where there are many frozen embryos. One's ex-spouse could be given not one or two, but as many as ten or twenty frozen embryos. If the pregnancy attempts are successful, the ex-spouse who didn't want to use the embryos may be left helplessly watching a series of their biological children get gestated against their will and wishes. If the man gained control of the embryos, a woman who might still be childless will have to watch the husband's new girlfriend - or multiple girlfriends - bear her genetic children. This cannot be an outcome that AZ legislature wants to promote.

Third, will the court follow up to ensure the frozen embryos are transferred to a good womb? If the individual who is given the embryos doesn't use them for reproduction, will a court order them to do so? What if there are many frozen embryos? Will the custodian have to transfer embryo after embryo after embryo and have child after child after child?

These unhappy scenarios are the end product when the government tries to impose an iron-clad rule on a situation that is complex and deeply personal. Courts can and have analyzed

frozen embryo disputes with the delicacy they require. The rule proposed in SB 1393 will cause unnecessary difficulties for people with infertility, for families, and for children.

As the Appeals Court in Missouri stated in 2016 in a case where an ex-wife sued for control over frozen embryos:

"[The parents who made the embryos] alone should decide whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents." [1]

The legal standards in SB 1393 are especially inappropriate because microscopic embryos are not equivalent to children. The science is clear that most embryos do not have the potential to become persons. In nature, without assisted reproduction, 70% or more of embryos simply stop developing usually while they are still in the embryonic stage. (Macklon NS, Geraedts JPM, Fauser BCJM. Conception to ongoing pregnancy: the 'black box' of early pregnancy loss. Hum Reprod Update 2002;8:333-43.)

We also object to the process described in section E, whereby a biological parent is treated like an egg or sperm donor and required to submit confidential health information that is kept on record for 99 years.

RESOLVE's mission is to support people building families, but believes strongly that individuals should make their own determinations about whether and when to have children. By co-opting people's most private decisions, SB 1393 would hurt the very people who struggled to have babies. The "solution" proposed in SB 1393 is not necessary … it is not even a solution: it is an attempt to add yet one more law that seems to treat microscopic embryos as having interests on a footing like that of children. Such "embryo personhood" poses great risks to those of us who need medical help to have children. We object to SB 1393 and urge you to vote against it.

Sincerely,

President/CEO

[1] .Gadberry v. McQueen, Missouri Court of Appeals, Eastern District, Nov. 15, 2016, found at http://caselaw.findlaw.com/mo-court-of-appeals/1754542.html. The Court further held that giving frozen embryos to one ex-spouse over another (i) would be contrary to U.S. Supreme Court decisions interpreting the U.S. Constitution; and (ii) would violate the objecting parent's constitutional right to privacy, right to be free from governmental interference, and right not to procreate.