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These would-be parents' embryos were lost. Now they're grieving — and suing.

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MIDDLEBURG HEIGHTS, Ohio — Colorful umbrellas dotted an otherwise bleak cemetery landscape as chaplains led a crowd of about 50 people in prayer. Kate Plants, the organizer of the memorial service, stood by an ash tree, crying.

The ceremony was a memorial for the potential souls lost in one of the biggest mishaps in the history of modern reproductive technology, the “catastrophic failure” of a cryogenic tank at the University Hospitals Fertility Center in Cleveland. Four-thousand eggs and embryos had been destroyed in a single weekend. Five of them belonged to Plants, 33.

As the number of stored eggs and embryos rises in the United States, people desperate to become parents are bonding with potential future children at the earliest stages, when they are still just a few dozen cells. The freezer malfunction has highlighted that bond — and sparked a debate over what, exactly, was lost.

That debate is taking place in dozens of lawsuits filed since the Ohio accident and a similar one at Pacific Fertility in California in March. The most explosive suit seeks to declare embryos people, potentially opening up the Cleveland center to charges of wrongful death.

The debate also is playing out in everyday life as prospective parents such as Plants search for appropriate ways to grieve. She placed her embryos in storage four years ago shortly before her ovaries were removed during cancer treatment. The embryos were her only chance to have biological children.

But when she and other mourners shared news of the May memorial service online, some commentators declared the event “stupid.”

“Thanks for disrespecting those bereaved parents” who “birthed, held, nurtured, raised and cared for and buried” their children, one woman, who had recently lost her youngest son to cancer, wrote to Plants in a private Facebook message.

“I thought I was going to throw up,” Plants said, adding, “Everybody’s pain is different, and just because I’m honoring our loss doesn’t mean we are taking away from anyone else’s.”

Clinic officials, too, are [struggling to respond](#) to the accident, about which they have provided little information. A preliminary investigation showed that the temperature in the tanks spiked rapidly one night, for unexplained reasons, after employees had mistakenly turned off temperature-sensitive alarms. Nearly all the eggs and embryos, able to survive only for a few minutes at room temperature, are believed to be nonviable.

Officials from the clinic have apologized repeatedly for the accident. They say they are working to help people who lost eggs or embryos by providing refunds, free services and “emotional support.”

“We recognize the sorrow this situation has caused patients who were affected,” the medical center said in a statement to The Washington Post, “and are sorry for the tank failure.”

But many people who lost genetic material say they are entitled to something more than an apology and a refund — including Wendy and Rick Penniman, a Cleveland-area couple who filed the lawsuit arguing that life begins at conception and seeking personhood status for fertilized eggs.

“Right now, embryos are treated more as property than people,” said their attorney, Bruce Taubman. “It’s a very complicated issue.”

If granted, the controversial request would have huge legal implications, especially for abortion rights. University Hospitals attorneys fought to have the case thrown out, arguing that the couple signed a consent form that referred to the embryos as their “sole property” and that “Ohio law does not recognize the embryo as a ‘distinct human entity with rights.’”

In court filings, the University Hospitals has argued that the loss should be litigated under the state’s medical malpractice laws, which place caps on damages and recognize the would-be parents — not the lost embryos — as the victims.

In May, Cuyahoga County Judge Stuart A. Friedman allowed the Pennimans’ lawsuit claiming negligence and seeking damage to proceed, but he denied their “personhood” motion. “The parents may believe that the embryos they created are already persons, but that is a matter of faith or of their personal beliefs, not of science and not of law,” Friedman wrote.

A University Hospitals spokesman said the decision “reflects Ohio law with regard to embryos.”

The Pennimans have appealed to the 8th District Ohio Court of Appeals. Legal experts say their efforts to have embryos recognized as people are unlikely to succeed. But they also note that reproductive law is changing rapidly.

Until 1985, Ohio’s wrongful-death statute had been applied only to adults and children. Then the [state Supreme Court](#) held that fetuses also can be covered if they are “viable,” or at a stage of development when life could be continued by natural or artificial means. So far, that standard has been interpreted to exclude embryos.

In the absence of statutes or clear precedent, the lawsuits filed over the freezer malfunctions are taking different courses in Ohio and California.

In Ohio, the suits have been consolidated under a single judge: Friedman. They contain a wide variety of allegations, mainly focused on the failure of the clinic to provide promised services. One case, filed by lawyer Gloria Allred on behalf of three women who are cancer survivors, alleges that the fertility clinic violated the federal Magnuson-Moss Warranty Act for consumer products.

Still, the specter of a more profound wrong hangs over the proceedings. After one lawyer characterized the March freezer accident as a “Mother’s Day massacre,” Friedman last month imposed a gag order to avoid tainting potential jurors.

While attorneys for the Ohio plaintiffs are working together to streamline the discovery process, depose witnesses and obtain scientific information, each case will continue as a separate suit. In California, by contrast, attorneys have filed two class actions on behalf of all Pacific Fertility clients who lost eggs and embryos.

In one of those lawsuits, lawyer [Doris Cheng](#) argues that Pacific Fertility’s conduct was sufficiently “egregious, oppressive and substantially injurious” to constitute a violation of the unfair-competition law under the state’s business code.

Taubman, the Pennimans’ attorney, said such claims are typically applied to disputes involving things such as an elevator malfunction or the purchase of a car that’s a lemon. He argued they “are inadequate to describe the loss of potential life.”

Wendy Penniman, 41, said she is angry that the glossy brochures and ads for fertility clinics often boast about high success rates in turning egg and sperm into bouncing babies. Yet when something goes wrong, she said, the lost material becomes mere “gametes” or “tissue.”

Unlike many others affected by the accident, Wendy Penniman and her husband have two children, born after years of fertility treatments and a heartbreaking 11 miscarriages. Wendy Penniman said that means her grief is infused with guilt.

“I am thankful for what I have,” she said. But “something was stolen from me. When I look at my kids, I see what the third one might have looked like. My life right now is full of ‘what if, what if.’ ”

Not long after University Hospitals called clients to inform them about the cryotank failure, they began gathering in a private Facebook group. It was, according to the would-be parents, a mass tragedy. But unlike other mass tragedies, there is no accepted protocol or language to deal with the loss.

Some of the grieving were young and healthy and immediately launched new rounds of egg freezing. Others attempted pregnancy with the damaged embryos; those who have reported back to the group say those attempts have failed.

The rest are in various stages of mourning. One 34-year-old woman, who spoke on the condition of anonymity because in vitro fertilization is not condoned by her church, said she had become depressed and sometimes can’t leave her bed. “I am broken inside,” she said.

Their grief is made harder because it can be difficult for outsiders to understand.

“People might look at you as being irrational,” said Kate Pedro, a counselor in Columbus, Ohio, who specializes in fertility issues. “But when the life you thought you were going to have is taken away from you, it is truly like a death.”

Alice Domar, a reproductive psychologist at Harvard Medical School and Boston IVF, said that many people understand intellectually that the loss of 5-day-old embryos created for in vitro fertilization is different from the death of a child, but their grief is still real.

“Many of [the embryos] are not going to end up being babies. But the people that created them have hopes and dreams for them,” Domar said.

Plants and her husband, Jeremy, 38, had been talking about their five embryos as if they were children ever since they were created. They joked that the kids would be sci-fi fans and “comedy prodigies” who would inherit the couple’s quirky sense of humor. On the day she had her eggs collected, he snapped a smiling picture of her in a hospital gown and shared it with friends.

Plants has sued University Hospitals and is among the 200 individuals and families represented by attorney Tom Merriman. Merriman said that each patient’s losses “are so personal and profound and unique, we didn’t feel a class action would capture that adequately.”

Several months ago, shortly after Plants finished her latest cancer treatment, they set up a nursery. Painted a cheerful shade of mint green, it is overflowing with picture books and stuffed animals, with a wall hanging that urges, “Don’t quit your daydream.”

Since the accident, Plants said, she has been in “a big black hole.” She is knitting booties to memorialize the lost embryos. The first one was shaped like a bright green dinosaur.

“It’s weird because it’s not somebody we knew in person,” she said of her hoped-for child. “But it is the same. I see people all around me with babies and kids, and I am happy for them. But there are no days I don’t think about my loss.”