

DEVELOPING A LEGAL FRAMEWORK FOR RESOLVING DISPUTES BETWEEN "ADOPTIVE PARENTS" OF FROZEN EMBRYOS: A COMPARISON TO RESOLUTIONS OF DIVORCE DISPUTES BETWEEN PROGENITORS

Abstract: Embryo donation has drawn increasing attention as an alternative to using frozen embryos for stem cell research and as a method of providing infertile couples with an opportunity to realize their goal of becoming parents. Although embryo donation offers significant advantages for recipient ("adoptive") couples, it is unclear what would happen if a couple who had adopted frozen embryos subsequently divorced and disagreed about what should be done with them. This Note examines how current embryo donation statutes and contract law are insufficient for resolving this scenario. It further presents a potential resolution of disputes over embryo disposition in the context of a subsequent divorce of the recipient couple by analogizing to divorce disputes between progenitors (couples whose genetic material was used to create the embryos). This Note concludes that the most useful analogy to progenitor cases is a balancing of the procreative liberty of each member of the recipient couple but that this approach should be modified to account for the lack of a genetic connection to the donated embryos.

INTRODUCTION

In the late 1970s and early 1980s, the field of reproductive technology experienced several medical breakthroughs that demonstrated that human embryos could be created and frozen outside of the human body.¹ The increasing societal acceptance and use of these tech-

¹ See Carl C. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 55 (1999) (noting that in 1983, in Australia, the first pregnancy resulted from an embryo that had been frozen, thawed, and implanted); Susan L. Crockin, *The "Embryo" Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599, 616 (2005) (noting that the first birth of a baby conceived by in vitro fertilization in the United States occurred in 1981); Fotini Antonia Skouvakis, Note, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 109 PENN. ST. L. REV. 885, 885 (2005) (noting that

niques has offered infertile couples an exciting option for fulfilling their hopes of parenthood.² It has also led to hundreds of thousands of frozen embryos being stored around the country.³ When couples no longer need or want to use the embryos for procreation, they must face the question of what to do with them.⁴

Because of the potential for human life inherent in embryos, this question presents a complicated intersection of moral and legal issues.⁵ At its most controversial level, the choice of what to do with excess embryos involves fundamental and hotly contested debates regarding the definition of parenthood and human life itself.⁶ Donation to another couple⁷ for use in procreation is frequently advanced as a superior

the highly publicized birth of Louise Brown in Great Britain on July 25, 1978, was the first birth of a child conceived through in vitro fertilization).

² See Tracey S. Pachman, *Disputes over Frozen Preembryos & the "Right Not to Be a Parent,"* 12 COLUM. J. GENDER & L. 128, 128 (2003). Without the availability of assisted reproductive technologies, infertile couples facing the news that they cannot conceive children essentially have two options: attempt to adopt or remain childless. See Robyn L. Ikehara, Note, *Is Adoption the "New" Solution for Couples in Dispute over Their Frozen Embryos?*, 15 S. CAL. REV. L. & SOC. JUST. 301, 325-26 (2006). Both options present significant obstacles. See *id.* at 324-35; Ellen Hopkins, *Tales from the Baby Factory*, N.Y. TIMES, Mar. 15, 1992, § 6 (Magazine), at 40. Adoption requires couples to submit to screening procedures that scrutinize many aspects of their life, including their financial, emotional, and physical capacity to parent. See Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN'S L.J. 179, 227-28 (2003). Like fertile couples, infertile couples generally hope to begin their family by experiencing the joys of a newborn baby. See Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 405, 408-09; Olga Batsedis, Note, *Embryo Adoption a Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565, 566, 568 (2003). Therefore, assuming that the prospective adoptive parents have successfully passed the screening process, they could endure years of uncertainty on a waiting list before their dreams of parenthood are fulfilled. See David L. Theyssen, Note, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 72 IND. L.J. 711, 726 (1999). The adoption process also often costs tens of thousands of dollars. See *id.* For many, however, these obstacles are preferable because the alternative choice of remaining childless is a default to be avoided at all costs. See Hopkins, *supra*.

³ See Crockin, *supra* note 1, at 609.

⁴ Batsedis, *supra* note 2, at 566; Naomi D. Johnson, Note, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 854, 856 (2003). The current options include implantation at a time when pregnancy is unlikely to result, destruction, continued storage, donation to research, or donation to another couple. Katz, *supra* note 2, at 188; see *infra* note 164 and accompanying text.

⁵ See Johnson, *supra* note 4, at 854; Jill Madden Melchoir, Comment, *Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties*, 68 U. CIN. L. REV. 921, 922 (2000).

⁶ See Batsedis, *supra* note 2, at 566-67; Kimberly Berg, Note, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 506 (2006).

⁷ Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 172 (2004). Donors may

choice for the disposition of excess embryos because all of the other options effectively prevent the embryos from reaching their potential for life.⁸ This option is also considered advantageous because it provides infertile couples with an alternative method of achieving parenthood that allows them to experience the joys of pregnancy and childbirth, presents less risk that the biological parents will revoke their consent to give up the child than in traditional adoption, and is generally less expensive than in vitro fertilization ("IVF") or traditional private adoption.⁹

Although embryo donation has recently received increasing media attention and is often advanced as a promising alternative to the problem of excess embryos,¹⁰ little attention has been paid to the potential pitfalls that might be encountered with this "solution."¹¹ There

also choose to donate their excess embryos to an individual rather than a couple. See Paul C. Redman II & Lauren Fielder Redman, Note, *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, 35 TULSA L.J. 583, 587-88 (2000). This Note, however, focuses only on the complexities of donation to a couple. See *infra* notes 8-297 and accompanying text.

⁸ See Johnson, *supra* note 4, at 863-64.

⁹ See *id.* at 864-66. IVF involves the use of drugs to stimulate a woman's ovaries to produce multiple eggs. Jennifer L. Medenwald, Note, *A "Frozen Exception" for the Frozen Embryo: The Davis "Reasonable Alternatives Exception,"* 76 IND. L.J. 507, 510-11 (2001). The eggs are surgically removed from the woman by a process called laparoscopy and are then fertilized with sperm in a petri dish. *Id.* at 511. The fertilized eggs are allowed to grow for a period that usually lasts between forty-eight and seventy-two hours, resulting in two-, four-, six-, or eight-celled entities called embryos. *Id.* At that point, several of the embryos are generally transplanted into the woman's uterus in the hope of creating a pregnancy. See *id.*

¹⁰ See Embryo Adoption Awareness Campaign, News, <http://www.embryoadoption.org/news/index.cfm> (last visited Jan. 16, 2008) [hereinafter EAAC, News]. In 2002, the U.S. Department of Health and Human Services announced that the government would provide a grant of one million dollars for the development of a Public Awareness Campaign regarding embryo adoptions. Embryo Adoption Awareness Campaign, What Is Embryo Adoption/Donation?, <http://www.embryoadoption.org/about/index.cfm> (last visited Jan. 16, 2008) [hereinafter EAAC, What Is Embryo Adoption/Donation?] (discussing the Education and Related Agencies Appropriates Act, which was passed in fiscal year 2002 by the U.S. Department of Labor, Health and Human Services). In May of 2005, President George W. Bush held a press conference, surrounded by families who had successfully used embryo donation to have children, in an effort to express his opposition to the use of embryos for research. Sheryl Gay Stolberg, *House Approves Stem Cell Bill Opposed by Bush*, N.Y. TIMES, May 25, 2005, at A1. President Bush noted that children born from donated embryos "remind us that there is no such thing as a spare embryo" because "every embryo is unique and genetically complete, like every other human being." *Id.* Most recently, embryo donation has received publicity due to the announcement that a Texas company has begun to create embryos from donor eggs and sperm, which infertile couples may then "adopt" or "order" (depending on how one feels about the issue). See Rob Stein, "Embryo Bank" Stirs Ethics Fears, WASH. POST, Jan. 6, 2007, at A1.

¹¹ See Becky A. Ray, Comment, *Embryo Adoptions: Thawing Inactive Legislatures with a Proposed Uniform Law*, 28 S. ILL. U. L.J. 423, 427, 432 (2004).

have been only a few legislative attempts to define the legal status of the participants in an embryo donation and the parentage of any resulting child.¹² Although there has been much debate about how to decide disputes that arise between progenitors (the genetic contributors to frozen embryos), there is virtually no guidance addressing the legal rights of recipient couples to donated embryos in the event that they should later have a dispute.¹³

The combination of the increasing use of embryo donation and a divorce rate in our country as high as fifty percent makes it likely that a divorce between a couple who has received or "adopted" frozen embryos could occur and eventually be litigated.¹⁴ In an effort to examine how such disputes should be resolved, this Note discusses the approaches that courts have taken in resolving disputes between progenitors and examines the difficulties that may arise in applying these approaches to disputes between recipient couples.¹⁵ To provide proper context, Part I explains the technology that has allowed the creation of frozen embryos and discusses the legal struggle to define embryos.¹⁶ Part II introduces the approaches that legislatures and courts have adopted for resolving disputes between progenitors.¹⁷ Part III discusses why donor and recipient couples may or may not be interested in participating in embryo donation and how the procedure is accomplished.¹⁸ Part IV argues that the few embryo donation statutes in existence are insufficient.¹⁹ It also explains the complexities of applying the approaches used in disputes between progenitors to disputes between recipient couples.²⁰ Part IV then highlights that a version of the balancing approach used in disputes between progenitors, modified to account for the recipients' lack of a genetic link to the embryos, is the best option for resolving dispositional disputes between recipients be-

¹² See FLA. STAT. ANN. § 742.14 (West 2005); LA. REV. STAT. ANN. § 9:121-133 (2000); OHIO REV. CODE ANN. § 3111.97 (West 2005 & Supp. 2007); OKLA. STAT. ANN. tit. 10, § 556 (West 2007).

¹³ See Ray, *supra* note 11, at 427, 432.

¹⁴ See ROSE M. KREIDER & JASON M. FIELDS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 1, 18-19 (2002), available at <http://www.census.gov/prod/2002pubs/p70-80.pdf>; Ray, *supra* note 11, at 452; EAAC, News, *supra* note 10.

¹⁵ See *infra* notes 89-326 and accompanying text.

¹⁶ See *infra* notes 22-88 and accompanying text.

¹⁷ See *infra* notes 89-161 and accompanying text.

¹⁸ See *infra* notes 162-198 and accompanying text.

¹⁹ See *infra* notes 199-232 and accompanying text.

²⁰ See *infra* notes 233-326 and accompanying text.

cause it offers the flexibility to address individual procreative autonomy and respects the uniquely complicated facts of each case.²¹

I. CREATION AND LEGAL DEFINITIONS OF FROZEN EMBRYOS

In order to comprehend the complexity of issues surrounding embryo donation, it is essential to understand how frozen embryos are created.²² Part I, therefore, offers a brief overview of the scope of infertility, the types of assisted reproductive technologies ("ART") available, the ways in which they are used to create frozen embryos, and the success rates for ART.²³

In addition, it is imperative to understand the climate of uncertainty regarding the legal definition of frozen embryos.²⁴ Thus, this Part also examines the three main theories of the legal status of frozen embryos: embryo as person, embryo as property, and embryo as an interim category.²⁵

A. *The Definition and Scope of Infertility and Assisted Reproductive Technology*

Infertility is generally defined as the inability to become pregnant after at least one year of trying.²⁶ Based on their most recent data, the Centers for Disease Control and Prevention (the "CDC") have reported that, as of 2002, twelve percent of the sixty-two million women of child-bearing age in the United States have received infertility services.²⁷ The most commonly used and most effective form of ART is IVF, whereby

²¹ See *infra* notes 280–326 and accompanying text.

²² See Katz, *supra* note 2, at 182.

²³ See *infra* notes 26–41 and accompanying text.

²⁴ See Melchoir, *supra* note 5, at 924–25.

²⁵ See *infra* notes 42–88 and accompanying text.

²⁶ NAT'L WOMEN'S HEALTH INFO. CTR., U.S. DEP'T OF HEALTH & HUMAN SERVS., INFERTILITY, FREQUENTLY ASKED QUESTIONS 1 (2006) [hereinafter NWHIC, FAQs], available at <http://www.womenshealth.gov/faq/infertility.pdf>. This definition also includes women who get pregnant but then have repeated miscarriages. *Id.*

²⁷ CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2004 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2006) [hereinafter 2004 ART SUCCESS REPORT], available at <http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf>. This twelve percent was made up of two percent (about 1.2 million) of women who received infertility services within the previous year and another ten percent (about 6.2 million) of women who had received infertility services at some point during their lives. *Id.* The CDC defined infertility services as including medical tests to diagnose infertility, medical advice and treatments to help a woman get pregnant, and services other than routine prenatal care to prevent a miscarriage. *Id.*

embryos are created outside of the human body.²⁸ Because a pregnancy often does not result and the process of removing eggs from a woman's ovaries is time-consuming, expensive, and physically painful, many more eggs are often removed and fertilized than can be safely implanted at one time.²⁹ The remaining embryos are often frozen using a process called cryopreservation that allows for the possibility of a significant lapse of time between conception and pregnancy.³⁰ It is commonly estimated that there are 400,000 frozen embryos in storage in the United States.³¹ The full extent of the use of cryopreservation is still unknown.³²

By the late 1980s, increasing use of fertility treatments such as IVF led to reports that some clinics were exaggerating their success rates.³³ In an attempt to remedy this problem by providing accurate statistical data, Congress passed the Fertility Clinic Success Rate and Certification Act of 1992.³⁴ The most recent CDC National Summary and Fertility Clinic Report explains that 73.5% of ART cycles involved the use of nonfrozen, nondonor eggs or embryos.³⁵ Another 14.5% involved fro-

²⁸ Coleman, *supra* note 1, at 58; NWHIC, FAQs, *supra* note 26, at 6. Although there are a wide variety of medical interventions available for infertile couples, ART is defined by the CDC as the subset of fertility treatments in which both eggs and sperm are retrieved from donors and used to create an embryo in a laboratory. 2004 ART SUCCESS REPORT, *supra* note 27, at 3. The definition of ART does not include instances where only sperm is donated or where women take drugs only to increase egg production but not for the purpose of having the eggs surgically removed. *Id.*

²⁹ See Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 202-03 (1997).

³⁰ See *id.* at 203.

³¹ Crook, *supra* note 1, at 609.

³² See Guzman, *supra* note 29, at 220-21. Although eggs have not yet been successfully frozen for more than a short amount of time, sperm and embryos have fared much better in the freezing process. *Id.* at 220. Research has suggested that embryos can remain frozen for two to ten years unharmed, and the likelihood of subsequent technological advances could result in an indefinite storage of frozen embryos. *Id.* at 220-21; see also Coleman, *supra* note 1, at 60 (indicating that, as of 1999, improved technology had lead to some practitioners estimates that embryos could be stored safely for as long as fifty years).

³³ Diane K. Yang, Note, *What's Mine Is Mine, but What's Yours Should Also Be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 613 (2002).

³⁴ Pub. L. No. 102-493, 106 Stat. 3146 (codified at 42 U.S.C. § 263a-1 to -7 (2000)); Yang, *supra* note 33, at 613. This Act requires fertility clinics to report their pregnancy success rate to the CDC. 2004 ART SUCCESS REPORT, *supra* note 27, at 4. The CDC, in turn, is required to compile this data and publish annual reports for the benefit of the general public. *Id.* at 1. These reports detail the success rate for each clinic, as well as the national success rates of infertility treatments. *Id.* The goal of this Act is to assist those who are considering ART in making informed decisions by providing information about the probability of success and the availability of fertility treatments. *Id.*

³⁵ See 2004 ART SUCCESS REPORT, *supra* note 27, at 4-5, 14.

zen, nondonor eggs or embryos.³⁶ In only 11.8% of ART cycles, the eggs or embryos were received from a donor.³⁷ Though success, as defined by "live birth rates," varies depending on the procedure performed, success rates have been increasing for all ART procedures since 1996.³⁸ In addition, ART has become a more widely used technique.³⁹ According to the CDC report, 127,977 ART cycles⁴⁰ were performed in 2004, resulting in the birth of 49,458 babies, which is approximately double the number of cycles performed and babies born in 1996.⁴¹

B. *The Uncertain Legal Status of Frozen Embryos*

Developments in assisted reproductive technologies have provided infertile couples with monumental opportunities to have children.⁴² The possibilities and complexities offered by these astounding accomplishments have transformed the previously private pain of infertility into an issue at the forefront of modern debate.⁴³

The existence of an embryo as an entity entirely physically separate from its mother's body and capable of perhaps indefinite storage once frozen presents a variety of unique legal and ethical questions.⁴⁴ One of the most fundamental inquiries involves exactly how the law should define a frozen embryo.⁴⁵ Is a frozen embryo a human life entitled to

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See id.* at 58.

³⁹ *See id.* at 57.

⁴⁰ 2004 ART SUCCESS REPORT, *supra* note 27, at 4, 6. As the CDC explains:

Because ART consists of several steps over an interval of approximately 2 weeks, an ART procedure is more appropriately considered a **cycle** of treatment rather than a procedure at a single point in time. The start of an ART cycle is considered to be when a woman begins taking drugs to stimulate egg production or starts ovarian monitoring with the intent of having embryos transferred. . . . For the purposes of this report, data on **all cycles that were started**, even those that were discontinued before all steps were undertaken, are submitted to the CDC through NASS and are counted in the clinic's success rates.

Id. at 4. Note that the number of ART cycles does not correspond to the number of women involved because an individual woman might have undergone multiple ART cycles within one year. *Id.* at 6. Therefore, success rates are not calculated "per woman." *Id.*

⁴¹ *Id.* at 57. In 1996, 64,681 ART cycles were performed, resulting in the birth of 20,840 babies. *Id.*

⁴² *See* Pachman, *supra* note 2, at 128; Melchoir, *supra* note 5, 921.

⁴³ *See* Berg, *supra* note 6, at 506-07; Melchoir, *supra* note 5, at 921; Ray, *supra* note 11, at 433.

⁴⁴ *See* Guzman, *supra* note 29, at 203; Melchoir, *supra* note 5, at 922.

⁴⁵ *See* Melchoir, *supra* note 5, at 924.

rights of its own?⁴⁶ Is it merely the property of the couple or even the doctor or researcher who created it?⁴⁷ Is it suspended somewhere along this continuum, simultaneously imbued with attributes of both personhood and property?⁴⁸ Although frozen embryos do not occupy the same position in our societal conscience that viable fetuses have attained, the thought of their disposal still raises serious ethical concerns.⁴⁹

1. Embryo as Person

The embryo as person approach is grounded in the idea that life begins at conception, at which point a genetically distinct entity is created.⁵⁰ Proponents of this approach believe that human embryos are entitled to many of the rights and protections afforded to living children, including the protections of the "best interests of the child" standard typically used in child custody and divorce cases, and, therefore, embryos should not be intentionally destroyed or subject to research that will result in their destruction.⁵¹

Louisiana has adopted the embryo as person approach through a statute that refers to the legal status of a frozen embryo as "a juridical person."⁵² This statute states that a frozen embryo is "a biological human being" and, as such, is not the property of the physician who created it, the facility in which it is stored, nor the donors of the sperm and ovum.⁵³ Furthermore, the statute recognizes a frozen embryo as a separate entity and bestows upon it distinct legal rights, including the right to sue or be sued and the right to confidentiality.⁵⁴

Under this statute, frozen embryos may be used only for "the support and contribution of the complete development of human in utero implantation."⁵⁵ They may not be intentionally destroyed, sold, or used in research.⁵⁶ If IVF patients renounce their parental rights,

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.* at 922.

⁵⁰ Coleman, *supra* note 1, at 66; Ikehara, *supra* note 2, at 308.

⁵¹ See Coleman, *supra* note 1, at 66; Ikehara, *supra* note 2, at 308.

⁵² See LA. REV. STAT. ANN. § 9:124 (2000).

⁵³ *Id.* § 9:126, :130.

⁵⁴ *Id.* § 9:124-:125.

⁵⁵ *Id.* § 9:122; see also Maternal, Fetal, and Infant Experimentation Act, N.M. STAT. ANN. § 24-9A-1(D) (LexisNexis 2000) (mandating that all IVF procedures "shall include provisions to insure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient").

⁵⁶ LA. REV. STAT. ANN. §§ 9:122, :129.

then the statute mandates that the embryos be made available for adoptive implantation by the facility where they are housed.⁵⁷ Also, if the IVF patients fail to express their identity, then the statute makes the physician who created the embryos the temporary guardian of the embryos until the mandated adoptive implantation occurs.⁵⁸

Critics of this approach contend that the definition of an embryo as a person is in conflict with the U.S. Supreme Court's abortion precedents because it affords frozen embryos more protection and rights than a developing fetus.⁵⁹ In 1973, in *Roe v. Wade*, the Court held that the term "person" as defined in the Fourteenth Amendment does not include the unborn.⁶⁰ Although this case was decided before the existence of frozen embryos, it would be a logical extension to assume that because the Court has not extended constitutional protection to a fetus, it would likely refuse to expand the notion of "person" to encompass an embryo that is at a much earlier state of development.⁶¹ Though critics of the embryo as person approach acknowledge that states have a general interest in protecting potential life, they assert that in the case of frozen embryos that interest would be slight because the chances of a frozen embryo resulting in a human life are much more attenuated than in the abortion context.⁶² They emphasize that the possibility of a frozen embryo ultimately maturing into a child depends upon a decision to implant followed by successful thawing, implantation, pregnancy, and childbirth.⁶³

Additionally, critics of the Louisiana statute assert that the mandate of embryo adoption when the biological contributors no longer seek implantation infringes on constitutional rights by effectively forcing people to become genetic parents against their will.⁶⁴ They argue that *Roe* did not merely protect bodily integrity but also sought to prevent the psychological and emotional harm that would result from unwanted parenthood.⁶⁵ Forcing IVF participants to donate their unused embryos would infringe on their constitutional right to avoid procreation and inflict psychological harm upon them through the knowledge

⁵⁷ *Id.* § 9:130.

⁵⁸ *Id.* § 9:126.

⁵⁹ Berg, *supra* note 6, at 525; see *Roe v. Wade*, 410 U.S. 113, 158 (1973).

⁶⁰ 410 U.S. at 158.

⁶¹ See *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992).

⁶² *Id.*

⁶³ Berg, *supra* note 6, at 526.

⁶⁴ Crockin, *supra* note 1, at 610; see *Davis*, 842 S.W.2d at 602.

⁶⁵ Berg, *supra* note 6, at 520; see *Roe*, 410 U.S. at 153.

that there may be children genetically related to them somewhere in the world.⁶⁶

Proponents of the Louisiana statute assert that there is no conflict with *Roe* because the definition of an IVF embryo as a "juridical person" does not implicate the right to bodily integrity that was being protected by the Court.⁶⁷ Though a woman's right to privacy and bodily integrity may override the state's interest in abortion cases, the fact that an embryo is an entity distinct from its mother's body obviates the reasons for supporting abortion rights.⁶⁸ The proponents argue that, although a frozen embryo is at a very early stage of development, the state has a strong interest in preserving life at every stage of development.⁶⁹ Further, they argue that it is unlikely that the Court would conclude that the psychological burden of knowing that a genetic child exists after implantation of a frozen embryo is the kind of burden on the family that the Court has sought to prevent, particularly when the embryos were intentionally created for the purpose of creating a child.⁷⁰ They believe that the Court would not likely conclude that there is a constitutional right to destroy intentionally created embryos.⁷¹

2. Embryo as Property

In contrast, some commentators have suggested that frozen embryos should be treated as the property of the couple who created them.⁷² Under a traditional analysis of property rights, the biological creators of frozen embryos would have the same rights over the embryos as any other property, including the rights to own, sell, bequeath, and destroy them.⁷³ In 1989, in *York v. Jones*, the Federal District Court for the Eastern District of Virginia implicitly adopted this approach by relying on property law principles to decide a case between a couple

⁶⁶ See *Davis*, 842 S.W.2d at 603; Berg, *supra* note 6, at 520-21.

⁶⁷ See Skouvakis, *supra* note 1, at 890; Yang, *supra* note 33, at 619; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (holding that state statute requiring a husband's consent before a married woman may obtain an abortion was unconstitutional because it violated a woman's right to privacy and bodily integrity).

⁶⁸ See Melchoir, *supra* note 5, at 950.

⁶⁹ See *id.*

⁷⁰ See *id.* at 949.

⁷¹ See *id.*

⁷² See Guzman, *supra* note 29, at 237.

⁷³ See *id.* at 207; Yang, *supra* note 33, at 599. But see John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 454-55 (1990) (stating that although the property approach focuses on who has ownership in terms of legal decision making authority over the embryos, the terms "ownership" and "property" need not signify that the embryo is treated in all respects like other property).

and a fertility clinic over control of disputed embryos.⁷⁴ The couple was seeking to transfer their embryos to another clinic, but the clinic where the embryos were stored refused to transfer them.⁷⁵ The court held that property law principles applied and that a bailor-bailee relationship had been established between the couple and the fertility clinic.⁷⁶ Further, the court held that the couple had successfully alleged a cause of action for detinue.⁷⁷

Proponents of this approach seek to define frozen embryos as property by analogizing to the legal treatment of human organs, tissues, and fluids, including blood and semen.⁷⁸ Critics argue that this approach undervalues and demeans embryos' unique potential for creating human life.⁷⁹

3. Embryo as Something in Between: The "Interim" Category

Seeking to avoid the rigid extremes of the embryo as person and the embryo as property approaches, many courts and commentators have embraced an intermediate approach that classifies embryos as neither persons nor property.⁸⁰

This definition is currently the most widely accepted, and it first gained judicial approval in 1992 by the Supreme Court of Tennessee in *Davis v. Davis*.⁸¹ In that case, the court rejected the notion that em-

⁷⁴ See 717 F. Supp. 421, 425-27 (E.D. Va. 1989).

⁷⁵ *Id.* at 422.

⁷⁶ *Id.* at 425.

⁷⁷ See *id.* at 427. The court explained that

[t]he requisite elements of a detinue action in Virginia are as follows: (1) plaintiff must have a property interest in the thing sought to be recovered; (2) the right to immediate possession; (3) the property is capable of identification; (4) the property must be of some value; and (5) defendant must have had possession at some time prior to the institution of the act. Moreover, if the property is in the possession of a bailee, an action in detinue accrues upon demand and refusal to return the property or upon a violation of the bailment contract by an act of conversion.

Id.; see also *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1261, 1272 (Ariz. Ct. App. 2005) (implicitly adopting property approach by finding, in part, that a bailment contract had been created between a couple and the fertility clinic where their embryos were stored and that the couple could maintain their claim for negligent destruction of their embryos as a "loss of things").

⁷⁸ See Guzman, *supra* note 29, at 237.

⁷⁹ See Redman & Redman, *supra* note 7, at 589; see also *Davis*, 842 S.W.2d at 596 (referring to the lower court's reliance on a property definition of embryos, as articulated in *York*, as "troublesome").

⁸⁰ See, e.g., *Davis*, 842 S.W.2d at 597; Skouvakis, *supra* note 1, at 892.

⁸¹ See 842 S.W.2d at 597; Berg, *supra* note 6, at 511-12; Skouvakis, *supra* note 1, at 892.

bryos are either persons or property and instead held that they "occupy an interim category that entitles them to special respect because of their potential for human life."⁸² After reviewing precedent interpreting state statutes governing wrongful death claims, abortion, murder, and assault, the court held that embryos are not persons under state law.⁸³ Additionally, the court held that embryos are not persons under federal law, citing the U.S. Supreme Court's refusal to grant fetuses independent rights in *Roe*.⁸⁴ The Tennessee court noted that in *Roe*, the Court undertook "a thorough examination of the federal constitution, relevant common law principles, and the lack of scientific consensus as to when life begins" to determine that the unborn are not persons.⁸⁵ On the other hand, the court in *Davis* also explicitly refused to accept the implicit holding from *York* that embryos should be treated as property, referring to that approach as "troublesome."⁸⁶ Rather, the court chose to adopt an interim, "special respect" approach, as articulated in a Report of the Ethics Committee of the American Fertility Society.⁸⁷

Despite its popularity, this approach has been criticized as empty rhetoric because it fails to define what protections the embryo should receive.⁸⁸

⁸² *Davis*, 842 S.W.2d at 597.

⁸³ *Id.* at 594-95.

⁸⁴ *Id.* at 595.

⁸⁵ *Id.*

⁸⁶ *Id.* at 596.

⁸⁷ *Davis*, 842 S.W.2d at 596-97 (citing Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technology*, 62 FERTILITY & STERILITY 5, 34S-35S). The court stated:

[T]he preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.

Id.

⁸⁸ Robertson, *supra* note 73, at 448-49; see Johnson, *supra* note 4, at 871.

II. LEGAL APPROACHES TO RESOLVING DISPUTES BETWEEN PROGENITORS REGARDING THE DISPOSITION OF FROZEN EMBRYOS

The theoretical debate regarding the definition of a frozen embryo has very real implications in courtrooms across America, where divorcing couples are battling with fertility clinics and each other over their rights to the frozen embryos they have created.⁸⁹ These disputes are particularly complex because they result in the intersection of many different areas of the law and do not seem to fit neatly into any one of them.⁹⁰ Not only have a variety of definitions emerged concerning what frozen embryos are, but various legal frameworks have been proposed for deciding what to do with embryos when disputes erupt.⁹¹ In a few states, statutes direct the resolution of such disputes.⁹² In the absence of statutory mandates, courts have generally first determined whether there is an enforceable contract between the divorcing couple setting out their intent in the event of divorce.⁹³ If such a contract does not exist or is unenforceable, some courts have employed a test that balances one party's constitutional right to procreate against the other party's right to avoid procreation.⁹⁴

A. Statutory Resolutions

A few state legislatures have attempted to address disputes over frozen embryos by statute.⁹⁵ For example, in Louisiana, a law directs courts to look to family law principles to resolve such disputes by requiring the use of a "best interests of the in vitro fertilized ovum" standard.⁹⁶ This comports with the statute's definition of an embryo as a

⁸⁹ See generally *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

⁹⁰ See Crockin, *supra* note 1, at 599.

⁹¹ See *A.Z.*, 725 N.E.2d at 1056 (refusing to enforce informed consent agreement signed by couple prior to IVF treatment); *Davis*, 842 S.W.2d at 603-04 (balancing constitutionally protected procreative rights of progenitors); *Roman*, 193 S.W.3d at 53, 55 (holding that informed consent agreement signed by a couple prior to IVF treatment was valid and enforceable).

⁹² See FLA. STAT. ANN. § 742.17 (West 2005); LA. REV. STAT. ANN. § 9:131 (2000).

⁹³ See *Kass*, 696 N.E.2d at 180; *Davis*, 842 S.W.2d at 590, 604; *Roman*, 193 S.W.3d at 50.

⁹⁴ *Davis*, 842 S.W.2d at 604; see *J.B.*, 783 A.2d at 719.

⁹⁵ See *infra* notes 96-102 and accompanying text.

⁹⁶ LA. REV. STAT. ANN. § 9:131.

"juridical person" and a "biological human being."⁹⁷ Because the embryos may not be intentionally destroyed or used in research, the only option available to couples who no longer want to store the embryos or use them for implantation is to donate the embryos for "adoptive implantation."⁹⁸ Though the "best interests" standard of resolving embryo disputes is unique in that so far it has only been adopted by Louisiana, it has received some support from commentators advocating that the states' strong public policy interest in protecting life would justify its adoption, especially because it does not implicate bodily integrity issues involved in the abortion context.⁹⁹

Another state that has used statutory means to resolve IVF embryo disputes is Florida.¹⁰⁰ There, a statute mandates that couples sign contracts indicating their preferences for disposition of frozen embryos in the event of divorce.¹⁰¹ The statute also provides that, in the absence of such a written agreement, the authority to determine the disposition of the embryos resides jointly in the couple.¹⁰²

B. *The Contractual Approach: Enforcement of Contracts Signed Prior to Undergoing IVF Treatment*

Before undergoing IVF treatments, couples are frequently required by fertility clinics to sign agreements establishing how any unused frozen embryos should be treated in the event that the couple should divorce.¹⁰³ There is some debate as to whether to treat these agreements as binding contracts that cannot be modified without the consent of both parties or as informed consent agreements that can be modified.¹⁰⁴ In the few litigated disputes between divorcing couples over their frozen embryos, courts have generally voiced support for treating such agreements as presumptively valid expressions of the couple's intent and thus binding contracts.¹⁰⁵

In 1998, in *Kass v. Kass*, the Court of Appeals of New York held that an informed consent agreement signed by a couple before their em-

⁹⁷ *Id.* § 9:123, :126.

⁹⁸ *See id.* § 9:122, :129, :130.

⁹⁹ *See* Melchoir, *supra* note 5, at 950; Skouvakis, *supra* note 1, at 904.

¹⁰⁰ *See* FLA. STAT. ANN. § 742.17 (West 2005).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Crockin, *supra* note 1, at 608; Berg, *supra* note 6, at 512; *see* A.Z., 725 N.E.2d at 1053.

¹⁰⁴ Crockin, *supra* note 1, at 608.

¹⁰⁵ *See* *Kass*, 690 N.E.2d at 180; *Davis*, 842 S.W.2d at 597.

bryos were frozen "unequivocally manifest[ed] their mutual intention" that in the event of divorce their frozen embryos would be donated to the IVF clinic for research.¹⁰⁶ In that case, the wife sought to use the embryos for implantation, and the husband wanted to donate the embryos to research in accordance with the consent form signed prior to undergoing IVF.¹⁰⁷ The court, citing the 1992 decision of the Tennessee Supreme Court in *Davis v. Davis*, held that agreements between a couple who provided biological material to create embryos should generally be considered presumptively valid, binding, and enforceable.¹⁰⁸

In 2002, in *Litowitz v. Litowitz*, the Supreme Court of Washington enforced an agreement between a couple and fertility clinic that was signed before the embryos were frozen.¹⁰⁹ The agreement stated that any embryos still frozen after five years would be destroyed by allowing them to thaw.¹¹⁰ Neither the husband nor the wife sought to enforce this portion of the agreement in court.¹¹¹ The wife wanted to use the embryos for implantation in a surrogate, whereas the husband wanted to donate the embryos to another couple.¹¹² Based on the determination that the embryos had been in storage for more than five years and that the couple had neither come to an agreement nor requested an extension, the court held that the embryos should be thawed in accordance with the couple's wishes as set out in the prior agreement.¹¹³ Similarly, in 2006, in *Roman v. Roman*, the Court of Appeals of Texas held that an informed consent agreement signed by the former husband and wife that provided for their frozen embryos to be discarded in the event of divorce was valid and enforceable.¹¹⁴

Nonetheless, some courts have indicated that even if there is an unambiguous contract, they will not enforce it if the parties later disagree with the terms or if the terms violate public policy.¹¹⁵ For instance, in 2001, in *J.B. v. M.B.*, the Supreme Court of New Jersey held that a couple's contract was not enforceable when its terms stated that the embryos would be relinquished to the fertility clinic unless the parties obtained a court order determining the disposition of the em-

¹⁰⁶ 690 N.E.2d at 181.

¹⁰⁷ *Id.* at 175.

¹⁰⁸ *Id.* at 180.

¹⁰⁹ See 48 P.3d at 271.

¹¹⁰ *Id.*

¹¹¹ See *id.* at 264.

¹¹² *Id.*

¹¹³ *Id.* at 271.

¹¹⁴ 193 S.W.3d at 54-55.

¹¹⁵ A.Z., 725 N.E.2d at 1057-58; *J.B.*, 783 A.2d at 719.

bryos.¹¹⁶ The court reasoned that even if it were possible to enter into a valid contract that would irrevocably determine the disposition of the embryos before beginning IVF treatment, that contract must be a "formal, unambiguous memorialization of the parties' intentions."¹¹⁷ The court determined that the conditional language in the agreement did not manifest a clear intent regarding the disposition of the embryos in the event of divorce.¹¹⁸

Furthermore, the court reasoned that enforcement of private contracts to enter into or terminate familial relationships could be unenforceable if contrary to public policy.¹¹⁹ In reaching this decision, the court looked to precedent that failed to enforce contracts to enter into marriage and surrogacy arrangements.¹²⁰ In particular, the court was concerned with the implications of enforcing a contract that might allow implantation of embryos at some future date even if one of the parties no longer wanted to be a parent.¹²¹ The court, therefore, adopted a rule whereby agreements entered into prior to beginning IVF services would not be irrevocably binding but rather would be subject to the right of either party to change their mind up until the point of use or destruction of the embryos.¹²²

Likewise, in 2000, in *A.Z. v. B.Z.*, the Massachusetts Supreme Judicial Court also refused to enforce a contract signed by the couple prior to beginning IVF treatment.¹²³ The contract provided that, upon divorce, the couple's frozen embryos would be given to the wife for implantation.¹²⁴ According to the court, this violated public policy because it amounted to forced procreation.¹²⁵

Advocates for enforcing dispositional agreements signed prior to initiating IVF services contend that such contracts are both useful and necessary because they encourage parties to consider the consequences of this type of treatment thoroughly, allow parties to specify their intentions in advance, prevent costly litigation, define the roles of the parties, and provide certainty.¹²⁶ Critics contend that the enforcement of

¹¹⁶ 783 A.2d at 713-14.

¹¹⁷ *Id.* at 714.

¹¹⁸ *Id.* at 713.

¹¹⁹ *Id.* at 717.

¹²⁰ *Id.* at 718.

¹²¹ *J.B.*, 783 A.2d at 718.

¹²² *Id.* at 719.

¹²³ See 725 N.E.2d at 1057.

¹²⁴ See *id.* at 1054.

¹²⁵ See *id.* at 1057-58.

¹²⁶ See *Kass*, 696 N.E.2d at 180.

prior dispositional agreements is dangerous and unfair because infertile couples who desperately want children may not have seriously considered the possibility of divorce or might be willing to sign away future rights for the more immediate opportunity to undergo IVF.¹²⁷ Because these agreements are necessarily made without crucial information, such as whether the IVF treatments will be successful or whether a couple's marriage will dissolve, it is unfair, they argue, to enforce such agreements as binding and irrevocable.¹²⁸

C. *The Contemporaneous Mutual Consent Model*

The contemporaneous mutual consent model applies the same premise as the contractual approach: that the decision regarding the disposition of frozen embryos should rest jointly with the couple who created them.¹²⁹ This alternative approach differs from the contractual model by acknowledging that it is unfair to hold the parties to agreements signed prior to undergoing IVF if one party has changed his or her mind.¹³⁰ Under this approach, the couple's mutual consent at the time they signed an IVF agreement is subject to the right of either party to change his or her mind about the disposition of the frozen embryos at any point up until use or destruction.¹³¹ In the event that one party changes his or her mind, the embryos will remain in storage until the parties agree on what to do with them and provide signed authorization of such.¹³²

In 2003, in *In re Marriage of Witten*, the Iowa Supreme Court adopted the contemporaneous mutual consent model in a divorce dispute between a couple regarding the embryos they had created through IVF.¹³³ In that case, the agreement signed by the couple did not specify what was to be done with the embryos in the event of divorce, but it did provide a general agreement that any transfer, release, or disposition would only be allowed upon signed approval by both parties.¹³⁴ Upon the couple's divorce, the wife wanted to use the embryos for implantation, and the husband wanted the court to enter a permanent injunction prohibiting either party from transferring, releasing, or utilizing

¹²⁷ See *J.B.*, 783 A.2d at 715; Berg, *supra* note 6, at 515.

¹²⁸ See Coleman, *supra* note 1, at 91; Crockin, *supra* note 1, at 609.

¹²⁹ See *Witten*, 672 N.W.2d at 777.

¹³⁰ See *id.* at 777-78, 781.

¹³¹ See *id.* at 778, 782.

¹³² *Id.* at 778, 783.

¹³³ *Id.* at 783.

¹³⁴ *Witten*, 672 N.W.2d at 773.

the embryos without the written consent of both parties.¹³⁵ After reviewing other cases that had adopted the contractual approach and the balancing approach, the court concluded that the contemporaneous mutual consent model best resolved the public policy concerns that critics had raised regarding the other two approaches.¹³⁶ Therefore, the court held that the couple's frozen embryos were to remain frozen until the parties could reach a mutual decision.¹³⁷ Further, the court required that the party who opposed destruction be solely responsible for the cost of keeping the embryos in storage.¹³⁸

D. *Balancing Constitutional Rights Regarding Procreative Autonomy*

In cases where there is no governing contract or where the contract is deemed unenforceable, courts have looked to balance the constitutional right of each donor to protect their procreative autonomy.¹³⁹ The first court to adopt this approach was the Tennessee Supreme Court in *Davis*.¹⁴⁰ Because this was the first case to consider a dispute over the disposition of frozen embryos between a divorcing couple, there was no statutory or case law to guide the court.¹⁴¹ The divorcing couple also had not signed an agreement directing what should be done with the embryos in the event of divorce.¹⁴² The court rejected categorizing the embryos as property or as people and thereby eschewed the application of property law or a "best interests of the child" standard.¹⁴³ Instead, given the absence of a contract, the court employed a balancing test that sought to weigh one party's constitutional right to procreate versus the other party's constitutional right not to procreate.¹⁴⁴

¹³⁵ *Id.*

¹³⁶ *Id.* at 783. Specifically, the court noted that the IVF process is an intensely emotional experience that often results in participants signing agreements based on feeling and instinct rather than rational deliberation. *Id.* at 777. Given this, the court determined that there was no public policy reason that required the enforcement of a prior consent agreement if one party had changed his or her mind. *Id.* at 780-81. Further, the court concluded that the balancing test's substitution of the courts as decisionmakers in this emotional and personal decision was contrary to public policy. *Id.* at 783.

¹³⁷ *Id.* at 783.

¹³⁸ *Id.*

¹³⁹ See *J.B.*, 783 A.2d at 719; *Davis*, 842 S.W.2d at 604.

¹⁴⁰ See 842 S.W.2d at 603.

¹⁴¹ *Id.* at 590.

¹⁴² *Id.*

¹⁴³ See *id.* at 597.

¹⁴⁴ *Id.* at 603.

Initially, the wife had wanted to use the embryos herself for implantation but, by the time the case reached the Tennessee Supreme Court, she had changed her mind and sought to donate the embryos to another couple.¹⁴⁵ The husband sought to have the embryos destroyed.¹⁴⁶

In balancing the rights of the parties, the court noted that procreative autonomy is "inherent in our most basic concepts of liberty."¹⁴⁷ Though not explicitly delineated in the Constitution, the right to procreative liberty exists in constitutional notions of liberty and privacy.¹⁴⁸ In 1942, in *Skinner v. Oklahoma*, the U.S. Supreme Court described the right to procreate as "one of the basic civil rights of man," reasoning that "marriage and procreation are fundamental to the very existence and survival of the race."¹⁴⁹ Further, in 1965, in *Griswold v. Connecticut*, the Court held that the privacy right of married couples protects their procreative choice to use and have access to contraceptives.¹⁵⁰ Justice Goldberg's concurrence in *Griswold* states that "the concept of liberty protects those personal rights that are fundamental and it is not confined to the specific terms of the Bill of Rights."¹⁵¹ Additionally, it is important to note that the right to procreative liberty does not merely exist within the province of a marital bond.¹⁵² In 1972, in *Eisenstadt v. Baird*, the Court extended the protections in *Griswold* to unmarried individuals.¹⁵³

Assisted reproductive technologies raise interesting questions about the scope of procreative liberty.¹⁵⁴ The U.S. Supreme Court has never addressed the issue of procreation within the context of IVF.¹⁵⁵ After citing Supreme Court precedents regarding contraception, abortion, and parental rights, the Tennessee Supreme Court in *Davis* emphasized that "whatever its ultimate constitutional boundaries, the right to procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."¹⁵⁶ The court weighed the burden that each party would face if

¹⁴⁵ *Davis*, 842 S.W.2d at 590.

¹⁴⁶ *Id.* at 589–90.

¹⁴⁷ *Id.* at 601.

¹⁴⁸ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

¹⁴⁹ 316 U.S. 535, 541 (1942).

¹⁵⁰ See 381 U.S. at 485.

¹⁵¹ *Id.* at 486 (Goldberg, J., concurring).

¹⁵² See *Eisenstadt*, 405 U.S. at 453.

¹⁵³ *Id.*

¹⁵⁴ See *Davis*, 842 S.W.2d at 601.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

their procreative autonomy were restricted and determined that the psychological burden that Mr. Davis would face in being forced to become a parent against his will was stronger than Mrs. Davis's "burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children."¹⁵⁷ The court ultimately reasoned that the party seeking to avoid procreation should ordinarily prevail unless the party seeking to use the embryos for procreation has no other reasonable alternative to achieving parenthood.¹⁵⁸ The court noted that if Mrs. Davis were seeking to use the embryos herself, the balancing test would result in a much closer case.¹⁵⁹

Subsequently, the balancing approach was also used in *J.B.* by the Supreme Court of New Jersey to resolve a dispute between a divorcing couple when the court determined that the IVF agreement at issue was not a valid contract.¹⁶⁰

Both the balancing approach and the reasonable alternatives exception have evoked a great deal of debate regarding the proper method of weighing conflicting procreative rights in frozen embryo disputes.¹⁶¹

¹⁵⁷ *Id.* at 604.

¹⁵⁸ *Id.*

¹⁵⁹ *Davis*, 842 S.W.2d at 604.

¹⁶⁰ 783 A.2d at 719. After determining that the IVF agreement signed by the couple was unenforceable, the court held that the interests of the wife in avoiding parenthood outweighed the interests of the husband who sought to preserve the embryos for either himself or another infertile couple to use for procreation. *Id.* at 719-20. In reaching this decision, the court noted that enforcement of the husband's right to use the embryos would effectively destroy the wife's right to choose to avoid parenthood, whereas enforcement of the wife's interest in not using the embryos would not seriously impair the husband's rights. *Id.* at 716-17. Specifically, the court emphasized that the husband already was a father and was physically capable of fathering more children. *Id.* The court refused to force the wife to become a parent against her will based on the reasoning that "genetic ties may form a powerful bond . . . even if the progenitor is freed from the legal obligations of parenthood." *Id.* at 717.

¹⁶¹ See *Witten*, 672 N.W.2d at 779 (noting that the balancing test is inadvisable because of its internal inconsistency and its resulting substitution of courts as decisionmakers in this highly emotional and personal area); Berg, *supra* note 6, at 517 (discussing that commentators have criticized the balancing approach as unpredictable and not sufficiently protective of procreative liberty because it undermines freedom of contract); Medenwald, *supra* note 9, at 522 (stating that "what a 'reasonable alternative' is cannot be determined without taking into consideration all of the pain, trauma, and expense suffered by a party prior to a frozen embryo custody dispute").

III. EMBRYO DONATION: ONE OPTION FOR THE DISPOSITION OF SURPLUS EMBRYOS

Given the considerable time, expense, and physical pain involved in retrieving eggs from a woman during the IVF process in combination with the uncertainty of success, it has become general practice to remove and fertilize more eggs than a couple would likely seek to use.¹⁶² Couples who no longer seek to use their embryos for implantation face the challenge of deciding what to do with their remaining embryos.¹⁶³ The current options include destruction, continued storage, donation to research, or donation to another person or couple.¹⁶⁴ To provide a full context for understanding the difficulties presented by disputes between recipients of donated embryos, this Part examines the advantages and disadvantages of embryo donation and the process by which it takes place.¹⁶⁵

A. *The Advantages and Disadvantages of Embryo Donation*

For IVF participants who no longer wish to use their remaining frozen embryos for implantation, but who nevertheless want to preserve the unique potential that embryos have for life, embryo donation

¹⁶² See Katz, *supra* note 2, at 184–85. This has contributed to the more than 400,000 frozen embryos currently in storage in the United States. Crockin, *supra* note 1, at 609. Most of these embryos are being stored for future implantation by the couple who created them. *Id.* (“[A]pproximately 88% (or 352,000) [of frozen embryos] are currently reserved for future family building by the patients who created them. Only about 2% are currently designated for donation, and about the same small percentage is available for donation to research.”).

¹⁶³ Katz, *supra* note 2, at 188.

¹⁶⁴ *Id.* Embryo donation is also commonly referred to as embryo adoption. EAAC, What Is Embryo Adoption/Donation?, *supra* note 10. Although the terms are often used interchangeably, there is significant debate regarding the proper terminology. See Katz, *supra* note 2, at 194; Kindregan & McBrien, *supra* note 7, at 174–75. This debate stems from the political ramifications of using the term “adoption” to refer to the transfer of embryos. Crockin, *supra* note 1, at 610–11; Katz, *supra* note 2, at 193–94. Critics of the term “embryo adoption” argue that the use of the word “adoption” is inaccurate at best, because this process is not the same as a traditional legal adoption and does not offer the same legal guarantees, and manipulative at worst, because it seeks to imbue the embryo with the legal protections of personhood in an attempt to undermine settled abortion precedent. See Katz, *supra* note 2, at 194; Kindregan & McBrien, *supra* note 7, at 174–75. Critics of the term “embryo donation” argue that this term demeans the potential for human life inherent in an embryo by referring to it as mere property. See Kindregan & McBrien, *supra* note 7, at 175.

¹⁶⁵ See *infra* notes 166–198 and accompanying text.

offers a desirable alternative.¹⁶⁶ Embryo donation may also be an attractive option for potential donors who want to help other infertile couples share in the joys of parenthood.¹⁶⁷ On the other hand, potential donors may be reluctant to donate their surplus embryos because they are uncomfortable with the notion that a child genetically related to them may be born and raised by others or because they are concerned that any resulting children may try to meet them in the future and inquire as to why they were given away.¹⁶⁸

For potential recipients, embryo donation offers a multitude of advantages.¹⁶⁹ Unlike traditional adoptions, embryo donation presents recipients with the opportunity to experience pregnancy and childbirth.¹⁷⁰ Additionally, because this process often involves the donation of multiple embryos, it affords recipients the opportunity to have multiple children who are biologically related.¹⁷¹ Embryo adoption is also often less expensive than both traditional adoption and IVF.¹⁷² For couples who have been unable to conceive children naturally or through the IVF process, or for those who do not fit the typically stringent screening guidelines in the traditional adoption process, embryo donation may indeed represent one of the last options for having a baby.¹⁷³

The most significant disadvantage for potential recipients of embryo adoptions is the legal uncertainty currently inherent in this proc-

¹⁶⁶ See Johnson, *supra* note 4, at 856, 863–64. Destruction of the embryos by thawing or donation to research is offensive to some who believe that the embryos should have a chance to develop. *Id.* at 864. Similarly, continued storage is often considered less than ideal because the embryos may never be implanted or may become damaged through the continued freezing process, thus effectively destroying them. See Berg, *supra* note 6, at 510; Nightlight Christian Adoptions, Snowflakes Embryo Adoptions Fact Sheet, <http://www.nightlight.org/Snowflakesfacts.pdf> (last visited Jan. 16, 2008). Continued storage can also be expensive. Katz, *supra* note 2, at 188.

¹⁶⁷ See Batsedis, *supra* note 2, at 567; EAAC, What Is Embryo Adoption/Donation?, *supra* note 10; Nightlight Christian Adoptions, *supra* note 166.

¹⁶⁸ Katz, *supra* note 2, at 189; Johnson, *supra* note 4, at 864. Based on anecdotal evidence from medical practitioners that suggests that fifty to seventy-five percent of patients who initially express an interest in donating their embryos ultimately choose not to do so, it appears that these concerns have a significant impact on potential donors' ultimate decision regarding disposition of their excess embryos. Crockin, *supra* note 1, at 615–16. These concerns may be particularly acute for those who were not successful in becoming parents through the IVF process. See *id.* at 617.

¹⁶⁹ Batsedis, *supra* note 2, at 572–73.

¹⁷⁰ *Id.* at 572.

¹⁷¹ *Id.* at 573.

¹⁷² Johnson, *supra* note 4, at 864.

¹⁷³ See Batsedis, *supra* note 2, at 568.

ess.¹⁷⁴ Unlike traditional adoptions, embryo adoptions are generally conducted without the benefit of state statutes to guide the process of determining legal rights and responsibilities to any resulting children or to the embryos themselves.¹⁷⁵ Although the term "embryo adoption" is often used to describe embryo donations, it is unclear whether a court would apply traditional adoption laws to determine the legal rights and responsibilities of the donating and adoptive couples to any resulting children or to the embryos themselves.¹⁷⁶ Under traditional adoption law, a biological parent generally may not terminate his or her parental rights until several days, weeks, or sometimes months after the baby is born.¹⁷⁷ Therefore, in the embryo donation context, the donor couple's voluntary relinquishment of parental rights and responsibilities to the embryos may not be legally sufficient, given the strong preference for allowing a waiting period in which biological parents may change their minds after the birth of the child.¹⁷⁸

Another significant disadvantage of embryo donation for potential recipients is that the likelihood of achieving parenthood through the use of donated embryos is generally low.¹⁷⁹ An embryo must be successfully thawed, implanted, and a child must be carried to term.¹⁸⁰ The complications inherent in this process are exacerbated by the fact that the donated embryos were created by another couple undergoing the IVF process to overcome their own struggles with infertility.¹⁸¹

¹⁷⁴ See Crockin, *supra* note 1, at 613. Only a few states have legislation that deals with the embryo adoption process. Redman & Redman, *supra* note 7, at 593. Even in states with statutes, legislatures may not be able to anticipate and effectively plan for the myriad potential complications that could arise from the complexity of this situation. See Ray, *supra* note 11, at 433-34, 440-45. Also, though often referred to as an "adoption," traditional adoption laws do not apply to embryo adoptions. Kindregan & McBrien, *supra* note 7, at 174. But see LA. REV. STAT. ANN. § 9:121-:133 (2000). Furthermore, although the process is completed by a contractual agreement, it is possible that the contract may exclude important aspects of the agreement or might be unenforceable if it is ambiguous, if money was paid for the embryos, or if its terms are contrary to public policy. See Ray, *supra* note 11, at 428-29, 431.

¹⁷⁵ See Crockin, *supra* note 1, at 609.

¹⁷⁶ See *id.* at 611; Kindregan & McBrien, *supra* note 7, at 174.

¹⁷⁷ Batsedis, *supra* note 2, at 568.

¹⁷⁸ See Kindregan & McBrien, *supra* note 7, at 174; Batsedis, *supra* note 2, at 568.

¹⁷⁹ Katz, *supra* note 2, at 230.

¹⁸⁰ Berg, *supra* note 6, at 526.

¹⁸¹ See Katz, *supra* note 2, at 230.

B. *The Embryo Donation Process*

Embryo donation is a largely unregulated endeavor.¹⁸² In a small minority of states, embryo donation has been addressed by statute but the specificity of these statutes varies.¹⁸³ Though embryo donation statutes are helpful in that they indicate the permissibility of the practice and address the parental rights of the parties with respect to any resulting children, these statutes generally provide little, if any, guidance as to how exactly this donation process should take place.¹⁸⁴ So far, Oklahoma is the only state to require court intervention in embryo donations.¹⁸⁵

Due to the lack of statutes, the vast majority of embryo donations are unregulated and are accomplished through private contracts where the donors relinquish their rights to the embryos and any resulting children and the recipients agree to assume legal responsibility for any child that may result.¹⁸⁶ This process can be achieved either through a fertility clinic or, more recently, through adoption agencies.¹⁸⁷ There

¹⁸² Crockin, *supra* note 1, at 609.

¹⁸³ See *id.* For instance, in Ohio, a statute specifies that embryo donors will have no parental responsibilities and no right, obligation, or interest with respect to a child resulting from the donation. OHIO REV. CODE ANN. § 3111.97 (West 2005 & Supp. 2007). A Florida statute requires that embryo donors relinquish all parental rights and obligations with respect to the donation or the resulting children and that only reasonable compensation directly related to the donation be permitted. FLA. STAT. ANN. § 742.14 (West 2005). An Oklahoma statute requires the written consent of both the recipient and the donating couple and mandates that these consents will not be open to the general public. OKLA. STAT. ANN. tit. 10, § 556 (West 2007). Further, the consent of the recipient couple must be executed and acknowledged by both members of the couple, by the physician who will perform the transfer of the embryo to the recipient woman's uterus, and by any judge having adoption jurisdiction in the state. *Id.*

But none of these statutes defines the rights of the parties with respect to the frozen embryos themselves, nor does any provide guidance as to how disputes between the parties should be resolved. See FLA. STAT. ANN. § 742.14; OHIO REV. CODE ANN. § 3111.97; OKLA. STAT. ANN. tit. 10, § 556. In Louisiana, a statute provides that a couple with excess embryos may renounce their parental rights to the embryos by a notarial act. LA. REV. STAT. ANN. § 9:130 (2000). This will result in the embryos being made available for adoptive implantation according to the written procedures of the facility in which they are stored. *Id.* The donating couple may also renounce their rights in favor of another married couple, but only if the receiving couple is willing and able to receive the embryo. *Id.* The statute prohibits any compensation to be paid to the donating or the receiving couple. *Id.* According to the statute, any disputes regarding the embryos must be resolved according to a "best interests of the fertilized ovum" standard. *Id.*

¹⁸⁴ See FLA. STAT. ANN. § 742.14; LA. REV. STAT. ANN. § 9:131; OHIO REV. CODE ANN. § 3111.97; OKLA. STAT. ANN. tit. 10, § 556.

¹⁸⁵ OKLA. STAT. ANN. tit. 10, § 556; see *supra* note 183.

¹⁸⁶ See Crockin, *supra* note 1, at 613.

¹⁸⁷ See Johnson, *supra* note 4, at 859.

are significant differences, however, in the approach and procedure of fertility clinics and adoption agencies.¹⁸⁸

Embryo donation has been practiced informally for many years through fertility clinics.¹⁸⁹ The approach is generally modeled after egg and sperm donation practices.¹⁹⁰ Typically, this process merely involves the fertility clinic pairing up available embryos with interested clients.¹⁹¹ This process is often accomplished anonymously and without the same stringent examination of parental fitness required for traditional adoptions.¹⁹² Fertility clinics will, however, usually require stringent medical and genetic screening.¹⁹³

In recent years, adoption agencies have sought to formalize embryo donation by modeling the procedure after traditional adoption practices.¹⁹⁴ Unlike the informal method employed by fertility clinics, adoption agencies tend to require detailed information from both prospective donors and recipients.¹⁹⁵ The agency typically conducts a home study and matches the prospective recipients according to the donors' preferences.¹⁹⁶ In many cases, the donors are allowed to select the recipients.¹⁹⁷ The adoption agencies also provide extensive counseling to the parties.¹⁹⁸

IV. DEVELOPING A LEGAL FRAMEWORK FOR RESOLVING DISPUTES BETWEEN THE RECIPIENT COUPLE

Embryo donation holds a great deal of potential as an attractive option both for prospective donors who do not want to see their excess embryos destroyed and for prospective recipients who may have very

¹⁸⁸ See *id.*; Ray, *supra* note 11, at 425-26.

¹⁸⁹ See Katz, *supra* note 2, at 185; Ray, *supra* note 11, at 425.

¹⁹⁰ EAAC, What Is Embryo Adoption/Donation?, *supra* note 10.

¹⁹¹ See *id.*

¹⁹² *Id.*

¹⁹³ Redman & Redman, *supra* note 7, at 589.

¹⁹⁴ Johnson, *supra* note 4, at 859; EAAC, What Is Embryo Adoption/Donation?, *supra* note 10. In 1997, Nightlife Christian Adoptions became one of the first agencies to initiate an embryo adoption program when it established the Snowflake Frozen Embryo Adoption Program. Johnson, *supra* note 4, at 859. The Snowflake Program refers to frozen embryos as "pre-born children" who deserve to be born and seeks to treat them as they would a child in a traditional adoption context. Nightlight Christian Adoptions, *supra* note 166. Since 1997, 134 babies have been born through the Snowflakes Program. *Id.*

¹⁹⁵ EAAC, What Is Embryo Adoption/Donation?, *supra* note 10.

¹⁹⁶ See Johnson, *supra* note 4, at 860.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

few alternative paths to parenthood.¹⁹⁹ It also has the potential, however, to further complicate the development of a cohesive legal framework for resolving disputes regarding control over excess embryos.²⁰⁰

As embryo donation receives increasing public attention, particularly given the political pressure to find alternative uses for frozen embryos other than stem cell research, it seems likely that couples facing significant infertility issues may turn to donated embryos as another, or perhaps a last, option.²⁰¹ Many infertile couples spend years of their lives and tens of thousands of dollars, which is often their entire life savings, on unsuccessful fertility treatments, including multiple IVF attempts.²⁰² Traditional adoption, with its high price tag, stringent screening guidelines, and long waiting lists, may not be a feasible option for all infertile couples.²⁰³ Therefore, it is not difficult to imagine that recipient couples could view donated embryos as a last hope for achieving their dreams of having a baby.²⁰⁴ The high divorce rate in this country combined with the intense emotional toll that infertility exacts on a marriage could make divorce an unfortunate reality for many couples who have "adopted" donated embryos.²⁰⁵ The uncertainty of one's procreative options in light of the threat of an impending divorce would likely result in a strong emotional incentive to fight for keeping these donated embryos or to prevent one's partner from keeping them.²⁰⁶

This Part argues that the few state statutes in existence are insufficient for resolving disputes between the recipient couple for two main reasons: (1) they focus almost exclusively on defining the rights of the donor and recipient couples with regard to any potential resulting children, and (2) they generally fail to identify the rights of either couple to the preimplantation embryos or to establish clear standards for the resolution of disputes.²⁰⁷ In light of these shortcomings, this Part

¹⁹⁹ *Id.* at 856; Redman & Redman, *supra* note 7, at 587; Nightlight Christian Adoptions, Snowflakes Embryo Adoption Frequently Asked Questions by Adopting Families, <http://www.nightlight.org/snowflakefaqsap.htm> (last visited Jan. 16, 2008).

²⁰⁰ See Kindregan & McBrien, *supra* note 7, at 174.

²⁰¹ See Stolberg, *supra* note 10; EAAC, News, *supra* note 10.

²⁰² See Hopkins, *supra* note 2.

²⁰³ See Katz, *supra* note 2, at 227-28; Batsedis, *supra* note 2, at 568.

²⁰⁴ Lisa Priest, *Embryo Adoption Program to Offer Infertile Couples One Last Chance*, GLOBE & MAIL (Toronto, Can.), Mar. 4, 2002, at A1; Nightlight Christian Adoptions, *supra* note 199.

²⁰⁵ See KREIDER & FIELDS, *supra* note 14, at 18-19; Hopkins, *supra* note 2.

²⁰⁶ See generally Margaret V. Pepe & T. Jean Byrne, *Women's Perceptions of Immediate and Long-Term Effects of Failed Infertility Treatment on Marital and Sexual Satisfaction*, 40 FAM. RELATIONS 303 (1991) (examining the significant impact of infertility on marital relationships).

²⁰⁷ See *infra* notes 209-223 and accompanying text.

emphasizes the complexities of applying the approaches used in disputes between progenitors to similar disputes between recipients and, ultimately, it advocates for the use of a modified version of the balancing test.²⁰⁸

A. *Insufficient Statutory Response*

Very few state statutes address the issue of embryo donation, and even fewer address the method for resolving dispositional disputes in the event that the recipient couple should divorce.²⁰⁹ For instance, both Ohio and Oklahoma have embryo donation statutes that provide some guidance for determining the parentage of any resulting children.²¹⁰ Both statutes, however, are inadequate because they fail to identify the rights of the parties with respect to the preimplantation embryos themselves and also fail to identify how disputes regarding the disposition of any excess embryos should be resolved.²¹¹

A Florida statute addressing embryo donation is somewhat more useful in that it explicitly directs that the donor couple give up rights and obligations not only to any resulting children but also to the embryos.²¹² Nevertheless, this statute is also insufficient because the question of how to resolve any subsequent dispute between the recipient couple remains unclear.²¹³ A related provision of the Florida statute generally addresses the disposition of embryos by requiring that the "commissioning couple" enter into a written agreement that will provide instructions regarding the disposition of their embryos in

²⁰⁸ See *infra* notes 224–297 and accompanying text.

²⁰⁹ See FLA. STAT. ANN. § 742.14, .17 (West 2005); LA. REV. STAT. ANN. §§ 9:121–:133 (2000); OHIO REV. CODE ANN. § 3111.97 (West 2005 & Supp. 2007); OKLA. STAT. ANN. tit. 10, § 556 (West 2007).

²¹⁰ OHIO REV. CODE ANN. § 3111.97; OKLA. STAT. ANN. tit. 10, § 556. The Ohio statute specifies that a woman who gives birth to a child as a result of embryo donation will be treated as the child's natural mother. OHIO REV. CODE ANN. § 3111.97. The statute also delineates the paternity of any resulting child born to a married woman based upon whether her husband has given consent to the embryo donation. *Id.* Additionally, the statute states that the embryo donors will have no parental responsibilities and no right, obligation, or interest with respect to any resulting child. *Id.* The Oklahoma statute provides guidance as to the process by which embryo donations must occur by requiring written consent of all parties involved and acknowledgment by a judge who has adoption jurisdiction. OKLA. STAT. ANN. tit. 10, § 556. The statute also provides that the recipient couple will be the legal parents of any resulting child and that the donors will be relieved of all parental responsibilities for such a child. *Id.*

²¹¹ See OHIO REV. CODE ANN. § 3111.97; OKLA. STAT. ANN. tit. 10, § 556.

²¹² FLA. STAT. ANN. § 742.14.

²¹³ See *id.* § 742.13–14, .17.

the event of divorce.²¹⁴ The definition of a "commissioning couple," however, includes only couples who are using the genetic material of at least one member of the couple.²¹⁵ Therefore, it does not appear to apply to couples who receive embryos created by the donating couple because these embryos would not have been created with the sperm or eggs of either member of the recipient couple.²¹⁶

In another example, a Louisiana statute provides for adoptive implantation of embryos if the donating couple relinquishes all rights and obligations to any child that may result.²¹⁷ Under the statute, frozen embryos are considered "biological human beings" and "juridical persons" and, as such, may not be owned by the couple whose genetic material created them, by the physician who performed the IVF procedure, or by the facility in which they are stored.²¹⁸ In accordance with this definition, the statute further provides that any disputes regarding these embryos between *any* parties must be resolved using the "best interests of the fertilized ovum" standard.²¹⁹ Given the breadth of this standard, it would apply in the event of a divorce dispute between the recipient couple.²²⁰ The "best interests" standard, however, has traditionally only been used in relation to custody and adoption cases involving live children.²²¹ When frozen embryos are bestowed with the rights of personhood it effectively confers upon them more rights than developing fetuses.²²² Given the political and legal ramifications of affording

²¹⁴ *Id.* § 742.17.

²¹⁵ *Id.* § 742.13(2) (defining "commissioning couple" as "the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents").

²¹⁶ *See id.* § 742.13(2), .17.

²¹⁷ LA. REV. STAT. ANN. § 9:130 (2000). The donor couple may accomplish this either through a notarized act, which would make the embryos available for adoptive implantation as provided for by the facility in which they are stored, or by transferring their rights over the embryos to another married couple. *Id.*

²¹⁸ *Id.* § 9:126, :130.

²¹⁹ *Id.* § 9:131 (requiring that "[i]n disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum").

²²⁰ *See id.*

²²¹ *See Johnson, supra* note 4, at 868; *see also In re Marriage of Witten*, 672 N.W.2d 768, 775 (Iowa 2003) (explaining that the purpose of the "best interests" standard as set forth in the state custody statute was to assure continuing physical and emotional contact with both parents and to encourage both parents to share in the rights and responsibilities of raising the child and that, therefore, it would be premature to apply this standard to determine which progenitor should have "custody" of the disputed embryos given that the "child" is still frozen in a storage facility).

²²² *See Berg, supra* note 6, at 525; *see also Roe v. Wade*, 410 U.S. 113, 158 (1973); *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992).

an embryo rights that would provide a corresponding limitation on the procreative liberty of the potential parents, other state legislatures would be ill-advised to adopt a "best interests" standard for cases regarding disputes over embryos.²²³

The current limited and superficial statutory treatment is insufficient to guide the complexities presented by embryo donations.²²⁴ To effectively provide guidance, embryo donation statutes must not only detail the legal status of the parties with regard to any resulting children, but also must define the legal rights of the parties to the preimplantation embryos.²²⁵ Defining these rights raises a multitude of questions that should be explored before the issuance of any statutory mandates.²²⁶ For instance, legislatures should evaluate whether embryo donation would relieve the donating couple of all rights to the embryos or whether the couple would have the right to retain some amount of control over the embryos.²²⁷ May the donating couple specify that the embryos are only to be used by the recipient couple jointly?²²⁸ May they request that any remaining unwanted or unused embryos be returned to them?²²⁹ May they place restrictions on the recipient couple's ability to redonate the embryos to another couple, to donate the embryos for research, or to destroy the embryos?²³⁰ Assuming that the recipient couple has broad authority to determine the disposition of excess embryos, legislatures should specify what legal standard will be used in the event that the recipient couple does divorce and disagrees on the disposition of any remaining embryos.²³¹ In doing so, legislatures must be cognizant of potential conflicts with the constitutional procreative rights of the participants.²³²

B. Analogizing to Case Law Involving Divorce Disputes Between Progenitors

Because only a handful of states have adopted legislation aimed at regulating embryo adoptions, and those limited statutes are ill-equipped for resolving disputes that may arise between a recipient couple as to

²²³ See Crockin, *supra* note 1, at 610; see also Davis, 842 S.W.2d at 595.

²²⁴ See Ray, *supra* note 11, at 433-34, 440-45.

²²⁵ See Crockin, *supra* note 1, at 614-15; Batsedis, *supra* note 2, at 574; Ray, *supra* note 11, at 449.

²²⁶ See Crockin, *supra* note 1, at 614-15.

²²⁷ See *id.* at 615.

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See Crockin, *supra* note 1, at 614-15; Ray, *supra* note 11, at 451-52.

²³² See *Roe*, 410 U.S. at 158; Berg, *supra* note 6, at 525.

the fate of excess embryos remaining at their divorce, it is necessary to identify other approaches that may be applicable to this situation.²³³ The remainder of this Note focuses on the main approaches adopted by appellate courts in cases involving disputes between progenitors and examines how applicable those solutions would be in the context of a dispute between a recipient couple.²³⁴ To date, there have been seven appellate-level cases involving divorce disputes between progenitors.²³⁵ The approaches adopted by these cases can be classified into three categories: (1) the contractual approach, (2) the contemporaneous mutual consent model, and (3) the balancing test.²³⁶

1. Problems with the Enforcement of Contracts

Before beginning IVF treatments, couples typically must sign an agreement with the fertility clinic specifying what will be done with the remaining embryos in the event of divorce, death, or other unforeseen circumstances.²³⁷ Three appellate-level courts have adopted a contractual approach, holding that agreements signed by a couple prior to undergoing IVF treatments should be presumptively valid, binding, and enforceable, subject to the couple's mutual change of mind.²³⁸ In support of this position, it has been noted that enforcement of such agreements encourages IVF participants to think through their options seriously in the event of subsequent contingencies, leads to efficiency by minimizing misunderstandings and avoiding costly litigation, respects the parties' procreative liberty by preventing judicial intrusion into a highly personal decision, and provides the certainty needed for effective operation of IVF programs.²³⁹ Though acknowledging the perceived unfairness of holding the couple to an agreement when one party has changed his or her mind, the New York Court of Appeals, in

²³³ See Ray, *supra* note 11, at 433-34; Redman & Redman, *supra* note 7, at 593.

²³⁴ See *infra* notes 235-297 and accompanying text. Although there are several other areas of the law that may provide guidance through analogy, an examination of the entire universe of options is beyond the scope of this Note. See, e.g., Crockin, *supra* note 1, at 611, 614 (discussing analogy to disputes regarding embryo mix ups, paternity of sperm donors, and surrogacy arrangements).

²³⁵ See generally Witten, 672 N.W.2d 768; A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Davis, 842 S.W.2d 588; Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

²³⁶ Witten, 672 N.W.2d at 774.

²³⁷ Crockin, *supra* note 1, at 608; Berg, *supra* note 6, at 512.

²³⁸ Kass, 696 N.E.2d at 180; Roman, 193 S.W.3d at 50; see Litowitz, 48 P.3d at 268.

²³⁹ See Kass, 696 N.E.2d at 180.

its 1998 decision of *Kass v. Kass*, emphasized that the advantages of enforcement would be lost if prior agreements were only upheld when both parties continued to agree.²⁴⁰

In three other appellate-level cases involving disputes between progenitors, however, courts have refused to enforce agreements signed by couples prior to beginning IVF treatments based on various concerns about ambiguity, violation of public policy through forced parenthood, and the potentially coercive nature of the environment in which IVF consent forms are signed.²⁴¹ For instance, in the 2001 case of *J.B. v. M.B.*, the Supreme Court of New Jersey held that the IVF agreement at issue was unenforceable because the existence of conditional language in the form indicated that the couple had not given their unambiguous, mutual consent regarding the disposition of the embryos in the event of divorce.²⁴² In another example, in 2000, the Supreme Judicial Court of Massachusetts, in *A.Z. v. B.Z.*, held that even if the IVF agreement in question had been unambiguous, enforcement would violate public policy given that it could result in the husband becoming a parent against his will.²⁴³ In addition, in 2003, in *In re Marriage of Witten*, the Supreme Court of Iowa refused to enforce an agreement signed prior to IVF treatment, citing the unfairness of the contractual approach.²⁴⁴

Analogizing from disputes between progenitors to disputes between the recipient couple in the embryo donation context presents

²⁴⁰ *Id.*

²⁴¹ See *Witten*, 672 N.W.2d at 777, 781; *A.Z.*, 725 N.E.2d at 1056-57; *J.B.*, 783 A.2d at 714-15.

²⁴² 783 A.2d at 713.

²⁴³ 725 N.E.2d at 1057. In examining the ambiguity of the document, the court emphasized that there was no indication that the parties intended to be bound by the IVF consent form should they later disagree about the disposition of any remaining embryos. *Id.* at 1056. Instead, the court concluded that the couple merely intended the consent form to be an instrument for defining their relationship with the IVF clinic. *Id.* Further, the court expressed concerns given the IVF form's lack of a duration provision and its use of the term "separated" instead of "divorced." *Id.* at 1057. Additionally, the court expressed concern that the manner in which the husband signed the forms may not have clearly captured his intentions. *Id.* Finally, the court noted that, pursuant to a state statute, the consent form was not a binding separation agreement because it did not provide for custody, support, and maintenance of any potential resulting children. *Id.*

²⁴⁴ See 672 N.W.2d at 781. Specifically, the court noted that a couple's decision to undergo IVF treatments in the hopes of having children is an intensely emotional decision that may result in participants acting on feelings and instinct rather than rational deliberation. *Id.* at 777, 781. Therefore, should one party later change his or her mind, it would be coercive to hold a person who desperately wanted children to an agreement signed as a condition of undergoing IVF, especially given the difficulty of predicting one's response to future life-altering events such as parenthood or divorce. See *id.* at 777-78, 781.

several practical difficulties.²⁴⁵ Though embryo adoption is accomplished by contract, it is unclear whether and to what extent these contracts typically provide for the disposition of remaining excess embryos in the event of subsequent changes in situation such as the divorce of the recipient couple.²⁴⁶ In embryo donation contracts, donors generally agree to relinquish all rights, obligations, and interests to any resulting child, and recipients agree to accept all corresponding rights, obligations, and interests.²⁴⁷ A provision such as this would not necessarily mean that the donors have relinquished all of their rights to retain control over the manner in which the recipient couple uses the embryos.²⁴⁸ If donors do retain control, it may be unclear how far it extends.²⁴⁹ For instance, the embryo adoption contracts signed by participants in the Snowflakes Program mandate that unused frozen embryos be returned to donors at the end of a specified amount of time or in the event that they are no longer to be used for implantation.²⁵⁰ This raises the question of how to resolve a dispute in which only one member of the recipient couple still seeks to use the embryos for procreation.²⁵¹

If the contract is silent as to the future rights of either couple regarding the disposition of any remaining embryos, it may be unclear how far the donors' consent to the original donation extends.²⁵² This situation raises questions regarding whether the recipients' rights must be exercised jointly and whether they may redonate the embryos to another couple, destroy the embryos, or donate them for research.²⁵³ Further, assuming that the donor couple has in fact clearly relinquished all future control over the embryos, it is not certain that recipient couples will regularly sign contracts between themselves providing for the disposition of remaining embryos in the event of their divorce.²⁵⁴

To summarize, any useful analogy to the contractual approach adopted by courts in the case of disputes between progenitors is de-

²⁴⁵ See Ray, *supra* note 11, at 424, 427-28.

²⁴⁶ See Crockin, *supra* note 1, at 615; Ray, *supra* note 11, at 432, 449.

²⁴⁷ See Redman & Redman, *supra* note 7, at 587.

²⁴⁸ See Crockin, *supra* note 1, at 614-15; see also Nightlight Christian Adoptions, *supra* note 199 (explaining that the contract by which the donors relinquish their rights is valid for one year and that if recipients have embryos remaining after this time period, they must request an additional relinquishment from the donors).

²⁴⁹ See Crockin, *supra* note 1, at 614-15.

²⁵⁰ See Nightlight Christian Adoptions, *supra* note 199.

²⁵¹ See Crockin, *supra* note 1, at 614-15.

²⁵² See *id.*

²⁵³ See *id.*

²⁵⁴ See Ray, *supra* note 11, at 432.

pendant upon the existence of embryo donation contracts that clearly specify the rights of the recipients, both individually and with respect to the donors, regarding not only any resulting children but also control over remaining embryos.²⁵⁵ Therefore, clinics and agencies that arrange embryo adoptions must endeavor to include these provisions in any embryo donation contract.²⁵⁶

Even if the recipient couple indicates their preference for disposition in the original embryo donation contract, this contract would be subject to the same perils of possible nonenforcement that apply to contracts between progenitors.²⁵⁷ Couples who seek to receive donated embryos often, though not always, face much steeper barriers to parenthood than even other infertile couples.²⁵⁸ For many, embryo donation is the last and best option for having a child, short of traditional adoption.²⁵⁹ If signing away one's future rights to control the disposition of embryos is the only barrier to proceeding with embryo donation, then it is not unimaginable that a person who desperately wants children might not be in a state of mind to appreciate fully the ramifications of this relinquishment.²⁶⁰ There are a multitude of reasons why people might later change their minds about the disposition of embryos, and many couples frequently do change their minds.²⁶¹ Justifying the contractual approach on the ground that it reduces litigation is particularly distressing because it ignores the reality that agreements are often signed in favor of administrative efficiency.²⁶² Effectively reducing the highly personal and sensitive decision regarding disposition of embryos to a binding contractual relationship with no recourse unless both members of the couple have a mutual change

²⁵⁵ See Crockin, *supra* note 1, at 616; Ray, *supra* note 11, at 427–28, 449.

²⁵⁶ See Crockin, *supra* note 1, at 616; Ray, *supra* note 11, at 427–28, 449.

²⁵⁷ See Witten, 672 N.W.2d at 781, A.Z., 725 N.E.2d at 1057, J.B., 783 A.2d at 713.

²⁵⁸ See Redman & Redman, *supra* note 7, at 587; Nightlight Christian Adoptions, *supra* note 199.

²⁵⁹ See Redman & Redman, *supra* note 7, at 587; Priest, *supra* note 204; Nightlight Christian Adoptions, *supra* note 199.

²⁶⁰ See Witten, 672 N.W.2d at 777; Coleman, *supra* note 1, at 101, 104; Ray, *supra* note 11, at 446. See generally Hopkins, *supra* note 2 (examining the desperate measures that infertile couples will go to in their quest to have a baby).

²⁶¹ See Coleman, *supra* note 1, at 90, 101; Sara D. Petersen, Comment, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1090 & n.156 (2003).

²⁶² See Christina C. Lawrence, Note, *Procreative Liberty and the Preembryo Problem: Developing a Medical and Legal Framework to Settle the Disposition of Frozen Preambryos*, 52 CASE W. RES. L. REV. 721, 734 (2002).

of mind fails to accord proper respect for the procreative liberty of the individuals involved.²⁶³

On the other hand, it is impractical to contend that embryo donation contracts or IVF agreements are invalid in their entirety.²⁶⁴ IVF agreements are a necessary safeguard for both infertile couples and fertility clinics because they serve the important goal of defining the status and rights of the participating parties.²⁶⁵ Similarly, in the absence of relevant and comprehensive statutory guidance, contracts are necessary to effectuate the embryo donation relationship because the rights of the recipient couple are dependent upon what has been relinquished to them by the donors.²⁶⁶ In reviewing contracts such as these, courts must be cognizant of the delicate nature of defining the respective rights of the parties without enforcing coercive provisions by which parties unwittingly bargain away their procreative liberty.²⁶⁷ To guard against the possibility that the entire embryo donation contract would be unenforceable, participants might want to consider including severability clauses that would allow any potentially coercive provisions regarding disposition of embryos to be struck without affecting the remainder of the contract.²⁶⁸ It could be difficult, however, to determine which provisions are tainted by coercion and which are not.²⁶⁹

2. Shortcomings of the Contemporaneous Mutual Consent Model

In 2003, in *In re Marriage of Witten*, the Supreme Court of Iowa concluded that IVF agreements between progenitors should be enforceable and binding on the couple, subject to the right of *either* party to change his or her mind up to the point of use or destruction.²⁷⁰ Should one or both parties exercise that right, the court held that the contemporaneous mutual consent model should apply.²⁷¹ Under this approach, frozen embryos may not be used, destroyed, or donated unless both donors give their written consent.²⁷² If no mutually agree-

²⁶³ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); Lawrence, *supra* note 262, at 731.

²⁶⁴ See *Witten*, 672 N.W.2d at 782.

²⁶⁵ See *id.*

²⁶⁶ See *Litowitz*, 48 P.3d at 267; Ray, *supra* note 11, at 427.

²⁶⁷ See *Witten*, 672 N.W.2d at 782; Ray, *supra* note 11, at 446.

²⁶⁸ See Maureen H. Monks et al., *Planning and Drafting Legal Instruments for Nontraditional Families*, in REPRESENTING NONTRADITIONAL FAMILIES 1, 23 (Katherine Triantafyllou ed., 2006).

²⁶⁹ See *id.*

²⁷⁰ 672 N.W.2d at 782.

²⁷¹ *Id.* at 783.

²⁷² *Id.*

able result can be reached between the donors, the embryos will remain frozen in storage.²⁷³ Further, the court added that the party who opposes destruction of the embryos should be solely responsible for paying the continued storage costs.²⁷⁴

The court adopted this approach in an attempt to rectify the criticisms of the contractual model but also to prevent judicial intrusion into these highly personal decisions.²⁷⁵ As with the contractual approach, the contemporaneous mutual consent model focuses its attention on preserving the procreative decision-making power of the couple rather than the parties' individual interests.²⁷⁶ But this approach is problematic in that its practical effect is to give no weight to the constitutional rights of a party seeking to use the embryos for procreation.²⁷⁷ Further, by forcing the party who does not want to destroy the embryos to pay the continued storage costs, the court not only ignores this party's procreative rights but effectively punishes that party for pursuing those rights.²⁷⁸ Although the goal of mutual consent is worthy, in the highly charged and often combative environment of a divorce dispute, this approach may provide no incentive for the party seeking destruction of the embryos to come to any mutually agreeable result with his or her former spouse.²⁷⁹

3. Modifications to the *Davis* Balancing Test Needed to Properly Weigh the Recipients' Constitutional Rights to Procreative Autonomy

Given the absence of sufficient controlling statutes and the possibility that dispositional provisions in embryo donation contracts might be either silent or unenforceable, courts hearing divorce disputes between recipient couples should look to the balancing test approach to evaluate the procreative rights of each party.²⁸⁰ Whereas the contractual and contemporaneous mutual consent models seek to protect the procreative liberty of the couple by allowing decisions to remain with them

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See *Witten*, 672 N.W.2d at 779.

²⁷⁶ See *id.* at 777.

²⁷⁷ See Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 408 (2005).

²⁷⁸ See *Witten*, 672 N.W.2d at 783.

²⁷⁹ See *id.*

²⁸⁰ See *J.B.*, 783 A.2d 707, 719–20 (adopting balancing approach after determining that IVF consent form was not binding); *Davis*, 842 S.W.2d 588, 603–04 (applying balancing approach in the absence of prior agreement regarding disposition of embryos).

rather than with the courts,²⁸¹ the balancing approach acknowledges that a divorce is a dissolution of the marital unit and involves the divergent interests of the parties.²⁸² The emphasis of the other models on preventing judicial intrusion into the decision-making authority of the couple is misguided because in a divorce dispute the role of the court is not to protect the interests of a single marital unit but rather to protect the rights of the individuals who are seeking the court's guidance.²⁸³

Divorce disputes regarding the disposition of embryos pit the procreative choices of two individuals against one another because the value of the embryos to the parties is not in their intrinsic worth as a bundle of cells, but rather in their potential to become children.²⁸⁴ This implicates issues of choice regarding reproduction and parenthood.²⁸⁵ Analogizing to cases of divorce disputes between progenitors as a basis for balancing the procreative rights of couples in the embryo donation context provides the most flexibility and respect for the individual interests of each member of the divorcing couple.²⁸⁶ The lack of a genetic link, however, between the divorcing couple and the disputed embryos in the context of embryo donation significantly complicates this issue and would require modifications to assess adequately each party's procreative interests in the donated embryos.²⁸⁷

As first articulated by the Supreme Court of Tennessee in *Davis v. Davis* in 1992, and subsequently applied by the Supreme Court of New Jersey in *J.B.*, the balancing test acknowledges that procreative liberty includes both the right to procreate and the right to avoid procreation.²⁸⁸ The tension between these rights is most acutely felt within the

²⁸¹ See *Witten*, 672 N.W.2d at 777; *Kass*, 696 N.E.2d at 180.

²⁸² See *J.B.*, 783 A.2d at 719; *Davis*, 842 S.W.2d at 601, 603; Lawrence, *supra* note 262, at 730-31.

²⁸³ See Lawrence, *supra* note 262, at 732.

²⁸⁴ *Davis*, 842 S.W.2d at 598.

²⁸⁵ *Id.*

²⁸⁶ See *J.B.*, 783 A.2d 707, 716-17 (balancing the interests of the husband in donating the embryos to another couple or using them himself for procreation against the interests of the wife in avoiding procreation); *Davis*, 842 S.W.2d 588, 603-04 (balancing the interest of the wife in donating the embryos to another infertile couple against the interests of the husband in avoiding procreation).

²⁸⁷ See Upchurch, *supra* note 277, at 422.

²⁸⁸ *Id.*; see also *Roe*, 410 U.S. at 153, 164 (striking down a state statute banning abortion because it infringed on a woman's right to avoid the unwanted burdens of pregnancy and parenthood); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a state statute banning the use of contraceptives by married couples); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a state statute requiring sterilization of certain categories of criminals because it infringed the fundamental right to procreate).

context of disputes over embryos created through IVF.²⁸⁹ In particular, the fact that frozen embryos are created and exist outside of the human body removes issues of bodily integrity inherent in the abortion context that have limited the rights of men to assert their right to procreate.²⁹⁰ Therefore, the *Davis* court held that in disputes over embryos the male and female gamete-providers should be treated equally.²⁹¹ Thus, the experiences of each as they "stand on the brink of potential parenthood" must be viewed "in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood."²⁹² In balancing the procreative rights of each gamete provider, the courts in both *Davis* and *J.B.* focused exclusively on the genetic link between the parties and the embryos and on the psychological burdens that this bond would create with respect to any potential children, regardless of whether legal parental obligations were imposed.²⁹³

Though acknowledging that undergoing lengthy IVF procedures only to discover that the embryos would never become children was not an insubstantial emotional burden, the *Davis* court nevertheless determined that the interest in donating the embryos to another couple for implantation was not as significant as the lifelong burden of unwanted parenthood.²⁹⁴ The court noted that the case would be closer if the wife had sought to use the embryos herself for procreation, but its reluctance to impose unwanted parenthood prompted adoption of a presumption in favor of the party seeking to avoid procreation unless the party seeking to use the embryos for procreation has no reasonable alternative for achieving parenthood.²⁹⁵ The court stated that the presumption in favor of the party seeking to avoid procreation should not be considered an automatic veto.²⁹⁶ But if further IVF treatments and traditional adoption fall within the definition of reasonable alterna-

²⁸⁹ *Davis*, 842 S.W.2d at 601.

²⁹⁰ See *id.*; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (holding that state statute requiring a husband's consent before a married woman could obtain an abortion is unconstitutional because it violates a woman's right to privacy and bodily integrity).

²⁹¹ 842 S.W.2d at 601.

²⁹² *Id.*

²⁹³ *J.B.*, 783 A.2d at 717 (stating that "genetic ties may form a powerful bond . . . even if the progenitor is freed from the legal obligations of parenthood"); *Davis*, 842 S.W.2d at 603 (concluding that "an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood").

²⁹⁴ 842 S.W.2d at 604.

²⁹⁵ See *id.*; see also *J.B.*, 783 A.2d at 719.

²⁹⁶ *Davis*, 842 S.W.2d at 604.

tives, as suggested in *Davis*, it is hard to imagine a scenario where the party seeking to avoid procreation would ever lose.²⁹⁷

Analogizing from *Davis* and *J.B.* to divorce disputes between the recipient couple in an embryo donation context presents an initial inquiry into the source of the rights at issue.²⁹⁸ Unlike the donor couple whose rights are grounded in the fact that their genetic material is used to create the embryos, recipient couples do not have the same genetic connection.²⁹⁹ Therefore, any rights that the recipients have must be based either on a statute or contract.³⁰⁰ This presents a difficult predicament given the current lack of statutes and contracts that clearly define the recipient couple's rights with respect to the frozen embryos.³⁰¹ Assuming that the donating couple has clearly transferred all rights over the embryos to the recipient couple by contract and further assuming that any provision in that contract indicating the recipients' initial choice for disposition is silent or unenforceable, the next avenue for courts in resolving a divorce dispute between recipients would likely

²⁹⁷ See Berg, *supra* note 6, at 518; Medenwald, *supra* note 9, at 519. Critics argue that neither option is actually a "reasonable" alternative. See Meena Lal, Note, *The Role of the Federal Government in Assisted Reproductive Technologies*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 530-31 (1997) (explaining the high costs of IVF procedures in comparison to the low likelihood of success and the unavailability of reproductive technologies for the lower class, given the expense, lack of insurance coverage, and screening procedures that focus the selection process, in part, on financial ability); Theyssen, *supra* note 2, at 726-27 (seeking to debunk the fallacy that traditional adoption is a reasonable alternative by highlighting the significant obstacles inherent in the process, including: significant costs; lengthy waiting-lists; stringent explicit and implicit screening restrictions based on age, marital status, race, and even personality or physical appearance; and the lack of availability of healthy infants).

²⁹⁸ See *Litowitz*, 48 P.3d at 267 (considering the source of the wife's rights given that she did not have any genetic link to the disputed embryos and concluding that her rights were based solely in contract).

²⁹⁹ See *id.*; Katz, *supra* note 2, at 213.

³⁰⁰ See FLA. STAT. ANN. § 742.14 (West 2005); *Litowitz*, 48 P.3d at 267; Katz, *supra* note 2, at 213. In *Litowitz v. Litowitz*, the embryos in question had been created using the husband's sperm and eggs from a third-party donor. 48 P.3d at 262-63. The court explained that the rights of the wife, who had no biological connection to the embryos, must be based solely on the contract signed between the couple and the egg donor. *Id.* at 267. Though the court found that the egg donor contract gave the husband and wife equal rights to the donated eggs, the court noted that the contract did not relate to the resulting embryos. *Id.* But without specifically determining what the wife's rights were to the embryos, the court then examined whether the couple had reached a mutual decision regarding the disposition of the embryos in an agreement signed prior to having the embryos frozen. See *id.* at 268.

³⁰¹ See Ray, *supra* note 11, at 427-29.

be to apply the balancing test.³⁰² Because the recipient couple lacks a biological connection to the embryos, however, courts will need to re-evaluate the *Davis* presumption favoring the party seeking to avoid procreation.³⁰³

The primary support for the presumption in cases between progenitors is that allowing one party to use the embryos for procreation imposes a lifetime of psychological pain on the party seeking to avoid procreation, either in wondering whether his or her genetic child has been born or in knowing that the child has been born but having no relationship with him or her.³⁰⁴ Due to the lack of a genetic relationship between the recipient couple and the embryos, a proper application of the balancing test must encompass a more multifaceted inquiry into the nature of parenthood than the singular focus on genetics seen in cases involving progenitors.³⁰⁵ Once the balancing test is modified to consider factors other than biological connection to the embryos, it may not necessarily favor the party seeking to avoid procreation in all cases.³⁰⁶

Recipient parties seeking to avoid procreation will not have the advantage of simply relying on the psychological burden of genetic parenthood to support a presumption in favor of their constitutional rights.³⁰⁷ Instead, they must make a case that the psychological bond that creates the burden of forced parenthood can exist in the absence of a genetic link to the child.³⁰⁸ This argument may include references to the strength of the parent-child bond that develops in traditional adoptions, surrogacy cases, or step-parent relationships.³⁰⁹ This is problematic, however, because it is difficult to assess the development of

³⁰² See *J.B.*, 783 A.2d at 719–20 (applying balancing test after finding IVF consent form to be nonbinding); *Davis*, 842 S.W.2d at 603–04 (applying balancing approach in the absence of prior agreement regarding disposition of embryos).

³⁰³ See *J.B.*, 783 A.2d at 717; *Davis*, 842 S.W.2d at 603–04; Katz, *supra* note 2, at 213.

³⁰⁴ See *Davis*, 842 S.W.2d at 604.

³⁰⁵ See Susan B. Apel, *Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent*, 39 FAM. L.Q. 663, 673–74 (2005); Upchurch, *supra* note 277, at 424; Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1041 (2004).

³⁰⁶ See *Davis*, 842 S.W.2d at 604; Upchurch, *supra* note 277, at 425.

³⁰⁷ See *Litowitz*, 48 P.3d at 267.

³⁰⁸ See Apel, *supra* note 305, at 673–74.

³⁰⁹ See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471, 473–74 (1990).

such a psychological bond before a child has actually been born, let alone to establish a bond with a frozen embryo stored in a petri dish.³¹⁰

Further, although an analogy could be made to traditional adoptions, which have the benefit of creating a legally-binding parent-child relationship in the absence of a genetic connection, it is unclear whether traditional adoption law is applicable to embryo donations.³¹¹ This is particularly true given that most traditional adoption laws mandate a waiting period after the birth of the child before the biological parents' rights can be terminated.³¹² Therefore, it is uncertain whether a voluntary relinquishment of parental rights and responsibilities to a donated embryo would be legally sufficient to transfer the burden of potential unwanted parenthood to the member of the recipient couple who opposes use of the embryo for implantation.³¹³

Another option for members of the recipient couple opposing implantation would be to analogize to cases in which the concept of "intended parenthood" has been used to impose legally binding parental responsibilities.³¹⁴ For instance, in the 1998 case of *In re Marriage of Buzzanca*, the California Court of Appeal held that a husband and wife who had contracted with a surrogate to carry an embryo genetically unrelated to either the couple or the surrogate were the legal parents of the resulting child.³¹⁵ The court cited as support cases in which fatherhood was established without a genetic connection but rather by virtue of an infertile husband *consenting* to the artificial insemination of his wife.³¹⁶

But the applicability of intended parenthood to establish legal rights in instances of embryo donation appears to be more attenuated than in *Buzzanca*.³¹⁷ *Buzzanca* involved a situation in which the couple intentionally had an embryo created from anonymous sperm and egg donors and intentionally consented to implantation of the embryo in a surrogate.³¹⁸ In contrast, in the embryo donation context, the recipient couple has neither orchestrated the creation of the embryo nor initi-

³¹⁰ See Upchurch, *supra* note 277, at 425.

³¹¹ See Crokin, *supra* note 1, at 611; Kindregan & McBrien, *supra* note 7, at 174.

³¹² See Batsedis, *supra* note 2, at 568.

³¹³ See Kindregan & McBrien, *supra* note 7, at 174.

³¹⁴ See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 292-93 (Cal. Ct. App. 1998).

³¹⁵ *Id.* at 293.

³¹⁶ *Id.* at 282, 286 (citing *People v. Sorensen*, 437 P.2d 495, 498-500 (Cal. 1968)).

³¹⁷ See *id.* at 282.

³¹⁸ *Id.*; Minor's Opening Brief at 2, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (Nos. G022147, G022157).

ated implantation of it.³¹⁹ Therefore, it would appear more difficult to apply the reasoning of intended parenthood to impose legal parental rights (and the resulting burdens of unwanted parenthood that are at the focus of the balancing test) in the embryo donation context because "adopting" a donated embryo is unlikely to be seen as the equivalent of bringing about the conception and birth of a child.³²⁰

The lack of any genetic relationship may also affect the interpretation of the *Davis* reasonable alternatives exception.³²¹ On the one hand, there may be an argument that those who seek to "adopt" embryos often tend to have the most severe infertility problems or perhaps cannot afford the IVF process or traditional adoptions, and, therefore, the use of donated embryos may in fact represent their last, best chance of achieving parenthood.³²² The parameters of this exception are unclear, however, especially given the implication in *Davis* that subsequent IVF treatments or traditional adoption may be considered reasonable alternatives.³²³ Thus, it might also be argued that the party seeking procreation would have reasonable alternatives other than using the disputed embryos because he or she can simply adopt embryos from other donors.³²⁴ Therefore, the party seeking to use the embryos for procreation would face the uphill battle of establishing that, in the absence of any genetic connection, he or she has a superior claim to these particular embryos.³²⁵ One potential argument is that the party opposing procreation does not have a sufficiently compelling burden of unwanted parenthood in light of the lack of a genetic connection to the embryos, and, therefore, a court should respect the embryos' inherent potential for life by awarding them to the party seeking implantation.³²⁶

³¹⁹ See *supra* notes 182–198 and accompanying text (describing the embryo donation process).

³²⁰ See *Buzzanca*, 72 Cal. Rptr. 2d at 282.

³²¹ See Upchurch, *supra* note 277, at 422.

³²² See Redman & Redman, *supra* note 7, at 587; Priest, *supra* note 204; Nightlight Christian Adoptions, *supra* note 199.

³²³ See *Davis*, 842 S.W.2d at 604. It is important to note that neither *J.B.* nor *Davis* involved an infertile party seeking to use the disputed embryos for his or her own goals of achieving parenthood. See *J.B.*, 783 A.2d at 717; *Davis*, 842 S.W.2d at 604.

³²⁴ See *Davis*, 842 S.W.2d at 604.

³²⁵ See *Litowitz*, 48 P.3d at 267.

³²⁶ See *Melchoir*, *supra* note 5, at 952.

CONCLUSION

Embryo donation has great promise as a solution to the concerns of donors who wish to respect the potential for life inherent in their embryos and to the desires of infertile couples in becoming parents. It would be naive, however, to assume that this process is a perfect solution. Practically, embryo donations are occurring with greater frequency and are receiving increasing media attention. Legally, the lack of sufficient legislative guidance will likely place courts in the difficult position of determining how to resolve disputes that may arise between couples who "adopt" frozen embryos. When faced with this challenge, courts may logically look to similar cases involving dispositional disputes between progenitors. But the complexities of embryo donation and the recipients' lack of a genetic relationship to the embryos are not adequately addressed by any of the current approaches adopted in cases involving progenitors. Though the original embryo donation may specify the recipients' dispositional choice, it is important to remember the highly emotionally charged environment in which the recipients enter into such contracts. The contractual approach fails to fully appreciate this context by enforcing choices made when the extent of the ramifications may not have been completely understood. Additionally, both the contractual and contemporaneous mutual consent models erroneously focus the court's role on how to protect the interests of the marital unit instead of on how to respect the individual procreative rights of the disputants appropriately. The balancing test provides the best method for considering the relative rights of the parties, but in applying this test, courts must adjust the balance to account for the lack of genetic relationship between recipient parents and donated embryos. In the context of donated embryos, the presumption favoring individuals seeking to avoid becoming a parent should not apply because their procreative autonomy is not so clearly infringed where they share no genetic bond with the embryo.

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