

impose this duty do so with complete disregard for a legislatively and professionally established standard of care.⁴¹⁶ Relying instead on unpersuasive and unsuitable theories, courts are effectively denying pharmacists their rightful professional status when upholding the no duty to warn rule. Moreover, due to growing prescription use, increasing drug errors, and mounting health care costs, public policy dictates that pharmacists use their expanded roles and knowledge to full potential.⁴¹⁷ This requires pharmacists to be held accountable for failing to warn patients about potential adverse drug events.⁴¹⁸

Theoretically, the expansion of pharmacists' liability is a step in the right direction, recognizing the professional status of pharmacists and leading to better patient care and drug therapy outcomes. Unfortunately, however, current working conditions have forced pharmacists to take a step back from quality patient care activities, negating any positive effects expanding liability might bring. As pharmacists struggle under high dispensing volumes and exhausting work conditions, little time is left to meet even the bare minimum in patient care requirements.⁴¹⁹ As a result, pharmacists have resorted to utilizing unsafe and inadequate methods in order to meet workplace demands and simultaneously avoid any liability to fulfill their duties.⁴²⁰ Thus, although the no duty to warn rule is no longer compatible with the contemporary pharmacy profession, any increase in liability without a corresponding decrease in other workplace demands can have dangerous consequences. It remains to be seen whether the pharmacy profession will be able to find the proper means to successfully remove itself from such a precarious position.

⁴¹⁶ See Omnibus Budget Reconciliation Act of 1990, 42 U.S.C. § 1396r-8 (mandating that the minimum standard of care for pharmacists requires that pharmacists perform drug utilization reviews and patient counseling).

⁴¹⁷ See generally THE PHARMACIST WORKFORCE, *supra* note 1, at 33 (discussing the increased importance and expanded role of pharmacists as medicine becomes more complex, the risk for errors increases, and cost constraints intensify).

⁴¹⁸ See Gonzalez, *supra* note 49, at 53, 76 (noting that the complexity of current drug therapy, combined with the OBRA mandates and various state statutes, creates an environment in which pharmacists must warn patients about the potential risks of drug therapy).

⁴¹⁹ See Ukens, *New York*, *supra* note 290, at 39 (suggesting that pharmacists' workloads require that they perform only their basic duties, often omitting higher-level functions such as patient counseling).

⁴²⁰ See Smith & Arbon, *supra* note 327, at 67.

ERECTING WOMEN: CONTRACTING PARENTHOOD FROM MARRIAGE TO DIVORCE

Rachel Polinger-Hyman

The sex impulse was dangerous to the Party, and the Party had turned it to account. They had played a similar trick with the instinct of parenthood. The family could not actually be abolished, and, indeed, people were encouraged to be fond of their children in almost the old-fashioned way. The children, on the other hand, were systematically turned against their parents and taught to spy on them and report their deviations. The family had become in effect an extension of the Thought Police. It was a device by means of which everyone could be surrounded night and day by informers who knew him intimately.¹

—George Orwell, 1984

INTRODUCTION

The disposition of frozen embryos in divorce proceedings presents an opportunity to explore how our judicial system accommodates advances in assisted reproductive technologies with contractual freedoms.² Recent case law and advancements in reproductive technology give rise to ethical and moral dilemmas

¹ GEORGE ORWELL, 1984, at 111 (New Am. Library of World Literature, Inc. 1961) (1949) (writing about an imminent future of corruption, manipulation, and the death of the human spirit, Orwell created a language called "doublethink" in his novel). Doublethink is the power of holding and accepting two contradictory beliefs in one's mind simultaneously; it requires both conscious and unconscious thought. The concept of doublethink translates well into the reproductive arena where the right to procreate and the right to avoid procreation co-exist. A significant and chilling aspect of Orwell's vision of the future is that in the year 1984, the government would monitor every aspect of human life. Orwell's negative utopia was a profound commentary on the ramifications of what happens when individuals no longer have the ability to create and maintain intimate and consensual relationships; consequently, the right to marry and procreate would no longer be free from governmental interference. *Id.*

² See Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 456 (1999) (explaining that each new development in reproductive technology will yield complicated social issues).

forcing a redefinition of family values, structure, and legal responsibilities.³

Traditionally, the political arena has served as a major contributor in shaping and reflecting societal notions of family.⁴ Political suggestions have ranged from condemning homosexuality to approving of working mothers outside the home; each of these suggestions has encompassed an ideological view of a society that either supported or criticized an alternative notion of family.⁵

The traditional nuclear, biological family is now a vision that is constantly morphing.⁶ Divorce, same-sex relationships, and out-of-wedlock births are examples of recent social phenomena that have challenged the traditional family structure.⁷ These social changes, in combination with rapid advancements in reproductive technology, are also transforming the fundamental meaning of parenthood.⁸

Recent developments in the high-tech field of fertility medicine, particularly the ability to cryopreserve embryos and store them indefinitely, have triggered perplexing questions regarding post-divorce rights of ownership.⁹ Current practices within the fertility field reflect the needs and desires of those actively participat-

³ Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 46 (2000); see also Mark Haut, Note, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 493-94 (1999) (advancing that New York courts should give joint dispositional custody to divorcing parties when they do not have a prior contractual agreement).

⁴ See Andrews & Elster, *supra* note 3, at 46.

⁵ See *id.* at 46-47 (noting that each political formulation of "family" will necessarily imply different family values); see also Ruth Macklin, *What is Wrong with Commodification?*, in *NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION* 106 (Cynthia B. Cohen ed., 1996) (noting that politics also plays a part in deciding how women are compensated for reproductive services such as egg donation, embryo donation, or surrogacy).

⁶ Andrews & Elster, *supra* note 3, at 47 (noting that the traditional nuclear, biological family consisted of a mother, father, and their children); see also Thomas H. Murray, *New Reproductive Technologies and the Family*, in *NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION* 52, 54-55 (Cynthia B. Cohen ed., 1996).

⁷ Andrews & Elster, *supra* note 3, at 48; see also Lisa Sowle Cahill, *Moral Concerns About Institutionalized Gamete Donation*, in *NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION* 74, 76 (Cynthia B. Cohen ed., 1996) (commenting that even though family structures are changing due to social factors, the parent-child relationship remains constant).

⁸ Andrews & Elster, *supra* note 3, at 47-48 (noting that parenthood may be defined by "gestation, genetics, intention, rearing, or some combination of these factors.>").

⁹ See *J.B. v. M.B.*, 751 A.2d 613, 616 (N.J. Super. Ct. App. Div. 2000) (holding that a former husband and wife's in vitro fertilization contract was unenforceable, stipulating that control and ownership of embryos would be relinquished to an IVF (in vitro fertilization) program should their marriage dissolve).

ing in this particular market.¹⁰ In the practice of reproductive medicine, patients are able to contract with their partners regarding the disposition and control of their embryos.¹¹ To date, courts have adopted a public policy position and are typically unwilling to enforce these reproductive contracts between in vitro fertilization (IVF) couples.¹²

This Commentary assesses the courts' rejection of contracts in the frozen embryo setting. Part I of this commentary provides a background into the IVF and cryopreservation process. Part II briefly discusses the early days of IVF and the advances in medical technology that have contributed to this new legal area of dispute. Part III introduces the different approaches courts have adopted regarding the disposition of frozen embryos in divorce situations; the "right to life", "property", and "deserving special respect" views are analyzed within the seminal cases of *Davis v. Davis*,¹³ *Kass v. Kass*,¹⁴ *J.B. v. M.B.*,¹⁵ and *A.Z. v. B.Z.*¹⁶ Part IV argues that the influential decisions arising from these embryo disposition cases demonstrates an increasing gap between biological reality and legal dicta.¹⁷ Part V attempts to harmonize ideas of reproductive freedom with the prac-

¹⁰ Murray, *supra* note 6, at 52-53 (demonstrating how market analogies are utilized in discussions regarding reproductive technology and its effect on families).

¹¹ See *J.B.*, 751 A.2d at 615 (citing a frozen embryo disposition contract, which stated that, "The control and disposition of the embryos belongs to the Patient and her Partner . . . [who] will be asked to execute the attached legal statement regarding control and disposition of cryopreserved embryos.>").

¹² *Id.* at 619-20 (resolving that, as a matter of public policy, individuals should not be forced into parenthood).

¹³ 842 S.W.2d 588 (Tenn. 1992) (granting Junior Davis custody of his and his ex-wife's frozen embryos because she was intent on implanting the embryos outside of wedlock).

¹⁴ 696 N.E.2d 174 (N.Y. 1988) (upholding the Kass' contractual agreement which provided that their frozen embryos would be donated to an IVF program upon divorce).

¹⁵ 751 A.2d at 613 (rejecting an in vitro contract which would donate the frozen eggs to a fertilization clinic should the parents divorce).

¹⁶ 725 N.E. 2d 1051 (Mass. 2000) (striking a contract which would enable an ex-wife to implant her and her ex-husband's frozen embryos even when the ex-husband did not wish to be a parent).

¹⁷ See ORWELL, *supra* note 1, at 10 (contemplating writing a diary, the narrator notes: "How could you communicate with the future? It was of its nature impossible. Either the future would resemble the present, in which case it would not listen to him, or it would be different from it, and his predicament would be meaningless.>"). This quote adequately reflects the current realm of reproductive technology, where the law constantly attempts to accommodate biological advances, only to find itself reassessing precedent in order to address new problems. In this new world of reproduction, the future will never resemble the present. Should the law fail to adjust to this rapid technological pace, legal dicta will become meaningless since it will not be able to accurately guide the changing times. *Id.*

ticality of enforcing written agreements between couples involved in artificial reproductive technologies. Part VI tests the validity of dispositional agreements by deconstructing an informed consent IVF contract. In sum, this comment criticizes how courts have severely departed from their historically protective stance towards procreative freedom by refusing to enforce IVF reproductive contracts.¹⁸

I. BACKGROUND

A. The IVF Process

Before analyzing the legal and political ramifications of contracting for parenthood, it is important to understand the purpose of IVF and the procedures involved.¹⁹ IVF provides infertile couples an opportunity to conceive their own children.²⁰ Infertility, however, should not be confused with sterility.²¹ The medically accepted definition of infertility is the inability to conceive after one year of intercourse without contraception.²² Usually, infertility, unlike ste-

¹⁸ Specifically, the Supreme Court has repeatedly sustained a woman's qualified right to terminate a pregnancy. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); see also *Roe v. Wade*, 410 U.S. 113 (1973). Moreover, more than half a century ago, the Supreme Court also protected the right to procreate, invalidating a state's provision for involuntary sterilization of habitual criminals. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁹ Literally translated, IVF means "fertilization in a glass". *Artificial Reproductive Technology*, at <http://www.lvcm.com/whavins/artrepro.htm> (last visited Sept. 16, 2001).

²⁰ Jennifer Marigliano Dehmel, Note, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1380 (1995); see also American Society for Reproductive Medicine, *Patient's Fact Sheet: Infertility*, at <http://www.asrm.org/fact/patients/FactSheets/infertility-Fact.pdf> (last visited Sept. 28, 2001) (reporting that over six million American women and their partners suffer from infertility).

²¹ See JANICE RAYMOND, *The Production of Fertility and Infertility*, in *WOMEN AS WOMBS* (1993) (explaining that infertility is temporary, while the connotation associated with sterility is permanent), available at <http://www.hsph.harvard.edu/rt21/globalism/RAYMOND.html>. See generally *Kass v. Kass*, 663 N.Y.S.2d 581, 593 (1997) (exemplifying the significance in the slight difference between infertility and sterility). This distinction becomes important in embryo disposition cases where courts inquire into whether there are any reasonable alternatives to achieve parenthood by other means for the party desiring embryos. If the court finds a gamete provider to be sterile, then future reproductive opportunities are limited. This limitation may have some weight in the court's determination regarding the disposition of the embryos in a divorce custody battle. *Id.* See also *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

²² U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *INFERTILITY: MEDICAL AND SOCIAL CHOICES* 35 (1988).

rility, is merely a result of impatience rather than inability to conceive.²³

The IVF procedure requires the stimulation of the ovaries to produce multiple eggs, which are then fertilized outside of the woman's body in a petri dish.²⁴ While ninety percent of removed eggs are successfully fertilized, only three or four embryos can safely be placed in the uterus.²⁵ Embryos that are not transferred right away may be stored for later use through cryopreservation.²⁶

B. Cryopreservation

Cryopreservation consists of freezing embryos in liquid nitrogen at subzero temperatures.²⁷ The process of freezing allows storage for later use of the extra embryos retrieved from the female.²⁸ By putting the embryos on ice for later use, cryopreservation relieves

²³ See RAYMOND, *supra* note 21, at ch.1.

²⁴ See Dehmel, *supra* note 20, at 1377; see also Nancy Hill-Holtzman, *Frustacis Preparing to Re-Enter Spotlight*, L.A. TIMES, Apr. 29, 1990, at A1 (discussing how Pergonal and HCG (human chorionic gonadotropin) tend to cause multiple births as a result of over stimulating an egg follicle). The birth of the Frustacis septuplets in the United States was a highly publicized case which illustrated various problems associated with fertility drugs. Although the septuplets were not born through IVF, their births evidenced problems that ensue when women take fertility drugs. In this case, four septuplets died within four months after their birth in 1985, and the remaining three lingered on with continuing medical problems, including cerebral palsy. The Frustacis sued the Tyler Medical Clinic, the oldest fertility center in Los Angeles, and their fertility specialist for malpractice. They claimed that the high dosage of Pergonal, as well as the doctors' alleged negligence in monitoring the number of follicles, caused these tragedies. In 1990, the Frustacis' settled the suit for six million dollars. *Id.*

²⁵ Marcia Joy Wurmbbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1083 (1986) (noting that Australian fertility specialists recommend no more than three embryos per implantation); see also John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, n.3 (1990) [hereinafter Robertson, *Prior Agreements*].

²⁶ See Jennifer L. Carow, Note, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 529 (1994) (describing how, in the absence of cryopreservation, the extra eggs extracted from the woman that are not implanted will expire).

²⁷ Wurmbbrand, *supra* note 25, at 1083 (explaining that the best stages at which to freeze the embryos are at the two, four, or eight cell development stage).

²⁸ See *id.* at 1083; see also Mina Alikani, *Preservation of Human Eggs and Embryos Through Freezing*, in *ISSUES IN REPRODUCTIVE TECHNOLOGY* 201 (Helen Bequaert Holmes ed., 1992) (explaining that the first human pregnancies resulting from cryopreservation occurred in 1983).

the woman from undergoing further egg retrievals that may be painful, risky, and dangerous.²⁹

Cryopreservation is appealing for several reasons. First, the cost efficiency of cryopreservation should not be overlooked.³⁰ Each IVF cycle, which includes ovum retrieval and implantation, can cost between \$10,000 and \$20,000.³¹ Extracting more than one egg during the IVF procedure reduces the need to repeat the process when a subsequent pregnancy is desired.³²

Second, hormonal inducement of egg production causes numerous deleterious side effects for successful embryo implantation.³³ Women who are at a high risk of developing ovarian disease following IVF ovarian stimulation are advised to freeze their embryos for subsequent transfer.³⁴ Cryopreservation also maximizes the potential of future pregnancy by giving doctors and parents the opportunity to choose the times when there is a reasonable possibility of success.³⁵ In addition, allowing the woman's cycle an opportunity to acclimate to a more natural balance after the IVF procedure benefits the woman by increasing the success rate for pregnancy.³⁶

²⁹ See RAYMOND, *supra* note 21 (describing difficulties associated with the IVF treatment such as pregnancies occurring outside the uterus, ectopic pregnancies, and miscarriages).

³⁰ See Carow, *supra* note 26, at 529 (noting that it is better for a woman to undergo as few egg retrievals as possible).

³¹ See *IVF Costs*, at <http://www.advancedfertility.com/ivfprice.htm> (last visited Sept. 28, 2001) (reporting that embryo freezing and storing may entail further costs in addition to the IVF cycle procedures).

³² See Carow, *supra* note 26, at 529; see also Helen Bequaert Holmes, *To Freeze or Not to Freeze: Is That an Option?* in *ISSUES IN REPRODUCTIVE TECHNOLOGY* 193, 196 (Helen Bequaert Holmes ed., 1994) (commenting that the "medical reasons" to utilize cryopreservation are numerous).

³³ Robyn Rowland, *LIVING LABORATORIES: WOMEN AND REPRODUCTIVE TECHNOLOGIES* 50 (Indiana University Press 1992) (finding that clomiphene, a current fertility hormone used to stimulate egg production, has a similar chemical structure to the drug diethylstilbestrol (DES)). Between the 1940s and 1970s, DES was administered to pregnant women as a prophylactic measure to avoid miscarriage. This drug was eventually removed from the market, as it was found to cause cancer of the vagina, cervix, and breast, increased rates of infertility, spontaneous abortions, and ectopic pregnancies in daughters of these women. *Id.*

³⁴ *Id.* at 35 (finding that pre-menopausal women should also consider freezing their eggs for future use).

³⁵ Richard P. Dickey, *The Medical Status of the Embryo*, 32 *LOY. L. REV.* 317, 333 (indicating that high fever, bleeding, accidental injury to the mother, or a natural disaster can compromise implantation success).

³⁶ See Carow, *supra* note 26, at 529-530 (noting that a woman is more likely to get pregnant through IVF when her body is free from fertility drugs).

Third, cryopreservation provides optimum family planning by enabling a couple to delay having children for years without the worry of future infertility problems.³⁷ Because fertility capabilities decrease with age, technological reproduction affords older couples hope.³⁸ IVF is not just a treatment for the forever infertile, it is also an option for couples who have already had children, but who cannot conceive again due to either male or female physiological factors.³⁹

Fourth, cryopreservation offers couples a choice in deciding the disposition of the embryos produced in the IVF process.⁴⁰ For example, frozen embryos have become available for donation to infertile couples as a result of successful cryopreservation programs.⁴¹ Cryopreservation also allows couples additional time to decide whether to implant, donate, or destroy the unused embryos.⁴²

Despite its touted benefits, cryopreservation also has some disadvantages. For example, one downside associated with cryopreservation is that not all embryos survive the freezing or thawing process related to an assisted reproductive technology procedure.⁴³ In fact, the Centers for Disease Control has discovered that the live

³⁷ See John A. Robertson, *Ethical and Legal Issues in Cryopreservation of Human Embryos*, 47 *FERTILITY & STERILITY* 371 (1987) (comparing cryopreservation with insurance coverage because couples can safeguard against future infertility by freezing their eggs now for later use).

³⁸ LEON SPEROFF ET AL., *CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY* 932 (5th ed. 1994) ("In successful IVF programs, where take-home baby rates can be in the 35% range for women 36 and younger, for women over 39 the figure is in the 10% range.").

³⁹ See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 *S. CAL. L. REV.* 939, 947 (1986) [hereinafter Robertson, *Legal Structure*] (commenting that male infertility is another common reason that couples resort to IVF).

⁴⁰ Interview with Dr. Robert G. Brzyski, Assistant Professor at the Univ. of Tex. Health Sci. Ctr. at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with St. Mary's L.J.).

⁴¹ See Robertson, *Legal Structure*, *supra* note 39, at 376-77 (suggesting that embryo donation may foster a stronger relationship for adoptive parents because the rearing mother will have carried the child to term herself).

⁴² Brzyski, *supra* note 40; see also Virginia Groark, *Divorce Settlement Keeps Frozen Embryos in Limbo*, *CHI. TRIB.*, Mar. 25, 2000, at N5 (reporting that a divorcing couple in Illinois agreed to preserve their two frozen embryos for fifty years until they come to a mutually satisfactory custody agreement).

⁴³ CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *1997 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports*, available at <http://www.cdc.gov/nccdphp/drh/archive/art97/index.htm> (last visited Oct. 3, 2001) (comparing frozen embryos per thaw, frozen embryos per transfer, and fresh embryos per transfer).

birth per thaw rate for frozen embryos is usually lower than the live birth per transfer rate for fresh embryos that were never frozen.⁴⁴

Another problem associated with cryopreservation involves the time limit imposed on storing the embryos.⁴⁵ To illustrate, a "prenatal massacre" ensued in Great Britain in 1996 when frozen embryos, essentially abandoned by their parents, were removed from liquid nitrogen freezers and immersed in a warm solution where they were allowed to disintegrate.⁴⁶ This event occurred pursuant to a United Kingdom law which insisted that frozen embryos must be thawed and allowed to die after five years.⁴⁷

One of the greatest disadvantages of cryopreservation, which is the focus of this comment, lies in the ability to contract for the future disposition of the frozen embryos.⁴⁸ Many programs require couples to sign cryopreservation contracts delineating the terms under which the clinic can preserve the embryos cryogenically.⁴⁹ Clinics outline the time limits in which frozen embryos are considered abandoned and highlight the actions of the clinic in such circumstances.

⁴⁴ *Id.*

⁴⁵ See Robertson, *Legal Structure*, *supra* note 39, at 375 (discussing the problems that can arise when gamete providers do not fully consider the ramifications of storage time limits on cryopreserved embryos).

⁴⁶ CNN Interactive, *Thousands of Human Embryos Destroyed in Britain*, at <http://www.cnn.com/WORLD/9608/01/frozen.embryos> (last visited Sept. 10, 2001).

⁴⁷ *Id.* (noting that parental consent is required for cryopreservation beyond five years).

⁴⁸ Howard J. Jones, Jr., *Cryopreservation and its Problems*, 53 *FERTILITY & STERILITY* 780, 780 (1990). The following instances are unexpected circumstances which should be included in a reproductive contract:

Death or disability of the prospective parents; death or disability of one of the prospective parents; legal separation of the prospective parents; divorce of the prospective parents; if the cryopreserved material remains in storage beyond the prospective mother's reproductive limit or beyond some other agreed upon time limit; loss of contact with the prospective parents, including their failure to pay current or delinquent cryopreservation fees and charges, if any; loss of interest by the prospective parents in attempting a pregnancy; a wish of one [or both] prospective parent's to remove the cryopreserved pre-zygote/pre-embryo from the original program; [and] voluntary or involuntary discontinuation of a cryopreservation program by an IVF program.

⁴⁹ John Dwight Ingram, *In Vitro Fertilization: Problems and Solutions*, 98 *DICK. L. REV.* 67, 78 (1993) (stating that medical facilities should clearly elucidate terms such as "transfer or withdrawal of embryos, sale or adoption, use for research, or destruction, and . . . time limits.").

These contracts create situations that can potentially cause conflicts between clinics and patients, and the couples themselves.⁵⁰ Parents may assume that their embryos will be destroyed by the clinic under the clinic's reservation of rights in the contract.⁵¹ This is important because, ultimately, many parents may be emotionally unable to make the decision to destroy their embryos.⁵²

A second disadvantage is that the lapse of time between the IVF procedure, freezing, and implantation gives the married couple an opportunity to change their minds about the process as well as their marriage.⁵³ When the couple decides to get divorced, they may disagree on the disposition of the frozen embryos.⁵⁴ The options available to the couple are implantation, donation, or allowing the embryos to thaw and expire on their own.⁵⁵ The usual scenario involves the wife's wish to implant the eggs while the husband seeks to have them destroyed.⁵⁶ Unfortunately, for couples who disagree and ultimately litigate, the courts' position leaves much to be de-

⁵⁰ *Id.* at 74 (commenting that medical facilities and gamete providers may disagree about the removal and transfer of embryos to another facility, and that gamete providers may argue among themselves about implantation, division, and donation of the embryos); see also Alise R. Panitch, Note, *The Davis Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 *CASE W. RES. L. REV.* 543 (1991) ("IVF has generated legal problems stemming from disputes over control and ownership of preembryos. These disputes fall into two categories: disputes between IVF participants and their clinic, and disputes between the IVF participants themselves.").

⁵¹ See Ingram, *supra* note 49, at 75 (finding that parties will not typically enter into an IVF contract unless they are certain that the contract's provisions will be honored).

⁵² *Id.* at 75 (asserting that couples will have strong emotions regarding issues such as disposal, implantation, death, and divorce).

⁵³ See Samuel A. Gunsburg, Note, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to In Vitro Fertilization*, 65 *FORDHAM L. REV.* 2205, 2211-12 (1997) (commenting that such life-changing decisions have created legal courtroom battles).

⁵⁴ See, e.g., *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (demonstrating Junior and Mary Sue Davis' disagreement about the disposition of their embryos after their marriage dissolved).

⁵⁵ See Robyn Shapiro, *Who Owns Your Frozen Embryos? Promises and Pitfalls of Emerging Reproductive Options*, 25 *SPG. HUM. RTS.* 12, 13 (1998) (noting that dispositional options may include the embryo's destruction, donation for scientific purposes, donation to an infertile couple, or storage).

⁵⁶ See *Davis*, 842 S.W.2d at 589 (chronicling Mary Sue Davis' desire to implant her and her ex-husband's frozen embryos after they divorced); *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1988) (reciting Maureen Kass's wish to be impregnated with her and her former husband's frozen embryos); but c.f. *J.B. v. M.B.*, 751 A.2d 613, 615-16 (N.J. Super. Ct. App. Div. 2000) (involving a situation where the wife wanted the embryos destroyed and the husband wanted to preserve them for later use).

sired because courts tend to disregard contracts concerning embryo disposition.⁵⁷

II. THE EARLY DAYS

A. Maidenhead Revisited: The First Time

The first IVF procedure in the United States occurred in 1973.⁵⁸ Doris and John Del Zio were the first couple in the United States participating in the radical new fertility procedure.⁵⁹ After three failed attempts to repair Mrs. Del Zio's fallopian tubes, New York fertility specialists, Dr. William Sweeney and Dr. Landrum Shettles, performed this procedure by surgically removing an egg from Mrs. Del Zio's ovary and placing it in a sterile package.⁶⁰ The egg was then fertilized with Mr. Del Zio's sperm and placed in an incubator to develop for three days at Columbia Presbyterian Hospital.⁶¹

Dr. Raymond Vande Wiele, Chairman of Obstetrics and Gynecology at Columbia, became enraged when he discovered that Dr. Shettle had not sought the institution's permission before performing the experiment.⁶² Dr. Vande Wiele objected to the procedure on ethical and moral grounds.⁶³ Punctuating his argument, Dr. Vande Wiele removed the container from the incubator and opened it, destroying the Del Zios' chances of ever giving birth to a child.⁶⁴ Ironi-

⁵⁷ See Shapiro, *supra* note 55, at 13 (advancing that courts should enforce IVF directives as other contracts are enforced).

⁵⁸ LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 16 (Henry Hold & Co. 1999); see also Patricia A. Marin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 259 (1990) (recognizing that the birth of the first infant ever conceived by IVF occurred in England in 1978).

⁵⁹ ANDREWS, *supra* note 58, at 16.

⁶⁰ *Id.* (identifying Dr. Landrum Shettles as a fertility specialist based at Manhattan's Columbia Presbyterian Medical Center).

⁶¹ *Id.* (stating that the zygote was incubated in a culture medium for this period of time to maximize the probability of a successful implantation in Mrs. Del Zio's uterus).

⁶² *Id.*

⁶³ ANDREWS, *supra* note 58 (revealing that Dr. Vande Wiele was also concerned that the petri dish may have been infected and could have harmed Mrs. Del Zio's health if implanted).

⁶⁴ *Id.* at 16-17 (revealing that Mrs. Del Zio's reproductive organs were damaged beyond repair after the surgical procedure, making another egg retrieval impossible); see generally *Del Zio v. Presbyterian Hosp. of N.Y.*, No. 74 Civ. 3588 (S.D.N.Y. 1978) (recognizing a cause of action for emotional distress for the mishandling or destruction of embryos). For unilaterally destroying the embryo of his own initiative and without notice or consultation with the couple involved, the couple sued Dr. Vande Wiele for intentional infliction of emotional distress. The jury awarded the couple \$500,000 in damages. *Id.* at 2, 11. This case

cally, although Dr. Vande Wiele was ethically opposed to the IVF procedure, he evidently was not opposed to destroying an embryo having a ten to twenty percent chance of becoming a child.⁶⁵

As reproductive technology procedures progressed throughout the 1970s and 1980s, it became clear that the Del Zios were not the exception to IVF embryo management; rather, they were the rule.⁶⁶ The Del Zio case demonstrated that there were many unresolved ethical and moral issues regarding embryo disposition.⁶⁷ Around the world, IVF clinics were coming under attack, predominantly from right-to-life organizations.⁶⁸ For example, priests in Australia staged a hunger strike in the lobby of an infertility clinic and patients had to walk past a human barrier whenever they wanted to get in.⁶⁹

B. Bipolar Nation: Redefining Family Values

Married couples have a fundamental right to determine whether and when they can bear a child.⁷⁰ Does this right extend to couples choosing the *means* by which they bear a child? Every culture and religion in the world has recognized procreation as a natu-

triggers important legal issues. The potential liability resulting from control and ownership of embryos hinges on the legal status of the embryo. If property law governs, then the gamete providers have a cause of action for conversion for the mishandling of the embryo. Conversely, if the embryo is classified as a person, then perhaps a common law theory of damages for mishandling the body of a close relative may arise. *Id.* at 5-13.

⁶⁵ ANDREWS, *supra* note 58, at 71 (explaining that many clinics do not want to destroy embryos, even in cases of abandonment, where the genetic parents cannot be contacted after a five year storage limit). Additionally, from a religious standpoint, the Vatican condemned the destruction of frozen embryos, calling it a "prenatal massacre." As an alternative to embryo abandonment, the Vatican recommended "prenatal adoptions," suggesting that married women volunteer to bring embryos to term, similar to taking in an orphan or abandoned child. *Id.*

⁶⁶ See *id.* at 18 (reporting that more than 1,300 doctors and scientists were working on assisted reproductive technology research by 1985).

⁶⁷ See generally Ingram, *supra* note 49, at 69-72 (explaining that questions such as "what do we mean by 'life'?" and "when does 'life' begin?" abound in IVF discussions).

⁶⁸ ANDREWS, *supra* note 58, at 23-24 (highlighting religious and legal protests in Australia, the United States, and England).

⁶⁹ See *id.* (noting that one young woman seeking abortion services looked a protesting priest in the eye and asked, "Why don't you want me to have this baby?").

⁷⁰ *Id.* at 25; see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis added)

ral right of marriage.⁷¹ The United States Constitution also protects this right.⁷² But how are morality and ethics reconciled with the desire to procreate for non-married couples?

Charles Baudelaire, a French poet, advanced an apt discussion about the function of morality in society.⁷³ He wrote, in *My Heart Laid Bare*, the following:

All the imbeciles of the Bourgeoisie who interminably use the words: "immoral", "immorality", "morality in art" and other such stupid expressions remind me of Louise Villedieu, a five-franc whore who once went with me to the Louvre. She had never been there before, and began to blush and cover her face with her hands, repeatedly plucking at my sleeve and asking me, as we stood before deathless statues and pictures, how such indecencies could be flaunted in public.⁷⁴

Baudelaire illustrates, through the subjective lens of high and low art, how morality is a bipolar disease, capable of two extremes.⁷⁵ In the name of ethics, one doctor would destroy an embryo, and conversely, in the name of ethics, another doctor would strive to protect the embryo from destruction.⁷⁶

⁷¹ ANDREWS, *supra* note 58, at 25 (further opining that, "For many married couples [having children] is the essence of family.").

⁷² See *Roe v. Wade*, 410 U.S. 113 (1973) (dealing with the fundamental right to make reproductive decisions when the means chosen by the state involved forcing a woman to remain pregnant against her wishes). Although this right of procreation is not an enumerated right, the Supreme Court has interpreted the Constitution to protect this right. *Id.*; see also Monique Vinet Imbert, Note, *The Golden Egg; In Vitro Fertilization Produces Adjudication*, 17 RUTGERS COMPUTER & TECH. L.J. 495, 505-06 (1991) (discussing the long-established United States Supreme Court precedent that "an individual may, without unjustified government interference, make decisions relating to marriage, procreation, contraception, abortion, family relationships, and child rearing"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that marriage and procreation are among the basic civil rights of man); see also Mario J. Trespalacios, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 823-24 (1992) (discussing the conflict that arises when the enforcement of one person's rights denies the rights of the other party). The argument advanced is that the parties exercised their rights to procreate when they decided to undergo the IVF procedure. Thus, they should not be allowed to change that decision if that decision would deny the other party the right to the preembryos. *Id.*

⁷³ CHARLES BAUDELAIRE, *MY HEART LAID BARE* 203-04 (Peter Quennell ed. & Norman Cameron trans., 1951).

⁷⁴ *Id.* at 203-04.

⁷⁵ *Id.*

⁷⁶ See ANDREWS, *supra* note 58, at 71-72 (discussing the controversy in Britain regarding laws which required the destruction of abandoned embryos that had been in storage for more than five years as of August 1, 1996). Then Prime Minister John Major denied a last-minute appeal by anti-abortionist groups to delay the disposal of the embryos. After the embryos had been destroyed, the clinics received requests from the genetic parents to preserve the embryos. Doctors, understandably distressed, never imagined they would be destroying embryos of women that were desperate to conserve them. *Id.*

Societal morals are currently in flux due to the interplay between assisted reproductive technology and traditional conceptions of family structure.⁷⁷ Therefore, before answering whether marriage is or should be a condition precedent to undergoing IVF procedures, or especially embryo disposition during divorce proceedings, it is first important to define and understand modern conceptions of parenthood.⁷⁸

Currently, one of the ways in which men and women are distinguishable is by a woman's ability to bear and beget children.⁷⁹ Yet, in the evolving world of the new millennium, even this idea is being challenged.⁸⁰ In 1997, Japanese researchers announced that they were close to developing "ectogenesis," an artificial womb with the ability to circumvent the need for human gestation.⁸¹ The advent of artificial wombs would compel the parenthood model to evolve and challenge a history of Supreme Court cases based on traditional notions of family.⁸² A man could become a single parent by purchasing an embryo, and utilizing the machine to nurture and support the fetus.⁸³ A woman could utilize an artificial womb to circumvent pregnancy.⁸⁴ In an epoch of environmentally engineered embryos

⁷⁷ Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1261-62 (1994) (commenting that the "complex system of assumptions and principles" endemic to our society are challenged by scientific innovation).

⁷⁸ Andrews & Elster, *supra* note 3, at 47 (supporting that reproductive technology encourages a reconsideration of the meaning of "parent").

⁷⁹ ANDREWS, *supra* note 58, at 73-74.

⁸⁰ *Id.*

⁸¹ *Id.* (describing the artificial womb as a clear plastic box of warm amniotic fluid in which a fetus is attached to a dialysis machine that replaces oxygen and cleans the fetus's blood). Currently, the Japanese researchers have only attempted to utilize the device with goats, removing the fetuses from their mothers three weeks before their due date and placing them in the artificial womb. *Id.*

⁸² The Connecticut Supreme Court has recognized that the traditional notions of nuclear family have been replaced and extended family now play a larger role. The court refuses to accept that a child's best interests and welfare should be determined only by individuals who fit a very narrow definition of "family". *Doe v. Doe*, 710 A.2d 1297, 1317 (Conn. 1998).

⁸³ ANDREWS, *supra* note 58, at 74 (theorizing the social and familial implications of the Japanese artificial womb technology).

⁸⁴ *Id.* (highlighting that women can also benefit from the Japanese womb machine, despite the fact that they are biologically equipped to support a fetus on their own).

and artificial wombs, society truly personifies a bipolar nation: the best and worst of times.⁸⁵

Disputes regarding the disposition of reproductive biological material can arise in a rich variety of circumstances and contexts.⁸⁶ Two fundamental rights of constitutional protection are the right to procreate and the right to avoid procreation.⁸⁷ Recently, courts have considered whether, through contract, these procreative rights can be waived.⁸⁸ Although case law indicates that waiving reproductive rights is contrary to public policy, courts should recognize a couple's procreational liberty by binding the gamete providers to their reproductive agreements.

III. ARGUMENTS FOR THE FROZEN EMBRYO AS LIFE, PROPERTY, OR DESERVING SPECIAL RESPECT

A. Embryo as Life

The pro-life movement is the impetus behind viewing the embryo as a life.⁸⁹ Under this view, destruction of a preembryo is

⁸⁵ CHARLES DICKENS, *A TALE OF TWO CITIES* (Richard Maxwell ed., Penguin Books 2000) (1859).

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.

⁸⁶ See, e.g., *J.B. v. M.B.*, 751 A.2d 613, 616 (N.J. Super. Ct. App. Div. 2000) (relating that a former husband and wife, prior to participating in an IVF and cryopreservation process, agreed to donate their embryos to an IVF program if they divorced).

⁸⁷ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see also *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that a statute outlawing the use of contraceptive devices was an unlawful invasion of the privacy of marital relationships); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); see also *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) (recognizing that "the choice to terminate a pregnancy or bear a child" is "one of the most intimate decisions in human experience").

⁸⁸ *A.Z.*, 725 N.E.2d at 1056-59.

⁸⁹ See *Dehmel*, *supra* note 20, at 1382 (stating that "the Right-to-Life approach would accord a preembryo the full rights and protections of persons under the law because they believe life begins at the 'moment' of conception.").

equivalent to the destruction of a living human being.⁹⁰ Applying the Right-to-Life analysis, the husband's right to avoid procreation ceases to exist after participation in the IVF program.⁹¹

1. *Davis v. Davis*

In 1980, Mary Sue and Junior Davis married and Mary Sue became pregnant six months later.⁹² Unfortunately, a tubal pregnancy forced her to undergo surgery, resulting in a loss of her right fallopian tube.⁹³ After her fifth tubal pregnancy, Mary Sue decided to have her remaining fallopian tube ligated, leaving her unable to naturally conceive.⁹⁴ The Davises then decided to pursue IVF in order to have a child.⁹⁵

The Davis' unsuccessfully attempted IVF six times, incurring a total expense of \$35,000.⁹⁶ Each pregnancy attempt required Mary Sue to endure hormone injections, invasive surgery, and psychological toll as she wondered each time if the procedure would work.⁹⁷ On December 8, 1988, their last attempt at IVF, nine eggs were retrieved from Mary Sue, fertilized, and allowed to develop in the lab-

⁹⁰ See Natalie K. Young, *Frozen Embryos: New Technology Meets Family Law*, 21 GOLDEN GATE U. L. REV. 559, 565 (1991) (stating that various entities and religions, such as the Catholic Church, consider embryos to be persons); see also Christopher G. Jesudason, *Maximum Consultation in the use of Frozen Embryo*, NEW STRAITS TIMES, May 26, 1997, at 15 (arguing that Western cultures, including Catholic and Christian religions, have historically emphasized the importance and sanctity of life), available at 1997 WL 2962717.

⁹¹ See Ruth Colker, *Pregnant Men Revisited or Sperm is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1069 (1996) (contending that a man cannot veto a woman's right to carry a pregnancy to term).

⁹² See *Davis v. Davis*, 842 S.W.2d 588, 591 (Tenn. 1992) (stating that after being married, the couple returned to Germany for army assignments, where they learned that Mary Sue was pregnant).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (explaining that the couple attempted adoption but for various reasons decided on IVF to become pregnant). IVF involves the aspiration of ova from the follicles of a woman's ovaries, fertilization of these ova in a petri dish using the sperm provided by a man, and the transfer of the product of this procedure into the uterus of the woman from whom the ova were taken. *Id.*

⁹⁶ *Id.* at 591-92 (noting Mary's failed attempts at pregnancy even though she subjected herself to both subcutaneous injections, which were necessary to shut down her pituitary gland, and intramuscular injections, to produce ova).

⁹⁷ See *Davis*, 842 S.W.2d at 591-92; see also *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *2 (Tenn. Cir. Ct. 1989) (outlining the difficulties Mary Sue underwent in her attempts to become a mother).

oratory.⁹⁸ Two of the embryos were implanted in Mary Sue's uterus, while the remaining seven were cryopreserved for future use.⁹⁹

The couple understood the scientific process of cryopreservation, but were still unaware of possible ethical issues and how cryopreservation changed the IVF process.¹⁰⁰ Furthermore, the couple did not consider the ramifications of storing the embryos beyond the time needed to transfer them if pregnancy did not initially result.¹⁰¹ No written agreement existed between the clinic and the couple, or between Mary Sue and her husband.¹⁰²

No pregnancy resulted from the last IVF attempt, and in February of 1989, before another embryo transfer could be considered, Junior Davis filed for divorce.¹⁰³ Thereafter, a dispute arose regarding the disposition of the seven remaining cryopreserved embryos.¹⁰⁴

Mary Sue requested custody of the embryos in order to later implant them and have additional opportunities at motherhood.¹⁰⁵ Junior opposed Mary's request, desiring to keep the embryos frozen until he decided "whether or not he wanted to become a parent outside the bounds of marriage."¹⁰⁶

a. The Trial Court's Decision

The trial court concluded that embryos are humans, and as such, they should be afforded the same protections as people born

⁹⁸ *Davis*, 842 S.W.2d at 592.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (noting that although they were pleased with the increased number of ova, they did not consider the possible negative consequences).

¹⁰¹ *Id.* (stating that the Davises were unprepared to deal with uncertainties, and did not have any disposition plans in the event of separation or divorce).

¹⁰² *Id.* (stating that the Davises had not discussed the possibility of long-term storage of the embryos, and that the clinic was unable to locate consent forms during the last IVF procedure). Consequently, the Davis's did not sign any consent forms for the last procedure, and the opportunity to discuss the ramifications of the procedure was forever lost. *Id.*

¹⁰³ *Davis*, 842 S.W.2d at 592 (indicating that Junior filed for divorce because his marriage had been unstable for at least a year, but that he had hoped the birth of a child would improve the relationship).

¹⁰⁴ *Id.* at 592 & n.10 (revealing that Mary Sue Davis' testimony is contradictory as to whether she would have gone through with the IVF if she had known her marriage was unstable).

¹⁰⁵ *Id.* at 589-90 (suggesting that although early in the divorce Mary Sue wanted the embryos for herself, she later asserted that she wanted them to be donated to a childless

¹⁰⁶ *Id.* at 590 (stating that Junior preferred to have the embryos destroyed rather than allow Mary Sue the right to donate them to another couple).

alive.¹⁰⁷ The trial court made an astounding assertion, stating that "human life begins at the moment of conception, . . . [and] Mr. and Mrs. Davis have accomplished their original intent to produce a human being to be known as their child."¹⁰⁸ The court further determined that its role was to establish public policy determining the status of embryos in a divorce proceeding.¹⁰⁹ Employing the above reasoning, the court found that awarding the frozen embryos to Mary Sue recognized the "best interests of [the] children."¹¹⁰ Unmoved by Junior's contention that he had a right to avoid procreation, the court postponed a ruling regarding the issues of child support, custody, and visitation rights until "such time as one or more of the seven cryogenically preserved human embryos are the product of live birth."¹¹¹

b. The Court of Appeals Decision

The Court of Appeals of Tennessee placed significant emphasis on the fact that the frozen embryos were a result of mechanical manipulation.¹¹² Unlike the trial court, the appellate court considered whether Junior Davis' right to avoid procreation had been violated and concluded that his constitutional rights were violated in a situation where pregnancy had not yet occurred.¹¹³ After reviewing parti-

¹⁰⁷ *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *3-*4; see also *Trespalcacios*, *supra* note 72, at 812-13 (arguing that the court's conclusion in *Davis* could lead to a paradoxical situation where a court might find a woman has a duty to implant the fertilized eggs, but could not order her to implant them as a result of the *Roe v. Wade* decision). The Right-to-Life approach argues that *Roe v. Wade* is not implicated by the divorce and fertilized egg cases. These proponents distinguish *Roe* from preembryos by arguing that *Roe* dealt with a woman's right to terminate her pregnancy during the first trimester, but when issues of bodily integrity are not involved, the state may protect preembryos as life. See *id.* at 812. The *Davis* trial court embraced this Right-to-Life approach by framing the issue on the inquiry of whether an embryo is a human being. See *Davis* at *4.

¹⁰⁸ *Davis*, 1989 WL 140495 at *9 (noting that the court addressed the issue of when human life begins and concluded that the embryos could not be property because they were human beings).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *11 (stating that temporary custody of the party's seven cryogenically preserved human embryos should be vested in Mary Sue, giving the embryos the chance to be implanted).

¹¹¹ *Id.* at *11.

¹¹² *Davis v. Davis*, No. 180, 1990 WL 130807, at *1 (Tenn. Ct. App. 1990), *aff'd by Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (stating that the development of the ova were limited to the eight cell stage, at which time they were frozen, preventing even the slightest development of major body systems).

¹¹³ *Id.* at *3.

ment legislative acts and case law in Tennessee, the court concluded that there was no compelling state interest to justify embryo implantation against the will of either party.¹¹⁴

Evaluating the disposition of the frozen embryos from a joint interest standpoint, the court held that justice would not be served by ordering Junior to be a father; this concept would be as abhorrent as ordering Mary Sue to implant an embryo against her will.¹¹⁵ The final holding of the Court of Appeals granted both Mary Sue and Junior joint control over the disposition of the embryos.¹¹⁶ This ruling thus required the consent of both parties before Mary Sue could implant the remaining seven cryopreserved embryos.

c. The Tennessee Supreme Court Decision

The Tennessee Supreme Court believed that the appellate decision did not adequately address the disposition of frozen embryos in situations where couples disagree.¹¹⁷ By the time the case reached the Supreme Court, Mary Sue and Junior's positions as to the disposition of the embryos had shifted; both parties had remarried and Mary Sue desired to donate the embryos to a childless couple while Junior sought to have the embryos discarded.¹¹⁸ The court disagreed with the trial court's finding that the embryos were persons, and discarded the appellate decision which afforded the embryos a property status.¹¹⁹ Instead, the court determined that the preembryos fall into an "interim category" between property and persons,

¹¹⁴ *Id.* at *3 & n.7 (comparing the evils of unrestricted state action to the notion of controlling reproduction in Nazi Germany).

¹¹⁵ *Id.* at *3; see also Carow, *supra* note 26, at 538-43 (describing the rights of a preembryo from various positions, including the Right-To-Life position, the special respect position, and the personal property approach). Unlike the trial court application of the Right-To-Life view, the appellate court adopts the property view. Under the property approach, neither party is allowed to implant the embryos against the will of the other unless bodily interests are introduced, and the preembryos are not entitled to state protection. The Right-To-Life position and the property approach are in sharp contrast with each other because the Right To Life approach suggests that implantation must take place, regardless of whether the woman desires implantation, while the property approach allows each "gamete-donor" to have the right to determine whether implantation should take place. *Id.* The problem inherent in the property approach is that it classifies embryos as property, which recalls the antiquated notion of slavery in which persons were considered property.

¹¹⁶ *Davis*, 1990 WL 130807, at *3 (holding that, to be consistent with existing law, both parties should share an interest in the seven fertilized ova).

¹¹⁷ *Davis v. Davis*, 842 S.W.2d 588, 590 (Tenn. 1992).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 597.

and should therefore receive "special respect" because of their potential for human life.¹²⁰

Interestingly, the Supreme Court did not focus its inquiry on the preembryo.¹²¹ Rather, the court framed the issue on whether the parties would become parents.¹²² Applying the Tennessee state constitution and federal law, the court concluded that the "right of procreation is a vital part of an individual's right to privacy."¹²³ This right includes "the right to procreate and the right to avoid procreation."¹²⁴ The court held that in situations where there is no other reasonable alternative for parties wishing to become parents than to use the embryos, their situation and arguments should be taken into consideration.¹²⁵ However, in cases where there is a reasonable alternative, "the party wishing to avoid procreation should prevail."¹²⁶

2. The Davis Court Framework

The holding of the *Davis* court ultimately dismissed Mary Sue's right to procreate. It reasoned that without implantation of the frozen embryos, the fundamental privacy rights normally associated with pregnancy were not triggered.¹²⁷ This argument overlooks the

¹²⁰ *Id.*

¹²¹ *Id.* at 598 (valuing the preembryos for their *potential* to become babies rather than for their value as eight cell organisms).

¹²² *Davis*, 842 S.W.2d at 598 (referring to individuals' Constitutional right to privacy when deciding whether to become parents).

¹²³ *Id.* at 600.

¹²⁴ *Id.* at 601. The United States Supreme Court has addressed the issue of procreation and resolved procreation as falling under the right of privacy. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹²⁵ *Davis*, 842 S.W.2d at 604.

¹²⁶ *Id.* at 604; see also Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and Disputes Over the Fate of Frozen Embryos*, 74 B. U. PUB. INT. L.J. 315, 320-21 (1997) (discussing the *Davis* case and detailing the special respect view, which strikes a balance between the right to life approach and the property approach).

¹²⁷ See *Davis*, 842 S.W.2d at 604; see also *Roe v. Wade*, 410 U.S. 113, 159 (1973) (articulating the concept that a pregnant woman cannot be isolated in her privacy because of the child she is carrying). The court in *Roe* declined to determine at what point life begins; with many specialists from varied areas unable to agree on the point in time when life begins, the court held that it was also unable to make that determination. *Id.* This fundamental liberty interest guards against government invasion in the areas of personal life such as marriage, procreation, contraception, family relationships and child rearing. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 852-53 (1992) (describing the notion of pregnancy as more than a physiological event and addressing how pregnancy plays a role in the woman's life).

emotional, psychological, familial, and religious ramifications surrounding the decision to bear a child.¹²⁸ By promoting pregnancy as the "gatekeeper of reproductive rights," the court fails to account for the physical risks the female experiences as a consequence of the IVF procedure and the notion that the pregnancy process begins before an embryo implants itself in the lining of a woman's uterus.¹²⁹

From a public policy standpoint, determining an embryo to be a human being and then regulating from that position probably does not serve the best interests of the participating couple or society at large.¹³⁰ If embryos are indeed humans, then the procedures used on them for research purposes must be limited.¹³¹ Also, treating embryos as persons may require all embryos extracted during each cycle to be implanted because the cryopreservation process runs a risk of harming them.¹³²

Furthermore, ovarian stimulation is an inexact science, yielding an unpredictable amount of eggs with each cycle.¹³³ Implanting all these "viable" embryos would produce a tremendous amount of high order multiple pregnancies.¹³⁴ Such multiple pregnancies are dangerous for both the mother and the babies.¹³⁵ Therefore, promoting multiple pregnancies through the restrictive regulation of reproductive technologies serves no one's best interests.

¹²⁸ *Casey*, 505 U.S. 833, 852-53 (noting the physical constraints of a pregnant woman and identifying this as a key factor in justifying restriction of the state's role in limiting abortion rights).

¹²⁹ Daar, *supra* note 2, at 457-62 (coining the idea of pregnancy as a gatekeeper for reproductive rights and arguing that parties to an IVF conception should be afforded reproductive rights just as those parties to an in vivo conception).

¹³⁰ Judith Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger*, 34 HOUS. L. REV. 609, 635-36 (1997) [hereinafter Daar, *Paper Tiger*].

¹³¹ *Id.*; see also Robertson, *Legal Structure*, *supra* note 39, at 981-82.

¹³² Daar, *Paper Tiger*, *supra* note 130, at 635-36; see also Robertson, *Legal Structure*, *supra* note 39, at 971.

¹³³ Daar, *Paper Tiger*, *supra* note 130, at 635-36; see also Shirley J. Paine et al., *Ethical Dilemmas in Reproductive Medicine*, 18 WHITTIER L. REV. 51, 54 (1996) (revealing the process for IVF and fixing the number of eggs that can be retrieved from a woman at any one time as being from one to fifty-six, with an average being around twelve).

¹³⁴ Daar, *Paper Tiger*, *supra* note 130, at 636.

¹³⁵ See Judith Daar, *Selective Reduction of Multiple Pregnancy: Lifeboat Ethics in the Womb*, 25 U.C. DAVIS L. REV. 773, 778-79 (1992) (explaining that maternal complications increase with the number of fetuses as well as a dramatic increase in the rate of neonatal and infant deaths).

B. Embryos as Property

Another possible classification for embryos is that they are property.¹³⁶ The property approach can require the mutual consent of the parties involved before allowing implantation of the cryopreserved embryos.¹³⁷ Unlike the Right-to-Life approach, the property view can be viewed as not requiring state protection of the preembryos.¹³⁸

1. *Kass v. Kass*

Maureen and Steven Kass were married in 1988 and quickly began trying to conceive a child.¹³⁹ Upon discovery that an exposure to diethylstilbestrol (DES) earlier in Maureen's life greatly reduced her chances of becoming pregnant, the couple then sought fertility assistance.¹⁴⁰

In 1990 the couple underwent five different egg retrieval procedures and doctors attempted nine different times to implant the embryos into Maureen's uterus.¹⁴¹ Unfortunately, she never carried any of them to term.¹⁴²

Three years later, in 1993, the couple signed four different consent forms provided by the hospital which outlined the procedures to be performed, the disposition of the fertilized eggs, and the disposition of the frozen embryos.¹⁴³ These forms included instructions regarding the disposition of the embryos in the event of divorce.¹⁴⁴

¹³⁶ See Alise R. Panitch, Note, *The Davis Dilemma: How to Prevent Battles over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 553 (1991).

¹³⁷ See Trespalacios, *supra* note 72, at 814.

¹³⁸ See *id.* The Supreme Court of Tennessee followed this view in the *Davis* case, concluding that because there were no before-birth entities on in state statutes and case law, these entities were not to be given state protection. *Davis v. Davis*, 842 S.W.2d 588, 602.

¹³⁹ *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998).

¹⁴⁰ *Id.* (revealing that after artificial insemination did not help the couple, they turned to the IVF program at John T. Mather Memorial Hospital).

¹⁴¹ *Id.* at 175-76.

¹⁴² *Id.* (stating that she became pregnant twice during the process, with one pregnancy ending in a miscarriage and the other in a surgically terminated ectopic pregnancy).

¹⁴³ *Id.* at 176-77 (revealing that these forms were necessitated by this being the first cryopreservation process the couple had undergone).

¹⁴⁴ *Kass*, 696 N.E.2d at 176 (stating in the agreement that "In the event of a divorce, we understand that legal ownership of any stored [embryos] must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction."). It is important to recognize that in *Kass*, unlike in *Davis*, there was an existing contract generally addressing the future disposition of the embryos in case of divorce. *Id.*

In late 1993, the Kass' decided to divorce, at which time five embryos remained frozen and stored at the hospital.¹⁴⁵ The disposition of the frozen embryos triggered a bitter custody dispute, with Maureen wanting custody of the frozen embryos in order to attempt another implantation, and with Steven opposing the removal of the embryos from storage to again attempt pregnancy.¹⁴⁶

a. The Supreme Court of Nassau County Decision

In 1995, the Supreme Court of Nassau County in New York awarded custody of the embryos to Maureen and directed her to "exercise her right" to have the embryos implanted.¹⁴⁷ Additionally, the court found that Maureen did not waive these rights although she signed the clinic consent forms and filed an "uncontested divorce" agreement.¹⁴⁸ Upon addressing Steven's rights, the court succinctly ruled that they ended with ejaculation.¹⁴⁹ In accordance with the trial court in *Davis*, the *Kass* court ruled that until the fetus reaches the stage of development when the State's interest in pro-

¹⁴⁵ *Id.* at 177 (detailing the "uncontested divorce agreement" the couple signed just prior to their divorce, which indicated that the embryos should be disposed of so that neither Maureen nor Steven Kass could obtain custody).

¹⁴⁶ *Id.* (stating that Steven wanted specific performance of the contract that he and Maureen signed with the clinic so that the clinic would retain the embryos for research purposes).

¹⁴⁷ *Id.* at 177 (reasoning that a woman undergoing IVF treatment should have decision-making authority over a fertilized egg produced through the treatment, just as a pregnant woman has the authority to determine the fate of a nonviable fetus).

¹⁴⁸ *Id.* It is interesting to note that the court did not enforce the contract and instead reasoned that Maureen could not sign away her constitutional rights of decisional authority over the disposition of her embryos. This statement is incompatible with the idea that cryopreservation affords couples choices in deciding the disposition of their frozen embryos. A more precise interpretation of decisional authority in the context of cryopreservation contracts is that it affords the woman a choice. If this is so, then the whole idea behind creating a cryopreservation contract between the couples and the clinic, and between the couples themselves, is meaningless, because even after the contract has been entered into, the woman still maintains complete control. The court here implies that even if the couple decides on a method for the disposition of their embryos, the woman's right to revoke her approval is not subject to any limitations or contract boundaries.

¹⁴⁹ *Kass v. Kass*, 1995 WL 110368, at *3 (Sup. Ct. Nassau Cty. Jan. 18, 1995). The court argues that following an in vivo fertilization, a man has no right to avoid procreation or compel or prevent an abortion. Hence, a man's rights and control over an in vivo fertilization end at ejaculation. The court continues to assert that there is no difference between an in vivo and an IVF, and it does not matter whether an in vitro zygote immediately is able to implant itself or not; the man should realize that delayed implantation is a very real possibility.

tecting life is triggered, the mother possesses exclusive control over the nonviable fetus' fate.¹⁵⁰

b. The Appellate Division

The Appellate Division reversed the New York Supreme Court's decision, and determined that a woman's right to privacy and bodily integrity do not arise until after implantation of the embryo in the uterus occurs.¹⁵¹ The court further held that the contract signed by the couple involving the disposition of any unused frozen embryos should control.¹⁵² The court's decision suggested that embryos were not recognized as persons for constitutional purposes and Maureen's rights to privacy or bodily integrity were not yet implicated.¹⁵³

c. The Court of Appeals Decision

The New York Court of Appeals affirmed the appellate decision, finding that Maureen and Steven adequately expressed their intent to donate the embryos for research purposes in the signed agreement.¹⁵⁴ By enforcing the contract, the court felt it was encouraging an important public policy: integrity of the contract.¹⁵⁵ After reading the consent agreement, the court determined that if the parties' intent is ascertainable from the signed agreement, then courts

¹⁵⁰ *Id.* at *2.

¹⁵¹ *Kass*, 696 N.E.2d at 177.

¹⁵² *Id.*

¹⁵³ *See id.* The court did, however disagree over whether the disposition agreement was sufficiently clear.

¹⁵⁴ *Id.* at 178. A plurality of the Appellate Division Justices believed that the consent form clearly indicated that the prezygotes should go to research purposes if the couple could not agree on their disposition, while a concurring Justice believed the consent form was so ambiguous as to be worthless. A final two Justices believed that a balancing of the parties' interests and abilities to support a child should be used to determine the ultimate fate of the preembryos. *Id.*

¹⁵⁵ *Id.* at 180-81 (reasoning that because the Kasses were both involved in the signing of the contract, and both parties concurred that the agreement was an expression of their intent, the agreement should be enforced). The court implies that if people knew their agreements would not be upheld in a court of law, then the integrity and seriousness of the consent process would be eviscerated and couples would spend no time in examining options before making their decisions. The individuals making these deeply personal decisions should be the individuals involved, not an impersonal court of law. Very clear agreements should be the interested parties are the ones making the decisions and the court has the ability to determine the true intent of the agreements and give effect to their decisions. *Id.* at 177-78.

should give effect to the plain intent of the agreement.¹⁵⁶ Because the parties' intent was clear, the court honored the agreement.¹⁵⁷

2. *The Kass Approach: Identifying Shared Preferences through Contracts*

A property approach asks courts to look at the preferences of the progenitors.¹⁵⁸ This view is unrealistic without the existence of a contract because it assumes a shared preference between the progenitors.¹⁵⁹ The contract framework is compatible with the property approach because it holds that addressing the rights of the parties is what courts would prefer to do, as opposed to focusing on the rights of the preembryo.¹⁶⁰

One of the benefits of the property view is that property owners are entitled to complete control, within legal bounds, over their property.¹⁶¹ Classifying embryos as property enables the respective egg and sperm donor to maintain complete decision-making authority over the disposition of their embryos. By injecting contracts into the property approach, the owners would be able to transfer their ownership rights of the embryos.¹⁶²

The *Kass* court accepted the couples' agreement regarding the future disposition of their embryos as binding.¹⁶³ Although seemingly establishing a precedent for the enforcement of IVF agreements, later courts have declined to enforce reproductive contracts.¹⁶⁴ "Contract law is primarily an instrument of commercial

¹⁵⁶ *Kass*, 696 N.E.2d at 181.

¹⁵⁷ *Id.* at 182 (stating that "[t]hese parties having clearly manifested their intention, the law will honor it.").

¹⁵⁸ See *Trespalacios*, *supra* note 72, at 814 (referring to a balancing of the parties' interests and the attendant negative implications that arise when treating a preembryo as property).

¹⁵⁹ See *id.* at 826-28.

¹⁶⁰ See *id.* at 826 (explaining that this assumption is consistent with the notion that preembryos may have no legal rights).

¹⁶¹ See, e.g., *Bree v. Wheeler*, 61 P. 782 (Cal. 1900); *Directors of Fallbrook Irrigation Dist. v. Abila*, 39 P. 794, 796 (Cal. 1895) (stating that property ownership confers upon the owner the right to the property's use however he wishes, assuming his use is within the bounds of the law).

¹⁶² See, e.g., *York v. Jones*, 717 F. Supp. 421, 426-27 (E.D. Va. 1989) (recognizing a property interest in embryos, the court held that gamete providers possess a proprietary interest in their embryos and may determine how to use or dispose of them).

¹⁶³ *Kass*, 696 N.E.2d at 180-81.

¹⁶⁴ See *Robertson, Prior Agreements*, *supra* note 25, at 419 (explaining the contract defense of changed circumstances as the "inability to foresee how one will feel when the stated con-

transfer," and because IVF contracts involve life choices, courts are unwilling to later force procreation through IVF agreements.¹⁶⁵

C. The Special Respect View

The special respect view strikes a compromise between the Right-to-Life view and the property approach.¹⁶⁶ The belief is that preembryos deserve special respect that is greater than that afforded to property or even human tissue.¹⁶⁷ By recognizing the special significance of preembryos and their potential to become full-fledged individuals, courts are urged to take into account the preembryo's significance without ignoring the gamete provider's interests.¹⁶⁸

1. *The A.Z. v. B.Z. Decision*

Provided that contracts do not contravene public policy, adults are free to enter into any bargains they choose.¹⁶⁹ Recently, the Massachusetts Supreme Court diminished the role of contracts between genetic progenitors.¹⁷⁰ The case of *A.Z. v. B.Z.* involved a controversy about a document executed by a fertility clinic and signed by a married couple desiring IVF treatment.¹⁷¹ The wife marked through pre-printed language on the clinic's prepared form, substituting in her own handwriting and detailing the disposition of the

tingency occurs and . . . the possibility of unfairness that could arise when a party's circumstances have changed.").

¹⁶⁵ *Irma S. Russell, Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J. FAM. L. 585, 632 (1989).

¹⁶⁶ *Carow*, *supra* note 26, at 555-56 (supporting the special respect position as being the correct perspective from which to view preembryos).

¹⁶⁷ *Steinberg*, *supra* note 126, at 320.

¹⁶⁸ See *Lynne M. Thomas, Comment, Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection?*, 29 ST. MARY'S L.J. 255, 290 (1997) (discussing the decision of the *Davis* court).

¹⁶⁹ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000) (rendering unenforceable a contract, signed by a husband and wife as one party and a clinic as another party, that provided for all preembryos to go to the wife for implantation should the couple separate); see also *Ronald Chester & Scott E. Alumbaugh, Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence*, 25 U.C. DAVIS L. REV. 21, 29-30 (1991) (sketching the history of individual freedom to contract through present day, when legislatures determine that some things should not be contracted for, regardless of what agreements individuals reach).

¹⁷⁰ *A.Z.*, 725 N.E.2d at 1055-56, 1059 (rejecting decisions to permit contract law to govern disputes between genetic progenitors).

¹⁷¹ *Id.* at 1053-54 (stating that the document was a preprinted consent form concerning cryo-preservation of the embryos).

embryos in the event the couple separated.¹⁷² The language change indicated that the preembryos contained in frozen vials stored at the clinic were to be returned to the wife for implantation.¹⁷³ Thus, the consent forms, although always signed by the husband, had been altered and completed by the wife.¹⁷⁴

After enduring two failed ectopic pregnancies, the removal of both fallopian tubes, and finally the birth of twin daughters, the couple separated and then divorced.¹⁷⁵ The wife wanted the right to implant the remaining frozen preembryos should she choose, but the ex-husband objected and sought an injunction to prevent the implantation.¹⁷⁶ The court ruled that even if the reproductive agreement was unambiguous, the result of enforcing the agreement would compel one donor, the ex-husband, to become a parent against his will.¹⁷⁷ The court determined that the consent form was not binding because its purpose was to guide the clinic in following decisions made by the couple and not to create a binding contract

¹⁷² See *id.* at 1056-57 (noting that because the husband signed the blank form before the wife changed the language regarding disposition of the preembryos, he never viewed the final form of the contract language).

¹⁷³ *Id.* at 1054 (revealing that when completing the first cryopreservation consent forms in fall of 1988, both husband and wife were present and signed the forms at the same time). The husband observed the wife make changes on the contract regarding the disposition of the embryos in the event of separation. After discussing with his wife the ramifications of her changes, he signed the contract. Six cryopreservation forms were signed over the next three years. These later forms the husband signed while they were still blank. Subsequently, the wife filled in the forms with the dispositional language previously discussed, and signed the forms in her husband's absence. *Id.*

¹⁷⁴ *Id.* (objecting to the piecemeal method by which the consent forms were signed, the court noted that the forms at issue were "intended only to define the donors' relationship as a unit with the clinic."). Because the consent form was literally "signed in blank by the husband," the court held that the consent form did not reflect the husband's true intentions regarding the disposition of the embryos. *Id.* at 1057.

¹⁷⁵ A.Z., 725 N.E.2d at 1052-53 (explaining that prior to the divorce, the couple had undergone IVF from 1988 through 1991, which resulted in the disputed frozen embryos).

¹⁷⁶ *Id.* at 1053-55. The court's focus is centered on the implantation stage of the embryo. If the embryo has not been implanted in the woman, the consensus of the court is to allow the man revocation rights. The counter-argument to this position is that a man participating in a naturally occurring pregnancy does not have these revocation rights. Perhaps courts should not focus on implantation as the trigger phase, but rather establish a medically reasonable period of time to implant the disputed embryos.

¹⁷⁷ *Id.* at 1057-58 (rejecting the enforceability of the contract, the court stated that forced procreation, which would occur if the contract were enforced, is very much against public policy).

between the husband and wife.¹⁷⁸ Holding that forced procreation is against public policy, the court refused to hold valid the 1991 consent form, thus preventing the wife from implanting the remaining frozen preembryos.¹⁷⁹

The A.Z. court established a troubling precedent. Following the A.Z. ruling, other courts affirmed that contracts to procreate are contrary to public policy and unenforceable, while also attempting to maintain the integrity of their opinion by immediately disclaiming that the case was decided on constitutional grounds.¹⁸⁰ For example, the circularity of the court's argument in the *J.V. v. M.B.* case weaves the following convoluted thought process: the case is not decided on constitutional grounds but on a public policy premise, yet "constitutional principles are a source of public policy."¹⁸¹

Another fundamental problem with the A.Z. decision is that it enervates the role of contracts, positioning written agreements between parties as mere formalities.¹⁸² In a suit for breach of contract, the plaintiff normally pleads the existence of an agreement, consideration, performance, breach, and resultant damages.¹⁸³ In determining the nature of the agreement, identifying the intent of the parties

¹⁷⁸ *Id.* at 1056-58 (relying on Massachusetts law which indicated that "agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions."). *Id.* at 1059.

¹⁷⁹ *Id.* at 1056-58 (indicating that the parties did not argue that the preconception agreements contained any ambiguity or that they were signed under fraud or duress). The court adopts a changed circumstance posture to resolve this case. However, the holding demonstrates that the court would have ignored the contract, regardless of its validity, if the contract required implantation over another's objection. *Id.* at 1059. The consequences of this decision have adverse effects: far from encouraging fertility clinics and their clients to improve the process of crafting dispositional agreements, the A.Z. case may in fact lead parties to dispense with contracting in general, since the courts will not enforce the agreement.

¹⁸⁰ See *J.B. v. M.B.*, 751 A.2d 613, 619-20 (N.J. 2000) (explaining that this decision is "not inconsistent with *Kass*, 696 N.E.2d 174, or *Davis*, 842 S.W.2d 588, because neither decision enforced a contract to procreate, despite the expansive dicta regarding the enforceability of agreements between progenitors."). At issue in the case at bar is the post-divorce disposition of frozen embryos. *Id.* at 614. The husband wanted to preserve the embryos for future use, while the wife wanted the embryos destroyed. *Id.* at 616. The court employed a balancing test, weighing the husband's right to procreate, against the wife's right to avoid procreation. *Id.* at 618-19. The court found in favor of the wife, reasoning that enforcement of the contract to create a child would impair the wife's constitutional right not to procreate, whereas permitting destruction of the embryos would not effectively impair the husband's reproductive rights. *Id.* at 618-20.

¹⁸¹ *Id.* at 620.

¹⁸² See *id.* at 619.

¹⁸³ *Berra v. Papin Builders, Inc.*, 706 S.W.2d 70, 73-74 (Mo. Ct. App. 1986).

is necessary.¹⁸⁴ In *A.Z. v. B.Z.*, the reproductive agreement between the couple clearly established by words and actions the intention for parenthood, as well as the anticipation of changed circumstances.¹⁸⁵

In *A.Z.* the court overlooks the fundamental idea that Artificial Reproductive Technology (ART) regulation should focus on the rights and obligations of patients and other parties availing themselves of ART services.¹⁸⁶ Of course, if the IVF participant consents to an ART cycle, and the patient is coerced into treatment that she does not desire, then courts should intervene because the patient's rights are violated. However, in a situation where the parties are fully informed of the nature of the procedure and the possible future contingencies and they contractually waive their reproductive rights, then courts have a duty to enforce the contract.¹⁸⁷

2. *The J.B. v. M.B. Decision*

A dyslexic version of the *A.Z. v. B.Z.*¹⁸⁸ fact pattern is evidenced in the New Jersey case of *J.B. v. M.B.*¹⁸⁹ In *J.B. v. M.B.*, the couple married in 1992 and, unfortunately, their efforts to have children were unsuccessful.¹⁹⁰ After discovering the medical basis in the wife's inability to become pregnant, the couple contacted an IVF clinic in an attempt to conceive children.¹⁹¹

¹⁸⁴ See Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent Child Bond*, 26 CONN. L. REV. 1261, 1294-1309 (1994).

¹⁸⁵ 725 N.E.2d 1051, 1056-57 (Mass 2000).

¹⁸⁶ See *id.* at 1056-1058 (where the court, despite acknowledging the *Kass* decision that a consent form signed by clinic donor "unequivocally manifested the donors mutual intent" was valid, the *A.Z.* court nevertheless determined that "the public interest in freedom of contract is sometimes outweighed by other public policy considerations" and went on to conclude that "forced procreation is not an area that is amenable to judicial enforcement.").

¹⁸⁷ See *id.* at 1056.

¹⁸⁸ *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

¹⁸⁹ *J.B. v. M.B.*, 751 A.2d 613, 618-19 (N.J. Super. Ct. A.D. 2000) (illustrating a tighter fit within the special respect view, the court ultimately balanced the gamete provider's interest while taking into account the embryo's significance). The primary inquiry in weighing the gamete provider's interests is exploring whether destruction of the embryos would impair the husband or wife's reproductive rights. *Id.*

¹⁹⁰ *Id.* (explaining the couple was married for four years before they were able to have a child).

¹⁹¹ *Id.* (determining that the wife's endometriosis and an abnormality of one of her fallopian tubes caused the reproductive problems). In consenting to the IVF procedure, the couple signed a form describing the procedure as follows:

With the couple's consent, any 'extra' embryos beyond three or four will be cryopreserved according to our freezing protocol and stored at -196 [degrees] C . . . [T]he control and disposition of the embryos belongs to the Patient and her Part-

The wife became pregnant during the IVF process and gave birth to a baby girl in March 1996.¹⁹² The extra embryos created during the IVF process were frozen for future use in the event the initial implantation was unsuccessful.¹⁹³ In September of 1996 the couple separated and the divorce was final on November 6, 1998.¹⁹⁴ Incorporated in the divorce settlement was a property agreement, which reserved a "decision concerning the parties' cryopreserved preembryos/embryos."¹⁹⁵

In the post-divorce proceeding regarding the disposition of the frozen embryos, the wife sought their destruction, claiming she had agreed to the IVF procedure to establish a family in the context of marriage.¹⁹⁶ While the wife stated she no longer wanted the embryos implanted, donated, or given to her ex-husband, the ex-husband argued that his ex-wife agreed to donate the unused embryos to infertile couples.¹⁹⁷

The trial court, granting summary judgment in favor of the wife, determined that the parties underwent IVF to procreate as a married couple.¹⁹⁸ Because the marriage dissolved, the rationale for

ner. You will be asked to execute the attached legal statement regarding control and disposition of cryopreserved embryos.

An attached statement noted "all control, direction and ownership of our tissues will be relinquished to the IVF Program under the following circumstances: A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues . . ." *Id.* at 616.

¹⁹² *J.B.*, 751 A.2d at 615 (explaining that it was undetermined whether the wife became pregnant as a result of IVF or through natural intercourse).

¹⁹³ *Id.* (explaining the embryos that were not implanted in the woman and were frozen when only eight cells large).

¹⁹⁴ *Id.* (noting the couple's child was born seven months before they were separated).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 615-16. The wife argued that:

Defendant [ex-husband] and I made the decision to attempt conception through in vitro fertilization treatment. Those decisions were made during a time when defendant and I were married and intended to remain married. Defendant and I planned to raise a family together as a married couple. I endured the in vitro process and agreed to preserve the preembryos for our use in the context of an intact family.

¹⁹⁷ *J.B.*, 751 A.2d at 616 (evidencing that the notion to donate the embryos was the wife's idea). The husband certified that she wanted to donate the embryos because she knew of other people who were having trouble conceiving. Members of the husband's family indicated that the wife had even offered the embryos to her husband's sister, who was childless. *Id.*

¹⁹⁸ *Id.* (noting the couple had achieved their goal of conceiving a child).

cryopreservation of the embryos no longer existed.¹⁹⁹ In reaching his conclusion that the embryos should be destroyed, the judge also emphasized that the ex-husband was capable of fathering children in another relationship.²⁰⁰

Citing the decisions in *Kass*,²⁰¹ *Davis*,²⁰² and *A.Z. v. B.Z.*,²⁰³ the appellate court concluded that regardless of the existence of an embryo disposition agreement, it would not enforce an agreement which would compel one donor to become a parent against his or her will.²⁰⁴ In upholding the trial court's ruling favoring the wife's position that the embryos should be destroyed, the appellate court noted that destruction of the embryos would not impair the husband's reproductive rights.²⁰⁵ In balancing the husband's and wife's interests in procreation, the court reasoned that even if all of the wife's financial and custodial responsibilities for her child disappeared, she would still be left with the fact that her biological child would exist in an environment controlled by strangers.²⁰⁶

¹⁹⁹ *Id.* (agreeing with the wife's argument that the preembryos were intended only to be used in the context of their marriage).

²⁰⁰ *Id.* at 616. Seemingly ill fit, this additional analysis employed by the court would be more apt if the husband wanted the embryos. However, in this case the husband's stated purpose for requesting that the embryos be preserved was so that they may be donated, not because he wanted to become a father. *Id.*

²⁰¹ *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998) (holding that where parties clearly manifest their intention to donate pre-zygotes to an IVF research program, then the law will give effect to that intention).

²⁰² *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that, "ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question"). If the issue is donation of the preembryos, then the objecting party should prevail in order to prevent forced parenthood. *Id.*

²⁰³ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000) (holding that "even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will").

²⁰⁴ *J.B. v. M.B.*, 751 A.2d at 618-19 (stating the court will not enforce contracts to procreate because they are against public policy).

²⁰⁵ *Id.* at 618-19 (reasoning that the husband retains the ability to father children even if the embryos are destroyed).

²⁰⁶ *Id.* at 618-19 (reasoning that enforcement of the alleged contract to create a child would impair the wife's constitutional right not to procreate, whereas permitting destruction of the embryos would not effectively impair the husband's reproductive rights). Unfortunately, the court does not address that the wife entered into the agreement with the understanding that divorce was a possibility. Therefore, this psychological aspect to egg donation that the court discusses should have already been accounted for during the consent process.

The appellate court focused its holding on a contract basis, and thus avoided addressing the complex constitutional right to procreate without undue government influence.²⁰⁷ The only way legislatures can override constitutional rules is by amending the Constitution, in part because rules of constitutional law are generally about far more fundamental matters than any given rule of tort or contract law.²⁰⁸ Therefore, the court adopted a cautionary posture by formulating its ruling on contractual, rather than constitutional, grounds.²⁰⁹

IV. LEGAL ASPECTS OF ART

A. In the Beginning: Constitutional Bearings

Within the robust content of the Constitution and its many layers, there exist several potential arguments supporting the enforcement of reproductive contracts directing the disposition of preembryos.²¹⁰ A fundamental right granted to all citizens of the United States under the Constitution is the right to procreate.²¹¹ However, the Supreme Court has never probed intensely into the specific inferential process for finding procreational autonomy to be a fundamental liberty interest: it was simply wholly stated in *Skinner*.²¹² In recent years, the Supreme Court has even backed away from using the term "fundamental rights" to refer to non-enumer-

²⁰⁷ *Id.* at 619-20 (holding that a contract forcing one person to be a parent against his or her will is against public policy); see also *Roe v. Wade*, 410 U.S. 113, 164 (1972) (maintaining a woman has the exclusive right to decide whether to continue or terminate a pregnancy in its early stages, and no state statute can detract from that fundamental right).

²⁰⁸ Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 808-09 (2000) (discussing the nature of constitutional law as judge-made law set by the Supreme Court).

²⁰⁹ *J.B. v. M.B.*, 751 A.2d 613, 619-20 (2000) (stating the court's decision was not based on constitutional grounds, while emphasizing that the reason for denying the contract was based on public policy reasons that are related to constitutional issues).

²¹⁰ See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing the constitutional right to procreate).

²¹¹ *Id.* at 536, 541-42 (explaining the position Justice Douglas took in arguing why the right to reproduce was a fundamental liberty interest). Justice Douglas referred to the right of reproduction as a "basic right" and asserted that the human race would end if the right were not exercised. *Id.*

²¹² *Id.* at 541-42 (holding that reproduction was a "basic liberty" requiring strict scrutiny analysis under the Equal Protection Clause); see also *Roe v. Wade*, 410 U.S. 113, 153 (1972) (holding the right to privacy includes the right for a woman to terminate her pregnancy).

ated rights strongly protected by the Constitution.²¹³ With procreation through reproductive technologies, defining the right to procreate becomes more difficult as a result of the shift from in vivo conception to IVF.²¹⁴

B. Tradition: A Fundamental Interest

Beginning with the proposition that procreational autonomy is a fundamental liberty interest, we must delineate the territory of this liberty interest.²¹⁵ In order to do this, we must first identify a reproductive case to be a paradigm and assume that some form of heightened judicial scrutiny constitutionally protects this paradigm.²¹⁶ For example, in *Roe v. Wade*, the Supreme Court held the constitutional right of privacy is "broad enough to generally encompass a woman's decision whether or not to terminate her pregnancy."²¹⁷ The Court specifically articulated that an individual's right to control his or her reproductive function is a "fundamental" right.²¹⁸ The Supreme Court also held unconstitutional a statute requiring the consent of a spouse for a woman to obtain an abortion.²¹⁹ These decisions suggest that whether an individual's body shall produce another life is a decision left solely to that individual.²²⁰

²¹³ Michael Shapiro, *I Want a Girl (Boy) Just Like The Girl (Boy) That Married Dear Old Dad (Mom): Cloning Lives*, 9 S. CAL. INTERDISCIPLINARY L.J. 1, 246 (1999) [hereinafter Shapiro, *Cloning Lives*] (discussing the term "fundamental rights" as those that are associated with free speech and free exercise of religion).

²¹⁴ *Id.* at 257 (discussing the difficulty with defining the liberty interest associated with reproduction as different procreation methods are introduced).

²¹⁵ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

²¹⁶ Shapiro, *Cloning Lives*, *supra* note 213, at 250 (identifying the difficulties in identifying a paradigm in this area when the parameters are virtually impossible to define).

²¹⁷ 410 U.S. 113, 164 (1972) (holding that a statute criminalizing abortion without regard to the stage of the pregnancy violates the Due Process Clause of the Fourteenth Amendment; therefore, the woman's interest in her pregnancy at certain stages outweighs the state's interest in regulating abortion).

²¹⁸ *Id.* at 152-53 (stating the right to privacy includes a woman's right to determine if she wants to abort her pregnancy).

²¹⁹ *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1975) (noting that a state is not permitted to allow a spouse the power to prevent pregnancy termination when even the government itself cannot interfere during the first three months of a pregnancy).

²²⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10 (2d ed. 1988) (noting the conflict between this privacy right to terminate or carry to term a pregnancy and situations where an innocent life must be taken in order to save another in certain abortion situations).

Later, the *Casey* Court spoke of the physical burdens of pregnancy, and of the role that pregnancy plays in a woman's life: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."²²¹ Pregnancy is therefore more than simply the process of implanting the embryo. The psychological and emotional elements involved in pregnancy often awaken within the woman before she is actually pregnant, giving support to the argument that "pregnancy encompasses a period of time before an embryo implants itself in the lining of a woman's uterus."²²²

There is little historical precedent for broad government regulation regarding parenthood; the Supreme Court has used several different sources to identify this non-enumerated liberty interest.²²³ There is, however, a rocky tradition of inhibiting procreation by persons of extremely low intelligence and, to a certain degree, by other incompetent persons.²²⁴ There exists a body of law regulating pregnancy to avoid injuries to the fetus, but this is intended to promote private procreational goals.²²⁵

C. Equal Protection: Developing an Equality Model for Reproductive Rights

Courts consistently hold that the right to avoid procreation usurps the right to procreate.²²⁶ Courts use a balancing test in circumstances where the female requests embryo rights, considering each party's future potential for reproduction.²²⁷ While inquiring into the sturdiness of the female's reproductive capability, the court

²²¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1991) (discussing the effect that making a decision about abortion has on a woman and people surrounding her, as well as the consequences and pain of choosing to deliver the child).

²²² Daar, *supra* note 2, at 462.

²²³ Shapiro, *Cloning Lives*, *supra* note 213, at 272.

²²⁴ *Id.* (noting that efforts have even been made to sterilize or inhibit sexual function of criminals).

²²⁵ *Id.* at 249 (discussing how some women addicted to "crack" cocaine have been offered money in exchange for being sterilized). But none of these laws or cases seriously challenge the tradition of procreational autonomy. For persons whose mental functioning is not in question, United States history does not show that communities or governments have any say in reproductive choices. *Id.*

²²⁶ See *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) (noting "the right to procreate and the right to avoid procreation . . . are both subject to protections and limitations).

²²⁷ See *id.* at 604 (stating that "the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question").

does not adequately address the physical and emotional aspects of the IVF procedure itself.²²⁸ Ultimately, courts are state actors that deny equal protection to women who can only use IVF to become pregnant.²²⁹

To date, only one court has recognized the need for equal treatment of fertility and non-fertility patients in the context of constitutional liberties.²³⁰ The trial court in *Kass v. Kass*, later reversed, advocated an equal treatment approach, reflecting "from a propositional standpoint it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilization is fertilization and fertilization of the ovum is the inception of the reproductive process."²³¹ To give a naturally conceiving woman the right to control her embryo and to deny this right to a fertility patient is to "favor situs over substance."²³²

The trial court's argument in *Kass* effectively rebuts the contention that reproductive agreements are contrary to public policy.²³³ IVF requires the male partner to surrender his semen with the understanding that his actions may result in procreation.²³⁴ Therefore, a man is more acutely aware of the possibility that a child will be born in the in vitro situation because he is providing sperm in a non-coital manner for the express purpose of procreation.²³⁵

Courts have not focused on the intent of the parties, despite their attempts to implicate this contractual world, rather, the courts focus on whether the embryo has been implanted or is being

²²⁸ See Keith Byers, 1997 *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 270-71 (1997) (discussing the "deeply emotional experience of IVF").

²²⁹ Daar, *supra* note 2, at 465 (noting courts have favored the party wishing to avoid procreation in every frozen embryo case to date).

²³⁰ *Kass v. Kass*, No. 19658/93, 1995 WL 110368, at *3 (N.Y. Sup. Ct. Jan. 18, 1995), rev'd, 235 A.D.2d 150, (N.Y. App. Div. 1997), aff'd, 696 N.E.2d 174 (N.Y. 1998) (stating since there is not a difference between conception in vitro and in vivo, the rights of the wife remain paramount and the husband's rights remain the same).

²³¹ *Id.* (stating that "biological life exists from that moment forward").

²³² *Id.*

²³³ See *id.* at *2-*3 (arguing that the man's right in natural conception, should be the same as when procreation is in vitro). His procreation decision ends after ejaculation. *Id.*

²³⁴ *Id.* at *3 (reasoning that the male knows of the eventuality of a possible child at some point in the future after participating in IVF).

²³⁵ See *Kass*, 1995 WL 110368 at *2-*3. (stating that "he knows, or should have known, that technology is such that the possibility and probability of a delayed implantation are very real.").

stored.²³⁶ In doing so, courts have created an inequality for infertile women.²³⁷ Women undergoing ART should have the same right to control the disposition of their embryos as afforded to naturally conceiving women.²³⁸

Casey and *Roe* recognize that states' interests in protecting the potential life of the unborn fetus increase as a pregnancy continues.²³⁹ Following this reasoning, courts should also require a reasonable time frame in association with a fertility patient's right to control her frozen embryos.²⁴⁰ For example, the trial court in *Kass* understood that giving Maureen Kass the exclusive and unlimited right to determine the fate of her disputed embryos meant that she could potentially delay implantation for many years, leaving her ex-husband in reproductive limbo.²⁴¹ A man engaging in sexual intercourse typically knows whether he is to become a father within nine months, but a man participating in ART will not have this same ability if a woman is given unlimited access to their cryopreserved embryos. For this reason, the *Kass* trial court directed that Maureen Kass exercise her right to implant the embryos "within a medically reasonable time."²⁴²

The controversy in establishing the meaning of a "medically reasonable time" can be resolved by utilizing the normal forty-week

²³⁶ See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (providing that if there is a dispute between the contracting parties then the contract should be enforced). However, this court also states that a bright line test should be avoided and the parties interests should be weighed. *Id.* at 591.

²³⁷ See, e.g., Melissa E. Fraser, *Gender Inequality in In Vitro Fertilization: Controlling Women's Reproductive Autonomy*, 2 N.Y. CITY L. REV. 183, 210 (1998) (stating women have been placed in an unequal position in part because of views of informed consent).

²³⁸ *Kass*, 1995 WL 110368, at *3 (stating that there is no difference between women conceiving naturally and those conceiving through IVF; therefore the wife's right should usually control with respect to disposition of the embryos).

²³⁹ *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1991) (explaining that the state's interest is sufficient to regulate whether and when a woman can terminate her pregnancy at a later point in fetal development); see also *Roe v. Wade*, 410 U.S. 113, 162-63 (ruling that after viability of the fetus, usually three months development, the state's interest may be in regulating or even proscribing abortion except where necessary).

²⁴⁰ See, e.g., *Kass*, 1995 WL 110368 at *5 (holding that the wife must use the embryos "within a medically reasonable time").

²⁴¹ See *id.* at *5 (explaining that the husband has notice of delayed implantation unless provided for otherwise in the contract).

²⁴² *Id.* at *4-5 (stating a husband's right to avoid procreation should not trump a woman's right to procreate). In this view, while the decision regarding the fate of the embryos lies exclusively with the wife, the husband is entitled to require the wife to implant the embryos within a "medically reasonable time" if she is going to implant at all. *Id.*

gestation period during which time the embryos could be used.²⁴³ Using the natural gestation period to define a "medically reasonable time" cures the problem of notice and certainty and affords fertile and infertile women the same rights.²⁴⁴ This framework dictates that if a woman became pregnant using fresh embryos from an IVF cycle and carried the child to term, her male partner could prevent her from using any remaining frozen embryos after forty weeks had elapsed from the time of embryo formation.²⁴⁵

D. Contracting Parenthood: The Enforceability of Contracts

1. Intent of the Parties

In *A.Z. v. B.Z.*, the court set a dangerous precedent regarding the role and enforceability of reproductive contracts.²⁴⁶ The court eased its way into a finding that favors public policy over forced parenthood by narrowing the issue into a discussion of forced procreation.²⁴⁷ The court analyzed the terms of the contract and determined that it was unenforceable.²⁴⁸

The legally relevant inquiry in determining intent and the nature of the contract language is to consider whether a meeting of the minds between the parties exists.²⁴⁹ In *A.Z. v. B.Z.*, the creation of the frozen preembryos required a meeting of the minds and the

²⁴³ Daar, *supra* note 2, at 468.

²⁴⁴ *Id.* (explaining that this approach follows the natural pregnancy term, which makes it easier to know the consequences of one's actions because the period of time is defined).

²⁴⁵ *Id.* (explaining further that if the woman did not become pregnant from implantation or if she miscarries, she would still have the gestational forty week period to implant the other embryos).

²⁴⁶ See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that even though both parties signed consent forms, the consent forms are unenforceable because they would force one party become a parent against his wishes).

²⁴⁷ *Id.* (referring to a state policy that prevents individuals from being forced into parenthood, and refusing to use law to override this public policy).

²⁴⁸ See *id.* at 1056-57 (commenting that the purpose of the consent form is not to become a binding agreement regarding disposition of the embryos at a later date). The court finds that a contract does not exist for the following reasons: the parties' intent cannot be discerned; there is no duration provision, the agreement fails to define what "become separated" means; the agreement is lacking elements of a traditional separation agreement; and the donor's conduct at the time of signing the agreement does not show his intent. *Id.*

²⁴⁹ Haut, *supra* note 3, at 511 (discussing the implied contract model which assumes that the reason the parties underwent the IVF procedure is for the creation and implantation of the pre-embryo); see also Trespalacios, *supra* note 72, at 829 (stating that "through the bilateral exchange of promises to complete the IVF process by the exchange of gametes for the engineering of a pre-embryo, the parties create[d] a contract whether or not they have signed a written agreement").

couple's genetic material;²⁵⁰ this indicates the contract element went uncontested by both parties.²⁵¹ Next, the agreement was negotiated by both parties and relied upon by the wife.²⁵² The wife also underwent multiple, risky, uncomfortable fertility treatments in order to procreate.²⁵³ Arguably, she tolerated these painful reproductive procedures at great risk to her own health, which outweighed the contributions of the husband who did not undergo these additional invasive procedures.²⁵⁴ Therefore, the wife provided extra consideration for the ability to keep the embryos in case of subsequent separation or divorce in two ways: she risked her own health in order to procreate, and she allowed the extraction of more than one egg to increase the chances of reproducing.²⁵⁵

2. Insuring Parenthood: Adopting and Insurance Contract Formula

Another possibility existing within the realm of contract law is the ability to insure frozen preembryos through the insurance contract domain.²⁵⁶ First party insurance covers the insured for injuries to the insured's property or person.²⁵⁷ The most prominent problem

²⁵⁰ See *A.Z.*, 725 N.E.2d at 1053 (describing that before the IVF procedure was performed by extracting the egg from the woman and fertilizing it with the donor's sperm, the parties had to both sign a consent form concerning embryo disposition).

²⁵¹ See Trespalacios, *supra* note 72, at 829 (stating that consent is established at the creation of the embryo).

²⁵² *A.Z.*, 725 N.E.2d at 1054 (explaining the IVF consent form provided options for disposition of the frozen embryos and had a space under the options for a husband and wife to fill in their own agreement if the options given did not meet their needs). The husband and wife in this case did provide for returning the eggs to the wife for implantation if there was separation of the couple. *Id.* The wife's reliance on the consent form is evident through her calling the clinic to inquire about the terms of the consent form several times. *Id.* at n.9.

²⁵³ See *id.* at 1053 (stating the wife underwent three years of IVF treatment after multiple ectopic pregnancies).

²⁵⁴ See *id.* (describing the IVF process as one that involves injecting fertility drugs into the woman and surgically removing the woman's eggs).

²⁵⁵ See *id.* at 1052-53; see also *Davis v. Davis*, 842 S.W.2d 588, 604 (ruling that "if no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered"); see also Ingram, *supra* note 49, at 82 (stating that a woman should be entitled to implant the embryos if there is no reasonable likelihood that she would conceive with another partner).

²⁵⁶ See, e.g., John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 *Jurimetrics J.* 285, 301 (1988) (stating that while tort and property law may need to adapt to address the negligent storage of embryos, determining the loss of value that occurs is really no different than insuring against accident or life insurance).

²⁵⁷ Chandra Lantz, Note, *Triggering Coverage of Progressive Property Loss: Preserving The Distinctions Between First-and Third-Party Insurance Policies*, 35 *WM. & MARY L. REV.* 1801, 1810

arising from this insurance formula is that coverage is limited to the insured's property or person.²⁵⁸ Therefore, in order for the donor to take out insurance on the preembryo, the preembryo must be classified as either a property or a person.

A preembryo is a zygote, or fertilized egg, that has not been implanted in the uterus.²⁵⁹ Recent case law supports that courts are unwilling to support the contention that preembryos are persons or property.²⁶⁰ Underlying the court's hesitancy in condoning a property approach in evaluating preembryos is likely a recognition of the inherent inequality within the property inquiry.²⁶¹ Associating preembryos as property conjures up antiquated notions of slavery, which predicated itself upon the idea that people may be equated with property.²⁶²

E. Assuming the Position: Forseeability and Risk

The issue of forseeability and assumption of risk, in the context of anticipating changed circumstances, is not adequately addressed by the court.²⁶³ Couples should be aware and account for any foreseeable risks when undergoing an IVF procedure.²⁶⁴ Although couples may not like thinking about the consequences of divorce,

(1994) (noting that first-party insurance covers the insured's interest and is meant to indemnify the insured against loss sustained). Third-party insurance, on the other hand, is meant to protect the insured against liability to a third party and not personal loss. *Id.* at 1812.

²⁵⁸ *See id.* at 1810.

²⁵⁹ OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES, 358, 384 (1988) (defining embryo as the "term used to describe the stages of growth from the second to the ninth week following conception"). The term zygote means "a fertilized oocyte formed by the fusion of egg and sperm, containing DNA from both." *Id.* at 388.

²⁶⁰ *Davis*, 842 S.W.2d at 597 (involving the disposition of frozen embryos in the context of divorce). The Tennessee Supreme Court ruled that "preembryos are not, strictly speaking, either 'persons' or 'property', but occupy an interim category that entitles them to special respect because of their potential for human life." *Id.*

²⁶¹ *See Radhika Rao, Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 429 (2000) (explaining that fragmentation of an individual into body parts can lead to inequality alienation).

²⁶² *Id.* at 433, n.432 (noting that many commentators compare surrogacy contracts to slavery because of the assumption in slavery that people were property).

²⁶³ Robertson, *Prior Agreements*, *supra* note 25, at 411 (stating that trial courts are inexperienced when enforcing contracts for IVF and that many objections to enforcement arise due to the time that lapses between contract formation and attempted enforcement).

²⁶⁴ *Id.* at 418-19 (discussing changed circumstances and forseeability in IVF contracts and suggesting that there would be fewer disputes over disposition if agreements were legally binding).

the parties' rights should be negotiated in order to guide them if such event were to occur.²⁶⁵ However, the court in *Baby M* refused to acknowledge an individual's right to contract for parenthood.²⁶⁶ The court in the *Litowitz* case took the same approach, although a default rule was employed so that by the contract neither party would receive use of disputed embryos without the other's consent.²⁶⁷

Opponents of enforcing IVF contracts argue that it is extremely difficult for the parties to contemplate hypothetical circumstances and plan for the future based upon conjecture.²⁶⁸ Arguably, such an argument lacks conviction and is merely suggested as an escape route enabling parties to avoid procreation.²⁶⁹ In the normal course of marriage and pregnancy it is not uncommon to plan for the future of a child that may result from the union; likewise, it is not strange that a couple plan for situations that may arise during or as a result of IVF. By refusing to enforce the IVF contract, the A.Z. court considerably weakened the role of contracts in reproductive technology situations to a debilitating degree.²⁷⁰ Denying the contract, the court reasoned that the ex-wife, who was forty years-old and desired implantation, would not be irreversibly harmed if implantation was denied because she could still produce offspring.²⁷¹

²⁶⁵ *See id.* at 409-10 (discussing how several IVF facilities have a provision in their contracts providing for the disposition of embryos in the event of divorce).

²⁶⁶ *Matter of Baby M*, 537 A.2d 1227, 1250 (N.J. 1988) (holding that a maternal surrogacy contract was unenforceable as contrary to public policy). The court indicated that no thought was given to the best interests of the child and that the entire scheme, driven primarily by money, was "contrary to the objections of our laws". *Id.*

²⁶⁷ *Litowitz v. Litowitz*, 10 P.3d 1086, 1089 (Wash. Ct. App. 2000). The contract signed by the parties stated in relevant part:

[B]ecause both the husband and wife are participants in the cryopreservation program, any decision regarding the disposition of [their preembryos] will be made by mutual consent. In the event [they] are unable to reach a mutual decision regarding the disposition of [their] [preembryos they] must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of [their preembryos]. *Id.*

²⁶⁸ Robertson, *Prior Agreements*, *supra* note 25, at 419 (suggesting that prior agreements are inadequate because of their "inability to foresee how one will feel when the stated contingency occurs and . . . the possibility of unfairness that could arise when a party's circumstances have changed").

²⁶⁹ *Id.* at 420 (stating that IVF contracts are no different from conventional contracts with regard to foreseeing future events and providing for them).

²⁷⁰ *See A.Z.v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that the law should not enforce contracts that interfere with intimate family relationships).

²⁷¹ *Id.* at 1053 (stating that at the time of divorce, the wife was still capable of conceiving); *see also Jennifer M. Stolier, Disputing Frozen Embryos: Using International Perspectives to Formu-*

In fact, the only fertile presence in the courtroom was the imaginations of the presiding justices.²⁷²

Courts should encourage the negotiation and execution of a reproductive contract prior to undergoing IVF. The facts in *A.Z. v. B.Z.* evidenced that a primary reason the couple entered into a prior agreement concerning the disposition of the embryos was to ensure that in case of divorce, the authority to make decisions regarding the future disposition of the frozen preembryos would reside in the mother.²⁷³ The ex-husband defeated this argument by asserting that the doctrine of changed circumstances should excuse him from performance of the contract.²⁷⁴ The reasoning employed by the court is questionable because the changed circumstances argument loses its vitality when the event that was actually bargained for is the occurrence the proponent later claims was unforeseeable.²⁷⁵

The knowledge that reproductive contractual agreements will be legally enforced emphasizes the importance and seriousness of the consent process.²⁷⁶ Furthermore, a contractual agreement provides certainty to the parties that their intentions will be followed.²⁷⁷ The *A.Z. v. B.Z.* case managed to dismantle everything that the *Kass* court attempted to construct with its statement that, "parties should be encouraged in advance, before embarking on IVF and cryopres-

late *Uniform U.S. Policy*, 9 TUL. J. INT'L & COMP. L. 459, 465-66 (2001) (stating the wife in *A.Z. v. B.Z.* was forty-four years old at the time the case was decided).

²⁷² See e.g. *A.Z.*, 725 N.E.2d at 1054 (noting the contract states that normal menopausal age is forty-five); Stoller, *supra* note 271, at 465-66 (stating the wife was forty-four years old). If the wife was forty-four years old and the normal menopausal age is forty-five, the court must have found the wife fertile for up to twelve more months at the least.

²⁷³ *A.Z.*, 725 N.E.2d at 1054; see also Robertson, *Prior Agreements*, *supra* note 25, at 415 (arguing that the gamete providers' reproductive rights are secured when they have authority to enter into binding contracts regarding the disposition of their frozen embryos). To exercise this control, therefore, it is necessary for the "gamete providers [to] have the power to make binding agreements for [the] future disposition of embryos." These agreements are impotent if their enforceability hinges on the parties continued to agreement. *Id.*

²⁷⁴ See *A.Z.*, 725 N.E.2d at 1057 (stating even though the couple provided for separation, divorce is a much different circumstance).

²⁷⁵ See *id.* (repeating the mantra of changed circumstances, the court claimed the reproductive contract was unenforceable). The court noted that the couple already had twins, and used other facts to explain why the agreement should not be enforced due to changed circumstances. In determining whether the circumstances warranted the contract unenforceable, the court looked to foreseeability. *Id.* Because the situation that occurred was practically spelled out in the contract, arguably, the only changed circumstance here is a change of mind.

²⁷⁶ *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

²⁷⁷ *Id.*

ervation, to think through the possible contingencies and carefully specify their wishes in writing."²⁷⁸

F. Vetoing Paternity: Implanting the Egg

Courts initially allowed for the proposition that the IVF agreements could be enforced in actions between a joint father/mother pairing and the clinic.²⁷⁹ Presumably, in *A.Z. v. B.Z.* the court did not find the reproductive document objectionable based on any procedural defects in its execution or in its ability to govern the disposition of the frozen preembryos.²⁸⁰ Rather, the court overruled the wife's claim to the preembryos on the grounds that it waived the father's right to veto paternity.²⁸¹

Ultimately, in determining the outcome in many procreation cases, significant weight is placed on the issue of implantation.²⁸² After implantation, the male progenitor has no right to insist on the embryo being destroyed, even if doing so occasions only a moderate physical invasion of the woman.²⁸³ Under these circumstances, it is quite possible that the male will become a father against his wishes.

Allowing the female's wish to outweigh the male's after implantation contradicts the policy argument the court advances regarding the unwillingness to enforce reproductive agreements that result in forced parenthood.²⁸⁴ The court would likely willingly compel parenthood in situations where implantation of the embryo already occurred.²⁸⁵ Thus the court's treatment of parenthood

²⁷⁸ *Id.* (noting that the benefits of enforcing agreements include certainty, avoiding costly litigation, minimizing misunderstanding, and aiding in the personal nature of loss in the instance of a dispute over an embryo).

²⁷⁹ See, e.g., *Kass*, 696 N.E.2d at 180 (stating "the parties' over-all direction" should be enforced and having courts enforce agreements for disposition would aid in the seriousness of the agreement-making process).

²⁸⁰ *A.Z.*, 725 N.E.2d at 1057 (explaining that the reasons for denying the contract are based on what the court deems the parties to intend).

²⁸¹ *Id.* (holding that a court will not force a party to become a parent).

²⁸² See *People in the Interest of S.P.B.*, 651 P.2d 1213, 1216-18 (Colo. 1982) (holding that a man is not discriminated against for having to pay child support because his wife did not get an abortion). The court focuses on the fact that the woman's right during pregnancy, i.e., after implantation, outweighs the man's right to avoid parenthood. *Id.*

²⁸³ See, e.g., *Kass v. Kass*, No. 19658/93, 1995 WL 110368, at *5 (stating the woman should have the right to control the embryo).

²⁸⁴ See *A.Z.*, 725 N.E.2d at 1057 (stating that the court will not force someone to be a parent against his or her will because it violates public policy).

²⁸⁵ See *Interest of S.P.B.*, 651 P.2d at 1216-18 (holding that a father had no right prior to childbirth and after conception to make a decision to terminate the pregnancy).

changes, depending on the phase of the new life and who is arguing against forced parenthood.²⁸⁶

G. Role Reversal: The Husband Speaks

In a dissolution action, the trial court in *Litowitz v. Litowitz* awarded the parties' preembryos to the husband.²⁸⁷ The *Litowitz* case is noteworthy because it represents the protection of a male's fundamental right to reproductive autonomy just as past cases have protected a female's right.²⁸⁸ In this case, the husband wanted to place the pre-embryos into adoption rather than grant them to his wife, who wanted the preembryos awarded to her for implantation in a surrogate.²⁸⁹ On appeal the wife relied on the argument that she should be the primary residential parent for any resulting child because the trial court should have enforced the egg donor contract.²⁹⁰

The appellate court affirmed the lower court and held that the husband was not bound by contract to become a parent.²⁹¹ Accordingly the husband could exercise his right not to procreate in a limited way, such as adoption, which would allow the preembryos to develop but would avoid placing him in the unwanted parenting role.²⁹²

V. DECONSTRUCTING CONTRACTS

The tension between preserving the status of contract law and the increasing success of assisted reproductive technology necessa-

²⁸⁶ Compare *A.Z.*, 725 N.E.2d, at 1057 (holding that courts will not enforce agreements regarding the disposition of preembryos) with *Interest of S.P.B.*, 651 P.2d at 1216 (holding that a man has no right to terminate pregnancy after conception).

²⁸⁷ See *Litowitz*, 10 P.3d at 1086, 1088 (Wash. App. 2000) (explaining the court chose not to enforce the egg donor contract because the husband was the sole progenitor before the court and was not completely bound by the agreement which would force him to become a parent).

²⁸⁸ See *id.* at 1092 (illustrating the court's holding that a husband has a constitutional right not to be forced to procreate).

²⁸⁹ See *id.* at 1089.

²⁹⁰ See *id.* at 1090 (explaining that the wife also argued that both she and the egg donor relied upon the agreement that only the Litowitzes would use the preembryos).

²⁹¹ See *id.* 1092.

²⁹² *Litowitz*, 10 P.3d at 1092 (noting that if a preembryo becomes a child then the husband might be unwillingly thrust into a lifetime parenting role and he should have control over whether this will happen).

rily demands a broader interpretation of the familial structure.²⁹³ An examination of the term infertility exemplifies the changing configuration of the traditional, nuclear family.²⁹⁴ With the advent of assisted reproductive technologies, infertility no longer completely precludes the choice to have children and create families.²⁹⁵ Reproductive technologies have cured many types of infertility and now impregnate the nomenclature with its own antithesis: the expectation of fertility.²⁹⁶

The courts have failed to accurately delineate the parameters and implications of a party's intent pertaining to IVF contracts.²⁹⁷ Because the concept of intent connotes a contractual relationship, it is necessary to examine the elements contained within a reproductive contract.²⁹⁸ This characterization of intent would allow courts to better resolve disputes involving reproductive technology through the world of contracts.²⁹⁹ Following are excerpts from a copy of an informed consent IVF contract.³⁰⁰ Accompanying the contract are comments and criticism regarding the strengths and weakness of the language employed. The purpose of deconstructing the contract is to help refine the terms of the agreement and therefore encourage future enforcement of reproductive informed consent contracts.

²⁹³ Janet L. Dolgin, *Symposium: Solomon's Dilemma: Exploring Parental Rights: The "Intent" of Reproduction: Reproductive Technologies and the Parent Child Bond*, 26 CONN. L. REV. 1261, 1262 (1994) (explaining that this increase in technology has appeared during a time of shifting views as to family definitions and social structures).

²⁹⁴ *Id.* at 1262 (because of the emergence of reproductive technologies, the term infertility has produced a profound change in the definition of family).

²⁹⁵ See *id.* at 1261-62 (explaining that society's view of infertility has changed due to the new reproductive technology that enhances the possibilities of pregnancy).

²⁹⁶ *Id.* at 1261 (explaining that the revolutionary changes in reproductive technology instills confidence in fertility when in the past it was thought to be impossible).

²⁹⁷ See *id.* at 1262, 1273 (explaining that courts have not rendered uniform decisions; basing the holdings on the intent of the parties leads to confusion because courts interpret intent differently).

²⁹⁸ Dolgin, *supra* note 293, at 1274.

²⁹⁹ See *id.* at 1273 (suggesting that because intent is a fundamental principle controlling contract law, studying contract law might be helpful; however, courts typically that the parties' intent to be more important than the contract itself, and prefer to use the contract as evidence of intent).

³⁰⁰ Informed Consent for In Vitro Fertilization and Embryos Transfer (Dec. 2000) (unpublished contract, on file with the Houston Journal of Health Law and Policy) [hereinafter Informed Consent Contract].

A. Informed Consent for IVF, Embryo Transfer and Cryopreservation

1. The Contract Language

"We, _____ and _____ the undersigned, are willing participants in and give our consent for ovarian stimulation, egg retrieval, *in vitro* fertilization and embryo transfer by Dr. _____ and his/her designees."³⁰¹

2. Deconstructing the Contract: Concerning Dual Consent

It has become accepted for an ART facility to require both donors to agree to disposition instructions for the embryos in the event of divorce or death.³⁰² Unfortunately, the enforceability of these dual consent disposition instructions has been somewhat weakened by the *A.Z. v. B.Z.* decision.³⁰³ In considering the binding value of this dual consent in the contract, a practical, and perhaps more appropriate means of limiting potential liability would be to draft the consent form to inform the donors that their first choice disposition instructions may not be available.³⁰⁴ Furthermore, the facility should reserve the right to allow the embryos to be discarded or used for research purposes if the donors' disposition instructions cannot be carried out within a reasonable period of time or because of conflicting interests from the donors.³⁰⁵

While considering the implications of having both donors consent to the procedure, recall the intent-based approach used in *Davis*.³⁰⁶ The *Davis* court reasoned that the fundamental right of choice on procreation could only be protected if the court follows the mani-

³⁰¹ *Id.*

³⁰² See, e.g., *Kass v. Kass*, 663 N.Y.S.2d 581, 583-84 (N.Y. App. Div. 1997) (illustrating current contract clauses and language detailing the contemplation of death or divorce).

³⁰³ See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056-57 (explaining that the court still found the contract to be unenforceable although the parties had specifically contemplated separation).

³⁰⁴ See *id.* at 1056 (explaining that one of the reasons the court held the contract unenforceable was the absence of any indication that the couple intended the form to act as a binding agreement in the event of a disagreement).

³⁰⁵ ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *Ethical Consideration of Assisted Reproductive Technologies*, 67 FERTILITY & STERILITY 1S, 1S (1997) (explaining that degeneration of the embryos is a default disposition in circumstances where no consent by the donors exists or where the couple has apparently abandoned the embryos after passage of a certain amount of time.)

³⁰⁶ *Davis v. Davis*, 842 S.W.2d 588, 594-96 (Tenn. 1992) (suggesting that an interest in reproductive cells is a limited property right that is subject to the decision-making authority of the owner).

fest intent of the parties.³⁰⁷ Interestingly, in *Davis* the court substituted the word "intent" for "consent."³⁰⁸ This is an important semantic swap because the court recognized the words were not interchangeable: the court could not satisfy the intent of both parties, therefore using the word intent would not accurately communicate the role of the court.³⁰⁹

A consent-based standard requires inquiry into whether the parties contemplated future disagreements regarding the status of the embryo at the time of embryo creation.³¹⁰ The *Davis* court's holding anticipated that future courts would enforce the consent agreements of the donor parties.³¹¹ Unfortunately, the *Davis* court's vision did not hold true; this was evidenced eight years later in *A.Z. v. B.Z.* when the court refused to enforce an ART contract that contained a prior agreement between the donors granting embryo rights to the mother.³¹²

B. The Informed Consent Standard

1. The Actual Contract Language

We understand that: (1) the purpose of this procedure is for us to obtain a pregnancy and have a child; (2) our physician will govern our care and determine what may or may not be appropriate in our situation; and (3) if eggs are obtained, fertilized, and develop normally, I the female, will allow transfer of the embryo(s) to my uterus, or have agreed separately to egg donation or embryo cryopreservation.

We understand that the woman's ovaries will be stimulated by medication. Growth of the follicles, which contain the eggs will be monitored by sampling blood for hormone analysis and by ultra-

³⁰⁷ *Id.* at 604; see also Gail A. Katz, *Parpalaix c. CECOS: Protecting Intent in Reproductive Technology*, 11 HARV. J.L. & TECH. 683, 693 (1998) (explaining that the court's holding in *Davis* was based on intent, rather than the consent standard, which would have required fulfillment of the contract).

³⁰⁸ *Davis*, 842 S.W.2d at 597; see also Katz, *supra* note 307, at 693 (explaining that the court recognized the impossibility of satisfying the intent of two donors, thus choosing the term consent instead of intent).

³⁰⁹ See Katz, *supra* note 307, at 693.

³¹⁰ See *id.* at 693 (explaining that consent is a standard that applies the *ex ante* intent of the parties).

³¹¹ See *id.* at 693.

³¹² *A.Z.*, 725 N.E.2d at 1056-57 (illustrating the unenforceability of the contract irrespective of the fact that the parties had contemplated separation). The parties apparently did not intend the consent form to act as a binding agreement because the consent form did not state that the husband and wife intended the agreement to be binding in the event that they later disagreed.

sound examination of the ovaries. There is the chance of cycle cancellation due to abnormalities in response to stimulation. There is also the possibility of formation of an ovarian cyst or of ovarian hyperstimulation as a result of the medication. This stimulation and monitoring protocol is frequently used in non-IVF infertility patients.

I (the woman) will undergo needle aspiration of my ovaries for recovery of the eggs. The eggs will be transferred to the Assisted Reproductive Technology Laboratory for inspection. I (the man) will obtain a semen sample for the purpose of fertilization of the eggs. (Should semen from a donor be utilized, a separate consent form will be used.) If the eggs appear normal, they will be incubated with the sperm. If fertilization is successful, the resulting embryos will be cultured in the laboratory. All laboratory procedures will be for the sole purpose of enhancing the success of fertilization and growth and the prevention of infection. The laboratory techniques will be those considered the state of the art and may be varied at the discretion of the Assisted Reproductive Technology Laboratory personnel. There will be no manipulation of the embryos *other than to aid in the achievement of a pregnancy*.³¹³ (emphasis added).

2. Limiting Liability through Informed Consent

Explaining to the patient the nature of the IVF procedure in contract terms helps to minimize liability.³¹⁴ One of the most important sentences in this portion of the contract establishes the intent of the parties and requires their consent: "the purpose of this procedure is for us to obtain a pregnancy and have a child."³¹⁵ This sentence clarifies the donors' intent and suggests that fertilization of embryos has only one purpose: procreation.³¹⁶

Contrast this argument with the wife's claim in *J.B. v. M.B.* where the wife contended that upon divorce, the contract pertaining to preembryos is not binding because it was made in the context of a current marriage.³¹⁷ The trial judge affirmed this argument holding the contract unenforceable.³¹⁸ Affirming the trial court, the appellate

³¹³ Informed Consent Contract, *supra* note 300.

³¹⁴ David M. Vukadinovich, *Assisted Reproductive Technology Law: Obtaining Informed Consent for the Commercial Cryopreservation of Embryos*, 21 J. LEGAL MED. 67, 69 (2000) (explaining that truly informed consent requires doctor-patient communications; simply signing the consent form is not sufficient).

³¹⁵ Informed Consent Contract, *supra* note 300.

³¹⁶ See Katz, *supra* note 307, at 691 (arguing that a court should be able to find intent to procreate easier in the case of fertilized eggs than in the case of donated sperm).

³¹⁷ See 751 A.2d 613, 615-16 (detailing her argument that the contract was not binding despite the fact that it specifically considered the event of divorce).

³¹⁸ *Id.* at 616 (noting that the trial judge determined that the parties only engaged in IVF during their marriage, thus the reason for producing and saving the embryos no longer existed).

court noted that even had the contract wording been perfectly clear, the court still would not have enforced an agreement that would compel one donor to become a parent against his or her will.³¹⁹

Another crucial function of the informed consent language employed in this contract is to establish a defense against a cause of action for battery.³²⁰ Explaining the invasive nature of the in vitro process protects the fertilization clinic in case the woman asserts a battery or other claim.³²¹ The contract at issue details the invasive nature of IVF by informing the woman that she will undergo "needle aspiration" of her ovaries.³²² If the courts remain unwilling to enforce these reproductive agreements, this could leave infertility clinics open to potentially high liability to an informed consent claim.³²³

C. The Transfer Stage

1. The Future Disposition Clause

"All embryos with normal appearance will either be transferred to the woman's uterus, cryopreserved or donated. The normal appearing embryo(s) will be transferred to the woman's uterus by means of a tube inserted through the cervix."³²⁴

a. Validity Does Not Guarantee Clarity

This clause contains three possible directives for the use of the embryos: implantation, cryopreservation, or donation.³²⁵ Although presumptively this is a valid clause, even the most carefully drafted

³¹⁹ *Id.* at 619 (illustrating that although fertilization's purpose is to procreate, the balancing of each donor's rights must be analyzed).

³²⁰ See Vukadinovich, *supra* note 314, at 74 (explaining that ART facilities face potential liability when the informed consent contract fails; then this failure exposes the facility to possible battery claims because the entire informed consent including defense clauses are void).

³²¹ *Id.* at 74 (by strengthening the informed consent document, an ART facility may be able to reduce the likelihood of incurring liability not only with embryo disposition, but also the possible peripheral issues such as battery claims).

³²² Informed Consent Contract, *supra* note 300 (illustrating the contractual clause giving notice that the IVF procedure is invasive).

³²³ See Vukadinovich, *supra* note 314, at 77.

³²⁴ Informed Consent Contract, *supra* note 300.

³²⁵ *Id.* The single clause, which contains three separate possible uses of the embryos, may be a source of ambiguity.

agreements may receive judicial scrutiny.³²⁶ A judge may be confronted with dual interpretations of the plain meaning of a document.³²⁷ Thus, even if one judge purportedly applies the plain meaning rule to the instrument, another judge may find the meaning ambiguous.³²⁸

b. Case Law Interpreting This Clause

Initially, in *Kass v. Kass*, the court adopted the presumed validity standard.³²⁹ Recall that Maureen and Steven Kass executed a single, seven-page consent agreement which had two informed consent sections: cryopreservation consent and statement of disposition.³³⁰ The contract provided the Kassess with the opportunity to direct the disposition of any frozen embryos should they disagree about the future of their gamete material.³³¹

While Maureen Kass argued that the consent forms she signed were ambiguous, Steven Kass argued that the prior agreement plainly mandated transfer to the IVF program.³³² The court unanimously declared that the consent forms unequivocally manifested the parties' mutual intention that the embryos be donated for re-

³²⁶ See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 148-49 (4th ed. 1998) (explaining that "[t]he Plain Meaning Rule states that if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind."). The court determines whether there is an ambiguity, not the drafters of the contract.

³²⁷ *Id.* at 148, 149 (explaining that the meaning of the words varies with the "verbal context surrounding circumstances and purposes in view of the linguistic education of their users" and, therefore, separate interpretations are possible).

³²⁸ See *id.* at 149.

³²⁹ See *Kass v. Kass*, 663 N.Y.S.2d 581, 587 (N.Y. App. Div. 1997) (quoting *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), and explaining the court's reliance on the presumed validity of an agreement regarding disposition in the event of contingencies, because the progenitors have provided the gamete materials and thus should retain control as to their disposition).

³³⁰ *Id.* at 583.

³³¹ *Id.* at 584. The couple signed their names to the following instructions:

In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to [choose one]: (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF program.

³³² See *id.* at 585, 588.

search.³³³ The court reasoned that the consent forms read as a whole indicated a shared intent that any disposition be made as a joint decision of the parties, and no party alone could lay claim to the embryos.³³⁴

Now contrast this detailed contract agreement to a broader, general statement such as: "we are unable to make a decision regarding the disposition of our embryos." Could such general language usurp a contract clause detailing specific circumstances in the event they transpire? *Kass* and subsequent cases have indicated that it does not matter how general or specific the contract language is; courts will take tremendous freedom in interpreting contracts that designate embryo dispositions.³³⁵

2. The Contract: Detailing the Risks Involved

a. Technology Invades the Woman

Although both donors may agree to a particular option at the time of the IVF procedure, changes in their relationship often influence their later desires.³³⁶ Often, donors do not give adequate consideration to the possible implications of their disposition instructions (or lack thereof).³³⁷ In many cases, the male donor does not consider the fact that if the disposition instructions are carried out, he may become the biological and legal father of a child born after the couple divorces or even remarries.

³³³ See *id.* at 590 (explaining the court's reasoning that where a manifestation of mutual intent exists between parties, the intent must be given effect; thus, their prior statement as to embryo disposition is controlling because the couple mutually agreed to the terms).

³³⁴ See *Kass*, 663 N.Y.S.2d at 590 (explaining that the "disposition of pre-zygotes form" expressly contemplates consent from both parties; because the parties no longer agree, the first preference of the progenitors cannot be ascertained). Because they could not come to a decision, the prior agreement in the contract (which directed that the pre-zygotes should be used by the IVF facility for scientific purposes) controlled, in accordance with the parties' wishes.

³³⁵ *Davis v. Davis*, 842 S.W.2d 588, 591, 597-99 (explaining that courts have the discretion to interpret contract clauses thus affecting the outcome, irrespective of what the intent of the parties may truly have been).

³³⁶ See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1053, 1056-57 (Mass. 2000) (noting that this case exemplifies the problem of what to do with fertilized embryos in the event of contingencies such as separation or death).

³³⁷ See *id.* at 1056-57 (noting that neither the form nor the record indicated that the couple intended the consent form to act as a binding agreement between them in the event of disagreement over disposition).

b. The Contract: Avoiding Liability by Ensuring Understanding of the Risks

We understand and accept that the procedure may involve the following sources of discomfort:

1. Ovarian stimulation: injections, blood sampling, and ultrasound examinations
2. Oocyte recovery: see surgical consent
3. Embryo transfer: uterine cramping

We understand and accept that the procedure may involve the following risks:

1. Ovarian stimulation: poor response resulting in cycle cancellation or hyper-stimulation resulting in ovarian cyst formation and cycle cancellation.
2. Oocyte recovery: see surgical consent
3. Embryo transfer: bleeding, pain, and infection

We understand that the chances of obtaining a pregnancy by this procedure are, at best, approximately 30 percent. If pregnancy is established, we understand and accept that multiple pregnancy, miscarriage, ectopic pregnancy, or stillbirth may occur. We understand that *in vitro* fertilization may lead to a higher incidence of multiple pregnancy. We know that, to date, the incidence of abnormalities has been approximately the same as the population in general.

I (the man) consent to accept paternity of any child we may have as a result of this procedure.³³⁸

c. Contracting Away the Right to Privacy

It is clear that the Constitution guarantees a right to be free from unwated significant invasions of the body.³³⁹ The woman may encounter significant risks and a great amount of bodily invasion in the IVF process.³⁴⁰ The informed consent process allows the woman to consider risks she will undertake and then consent to the bodily invasion. Although it is not possible to anticipate every problem that might occur with regard to gamete donors, adopting a comprehensive patient informed consent process may limit many potential liabilities facing an ART facility.³⁴¹

³³⁸ Informed Consent Contract, *supra* note 300 (emphasis added).

³³⁹ See *Rochin v. California*, 342 U.S. 165, 172 (1952) (illustrating the Court's shock at an illegal violation of the petitioner's privacy by the use of force to open his mouth in order to extract evidentiary capsules that the accused swallowed).

³⁴⁰ Informed Consent Contract, *supra* note 300 (illustrating the clause giving notice that the IVF procedure is invasive by informing the woman that she will undergo needle aspiration).

³⁴¹ Vukadinovich, *supra* note 314, at 74 (2000) (contemplating potential actions the facility can take to gain more protection from possible patient claims). The contract lists several reasons why pregnancy may not occur, thus further limiting its liability as much as it can. See Informed Consent Contract, *supra* note 300.

In analyzing the ability to waive privacy rights through informed consent, it seems appropriate to consider the ability to waive reproductive rights through contract as well.³⁴² In agreeing to the infertility treatment, the patient's consent effectively waives certain rights, such as privacy, through contract.³⁴³ Carrying this logic one step further, if the patients possess the authority to waive their right to privacy, why can they not also be allowed to waive their reproductive rights as well?

Many physicians perceive the consent form as a "Medical Miranda" requirement.³⁴⁴ The doctor explains to the patient his rights, and the patient, by signing the consent form, effectively waives these rights.³⁴⁵

3. Insurance

"As in other IVEFT [in vitro fertilization and embryo transfer] programs in the United States, all costs will be borne by the patient."³⁴⁶ This clause targets an area of legislation concerning IVF health insurance coverage for the procedure itself.³⁴⁷ Some states

³⁴² See Alan Meisel & Mark Kuczewski, *Legal and Ethical Myths about Informed Consent*, 156 ARCHIVES INTERNAL MED. 2521, 2522 (1996) (explaining that the purpose of informed consent is to require the physician to explain the various possibilities for the treatment of a particular patient's condition, and to allow the patient to consider this information in his or her own context of values and then choose a course of treatment).

³⁴³ See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056 (Mass. 2000) (indicating that if the couple had indeed stated clearly and unambiguously their intent, the consent form would be a binding agreement effectively limiting their right to the preembryos; the ART facility would have the rights concerning the preembryos).

³⁴⁴ See Meisel & Kuczewski, *supra* note 342, at 2522-23. In comparing consent forms to warnings, the authors comment that:

As practiced, and certainly as symbolized by consent forms, informed consent is often no more than a medical Miranda warning. Just as police are required to tell criminal suspects that 'you have a right to remain silent, you have a right to a lawyer, and if you choose to speak, anything you say can be used against you,' some physicians believe that informed consent has been obtained if they warn patients of the risks of treatment.

³⁴⁵ See *id.* at 2522-23.

³⁴⁶ Informed Consent Contract, *supra* note 300.

³⁴⁷ See, e.g., ARK. CODE ANN. § 23-85-137 (Supp. 2001) (providing that "[a]ll disability insurance companies doing business in this state shall include, as a covered expense, in vitro fertilization."); CONN. GEN. STAT. ANN. § 38a-536 (West 2000) (requiring coverage for IVF procedures); see, e.g., HAW. REV. STAT. ANN. § 432:1-604 (Michie 1998); 215 ILL. COMP. STAT. 5/356m (1993).

have already enacted laws regulating insurance coverage for IVF and other forms of infertility treatments.³⁴⁸

4. The Options

a. Contractually Carrying Out Disposition Instructions

If extra eggs are obtained, we have the following options:

1. We do ___ do not ___ wish to have all of the eggs inseminated. If there are more than the optimal number of embryos for the establishment of a pregnancy, we want the extra embryos frozen and saved for later transfer. (An additional fee and separate consent form will be necessary) We understand that, if we do not elect to have embryo cryopreservation, only a limited number of eggs will be inseminated and all resulting embryos will be transferred to the uterus.

2. We do ___ do not ___ wish to donate extra eggs which we do not utilize to another couple who cannot obtain normal eggs of their own.³⁴⁹

b. The Implications for the Donors

It has become accepted for an ART facility to require both donors to agree to disposition instructions for the embryos in the event of the couples' divorce, death, or other unforeseen circumstances.³⁵⁰ However, these disposition instructions will probably not be binding upon the parties if the *A.Z. v. B.Z.* case is an indication of how courts will treat these agreements.³⁵¹

It is interesting to note that the informed consent provisions and the disposition instructions are contained in the same contract.³⁵² Some critics of this layered consent claim that including disposition instructions in the informed consent agreement triggers an unconscionability defense because of the strictures contained in the agreement.³⁵³ However, in the contract above, there is no fine print

³⁴⁸ ARK. CODE ANN. § 23-85-137 (noting that IVF is a covered expense); see also CONN. GEN. STAT. ANN. § 38a-536 (requiring coverage for IVF procedures).

³⁴⁹ Informed Consent Contract, *supra* note 300 (illustrating the exact contract language and terms).

³⁵⁰ See *Kass v. Kass*, 663 N.Y.S.2d 581, 584 (N.Y. App. Div. 1997) (disputing the custody of five frozen embryos after divorce); see also *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (indicating that these agreements should be presumed valid and thus enforced).

³⁵¹ *A.Z. v. B.Z.*, N.E.2d 1051, 1057 (Mass. 2000) (holding that although disposition was contemplated in an agreement, the contract was still unenforceable).

³⁵² See *id.* at 1056-57.

³⁵³ Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 926 (2000) (arguing that informed consent documents containing dispositional agreements are indicative that unconscionability is present).

attempting to hide the nature of the agreement.³⁵⁴ Rather, there is room in which the parties are invited to add to the contract any additional terms, conditions, or directions they would like.³⁵⁵

In drafting this portion of the contract, the fertility clinic has limited the options regarding the disposition of the embryos. Implied in this options clause, ironically, is a lack of choice: a woman can either discard the embryos or donate them. Being limited to selecting one of these preferences may not accurately reflect the true nature of her desires. Limiting the post-divorce embryo possibilities to donation or destruction, without room for negotiation or modification, creates a persuasive public policy argument for enforcing reproductive agreements.³⁵⁶

There is nothing in this disposition clause which directly asserts that the primary purpose of seeking fertility treatment is to create a child within the bounds of marriage.³⁵⁷ Without this explicit language, the agreement reflects the primary purpose of the consent form, which is to enable the gamete providers to create a child regardless of their personal relationship.³⁵⁸ In fact, the appellants in *Davis, Kass*, and *A.Z.* went to enormous lengths in a futile attempt to enforce post-divorce parenthood, but to no avail.³⁵⁹

c. The Implications for the Fertility Clinic

ART facilities may soon face an interesting dilemma and potential liability when instructions left by donors are not carried out, either from negligence or impossibility.³⁶⁰ This impossibility in carrying out a donor's wishes is common when the wishes relate to donating of embryos for research or to childless couples, because the facility often has a hard time carrying the instructions out.³⁶¹ One such situation occurs when the facility cannot locate a couple who desires the embryos for implantation and instead allows them

³⁵⁴ Informed Consent Contract, *supra* note 300 (illustrating the straightforward language of the contract).

³⁵⁵ See *id.*

³⁵⁶ See *Kass*, 663 N.Y.S.2d at 584-85 (noting that the lack of choice in an addendum, which was a contractual term in the consent agreement, severely restricts post-divorce possibilities).

³⁵⁷ See Informed Consent Contract, *supra* note 300.

³⁵⁸ See *id.*

³⁵⁹ See *Kass v. Kass*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997); *A.Z. v. B.Z.* 725 N.E.2d 1051 (Mass. 2000); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

³⁶⁰ See *Vukadinovich*, *supra* note 314, at 77.

³⁶¹ *Id.*

to deteriorate to the point they are no longer viable. This presents a case for potential liability if the donors happen to be strongly pro life.

The facility might be able to avoid such potential liability by informing donors on the consent form that their first choice for embryo disposition might not be available.³⁶² As a default position, the facility also could reserve the right to allow the embryos to degenerate if the donor's wishes cannot be carried out in a given amount of time.³⁶³

CONCLUSION

Disputes over the disposition of frozen embryos offer fertile grounds for debate.³⁶⁴ Although the judicial approach to existing reproductive disputes suggests a rejection of the contract model, this comment suggests that IVF agreements delineating the disposition of post divorce embryos should be honored. By upholding the integrity of the contract, courts can minimize the costs and frequency of suits surrounding disagreements over the disposition of frozen embryos.³⁶⁵ More importantly, by binding couples to a prior agreement, courts recognize gamete providers' procreational liberty: the right to choose.³⁶⁶

The court should not limit the couple's legally valid dispositional choices.³⁶⁷ In refusing to enforce post-divorce disposition arrangements, courts confine IVF participants into a situation that may not yield the results they desired and intended.³⁶⁸ If the only options presented to the IVF participant are either destruction or donation of the embryo upon divorce, the selection of one of these does not necessarily reflect the true preferences of the participants.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ See Robertson, *Prior Agreements*, *supra* note 25, at 408-09 (noting that the growing practice of embryo freezing will inevitably lead to perplexing legal questions that must be resolved).

³⁶⁵ See *id.* 424 (emphasizing that enforcement of disposition agreements will maximize procreational freedom, give certainty to ART programs, and minimize disputes).

³⁶⁶ See *id.* at 424 (noting how respect for the freedom of a couple in making choices should be recognized if the goal is to give maximum reproduction control to the actual gamete providers).

³⁶⁷ See *id.* (recognizing that if the goal is to give couples control over disposition, then the couples should have a range of legally viable options).

³⁶⁸ See *id.* (arguing that agreements between gamete providers should be legally binding within general principles of contract law).

By restricting the choices reproductive contracts offer, courts have encouraged the enforcement of an unconscionable agreement pregnant with procedural deficiencies: the IVF participant can either take it or leave it with no option to alter the choices.³⁶⁹ If advances in reproductive technology are going to effectively enhance procreational liberty, then courts must protect this liberty by enforcing prior reproductive agreements regarding the disposition of frozen embryos.

To the future or to the past, to a time when thought is free, when men are different from one another and do not live alone—to a time when truth exists and what is done cannot be undone: From the age of uniformity, from the age of solitude, from the age of Big Brother, from the age of doublethink—greetings!

—George Orwell, 1984.³⁷⁰

³⁶⁹ See Robertson, *Prior Agreements*, *supra* note 25, at 423 (noting that the options have great consequences if not fully understood or analyzed; thus, ART restrictive programs should make clear to the gamete providers all of their other options).

³⁷⁰ GEORGE ORWELL, 1984, at 26-7 (New Am. Library of World Literature, Inc. 1961) (1949).