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EXAMINING DISPUTES OVER OWNERSHIP RIGHTS TO FROZEN EMBRYOS: WILL PRIOR CONSENT DOCUMENTS SURVIVE IF CHALLENGED BY STATE LAW AND/OR CONSTITUTIONAL PRINCIPLES?

Donna M. Sheinbach

In the United States, approximately one in five couples is infertile. Scientific advancements in reproductive technology, however, allow couples to combat problems with conception through various surrogacy arrangements. In vitro fertilization (IVF) is one type of artificially assisted conception procedure that creates an embryo ex utero, combining the egg of the intended mother with the sperm of the intended father in a petri dish. This surrogacy arrangement allows infertile couples the chance to become parents when they otherwise are unable to conceive.
Among the different types of surrogacy arrangements, IVF is unique in that it provides infertile couples with the opportunity to create a child who possesses their genetic makeup.\(^5\) The IVF procedure, however, is initially "invasive and traumatic for the woman seeking implantation."\(^6\) The process usually involves numerous attempts at fertilization because only one out of ten implanted embryos results in a successful pregnancy.\(^7\) The advent of a procedure known as cryopreservation,\(^8\) though, eliminates the need for the woman to undergo the painful aspiration process attendant with each attempt at conception.\(^9\) Today, several eggs are extracted from the woman and fertilized during a single procedure; cryopreservation, or "freezing" of the embryos, maintains them for use at a

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of Status, Rights, and Research Policy, 5 HIGH TECH. L.J. 257, 265 (1990) (explaining the individual steps of the IVF procedure). The first step is for a physician to administer fertility drugs to the woman in order to increase her egg, or oocyte, production. See id. Second, the physician surgically removes the woman's ova. See id. Third, the IVF physician fertilizes the woman's eggs with donated sperm. See id. Once the egg and sperm are combined, the two cells become one, producing what is known as a "zygote." Alise R. Panitch, Note, The Davis Dilemma: How to Prevent Battles over Frozen Preembryos, 41 CASE W. RES. L. REV. 543, 547 (1991). The zygote then divides, and is known as a "preembryo" because it has not reached the stage of advanced cell differentiation. See id. When the preembryo reaches the four to eight cell stage, it can be implanted in the woman—the fourth step in the IVF process—or frozen for use at a later date. See id.; see also Martin & Lagod, supra, at 265. If successfully implanted, the preembryo may grow into a fetus. See Panitch, supra, at 547; see also Clifford Grobstein, The Early Development of Human Embryos, 10 J. MED. & PHIL. 213, 234-35 (1985) (discussing the stages of embryonic development).

5. See Kerian, supra note 1, at 114 (contrasting the fact that IVF children are "biologically and genetically related to their parents, the infertile couple," whereas traditional surrogate children, conceived by artificial insemination, are not genetically related to their parents).

6. Steinberg, supra note 1, at 317 (describing the painful injections and aspiration procedures associated with IVF treatment).

7. See id. at 318 (adding that this figure does not take into account pregnancies that end in miscarriage or stillbirth); see also Jennifer P. Brown, Comment, "Unwanted, Anonymous, Biological Descendants": Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy, 28 U.S.F. L. REV. 183, 189 (1993) (stating that fewer than ten percent of the 3290 attempts in 1990 to use cryopreserved embryos in IVF achieved live births).

8. See generally Brown, supra note 7, at 188 (explaining that "[c]ryopreservation is a process that allows 'excess' preembryos fertilized during the IVF procedure to be frozen and stored for future implantation"); see also Davis v. Davis, No. 180, 1990 WL 130807, at *1 (Tenn. Ct. App. Sept. 13, 1990) (noting that the technique of cryopreservation is only possible because at the eight cell stage, the nervous system, circulatory system, and pulmonary system of the embryo are not developed yet; thus, development can be "arrested" by "freezing" the preembryo).

9. See Brown, supra note 7, at 188-89 (stating that "[c]ryopreservation both improves the chances of achieving pregnancy and reduces the emotional, physical and monetary costs of subsequent cycles of treatment" (footnote omitted)).
Examining Disputes over Ownership Rights

later date. This freezing technique lessens the pain and the cost of IVF in the event that the first attempt to conceive proves unsuccessful.

Controversy over cryopreservation arises, however, when the embryos are frozen for a period of time and unforeseen conditions necessitate a decision regarding which donor controls the fate of their embryos. For example, if death or divorce precludes the parties from using the embryos to conceive together and the donors disagree as to whether to implant or dispose of the remaining embryos, the courts must decide which donor's interests prevail. If one party still wishes to become a parent while the other does not, the first issue for the courts' determination is what law applies to embryo-ownership disputes.

10. See id. at 188 (explaining that once the fertilized eggs reach the four- to eight-cell stage, they are frozen in liquid nitrogen for preservation and storage); see also Janette M. Puskar, Note, “Prenatal Adoption”: The Vatican’s Proposal to the In Vitro Fertilization Disposition Dilemma, 14 N.Y.L. SCH. J. HUM. RTS. 757, 762-63 (1998) (explaining that the embryo culture is packaged with cryoprotectants, then placed in liquid nitrogen at a temperature of minus 196 degrees Celsius, and when the woman is ready for implantation, the process is reversed and the embryos are thawed and placed inside the woman’s womb); Robyn Shapiro, Who Owns Your Frozen Embryo? Promises and Pitfalls of Emerging Reproductive Options, HUM. RTS., Spring 1998, at 12 (describing the process of placing a safe number of fertilized embryos in the uterus of the woman while preserving the rest for transfer during a woman’s later cycles).

11. See Shapiro, supra note 10, at 12 (acknowledging that future use of cryopreserved embryos is not usually controversial; however, in some circumstances the future disposition of embryos can involve difficult ethical, legal, and social inquiries).

12. See Davis, 842 S.W.2d at 589-90, 603-04 (discussing the former wife's interest in giving the embryos a chance at life as contrasted with Mr. Davis's adamant opposition to the implantation of the embryos in his ex-wife in light of severe bonding problems he suffered as a child due to the absence of his own father, resulting from his parents' divorce). Originally, Mary Sue Davis wanted the opportunity to implant the embryos in herself in a "post-divorce effort" to become pregnant, but once remarried, she instead wanted the authority to donate them to another couple. See id. at 589-90.


14. See Davis, 842 S.W.2d at 589-90, 603-04 (discussing the former wife's interest in giving the embryos a chance at life as contrasted with Mr. Davis's adamant opposition to the implantation of the embryos in his ex-wife in light of severe bonding problems he suffered as a child due to the absence of his own father, resulting from his parents' divorce). Originally, Mary Sue Davis wanted the opportunity to implant the embryos in herself in a "post-divorce effort" to become pregnant, but once remarried, she instead wanted the authority to donate them to another couple. See id. at 589-90.

15. See id. at 594 (stating that "[o]ne of the fundamental issues . . . is whether the preembryos . . . should be considered 'persons' or 'property' in the contemplation of the law"). The trial court concluded that the preembryos were "human beings" and therefore relied on a "best interest of the child" analysis. See id. The supreme court, however, determined that the embryos were neither persons nor property; thus, its analysis centered
If the courts consider the embryos to be "persons" or "unborn children," they will use parens patriae reasoning—a "best interests of the child" analysis based on family law principles—to decide which parent prevails in the "custody" battle. If the courts classify the jointly fertilized entities as matrimonial assets, however, the court may analyze the embryos as personal property and apply property law as if the embryos were automobiles or jewelry. If the embryos are determined to be neither persons nor property but something in between, the applicable regime is constitutional law because the issue is then whether one party's fundamental right to procreate is more or less significant than the other party's right not to procreate. Lastly, if contingency agreements are executed prior to the couple's IVF participation, the courts also must apply contract law to determine the validity of these documents.

on the donors' constitutional rights to procreational autonomy. See id. at 598. The issue for the supreme court was whether the parties would become parents. See id. Had a prior agreement existed between the parties, however, the supreme court noted expressly that the controversy would have turned on the validity of the parties' agreement and thus the court would have applied a contract analysis in deciding ownership. See id. at 597.

16. See id. at 594 (discussing that the trial court's decision prohibiting the destruction of the embryos was based upon the proposition that "human life begins at the moment of conception" (internal quotations omitted)).

17. See York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989). In York, a New Jersey couple had been participating in an IVF program at a clinic in Virginia when they subsequently moved to California. See id. at 423. When the Virginia clinic refused to transfer the one frozen embryo that remained from a number of unsuccessful implantation attempts to their new fertility clinic in California, claiming that transfer was not an option according to the parties' disposition agreement, the couple brought suit. See id. at 424-25. The court in York applied an embryo-as-property theory to the dispute between the IVF participants and their IVF clinic, treating the parties as bailor and bailee of the embryo. See id. at 425. In fact, the court did not even discuss any possibilities other than that the embryo was the "property" of one of the parties. See id. at 425-27. The case eventually settled, leaving the strength of the embryo-as-property theory questionable. See id. But see Del Zio v. Presbyterian Hosp. of N.Y., No. 74 Civ. 3855, slip op. at 7-8, 11, 16 (S.D.N.Y. Nov. 14, 1978), available in 1978 U.S. Dist. LEXIS 14450 (rejecting the embryo-as-property theory on a tortious conversion of personal property claim brought by a couple against a physician who intentionally destroyed their frozen embryo because he believed the IVF procedure was too premature to attempt with humans). The court in Del Zio, however, did accept the couple's claim for intentional infliction of emotional distress, awarding the woman damages of $50,000. See id. at 7-8.

18. See Davis, 842 S.W.2d at 598-601 (acknowledging that the specific freedom in dispute is the fundamental right to procreational autonomy); see also supra note 15 and accompanying text (noting that embryo ownership disputes are analyzed in accordance with family law if the embryos are considered persons; constitutional law if the embryos are considered to be something in between persons and property; and contract law if there is a prior agreement).

19. See Kass v. Kass, 696 N.E.2d 174, 180-82 (N.Y. 1998) (using contract analysis to determine whether the parties' disposition agreement clearly expressed their intentions); see also Davis, 842 S.W.2d at 597-98 (discussing the enforceability of a contingency agreement prior to IVF participation and noting that the court would have found contract law
As a result, disputes over frozen-embryo ownership depend on 1) how courts legally classify the embryos and 2) whether the parties executed a prior contingency agreement. The answers to these two questions determine the proper legal analysis; the applicable law determines whether or not the parties involved will become parents.

Currently, no federal law exists to provide uniformity with respect to disputes over embryo ownership and few states have legislation to deal with the novel issues new reproductive technology presents. Caselaw is fairly scarce as well, as only a few state courts have ruled on the embryo-applicable if a valid prior agreement had existed).

20. See Bill E. Davidoff, Comment, Frozen Embryos: A Need For Thawing in the Legislative Process, 47 S.M.U. L. REV. 131, 132 (1993) (stating that the legal status a frozen embryo possesses is at the heart of embryo disposition disputes); see also GROBSTEIN, supra note 3, at 61-64 (considering the implications of status appropriated to the unborn). Determining status, however, forces courts to get involved in highly controversial issues about privacy and human life. See John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437, 437 (1990) (noting that “[t]he central problem in determining the legal status of early embryos is reconciling respect for human life and personhood with competing concerns of bodily integrity and procreative choice”).

21. See supra notes 15, 19 and accompanying text (noting that the applicable law is contract law when IVF disputes involve the existence of a prior consent agreement).

22. See Davidoff, supra note 20, at 150. Davidoff discusses the different effects of embryo status on the enforceability of disposition agreements. See id. He states that protection of embryos as persons would presumably render embryo-disposition agreements that called for destruction of the embryos unenforceable; however, an embryo-as-property theory or an embryo-deserving-special-respect theory implies that “there would be few, if any, limitations on the disposition” of the embryos. See id.

23. See Shapiro, supra note 10, at 24 (concluding that the virtual nonexistence of reproductive regulation may be due to the “politically charged nature of the issue of assisted human reproduction,” the rate at which scientific advancement is proceeding, or the special value placed upon the individual’s right to privacy in procreative choice).

24. See generally infra Part I.D (recognizing the few states that have passed legislation with respect to the classification and disposition of embryos prior to implantation).
ownership dilemma. As use of the procedure increases, however, the potential for debate also will increase, promoting a need for proper guidance to help in answering the moral, ethical, legal, and social policy questions that these procedures raise.

This Comment first explains how constitutional rights to privacy, procreation, and parentage extend to reproductive technology techniques. Next, this Comment examines the current statutory law pertaining to IVF, noting that the few states that have acknowledged the controversy do not have a uniform perspective. This Comment then analyzes the recent caselaw concerning ownership rights to reproductive material by addressing the various classifications suggested for frozen embryos and the legality of IVF consent agreements. Lastly, although recognizing that contract law provides a useful means of resolving disputes over embryo disposition, this Comment argues that IVF consent agreements are essentially futile if the donors' contractual intent conflicts with state law or

25. See York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989) (deciding that the dispute over a remaining frozen embryo was a contractual dispute because the cryopreservation agreement between the parties had created a "bailment" relationship); Del Zio v. Presbyterian Hosp. of N.Y., No. 74 Civ. 3858, slip op. at 7-8, 11, 16 (S.D.N.Y. Nov. 14, 1978), available in 1978 U.S. Dist. LEXIS 14450 (awarding IVF participants damages for intentional infliction of emotional distress because a physician destroyed their embryo, but rejecting the plaintiffs' conversion of property claim); Kass v. Kass, 696 N.E.2d 174, 181 (N.Y. 1998) (holding that a prior informed-consent agreement was controlling in a dispute over cryopreserved embryos); AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, at 24-25, 28 (Mass. Prob. & Fam. Ct., Suffolk County, Mar. 25, 1996) (granting a permanent injunction against the wife to prohibit embryo implantation because the court considered the couple's situation to be drastically different from the time when they initially agreed to participation in the IVF procedure); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (awarding preembryo custody to the husband in order to avoid unwanted parenthood); see also Custody Questions: Divorcing Couple's Fight over the Fate of its Embryos Prompts Smart Move to Take Issue out of the Courts, THE PHILADELPHIA INQUIRER, Oct. 10, 1998, at A10 [hereinafter Custody Questions] (discussing a court's recent decision ordering the destruction of seven frozen embryos against the husband's wishes to preserve them for use with another woman or for donation to an infertile couple; the case is on appeal and the embryos are being stored until a decision is reached).

26. See Kevin U. Stephens, Sr., M.D., Reproductive Capacity: What Does the Embryo Get?, 24 S.U. L. REV. 263, 265 (1997) (stating that the first IVF baby, Louise Brown, was born on July 25, 1978 in Great Britain). Since the birth of Louise Brown, the number of medically assisted reproduction procedures has grown substantially. See id. Today, new procedures such as Gamete Intra-Fallopian Transfer (GIFT), Zygote Intra-Fallopian Transfer (ZIFT), Frozen Embryo Transfer (FET), and Oocyte Donation and Surrogate Gestational Carrier exist to aid infertile couples in their attempts at conception. See id. at 265-66.

I. EXAMINING THE FUNDAMENTAL RIGHTS OF EVERY INDIVIDUAL TO PRIVACY, PROCREATION, AND PARENTAGE—DO THESE RIGHTS EXTEND TO THE PETRI DISH?

Although the right to privacy is not stated explicitly in the United States Constitution, the Supreme Court recognizes such a right in the "penumbras" of the specific guarantees in the Bill of Rights. In addition, the Court extends the idea that every American has a fundamental privacy right to activities relating to marriage, procreation, contraception, family relationships, child-rearing, and education. Indeed, the Court maintains that traditional domestic matters generally deserve sanctity from governmental intrusion; however, the Court has not hesitated to interfere in cases where the private behavior of individuals is not what the judiciary considers either "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."
A. The Judicial Origins of an Individual's Rights to Privacy, Procreation, and Parentage

The due process guarantee of liberty that the Fourteenth Amendment provides supports the idea that individuals have the right to make autonomous decisions regarding their personal and family lives. In the landmark case of Roe v. Wade, the Supreme Court solidified a woman's right to autonomy in procreational decisions, but the Court also stated that this right was not absolute. Although the Court established as fundamental the right of a woman to terminate her own pregnancy, it also maintained that a compelling state interest in protecting the life of the fetus could overcome this right. In order to determine the point at which a state's interest becomes compelling, the Court in Roe established the trimester framework. The quotations omitted).

36. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall... deprive any person of life, liberty, or property, without due process of law.").

37. See Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (recognizing that the Fourteenth Amendment protects beliefs about one's own existence, and that matters involving choices "central to personal dignity and autonomy" deserve sanctity because they are the "most intimate and personal choices a person may make"). But see Palko v. Connecticut, 302 U.S. 319, 325 (1937) (qualifying the right to personal privacy as including only rights that are "fundamental" or "implicit in the concept of ordered liberty"); see also Bowers, 478 U.S. at 191-92 (citing with approval the language in Palko).


39. See id. at 152-54 (holding that the implied right to privacy encompasses a woman's qualified right to terminate her pregnancy).

40. See id. at 153-54, 164-65 (establishing that a woman's decision to terminate her pregnancy through abortion is a fundamental right arising from the right to privacy, but restricting the right as applicable only prior to the viability of the fetus).

41. See id. at 153-54 (discussing that the implied right to privacy is broad enough to apply to an abortion decision); see also Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (declaring the breadth of the liberty provision of the Due Process Clause of the Fourteenth Amendment). But see Casey, 505 U.S. at 951-53 (Rehnquist, J., concurring in part and dissenting in part) (arguing, with three Justices joining, that the right to an abortion is not a fundamental right as are the rights to marriage, procreation, and contraception, and that the right therefore does not invoke a "strict scrutiny" analysis).

42. See Roe, 410 U.S. at 164-65 (recognizing that once the point of viability has passed, a state can proscribe abortion in the interest of the life of the fetus, except in cases where abortion is necessary to protect the life of health of the mother); see also Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) (recognizing that courts may only justify limitations on "fundamental rights" (e.g., the right of qualified citizens to vote) where there is a "compelling state interest"); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (same); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (same).

43. See Roe, 410 U.S. at 164-65. According to the trimester framework, the Court in Roe determined that a woman was free from state regulation to seek an abortion during the first trimester of her pregnancy. See id. at 164. During the stage subsequent to approximately the end of the first trimester, however, the state has the right to regulate the abortion procedure if its interest is "reasonably related" to the health of the mother. Id.
Court initiated the idea that the "compelling point" is at the end of the first trimester, maintaining that state regulation is permissible if reasonably related to the preservation and protection of the health of the mother. Consequently, the woman is free to decide, in consultation with her treating physician, whether to terminate her own pregnancy prior to this "compelling point." It is "the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child" that support a woman's right to terminate her pregnancy before viability of the fetus. This right falls within the liberty protection provision of the Due Process Clause of the Fourteenth Amendment.

The Supreme Court again upheld the right of a woman to choose an abortion before fetal viability in Planned Parenthood v. Casey. The Court, however, qualified its decision in Roe by rejecting the rigidity of a trimester framework that established the point at which a state's interests became compelling in an abortion decision. Instead of adhering to the trimester framework, the Court in Casey proposed an "undue burden" standard to evaluate state abortion restrictions imposed before fetal viability. Thus, the Court in Casey modified the standard by which to

For the stage subsequent to viability of the fetus, the Court determined that the state’s interest in the life of the fetus is sufficiently compelling to regulate, and even proscribe, abortion, except where necessary to protect maternal life or health. See id. at 164-65.

44. See id. at 163 (providing that at approximately the end of the first trimester, state regulation is permissible if it relates to the "qualifications of the person who is to perform the abortion; [or] to the licensure of that person; [or] to the facility in which the procedure is to be performed").

45. See id. at 159, 163 (explaining that there is a point in a woman’s pregnancy where her interest is "no longer sole," and at this point her right to privacy must be measured against the state’s right “to decide that . . . another interest, that of health of the mother or that of potential human life, [is] significantly involved").

46. See id. at 170 (Stewart, J., concurring).

47. See id. at 164 (striking down as unconstitutional the Texas statute which criminalized abortions except those medically necessary to protect the life of the mother).

48. 505 U.S. 833, 846 (1992) (recognizing and afferring all three parts of the holding in Roe). First, a woman has the right to have an abortion and “to obtain it without undue interference from the State” before fetal viability. Id. Second, the State has the power to restrict a woman’s right to an abortion after viability of the fetus, except for when an abortion is necessary to protect the life or health of the mother. See id. Third, the interests of the State in protecting the health of the woman and the life of the fetus are legitimate interests. See id.

49. See id. at 876; see also Webster v. Reproductive Health Servs., 492 U.S. 490, 519 (1989) (recognizing that there does not have to be a "rigid line" designating the point of viability after which a state may regulate but before which it may not).

50. See Casey, 505 U.S. at 876-77 (defining an "undue burden" as a "state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").
judge a state's interest in protecting a potential life, but it did not disturb Roe's essential holding that a state's power begins at viability.\(^{51}\)

The Court previously had emphasized the fundamental rights of an individual to privacy, procreation, and parentage in Stanley v. Illinois.\(^{52}\) The Court in Stanley stated that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights' . . . and '[r]ights far more precious than property rights.'\(^{53}\) This distinction, that rights involving parenthood carry more weight than rights to personal property, is precisely the reasoning that governs states' decisions regarding ownership rights to frozen embryos.\(^{54}\)

**B. Examining the Constitutional Privacy Rights Negatively—A State Court Suggests that the Rights Not To Procreate and Not To Become a Parent Are More Significant than the Rights To Procreate and To Become a Parent**

In 1992, the Tennessee Supreme Court, in Davis v. Davis,\(^{55}\) confronted a marital dispute over the disposition of seven cryopreserved embryos.\(^{56}\) In Davis, the parties attempted unsuccessfully for years to conceive through the help of IVF.\(^{57}\) Frustrated, the couple divorced, leaving the

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51. See id. at 846, 876; cf. David Stoller, Prenatal Genetic Screening: The Enigma of Selective Abortion, 12 J.L. & HEALTH 121, 135 (1998) (arguing that the Court's reasoning in Roe and Casey allows an abortion based upon pre-natal genetic screening because these tests can be performed far in advance of the point of viability of the fetus).

52. 405 U.S. 645 (1972).

53. Id. at 651 (citations omitted); see also Kerian, supra note 1, at 120-21 (discussing the fundamental right of parents to "bear [and] beget" children, unless a compelling state interest justifies intervention).

54. See infra Part I.B (explaining that state courts prefer embryo disposal over implantation due to the importance of an individual's right to avoid forced parenthood); see also Kerian, supra note 1, at 121-22 (discussing the contention that the right to privacy includes a fundamental right to procreate including procreation through surrogacy or other medically available options).

55. 842 S.W.2d 588 (Tenn. 1992).

56. See id. at 589. The parties in Davis were able to agree on all aspects of the dissolution of their marriage, except for the ownership of seven frozen embryos. See id. Mary Sue Davis originally brought suit for the purpose of gaining control over the embryos with the hopes of conceiving a child after her divorce. See id. The trial court awarded her custody of the embryos to afford her the "opportunity to bring [them] to term through implantation." Id. (internal quotations omitted). The court of appeals, however, reversed, concluding that Junior Davis, Mary Sue's ex-husband, had a "constitutionally protected right not to beget a child where no pregnancy has taken place." Id. (internal quotations omitted).

57. See id. at 591-92 (detailing the woman's attempts to become pregnant). Prior to the couple's attempts to use IVF, Mary Sue Davis had five extremely painful tubal pregnancies resulting in the ligation of both of her fallopian tubes. See id. at 591. After encountering problems with adoption, IVF was the Davises' only remaining option. See id.
issue of ownership over their stored, fertilized embryos as the source of much debate. The issue in Davis concerned the appropriate legal characterization of the embryos because the wife viewed the embryos as potential human beings whereas the husband viewed the embryos as marital property.

The court in Davis analyzed each of the parties' arguments and concluded that cryopreserved embryos were neither "persons" as the wife claimed nor "property" as the husband suggested. Instead, the court initiated the idea that the embryos were something more than simply human tissue but less than complete persons and, therefore, deserved "special respect." The court's interim classification awarded the em-

Mrs. Davis unsuccessfully underwent the IVF procedure six times at a total cost of $35,000 before the advent of cryopreservation. See id. Once their clinic offered cryopreservation as an option, Mary Sue Davis opted to try the freezing technique to avoid further painful aspiration procedures. See id. at 592. The couple's seventh attempt at IVF provided nine ova for fertilization; seven of which were fertilized and frozen for subsequent conception attempts. See id.

58. See id. (noting that there was no indication that the parties ever considered what would become of their remaining embryos and that the clinic never discussed with the couple what would happen to their embryos in the event of any unforeseen events, such as divorce). There is sharp division over how to handle unimplanted embryos. Compare Puskar, supra note 10, at 776-80 (discussing the Vatican's plan for the "pre-natal adoption" of frozen embryos in order to bring unwanted embryos to term), with Brown, supra note 7, at 236-37 (concluding that regulations that prohibit preembryo discard violate the donors' right to procreative liberty and are unconstitutional absent a compelling state interest).

59. See Davis, 842 S.W.2d at 593-94, 598 (noting the discussion on the record regarding the proper descriptive terminology to use, because denotation of a four- to eight-celled entity as a "child" would define the embryo's legal status differently than if it were referred to as a "preembryo"). Mary Sue Davis characterized the embryos originally as "human beings" and won at the trial court level with the argument that "human life begins at the moment of conception." Id. at 594 & n.16. Before the Supreme Court of Tennessee heard the case, however, Mrs. Davis changed her position and characterized the embryos as "potential life" instead of "human beings." See id. at 594 n.16. Junior Davis did not explicitly call the embryos "property," but he referred to them as "two or eight cell tiny lumps of complex protein" in his brief. See id. at 598. The court of appeals, ruling in favor of Mr. Davis, also did not state that the embryos were "property," but it held that the parties shared an "interest" in the embryos, indicating that it believed them to be more like property than persons. See id. at 595-96. The court of appeals also relied on York v. Jones, 717 F. Supp. 421, 424-25 (E.D. Va. 1989), which reasoned that an embryo was "property" for the purpose of deciding a dispute over ownership. See id. at 596.

60. See Davis, 842 S.W.2d at 594-97 (rejecting the trial court's analysis that the embryos were "children in vitro" and, therefore, deserved to be born, rather than destroyed); cf. Roe v. Wade, 410 U.S. 113, 158, 162 (1973) (concluding that the Fourteenth Amendment's use of the word "person" does not include the unborn, and that "the unborn have never been recognized in the law as persons in the whole sense").

61. See Davis, 842 S.W.2d at 595-97 (rejecting the court of appeals' characterization of the embryos as mere property).

62. See id. at 596-97 (contemplating the "person" versus "property" dichotomy based
bryos more respect than property, but less respect than that accorded to living beings, because although the embryo represented more than a mere collection of cell tissue, its status as a human was still only "potential." 63

Thus, the court in Davis rejected both an embryo-as-person and embryo-as-property analysis of this issue, and instead balanced the interests of the parties based upon their individual constitutional rights to have or, alternatively, not to have children. 64 The court maintained that without the benefit of a prior consent agreement indicating the parties' intentions at the time they agreed to IVF participation, the interests of the party desiring to avoid genetic parenthood were more significant than the burden imposed on the procreational autonomy of the other donor. 65 As a result, the court in Davis refused to allow either implantation or adoption of the seven embryos, and instead, awarded the embryos to the fertility clinic to dispose of in accordance with its normal procedure. 66

C. Prior Consent Agreements Provide Individuals with the Opportunity to Outline Their Personal Interests in Procreation or in Avoiding Procreation Prospectively

The court in Davis recognized that the existence of a prior agreement

upon the three categorizations presented by the American Fertility Society. The Society suggests three ethical positions in the debate over embryo status: 1) that embryos be afforded the same rights as people; 2) that embryos are no different from human tissue; or 3) that the embryo occupies an "intermediate position," somewhere between persons and tissue due to both their potential for life and the symbolic meaning of a preembryo for many people. See id. at 596; see also Ethics Committee of the American Fertility Society, 53 FERTILITY AND STERILITY supp 2, 34S-35S (1990) [hereinafter American Fertility Society's June 1990 Report] (articulating the different views in the embryo status debate).

63. See Davis, 842 S.W.2d at 596-97 (concluding that the preembryos are entitled to special respect in accordance with the American Fertility Society's June 1990 Report); see also American Fertility Society's June 1990 Report, supra note 62, at 34S-35S (recognizing that the "special respect" classification is the most widely accepted view in the preembryo status debate).

64. See id. at 603-04 (placing Junior Davis's right to avoid procreation above Mary Sue's right to engage in procreation because it agreed with Junior's testimony that "[d]onation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited").

65. See id. (describing the court's attempt to balance the interests of the parties).

66. See id. at 605. The court's ruling awarded the embryos to the couple's fertility clinic; however, the court was not aware that the clinic's "normal procedure" was to donate any surplus embryos to a childless couple. See Davis v. Davis, No. 34, 1992 WL 341632, at *1 (Tenn. Nov. 23, 1992) (per curiam). Because this result was exactly what the court rejected when it ruled in Junior's favor, it subsequently remanded the case for further proceedings. See id. at *2. The issue to decide on remand was whether to donate the embryos for approved research, which would require the consent of both parties, or to otherwise discard them. See id.
might have eliminated the need to analyze the characterization of the embryos in deciding the ownership dispute. The court did not have the benefit of a prior agreement, though, because the parties did not execute one before participating in the IVF procedure. The New York Court of Appeals in *Kass v. Kass* did have the benefit of a prior consent document when it confronted a similar issue. Like *Davis*, the issue in *Kass* was whether implantation would be permitted where one of the parties to IVF subsequently objected to the use of the frozen embryos for purposes of conception.

In *Kass*, the couple underwent nine unsuccessful attempts in three years to have a child through IVF, but only their final IVF procedure involved cryopreservation. Consequently, prior to the last of their IVF attempts, the clinic required that the parties sign a consent document regarding disposition of the embryos before they could begin the egg retrieval process. The document that both parties signed gave the IVF clinic permission to examine, for biological studies, any embryos that remained from their IVF participation and to dispose of them for approved research investigation if the parties no longer wished to initiate a pregnancy or were unable to make an independent decision as to disposition.

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67. See *Davis*, 842 S.W.2d at 590 (noting that two critical factors were missing that potentially could have influenced the outcome of the litigation: 1) the existence of a written agreement regarding disposition of the embryos; and 2) statutory law governing disposition).

68. See *id.* at 592 & n.9 (noting that there was no agreement because “the clinic was in the process of moving its location [and] ... it was impossible to postpone the procedure until the appropriate forms were located”).


70. See *id.* at 179 (indicating that the issue over which party had authority over the embryos was answered by the parties’ original consent agreement; therefore, the court did not address whether the embryos were entitled to “special respect” as suggested by *Davis*).

71. See *id.* at 175.

72. See *id.* at 175-76. The wife went through the egg-retrieval procedure five times and went through nine implantations. See *id.*

73. See *id.* at 176-77 (explaining the provisions of each of the consent forms signed by both parties with respect to disposition of any remaining fertilized embryos).

74. See *id.* On May 12, 1993, the couple gave their IVF physician permission to retrieve as many eggs as medically possible by signing Addendum No. 1-1 to the clinic’s General Informed Consent Form No. 1. See *id.* at 176. Their agreement to allow more eggs than necessary to be retrieved during one aspiration required the parties to sign the “Additional Consent Form for Cryopreservation [Informed Consent Form No. 2].” *Id.* The first part of the Informed Consent Form No. 2 provided that the parties decide how to dispose of the pre-zygotes in the event of any unforeseen conditions. See *id.* The couple indicated that: 1) the excess eggs were to be inseminated and cryopreserved for possible
Relying on the *Davis* court's acknowledgment that if a prior agreement existed, it would have been presumed valid and controlling, the *Kass* court maintained that the existence of the parties' consent document controlled the dispute over their frozen embryos. In order to determine whether the signed agreement indicated the original intentions of the parties, the court in *Kass* applied the principles of contract law. Because a tangible document existed to indicate the donors' intent at the time of their participation in the IVF procedure, the court did not have to address the issue of whether the embryos were entitled to special respect. Ultimately, the court in *Kass* held that the parties' consent document was a valid and binding contractual agreement that clearly and unequivocally expressed the couple's intent to donate the embryos for research purposes in the event that the parties were unable to come to an agreement on how to dispose of them.

**D. The Variations of Statutory Law with Respect to the Classification and Disposition of Frozen Embryos Prior to Implantation**

Currently, only six states have initiated specific legislation attempting to resolve the problems associated with IVF. The extent to which each

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75. *See* *Davis v. Davis*, 842 S.W.2d 588, 597-98 (Tenn. 1992) (discussing the enforceability of a prior contingency agreement and concluding that "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors").

76. *See* *Kass*, 696 N.E.2d at 178-79 (recognizing that, based on its reading of *Davis*, "any prior written agreement ... should be presumed valid, and implemented," lest courts balance the competing interests of the gamete providers).

77. *See* id. at 180-81. Mrs. Kass claimed the consent forms were "fraught with ambiguity" regarding the disposition of the embryos; hence, they did not express clearly the intentions of the parties. *See* id. at 180. Mr. Kass maintained that the consent forms were clear, and "plainly mandate[d] transfer to the IVF program." *Id.*

78. *See* id. at 179.

79. *See* id. at 182; cf. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (en banc) (supporting the validity of a gestational surrogacy contract after the host mother objected to relinquishing the baby). The court in *Johnson* examined the document in order to determine the intent of the parties and found that the document clearly expressed the parties' intent to use the surrogate only for the purpose of facilitating procreation. *See* id. Therefore, the court awarded custody to the parents who originally intended to bring the child into being. *See* id.

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of these states has set guidelines varies greatly.\textsuperscript{81} Furthermore, the states do not categorize the embryos within the interim classification structure that the Davis court suggested.\textsuperscript{82}

\textsuperscript{81} Compare LA. REV. STAT. ANN. §§ 9:123, 129 (affording frozen embryos the same status as biological human beings and consequently making intentional destruction unlawful), with KAN. STAT. ANN. § 65-6702 (providing that embryo disposition is lawful), and N.H. REV. STAT. ANN. §§ 168-B:13, 168-B:21 (stating that IVF is only available to donors who, among other requirements, receive counseling and obtain judicial preauthorization of all required written consent agreements).

\textsuperscript{82} See supra Part I.B (discussing the Davis case). An issue for the court in Davis was whether the embryos were “persons” or “property.” See Davis v. Davis, 842 S.W.2d 588, 594-97 (Tenn. 1992). The court decided, however, that it could not classify the embryos as either “persons” or “property” because the embryos did not fit neatly into either category. See id. at 597. The court’s rationale was that the embryos deserved less respect than persons, but more respect than property. See id. Therefore, the court created a third classification—an “interim category”—and awarded the embryos “special respect.” See id. The
1. One State's Classification of Embryos as Persons Legislatively Imposes Their Right to Life

Interestingly, the state with the most comprehensive measures to regulate IVF is the state that maintains the most controversial position. Although many of the judicial decisions regarding the disposition of frozen embryos conform to the Davis interpretation—that the embryos do not deserve the respect afforded persons because they may never realize their biologic potential—the Louisiana statute states explicitly that "[a]n in vitro fertilized human ovum exists as a juridical person." Louisiana maintains that, as people, the embryos are separate entities with the legal capacity to sue or be sued. With respect to ownership of the "human embryo[s]," Louisiana asserts that a fertilized embryo is a "biological human being" that is not the donor's property.

As might be expected from Louisiana's characterization of the embryos as human beings, the statute expressly punishes the intentional destruction of the embryos. Thus, the ovum must be made available for

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states that have passed legislation regarding IVF, nevertheless, do not classify the embryos uniformly in this "interim category"; some equate them with persons, others with property (i.e., human tissue). Compare LA. REV. STAT. ANN. § 9:126 (defining "[a]n in vitro fertilized human ovum [as] a biological human being"), with N.H. REV. STAT. ANN. § 168-B:1 (1994) (defining a preembryo as a "cell mass that results from fertilization of an ovum prior to implantation").

83. See LA. REV. STAT. ANN. §§ 9:123-33 (maintaining that embryos that result from the IVF procedure are "juridical person[s]" and deserve rights approximating those of human beings).

84. See Davis, 842 S.W.2d at 596 (detailing the American Fertility Society's "intermediate" approach which suggests affording embryos "special respect" because they are neither persons nor property); see also Kass, 696 N.E.2d at 179 (concluding that the prezygotes were not "'persons' for constitutional purposes"); AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, at 19 (Mass. Prob. & Fam. Ct., Suffolk County, Mar. 25, 1996) (adopting the Davis court's "'special status' approach"). But see York v. Jones, 717 F. Supp. 421, 426-27 (E.D. Va. 1989) ("recognizing the plaintiff's proprietary rights in the pre-zygote").

85. LA. REV. STAT. ANN. § 9:123.

86. See §§ 9:124-125.

87. Id. §§ 9:121 (defining a human embryo as "an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child"). The state of Louisiana classifies the capacity, legal status, separate entity, ownership, responsibility, qualifications, destruction, duties of donors, judicial standard, liability, and inheritance rights of the in vitro fertilized human ovum under the Chapter 3 heading, "Human Embryos." See id. §§ 9:123-33.

88. See id. § 9:126 (allowing patients' rights as parents to be preserved if their identity is expressed and, if no identity is expressed, the physician is deemed a temporary guardian of the ovum until implantation can occur).

89. See id. § 9:129. Louisiana provides that the in vitro fertilized human ovum deserves separate recognition from the medical facility or clinic that stores it, yet the physician or medical facility that performs the IVF procedure is responsible directly for the
adoptive implantation if the IVF patients renounce their parental rights.90 Employing the principles of family law, Louisiana examines the “best interests of the child” to resolve disputes that arise between the parties regarding their IVF embryos.91 Louisiana places great emphasis on the fact that, although the IVF patients do not own the embryos, they still owe them a “high duty of care and prudent administration.”92

2. Examining the States that Provide Legislative Guidance for Donors and Medical Facilities By Requiring a Contractual Agreement Regarding Disposition Prior to IVF Participation

Although Louisiana’s legislative focus is on protecting the lives of the embryos, other states concentrate their legislative efforts on the reproductive decisions of the donors.93 Florida law, in particular, requires a written agreement similar to the one relied on in *Kass*, whereby the commissioning couple and the treating physician provide for the disposition of the ovum’s safekeeping. See *La. Rev. Stat. Ann.* §§ 9:125, 127. At least one commentator finds Louisiana’s solution to be short-sighted and potentially a source of more problems than it purports to solve. See Stephens, *supra* note 26, at 268-69 (questioning Louisiana’s law punishing the intentional destruction of frozen embryos, due to the potential for the embryos to exist for years or even decades after the death of the donors who provided the eggs and sperm that created them).

90. See *La. Rev. Stat. Ann.* § 9:130; see also *Puskar, supra* note 10, at 776-80 (quoting a member of the Catholic Church who called the destruction of frozen embryos “‘prenatal slaughter,’ where ‘tens of thousands of innocent lives will be legally cut short’” and highlighting the Vatican’s proposal that married women volunteer to bring unwanted embryos to term (internal quotations omitted)). The Church’s suggestion, that frozen embryos should be brought to term by married women, should not be interpreted as an implicit approval of the IVF process by the Church; it is staunchly opposed to the IVF procedure. See *id.* at 778.

91. See *La. Rev. Stat. Ann.* § 9:131 (stating that “[i]n disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum”).

92. *Id.* § 9:130. If the couple does not want the embryos, then they may renounce their parental rights and make the embryos available for adoption, but they may not receive any compensation for such renunciation. See *id.*

93. See *Colo. Rev. Stat.* § 19-4-106 (1998) (addressing parental responsibilities and custody rights of artificial insemination donors); *N.Y. Dom. Rel. Law* § 73, 123-24 (McKinney 1988 & Supp. 1999) (same). The states of Colorado and New York provide that in cases where a married woman is artificially inseminated with semen donated by a man not her husband, that the husband, not the semen donor, is the natural father of a conceived child. See *Colo. Rev. Stat.* § 19-4-106; *N.Y. Dom. Rel. Law* § 73 (McKinney 1988); see also McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (App. Div. 1994) (holding that in cases where a woman gives birth to a child formed from the egg of another woman, but intends to raise the child as her own, the birth mother is the natural mother for custody purposes). Thus, by statute and judicial interpretation, New York extinguishes the parental rights of sperm/egg donors when these individuals do not have an intent to raise the child that results from a successful implantation. See *N.Y. Dom. Rel. Law* § 73; *McDonald*, 608 N.Y.S.2d at 480.
tion of any eggs, sperm, or embryos in the event of death, divorce, or an unforeseen circumstance. In addition, Florida law provides for the resolution of similar disputes in the absence of a prior written agreement. By prescribing a prior written agreement, Florida forces IVF patients to consider specifically how they wish to dispose of any resulting embryos before attempting to conceive through IVF.

Similarly, New Hampshire requires a prior agreement from IVF participants; however, New Hampshire further requires judicial preauthorization for any proposed surrogacy arrangement. New Hampshire attempts to ensure that donors are well informed with respect to the IVF process by statutorily outlining the requirements necessary to participate in IVF and insisting that each donor receive counseling prior to the embryo transfer procedure. Under New Hampshire’s surrogacy law, the wife and husband, if the woman is married, must indicate in a written agreement their acceptance of the legal rights and responsibilities of parenthood for any children that result from their participation in IVF.

3. States Are at Odds as to Whether Disposition Should Be Lawful or Unlawful

There is sharp disagreement among the states regarding the legal disposition of cryopreserved embryos. As mentioned above, Louisiana law provides that destruction of the embryos is unlawful because it con-

95. See id. (stating that, absent a written agreement, there are three options: 1) if the eggs and sperm are not yet fertilized, each party retains ownership of his/her own material; 2) if fertilization has taken place, the couple has joint decision making authority; and 3) if one of the donors has died, the survivor retains control of any eggs, sperm, or preembryos).
96. See id.
97. See N.H. Rev. Stat. Ann. § 168-B:21 (1994) (stating that the parties to IVF must jointly petition the court for judicial preauthorization of the surrogacy arrangement in order to participate in IVF or embryo transfer to a surrogate).
99. See id. § 168-B:13(IV)(c) (1994). The language of the statute seems to suggest that if the woman is not married, but otherwise meets the statutory requirements, her nonmarital partner does not need to receive consultation. See id.
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siders the embryos to be biological persons. In contrast, Florida maintains that disposition is lawful, but requires that the commissioning couple jointly agree on disposition.

Although the New Hampshire statute does not address disposition specifically, it mentions donation for research purposes, implying that experimentation on embryos—which presumably would result in eventual disposal—is permissible. Kansas statutes agree with Florida statutes that disposition is lawful when jointly decided by the donors, but Kentucky maintains that a public medical facility's intentional destruction of an embryo is unlawful. Thus, it is evident that the "person" versus "property" characterization of embryos is not determinative in the dispute over disposition versus implantation because some states clearly consider disposition unlawful even though they do not classify the embryos as living persons.

II. AN ANALYSIS OF THE SOLUTIONS PROPOSED BY THE COURTS THAT HAVE ADDRESSED CONTROVERSY OVER CRYOPRESERVED ENTITIES

State courts apply a generally uniform analytical method to controversies over entities stored in cryobanks for the purpose of future implantation. Although the courts recognize that the embryos possibly have the ability to grow into human beings, they nonetheless place the interests of the progenitors above the interests of the potential lives. The courts

101. See LA. REV. STAT. ANN. §§ 123, 129.
102. See FLA. STAT. ch. 742.17 (requiring that the commissioning couple provide for the disposition of any eggs, sperm, or embryos in a prior written agreement, or absent a written agreement, decide upon it jointly).
103. See N.H. REV. STAT. ANN. § 168-B:15 (1994) (stating that embryo transfer is unlawful once research is performed upon an embryo).
104. See KAN. STAT. ANN. § 65-6702 (prohibiting the state or any political subdivision of the state from prescribing the "use of any drug or device that inhibits or prevents ovulation, fertilization or implantation of an embryo and disposition of the product of in vitro fertilization prior to implantation" (partial emphasis added)).
105. See KY. REV. STAT. ANN. § 311.715 (prohibiting the use of public funds for abortion or in vitro fertilization and prohibiting use of public medical facilities for intentional destruction of embryos).
106. See FLA. STAT. ch. 742.17 (allowing frozen embryos to be disposed of only if the couple agrees to it jointly; however, not defining embryos as "property"); KY. REV. STAT. ANN. § 311.715 (denying the option of disposition if public funds or facilities are involved, even though the embryos are not classified as human beings).
108. See supra note 107 and accompanying text (discussing state court decisions or-
focus their judicial inquiry on balancing the interests of the parties, and mandate that the real issue involving embryo ownership is whether the parties desire to become parents. The court in *Davis* suggested that in the absence of a contingency agreement providing guidance, courts must use a fact-specific analysis to decide which partner prevails in an embryo-ownership dispute. Ultimately, the courts look to the burden that forced parenthood would impose upon the objecting party to determine whether his/her burden outweighs the other party's interest in procreation.

A. Sensitivity Precludes a Bright-Line Rule: Seven Suggestions to Resolve the Dilemma over Frozen Embryo Ownership

The court in *Davis* acknowledged that a bright-line rule with respect to the frozen-embryo-ownership dilemma would dispose of these disputes "in a clear and predictable manner." The court, however, refused to elect an unconditional rule in part due to the "ethical considerations that have developed in response to... scientific knowledge."

The court in *Davis* noted that according to various medical-legal scholars and ethicists, there are seven possible models for the disposition of frozen embryos: 1) to donate all embryos that the gamete-providers do not use; 2) to discard all embryos that the gamete-providers do not dering the destruction of embryos).

109. *See* e.g., *Davis*, 842 S.W.2d at 598.

110. *See id.* at 603-04 (looking to the burden each party would bear if judgment were entered against them).


112. *Davis*, 842 S.W.2d at 590-91 (recognizing "the virtue of ease of application" if only the court would adopt one of the options various medical-legal scholars and ethicists have proposed regarding cryopreserved embryos).

113. *Davis*, 842 S.W.2d at 591 (deciding that the moral, ethical, and legal considerations that accompany such a delicate issue require a case-by-case analysis rather than a bright-line rule); *see also* Siegel, supra note 4, at 43 (underscoring the complexity of a bright-line test for frozen embryo ownership due to the significant controversy and intense emotion that accompany this issue).

114. *See Davis*, 842 S.W.2d at 590-91 (commenting on the absence of a written agreement, statutory law, and caselaw that would otherwise govern or guide the court regarding the issue of disposition; therefore, looking to the comments and analysis contained in various legal journals to guide its reasoning). Recently, the New York State Task Force on Life and the Law articulated a possible eighth disposition model suggesting that "no embryo should be implanted, destroyed or used in research over the objection of an individual with decision-making authority." *See* Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).

115. *See Davis*, 842 S.W.2d at 590 & n.3 (citing Colleen M. Browne & Brian J. Hynes, Note, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uni*
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use, to vest control of the embryos solely with the female provider; to allow the IVF clinic to control the embryos in the event of an impasse; to infer that the parties have made an irrevocable commitment to reproduction [that] would require transfer either to the female provider or to a donee; to divide the remaining embryos equally between the parties, or 7) to give veto power to the party wishing to avoid parenthood.

Indeed, the Tennessee Supreme Court recognized the utility of choosing one of these options as a uniform means of resolving future disputes; however, it concluded that the issue required a fact-specific inquiry in every case in order to be fair to the parties involved.

Therefore, the court in Davis held that the first step in deciding controversies over embryo disposition is to consider the preferences of the progenitors. If the donors’ wishes conflict or are unascertainable, then any prior agreement regarding disposition controls. In the event that there is no prior agreement, a court must weigh the relative interests

116. See id. at 590.
117. See id. at 590 & n.4 (describing the “sweat-equity” model as entitling the female to control over the embryos due to “her greater physical and emotional contribution to the IVF process”) (citing John A. Robertson, Resolving Disputes Over Frozen Embryos, 19 Hastings Center Rep., Nov./Dec. 1989, at 7, 7-8 (rejecting this approach)); cf. Lori B. Andrews, The Legal Status of the Embryo, 32 Loyola L. Rev. 357, 404 (1986) (commenting on an alternative model that vests control with the female only when she wishes to use the embryos herself).

118. See Davis, 842 S.W.2d at 590-91 (describing one of the two “implied contract” models).
119. Id. (describing the second of the two “implied contract” models); see also Tanya Feliciano, Note, Davis v. Davis: What About Future Disputes?, 26 Conn. L. Rev. 305, 344-46, 348 (1993) (asserting that an implied contract model is the most equitable approach for determining the disposal of unused frozen embryos); Mario J. Trespalacios, Comment, Frozen Embryos: Towards an Equitable Solution, 46 U. Miami L. Rev. 803, 828-29 (1992) (same).

120. See Davis, 842 S.W.2d at 591 & n.6 (describing one of the two “so-called ‘equity models’” as being the “worst of both worlds” because neither gamete-provider would be satisfied with the result).
121. Id. at 591.
122. See id. at 590-91. In arriving at the conclusion that none of the proposed models was sufficient to establish a defined rule, the court recognized that given the relevant principles of constitutional law, the existing public policy of Tennessee with regard to unborn life, the current state of scientific knowledge giving rise to the emerging reproductive technologies, and the ethical considerations that have developed in response to that scientific knowledge, there can be no easy answer.

123. Id. at 604.
124. See id.
of each donor. For this inquiry, the court elected a variation of the seventh model which, as suggested, gave the objecting party the power to veto use of the embryos for purposes of conception. The court in *Davis* concluded that in weighing the relative interests of the parties in disputes over frozen embryo ownership, the donor wishing to avoid procreation ordinarily should prevail over the donor who desires to conceive.

**B. An Examination of the Person Versus Property Dichotomy**

In *Davis*, the lower courts split regarding the issue of whether the embryos were persons or property. The trial court determined that the embryos were human at the moment of conception and thus deserved a chance at life. The court of appeals, however, recognized “that ‘the parties share[d] an interest’” in the embryos and treated them more like marital property. As a consequence of the appellate court’s failure to define this “interest” more specifically, the Supreme Court of Tennessee decided to address the proper characterization of frozen embryos.

An argument for awarding rights approximating those of human beings to four- to eight-celled embryos is that these embryos are already fertilized at the time that they are preserved. Therefore, scientifically,
frozen embryos have a unique genetic identity and the potential for life. In contrast to this argument, the embryos, though fertilized, have not developed to the point where they can be considered autonomous when they are cryopreserved for future implantation. This opposite argument, therefore, begs the result that embryos cannot be counted or given the same rights as sovereign members of a state because they more closely resemble items of property while they are stored stagnantly in liquid nitrogen containers.

The Davis court determined that the embryos were neither persons nor property, but instead occupied an "interim category," deserving of "special respect." The special respect classification the court implemented afforded the embryos more rights than human tissue, but less rights than actual living beings.
In awarding the embryos less respect than if they were considered humans, the Tennessee court's rationale complied with the Supreme Court's reasoning in *Roe v. Wade* and *Planned Parenthood v. Casey.* The Supreme Court in *Roe* afforded women the constitutional right to terminate their pregnancies without state interference prior to viability of the fetuses in part because the fetuses were not capable of surviving on their own before this point. Similarly, the court in *Davis* reasoned that "if the state's interests do not become sufficiently compelling in the abortion context until the end of the first trimester, after very significant developmental stages have passed, then surely there is no state interest in these preembryos which could suffice to overcome the interests of the gamete-providers." The court gave paramount importance to the "dramatic change" pregnancy brings to the lives of the donors and concluded that the issues that forced maternity or paternity present supersede a potential child's right to life. Thus, the potential lives of the embryos are "not sufficient to justify any infringement upon the freedom of these individuals to make their own decisions." By using this analysis, at least in the context of IVF, state courts can consider the donors' interests first and, therefore, dispense with trying to classify the preembryos conclusively as either persons or property.

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139. 410 U.S. 113, 162 (1973) (noting that "the unborn have never been recognized in the law as persons in the whole sense"); *Davis*, 842 S.W.2d at 595, 601 (referencing *Roe v. Wade*).

140. 505 U.S. 833, 870-71 (1992) (maintaining that the state's interest in fetal life is not enough to justify a legislative ban on nontherapeutic abortions before the point of viability); *see also* *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 529 (1989) (O'Connor, J., concurring) (noting that "viability remains the ‘critical point’"); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring) ("No member of this Court has ever suggested that a fetus is a ‘person’ within the meaning of the Fourteenth Amendment."). *overruled by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

141. *See* *Roe*, 410 U.S. at 162-63 (reasoning that the state's interest in protecting the potential life of the fetus becomes compelling at viability because it is at this point that the fetus "has the capability of meaningful life outside the mother's womb"); *see also* *Casey*, 505 U.S. at 870 (defining viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb").

142. *Davis*, 842 S.W.2d at 602 (footnote omitted).

143. *See id.* at 603 & n.28 (acknowledging the haunting feelings of regret and concern, associated with the birth of a child, that occur when genetic parents do not have contact with their children).

144. *Id.* at 602.

145. *See Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998) (deciding to ignore whether the embryos are entitled to special respect and instead concentrate on the interests of the parties as evidenced by their prior consent agreement); *Davis*, 842 S.W.2d at 604 (establishing...
C. Balancing the Interests of the Parties Without the Benefit of a Prior Consent Document: Courts Prevent Procreation When One Party Objects

In analyzing disputes over disposition, the court in *Davis* suggested that the first step is to consider the interests of the involved parties. In *Davis*, though, the court did not have the benefit of a prior consent agreement to look to in determining what the interests of the progenitors were. Without a prior agreement, the court was forced to intervene to decide what was best for the IVF participants. In its conclusion, the *Davis* court initiated the idea that "the party wishing to avoid procreation [ordinarily should] prevail."

In evaluating the interests of the progenitors, the Tennessee Supreme Court recognized that IVF does not concern interference with a woman's bodily integrity, as does an abortion decision. The controversy over whether to implant or dispose of the preembryos occurs before the clinic implants the entities into the woman's womb; thus, the fetus is not actually growing inside the woman's body when the decision to carry or dispose of the potential life is made. Therefore, unlike abortion, the female IVF participant does not have greater decision-making power over the male participant with respect to whether to implant or dispose of the frozen embryos. With IVF, the burden imposed on the woman is no greater than the burden imposed on a man; that is, neither has committed yet to the pregnancy; therefore, neither party has greater decision-making power that the donors' interests be considered first in disputes regarding embryo disposition).

146. *See Davis*, 842 S.W.2d at 604 (summarizing the steps to take in resolving frozen embryo ownership disputes).

147. *See id.* at 590 (noting also that there was no Tennessee statute or caselaw addressing the disposition of frozen embryos so the court turned to medical and legal journals for guidance on this issue).

148. *See id.* at 590, 602-04 (choosing disposal over implantation due to the objection of Mr. Davis to becoming a parent, explaining that the state's interest in potential life is not substantial enough to allow encroachment upon a donor's procreational rights).

149. *Id.* at 604 (summarizing the court's holding). In arriving at this conclusion, the court discussed the novel issue presented by genetic parenthood—that "someone unknown to these parties could gestate these preembryos . . . [and] that these parties, the gamete-providers, would become parents in that event, at least in the genetic sense." *Id.* at 603.

150. *See id.* at 601.

151. *See id.* at 602 (noting that even after implantation it is questionable whether these embryos will ever result in a successful pregnancy); *cf.* Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (explaining that it is the woman's unique liberty interest in her bodily integrity that entitles her to have an abortion free from the state's interference before viability).

152. *See Davis*, 842 S.W.2d at 601; *cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976) (stating that the woman is "more directly and immediately affected by the pregnancy" because it is she "who physically bears the child").
making authority. Thus, the court in *Davis* maintained that concerns that have previously precluded men from controlling abortion decisions are not applicable to disputes over ownership rights to cyropreserved embryos.

**D. Focusing on the Interests of the Progenitors When Expressed By Prior Consent Agreements**

Whereas the court in *Davis* did not have the benefit of a prior consent agreement to determine the interests of the progenitors, the Court of Appeals of New York in *Kass* did have the couple's prior agreement, which expressed their intent at the time of their participation in the procedure. The only issue in *Kass*, therefore, was whether the couple's prior agreement was sufficiently clear to control disposition.

The parties in *Kass* agreed to divorce barely three weeks after signing the hospital's IVF consent forms. Shortly thereafter, Mrs. Kass informed her physician that she changed her mind regarding the consent instructions allowing for the destruction or release of the embryos. One month later, she requested sole custody of the embryos to attempt another implantation. As a result of this request, her husband sought specific performance of their initial consent agreement that vested control of the embryos with the IVF facility for purposes of research.
In its attempt to discern whether the consent documents reflected the true intentions of the parties, the court in *Kass* analyzed the issue in accordance with common law principles governing contract interpretation. Thus, the court examined the document as a whole and considered the parties' circumstances at the time they executed the contract. In its analysis regarding the clarity of the agreement, the court focused on the couple's "[w]ords of shared understanding—'we,' 'us' and 'our'," and concluded that the evidence indicated that both parties desired disposition to be their joint decision. Therefore, the court in *Kass* held that the prior consent document was sufficiently clear to indicate the parties' intentions and, consequently, ordered donation of the embryos to the IVF program for approved research pursuant to the agreement.

In *Hecht v. Superior Court*, the Court of Appeals of California confronted an analogous situation; however, the dispositional inquiry concerned only a man's sperm, as opposed to a fertilized entity as in *Davis* and *Kass*. Nevertheless, the court similarly attempted to discern the true intentions of the donor in examining the issue of whether the donor's wife or his adult children controlled possession of his frozen sperm.

In *Hecht*, a man donated his sperm to a sperm bank for preservation with the hope that his wife would decide to have his child after his death. A few weeks after depositing fifteen vials of sperm at the sperm

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161. *See id.* at 180-81.
162. *See id.* (stating that traditional contract interpretation dictates that "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby" in deciding whether an agreement is ambiguous).
163. *Id.* at 181.
164. *See id.* (stating that "[t]he overriding choice of these parties could not be plainer").
165. *See id.* at 182.
166. 59 Cal. Rptr. 2d 222 (Ct. App. 1996).
167. *See Hecht*, 59 Cal. Rptr. 2d at 223; *Kass*, 696 N.E.2d at 175 (dealing with cryopreserved embryos); *Davis v. Davis*, 842 S.W.2d 588, 591 (Tenn. 1992) (same).
168. *See Hecht*, 59 Cal. Rptr. 2d at 223-25 (noting that the decedent clearly intended to donate his sperm to his wife for the purposes of conception). The issue before the court, however, was whether his intent to donate his sperm superceded a property agreement to distribute his "assets" after his death. *See id.* at 225.
169. *See id.* at 223-24 (acknowledging decedent's intent to give his frozen sperm to his wife, as evidenced in 1) the signed sperm bank donation form, 2) his will, which specifically bequeathed his sperm to his wife for the purpose of conceiving his child even after his death, and 3) a letter addressed to his children expressing his desire for his wife to have another child using his sperm).
bank, the man committed suicide.\textsuperscript{170} Yet despite his specific instructions to give his sperm vials to his wife for the purpose of procreation, as evidenced by his sperm bank donation form and his will, the executor of his estate refused to give the wife possession of the fifteen vials of sperm.\textsuperscript{171}

When the executor requested instructions from the court, the superior court judge ordered all of the vials destroyed, but the court of appeals reversed and remanded the decision.\textsuperscript{172} On remand, another judge decided to treat the sperm as part of the wife's property settlement, and awarded her custody of three of decedent's fifteen vials, explaining that because the wife was entitled to twenty percent of her husband's assets according to the estate settlement, she was also entitled to twenty percent of his sperm.\textsuperscript{173}

The court of appeals' final decision stated that the decedent's sperm was not subject to the terms of the parties' property settlement agreement because sperm is "unique material."\textsuperscript{174} The court did not apply property law to the dispute, explaining that the same rules do not apply with respect to disposition of human reproductive material as they do to specie or land.\textsuperscript{175} The court concluded instead that the fundamental right to conceive must be "jealously protected," and awarded the sperm to the widow in light of the decedent's unequivocally expressed intent to procreate.\textsuperscript{176} The \textit{Kass} and \textit{Hecht} decisions reflect the benefit of prior consent agreements in determining the interests of the donors of reproductive material.\textsuperscript{177}

\textsuperscript{170} See \textit{id.} at 224 (explaining that over a period of one month, the man made six trips to the cryobank to deposit his sperm, then, a few weeks later on a trip to Las Vegas, lost $20,000 and thereafter committed suicide).
\textsuperscript{171} See \textit{id.} at 223-24.
\textsuperscript{172} See \textit{id.} at 224.
\textsuperscript{173} See \textit{id.} (stating that the property settlement arose because the decedent's two adult children challenged his will). The parties eventually signed a "global settlement" providing that the decedent's wife would "receive 20 percent of the estate's residual assets." \textit{Id.}
\textsuperscript{174} \textit{Id.} at 226 (explaining that genetic material "is a unique form of 'property' [and thus,] is not subject to division through an agreement among . . . beneficiaries which is inconsistent with the decedent's manifest intent").
\textsuperscript{175} See \textit{id.} (recognizing that "[a] man's sperm or a woman's ova or a couple's embryos are not the same as a quarter of land, a cache of cash, or a favorite limousine").
\textsuperscript{176} See \textit{id.} at 226-27 (stating that there was no ambiguity regarding the decedent's intent; therefore, it should be honored); \textit{see also} E. Donald Shapiro \& Benedene Sonnenblick, \textit{The Widow and the Sperm: The Law of Post-Mortem Insemination}, 1 \textit{J.L. \& HEALTH} 229, 232 (1986-87) (noting a court's characterization of sperm as "the seed of life"; therefore, determining that the donor should dictate its fate).
\textsuperscript{177} See \textit{Hecht}, 59 Cal. Rptr. 2d at 227 (relying on decedent's donation form, will, and letter because these documents unambiguously indicated his intent); \textit{Kass v. Kass}, 696
III. SEARCHING FOR A REASONABLE MEASURE TO PREVENT UNWANTED CHILDREN WHILE SALVAGING LAST-CHANCE EFFORTS AT PARENTHOOD: A COMMENT ON THE UTILITY OF PRIOR CONSENT DOCUMENTS

The issue regarding whether to implant or discard leftover frozen embryos lies in the difficulty in weighing the individual rights of the prospective mother and father against the interest in preserving unborn lives. \(^{178}\) In determining whether embryos are human beings or human tissue, some believe that embryos are not persons due to the possibility that they may never realize their biologic potential. \(^{179}\) On the other hand, others believe that the fact that the embryos are fertilized before they are frozen weakens the argument for merely treating them as chattel. \(^{180}\) It is apparent that people have different viewpoints regarding the proper categorization of frozen embryos. \(^{181}\)

To overcome this divergence of views, donors may rely on consent agreements; a method for indicating how they wish to dispose of extra embryos remaining from their IVF attempts. \(^{182}\) For example, donors who

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\(^{178}\) Cf. Custody Questions, supra note 25, at A10 (recognizing the most recent battle over frozen embryo custody in New Jersey as the third judicial dispute to confront “the conflict of rights among prospective mothers, fathers and children”).

\(^{179}\) See Davis v. Davis, 842 S.W.2d 588, 595 n.19 (Tenn. 1992). In its analysis of whether the embryos were persons or property, the court noted that embryos transferred from a petri dish to a host mother have only a 13-21 percent chance of achieving actual implantation. See id. The court then compared the poorer chance of pregnancy attempted with the use of a surrogate with the excellent chance of pregnancy to result in a live birth given a viable fetus left undisturbed in the mother’s uterus and brought to term. See id.

\(^{180}\) See Destro, supra note 138, at 55 (understanding Kass as treating the unborn as property because the court determined that contract law decided the issue).

\(^{181}\) See Roe v. Wade, 410 U.S. 113, 160-61 (1973). The Court in Roe discussed the strong support for the belief that birth is the beginning of life, but it also recognized that the Catholic Church believes that life begins at the moment of conception. See id. In addition, the Court recognized that new medical technologies such as the “morning-after” pill, artificial insemination, IVF, and artificial wombs present further problems regarding how to classify embryos due to the difficulty in establishing a precise definition as to when life begins. See id. at 161.

In Davis, the Tennessee Supreme Court rejected a geneticist’s testimony that embryos are “tiny human beings,” explaining that his interpretation “revealed a profound confusion between science and religion.” Davis, 842 S.W.2d at 593. The Vatican, however, recently issued a proposal calling for “prenatal adoption” of unwanted embryos, based on its belief that the embryos are human and deserve a chance at life. See Puskar, supra note 10, at 776-780. The Vatican’s proposal purports to give all fertilized embryos a chance at survival, despite the fact that the Catholic Church does not condone the IVF procedure. See id.

\(^{182}\) See Kass, 696 N.E.2d at 180 ("Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize pro-
view their embryos more like marital property than persons can indicate their desire to donate them for research purposes or simply discard them, pursuant to a jointly signed consent document. Alternatively, donors who consider the embryos to be more like people than property can indicate, in a prior agreement, that they wish to give their embryos a chance for survival by allowing the female donee to attempt her own pregnancy, or by allowing for adoptive implantation by a willing surrogate. The problem with these agreements, however, is twofold: 1) they indicate the donors’ intent at the time they began the procedure, which may change over time; and 2) state law or constitutional principles may overturn some prior agreements.

Contractual intent to dispose of the embryos in the event of disagreement is futile if state law prohibits the intentional destruction of frozen embryos. Similarly, if one of the donors decides that s/he does not wish to become a parent, subsequent to signing a prior consent directive that allows any excess embryos to be used by the woman or put up for adoptive implantation, the prior consent agreement is useless because the objecting party’s constitutional right to avoid procreation becomes creative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.

183. See supra note 74 and accompanying text (recognizing one couple’s intent, as evidenced by their signed consent document, to donate any unused frozen embryos to their clinic for biological research in the event of changed conditions).

184. Cf. Hecht v. Superior Court, 59 Cal. Rptr. 2d 222, 227 (Ct. App. 1996). The court in Hecht held that decedent’s widow was entitled to possession of her husband’s cryopreserved sperm in accordance with his written intent because he indicated in the sperm bank donation form, his will, and in a letter to his children, his desire to allow her to attempt a pregnancy after his death if she desired to do so. See id.

185. See Kass, 696 N.E.2d at 180 (encouraging parties to give serious thought to the possible contingencies that surround the IVF procedure and to procure explicit agreements in an effort to dispense with the necessity of costly litigation); see also Custody Questions, supra note 25, at A10 (advocating that states follow New Jersey’s lead in proposing legislation that requires all IVF participants, prior to participation, to sign a directive similar to a living will that would indicate their preferences for disposition in the event of death, divorce, separation, or abandonment). New Jersey Assemblyman, Neil M. Cohen, finds that this legislation “would eliminate the emotional and legal problems of judges having to make [these] decisions.” Id.; Davidoff, supra note 20, at 136-37 (recognizing the emotional vulnerability of IVF patients due to participation in the procedure itself as well as feelings of loss, alienation, and anger due to their infertility).

186. See LA. REV. STAT. ANN. § 9:129 (West 1991) (preventing the intentional destruction of IVF embryos); supra Part I.B. (suggesting that the right not to procreate is more significant than the constitutional right to procreate).

187. See LA. REV. STAT. ANN. § 9:129 (prohibiting the destruction of human embryos); cf. Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (recognizing that state regulations that discourage abortion are permitted, but may not present “a substantial obstacle” to the woman’s right to choose).
Examining Disputes over Ownership Rights

paramount to the other donor's interest in procreating. Thus, the utility of IVF consent agreements lies in whether they conform to state law and/or constitutional principles.

A. States Preclude Contractual Enforcement of Prior Consent Agreements When Disposition Is Prohibited

Legally, the benefit to consent agreements lies in their practical application. In determining the validity of prior consent documents, courts apply the same principles that apply to any contract. As a result, agreements that violate public policy preclude contractual enforcement. Similarly, consent agreements may also be unenforceable by reason of mistake, misrepresentation, or significantly changed conditions. The analysis of the consent agreement in Kass emphasized the importance of examining the document in its entirety to discern the agreement's plain meaning and purpose. Ultimately, the court in Kass determined that the agreement clearly articulated the parties' intentions; thus, the court found the agreement to be a valid means of determining the parties' intent at the time of their participation in the IVF procedure.

188. See supra Part I.B (suggesting that the right not to procreate is more significant than the constitutional right to procreate); cf. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, at 8-11, 23-24 (Mass. Prob. & Fam. Ct., Suffolk County, Mar. 25, 1996) (negating the existence of seven prior consent documents that explicitly mandated that the woman receive any remaining frozen embryos for implantation, by applying a contract law analysis to the couple's "change in circumstances").

189. But see American Fertility Society's June 1990 Report, supra note 62, at 55 (suggesting that the constitutional liberty interest in procreation prohibits state interference with procreational decisions among consenting adults because different viewpoints regarding morality, religion, or symbolism are not enough to justify infringement on fundamental rights).

190. See Kass, 696 N.E.2d at 180 (noting the value of signed consent to "minimize misunderstandings and maximize procreative liberty").

191. See id. (noting that the subject matter of disputes over frozen embryos is new, but that the "principles governing contract interpretation are not" and that "[w]hether an agreement is ambiguous is a question of law for the courts" to decide).


193. See id. §§ 152-53 (explaining when a mistake makes a contract voidable).

194. See id. § 163 (describing when misrepresentation prevents contract formation).

195. See id. §§ 261, 265 (addressing discharge by impracticability and/or frustration).

196. See Kass, 696 N.E.2d at 180-81 (illustrating that contract interpretation requires that substance prevail over form; therefore, a "sensible" construction of the words is necessary to illuminate the "plain purpose" of the agreement).

197. See id. at 180-82. The appellant argued that the prior agreement was ambiguous. See id. at 180. Specifically, she argued that one of the sentences in the document awarded
The aim of informed consent agreements is to dispense with the need for courts to intervene and attempt haphazardly to balance the interests of the competing parties. Therefore, there are many advantages to legislation that requires donors, prior to IVF participation, to consider the options cryopreservation presents. For example, New Hampshire's requirements of counseling and judicial preauthorization of consent documents are provisions that other states should emulate when formulating and adopting their own IVF legislation, because it mandates this pre-agreement reflection. In New Hampshire, state law requires IVF donors to consider the profound implications of parenthood before they

full authority to the courts to decide disposition in the event of disagreement. See id. at 181. The sentence in question provided that “[i]n the event of 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.” Id. The court determined that appellant's reading of this sentence explicitly ignored the words providing that ownership “must be determined in a property settlement.” Id. The appellate court had concluded that the sentence, read in the context of the entire agreement, was not intended to provide a court with sole dispositional authority. See id. at 181-82. Further, the lower court had determined that the sentence was a protective measure designed to insulate the IVF program from liability in the event of disagreement between the parties. See id. at 182. Thus, the court of appeals affirmed the appellate division's interpretation that the sentence plainly manifested the parties' intent that only a joint decision would allow implantation of the frozen embryos. See id.

198. See Custody Questions, supra note 25, at A10 (describing proposed legislation that would eliminate the courts' investment in these matters); see also Davis v. Davis, 842 S.W.2d 588, 590, 603-04 (Tenn. 1992) (balancing the respective interests of the parties due to the absence of a prior agreement).

199. Cf. Kass, 696 N.E.2d at 180 (noting that written agreements are beneficial because they provide certainty to the IVF programs that utilize them). For examples of states that have proposed legislation recently regarding prior consent agreements, see S. 451, 144th Gen. Ass. (Ga. 1998), available in WESTLAW, GA-BILLS Database (providing that gestational surrogacy contracts are necessary before employing assisted reproductive technology techniques and that under the terms of the contract, the parents must agree to assume full parental rights and responsibilities for any resulting children); H.R. 481, 90th Gen. Ass. (Ill. 1997), available in WESTLAW, IL-BILLS Database (requiring the written consent of the donors before using or implanting any sperm, ova, or embryos); H.R. 2863, 181st Gen. Ct. (Mass. 1997), available in WESTLAW, MA-BILLS Database (providing that fertility clinics must supply patients with information regarding counseling and support services and all appropriate medical and non-medical alternatives with respect to their proposed treatment, and that they must obtain written consent from the donors before their participation); A.B. 1932, 222d Ann. Leg. Sess. (N.Y. 1999), available in WESTLAW, NY-BILLS Database (requiring couples or individuals to sign advance written directives for the disposition of frozen embryos before participating in IVF).

200. See N.H. REV. STAT. ANN. § 168-B:13 (1994) (requiring counseling, written certification of the counseling, and the health care provider's evaluation that the person participating in the IVF procedure is qualified); see also id. § 168-B:21 (requiring that the parties to a surrogacy contract petition the court jointly for judicial preauthorization of their surrogacy arrangement).
are able to participate.\textsuperscript{201} Thus, a legislative procedure that requires participants to be informed of the potential issues surrounding IVF provides donors with the information to make educated decisions concerning how to dispose of their embryos in the event of unforeseen circumstances.\textsuperscript{202}

Education regarding issues that may arise in the context of IVF includes whether state law will preclude the parties from contractually providing for their futures.\textsuperscript{203} For example, Louisiana law prohibits embryo destruction; therefore, donors who wish to prevent implantation in the event of disagreement may not be able to do so contractually because this result is statutorily prohibited.\textsuperscript{204} Maintaining that frozen embryos have the same statutory rights accorded persons,\textsuperscript{205} and considering embryo disposal akin to murder,\textsuperscript{206} presumably, in Louisiana, a contract providing for destruction in the event of death, divorce, or an unforeseen circumstance is unenforceable.\textsuperscript{207} Louisiana's statute that affords an embryo the same rights as a living person implies that the interests of the embryos likely would be considered equally with the interests of the donors of the genetic material.\textsuperscript{208} The idea of affording embryos equal respect to human beings contradicts sharply with caselaw from other states, which maintains that the progenitors' interests are paramount in deciding inquiries regarding ownership.\textsuperscript{209}

\begin{footnotesize}
\textsuperscript{201} See id. § 168-B:13 (requiring potential parents to indicate in writing their acceptance of the legal rights and responsibilities associated with parenthood prior to their participation in the IVF procedure); see also id. § 168-B:8 (stating that noncompliance with respect to New Hampshire's surrogacy requirements allows a court to impose support obligations upon the parent(s)).

\textsuperscript{202} See Robert J. Araujo, S.J., Abortion, Ethics, and the Common Good: Who Are We? What Do We Want? How Do We Get There?, 76 MARQ. L. REV. 701, 712 (1993) (noting the importance of an individual's informed consent regarding medical and health care decisions); see also supra notes 199-201 and accompanying text (discussing the benefits of such legislation).

\textsuperscript{203} See LA. REV. STAT. ANN. § 9:129 (West 1991) (prohibiting embryo destruction).

\textsuperscript{204} See id.; see also Stephens, supra note 26, at 268-69 (discussing the possibility that IVF participants who reside in Louisiana will "clinic shop" outside of the state due to the "unfairness" of Louisiana's law prohibiting intentional destruction of fertilized embryos).

\textsuperscript{205} See LA. REV. STAT. ANN. § 9:126 (stating that embryos are "biological human being[s]").

\textsuperscript{206} Cf. id. § 9:129 (stating embryos shall not be intentionally destroyed).

\textsuperscript{207} Cf. id.

\textsuperscript{208} See id. §§ 9:121, 9:123-125, 9:129.

\textsuperscript{209} Compare id. § 9:129 (recognizing that human embryos have certain rights granted by law and cannot be intentionally destroyed), with Kass v. Kass, 696 N.E.2d 174, 182 (N.Y. 1998) (ordering donation of the embryos for research purposes based upon the interests of the commissioning couple as expressed in their prior agreement), and Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (ordering disposal of the embryos after balancing the interests of the parties).
\end{footnotesize}
When destruction is prohibited statutorily,210 or when disposition is allowed only by joint decision of the parties,211 embryos can remain indefinitely in the cryopreserved state.212 This result, in states that require a joint decision for disposition, deprives other infertile couples access to unwanted frozen embryos for purposes of adoptive implantation.213 In addition, society is deprived of the potential benefits of embryological research that can lead to better IVF techniques as well as possible cures for fatal diseases and congenital birth defects.214 To counteract this result, states must keep pace with science215 by developing legislation that honors the parties’ reproductive intent.216

B. Constitutional Rights Also Preclude Contractual Enforcement of Prior Agreements

The moral and ethical dilemmas collaborative reproduction presents217


211. See, e.g., FLA. STAT. ANN. § 742.17 (West 1997) (providing that the couple’s written agreement controls disposition of their embryos, but that in the absence of a written agreement the commissioning couple must jointly decide the disposition).

212. See Gina Kolata, Medicine’s Troubling Bonus: Surplus of Human Embryos, N.Y. TIMES, Mar. 16, 1997, at A1 (stating that tens of thousands of embryos are accumulating in liquid nitrogen tanks nationwide as a result of the recent success of IVF).


216. Cf. Johnson v. Calvert, 851 P.2d 776, 782-84 (Cal. 1993) (interpreting legislation and finding that an intent-based or contractual analysis should be used to establish parentage in the context of surrogacy arrangements).

217. See Siegel, supra note 4, at 43 (suggesting that the legal and ethical side effects of new “miracle” technologies create a “dark side to science”); see also Davidoff, supra note 20, at 131 (stating that the American legal system has been struggling with the legal and ethical questions posed by IVF since the first IVF baby was born in the United States in 1981) (citing David G. Dickman, Comment, Social Values in a Brave New World: Toward a Public Policy Regarding Embryo Status and In Vitro Fertilization, 29 ST. LOUIS U. L.J. 817 (1985)). But see Planned Parenthood v. Casey, 505 U.S. 833, 850-51 (1992) (noting that the Court’s obligation is not to mandate a moral code regarding abortion, but to ex-
force the courts to dispense with an inferred commitment from the donors to initiate a pregnancy. 218 Similarly, prior agreements that award the embryos to a donor who wishes to give the entities a chance at survival may be unenforceable due to the other party’s constitutional right to avoid procreation. 219 In matters of reproductive choice, protection against unwanted procreation is the predominate concern. 220 Thus, the constitutional right of all individuals to refrain from procreation may negate the rule promulgated in Kass, and suggested by the court in Davis, that a prior consent agreement is always binding on the parties if the agreement expressly allows the woman who paid for the IVF procedure or a willing donee to implant any leftover embryos. 221 The overriding

218. See Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992) (rejecting an inference “from the parties’ participation in the creation of the embryos that they had made an irrevocable commitment to reproduction”); cf. Casey, 505 U.S. at 853 (noting that one view is that every pregnancy ought to be carried to term no matter how difficult; the other view is that a parent’s anguish over an inability to provide for an infant is a cruelty that should be avoided). But see Puskar, supra note 10, at 776-77 (articulating the Catholic Church’s position that the embryos are children and must be treated with the full respect afforded persons).

219. See supra Part I.B (discussing state court decisions that have trumped an individual’s right to procreate with the other party’s right not to procreate); cf. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, at 23 (Mass. Prob. & Fam. Ct., Suffolk County, Mar. 25, 1996) (overriding a prior consent document by applying the principles of contract law).

220. See Davis, 842 S.W.2d at 603-04 (awarding the embryos to the party who objected to becoming a parent in part because the party was “vehemently opposed to fathering a child that would not live with both parents” due to his own experiences as a child growing up without his own father). The court’s decision acknowledged that parenthood forced upon a man who no longer desired a child would financially and emotionally burden him against his will. See id.; AZ v. BZ, Mass. Law. Wkly. 15-008-96, at 23-25 (prohibiting embryo implantation, despite the couple’s prior agreement to award them to the wife in the event of disagreement, separation, death, or menopause).

221. The rule promulgated in Kass and suggested by the court in Davis was that prior consent documents are valid and enforceable. See Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Davis, 842 S.W.2d at 604. Both courts, however, also noted that the first step in resolving frozen embryo ownership disputes is to look to the preferences of the participants. See Kass, 696 N.E.2d at 180; Davis, 842 S.W.2d at 604. Neither case addressed whether a prior agreement still controls if it specifies implantation over disposition and one party later objects, but this was the issue in the case of AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, at 8-11, 14-16. In AZ v. BZ, the court noted that judicial authorization to use the embryos for the purpose of achieving a pregnancy may result in a child (or children) that would be unwanted by the husband, even though he initially agreed to this result when he consented to the IVF procedure. See id. at 16. The judge applied the principles of contract law to the dispute and determined that the couples’ lives were so drastically different from the time that they executed the IVF directive seven years earlier—in the sense that the couple had twins as a result of a previous implantation, the wife filed a restraining order against the husband, and the husband filed for divorce—that they could not possibly have foreseen their present situation. See id. at 22-25. The judge ruled that the couple’s
constitutional and inherent social concerns of unwanted parenthood instead may force state courts to choose disposition, even when a jointly signed prior agreement expressly mandates the use of the remaining frozen embryos for procreational purposes.\footnote{222}

The technique of cryopreservation extends the viability of fertilized embryos for an indefinite period of time.\footnote{223} Consequently, participating parties may wish to plan for their futures by way of prior informed consent documents.\footnote{224} It is relevant in considering this issue of whether constitutional rights should override contractual intent, however, to analyze the reproductive differences between men and women.\footnote{225} It is often overlooked that a woman's supply of eggs is limited, and that a woman's fertility declines over time, whereas men can produce sperm throughout their adult lives.\footnote{226} As a consequence, older women who divorce are more likely to face a declining possibility of becoming a parent if they are not allowed access to their frozen embryos, whereas a man remains fer-

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\footnote{222}{See supra note 220 and accompanying text.}

\footnote{223}{See Kass, 696 N.E.2d at 178, 180 (citing the New York State Task Force on Life and the Law, Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy, at 289 (Apr. 1998)) (maintaining that tens of thousands of frozen embryos are stored annually in liquid nitrogen canisters, some having been in that state for more than ten years without any instructions for their use or disposal and also declaring that the benefit of cryopreservation—that viability of embryos can be extended indefinitely—is also a detriment because it "allows time for minds, and circumstances, to change"). In England, a large number of frozen embryos were recently destroyed due to the fact that they were being kept in storage with no instructions for their use or disposal. See Puskar, supra note 10, at 776-77. In response, the Vatican issued its proposal whereby married women should come forward and carry these unwanted embryos to term. See id.}

\footnote{224}{See Kass, 696 N.E.2d at 179-80 (acknowledging the need for "particular care" in formulating consent documents to adhere to the true interests of the parties).}

\footnote{225}{Cf. Elizabeth Heitman, Infertility as a Public Health Problem: Why Assisted Reproductive Technologies Are Not the Answer, 6 STAN. L. & POL’Y REV. 89, 92 (1995) (highlighting the fact that a man's reproductive capacity lasts a lifetime, whereas a woman's reproductive capacity is limited to the time between the onset of menses and menopause, or roughly between the ages of 15 and 44).}

\footnote{226}{See Ruth Colker, Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not, 47 HASTINGS L.J. 1063, 1063 (1996) (arguing that women have a greater interest in gaining the right to implant their frozen embryos because sperm are "cheap" and plentiful). But see Gina Kolata, A Record and Big Questions as Woman Gives Birth at 63, N.Y. TIMES, Apr. 24, 1997, at A1 (reporting that a fertility clinic assisted a 63-year-old woman in giving birth to a healthy baby).}
tile into his much later years.\textsuperscript{227} Thus, “allow[ing] the person who does \textit{not} wish to become a parent to play the trump card is to exercise an extremely powerful veto in the life of the other person when there initially was mutual consent.”\textsuperscript{228}

It is in the best interests of society, however, to allow one donor the ability to override the couples’ joint contractual intent due to the potentially detrimental effects of parenthood forced upon an unwilling participant.\textsuperscript{229} Although the desire to become a parent is an important concern,\textsuperscript{230} the strain accompanying unwilling parenthood is arguably greater.\textsuperscript{231} Even if the embryos are put up for adoption and not used by one of the donors themselves, the psychological burden still rests upon the involuntary parent in knowing that a child of his/her exists somewhere.\textsuperscript{232} The fact that the parent has no idea with whom or where that

\begin{itemize}
  \item \textsuperscript{227} See Colker, \textit{supra} note 226, at 1066 (noting that women are less stable economically after a divorce than men); \textit{see also} Heitman, \textit{supra} note 223, at 95 (approximating the costs associated with IVF as ranging between $66,667 and $114,286 and recognizing that these numbers climb to between “$160,000 [and] $800,000 when IVF is used to overcome the combination of male-factor infertility and advanced maternal age”).
  \item \textsuperscript{228} Colker, \textit{supra} note 226, at 1069; \textit{see also} Kass v. Kass, 663 N.Y.S.2d 581, 592 (App. Div. 1997) (stating that “[o]nce lost, the right not to procreate can never be regained).
  \item \textsuperscript{229} \textit{See supra} note 220 and accompanying text.
  \item \textsuperscript{230} \textit{See} Kass, 696 N.E.2d at 175 (explaining that the ex-wife wanted the pre-zygotes implanted because she felt that this was her last chance to become a mother).
  \item \textsuperscript{231} \textit{See} Roe v. Wade, 410 U.S. 113, 153 (1973) (discussing the detriment imposed upon a pregnant woman if the state chose to deny her the right to an abortion in the early stages of pregnancy). The Court noted specifically that forced maternity may impose “a distressful life and future,” invoke psychological harm, and tax the mother’s mental and physical health. \textit{id}. The Court also cautioned against the problems of bringing a child into a home where s/he is unwanted or where the family is unable to provide for its development and care. \textit{See id}. Therefore, the Court suggested that these elements warranted consideration over whether or not to terminate the life of the fetus in the consultation process between a woman and her physician in the decision. \textit{See id}.
  \item In the context of IVF, this strain of becoming a parent unwillingly is also a man’s concern. \textit{See} Davis v. Davis, 842 S.W.2d 588, 603-04 (Tenn. 1992). In \textit{Davis}, the male IVF participant did not want to become a father after he and his wife divorced because his own biological father was absent from his childhood and he suffered psychologically as a result. \textit{See id}. In balancing the interests of the parties, the \textit{Davis} court found the husband’s argument persuasive, but noted an exception to its rule—that the party wishing to avoid parenthood ordinarily should prevail—if this were the woman’s last chance at becoming a parent. \textit{See id} at 604.
  \item The female progenitor in \textit{Kass} articulated this last-chance argument. \textit{See} Kass, 696 N.E.2d at 175. The court, however, did not find it persuasive and chose instead to rely on the prior agreement between the parties. \textit{See id}.
  \item \textsuperscript{232} \textit{See} Jennifer L. Carow, \textit{Note}, Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology, 43 \textit{DEPAUL L. REV.} 523, 566 (1994) (stating “there is no way to end biological ties, and very few ways to end emotional ones”).
\end{itemize}
child is living is not important if there are feelings of "guilt, attachment, or responsibility" associated with the birth of that child. 233

Public policy also seems to indicate that gamete-donors unwilling to proceed with IVF should not be forced into parenthood because they may be bound legally to comply with parental responsibilities. 234 Some states impose an unwaivable duty upon biological parents to support their offspring, regardless of the means of conception. 235 Finally, it is important to consider whether a child brought into existence as a result of a court-ordered implantation has inheritance rights to a biological parent's estate. 236 Problematic situations such as these further support the proposition that both parties to the IVF procedure should have the opportunity to dispose of the embryos even if this decision runs contrary to prior contractual intent. 237

IV. CONCLUSION

Scientific advancements in reproductive technology have made procreational decision making complicated. Controversy surrounds ownership rights to frozen embryos because unforeseen circumstances may

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233. See Robertson, supra note 20, at 479 (stating that "[e]ven if no rearing duties or even contact result[s], the unconsenting partner will know that biologic offspring exist, with the powerful attendant reverberations of guilt, attachment, or responsibility which that knowledge can ignite").

234. Cf. L. Pamela P. v. Frank S., 449 N.E.2d 713, 714, 716 (N.Y. 1983) (imposing a support obligation upon a father who became a parent unwillingly when the court determined that the mother's alleged misrepresentation—that she was using contraception—was irrelevant); see also In re Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (holding the husband liable for child support because he initially consented to becoming a parent, even though the child was conceived after he filed for divorce by a donor egg, donor sperm, and a surrogate mother); Stephens, supra note 26, at 265 (arguing that the method of conception should not be a factor in determining the rights of a child).

235. For examples of states that impose parental responsibilities and custody rights upon artificial insemination donors, see CAL. PENAL CODE § 270 (West 1988) and N.H. REV. STAT. ANN. § 168-B:8 (1994). But see In re Witbeck-Wildhagen, 667 N.E.2d 122, 125-26 (Ill. App. Ct. 1996) (holding that it would be "unjust" to impose a support obligation upon a husband who never consented to the artificial insemination procedure).

236. Cf. Barry Renfrew, Future of 2 Embryos Poses New Questions, BOSTON GLOBE, June 19, 1984, at 1 (questioning the legal status of these embryos, particularly whether they would be able to inherit from their biological parent's estate); Sally Squires, Whose Baby Is It, Anyway? Surrogates, Donors and Petri Dishes Are All in the Family, WASH. POST, April 12, 1988, at z14 (reporting that a court ruled that any children born as a result of embryo implantation had no legal rights to the biological parents' estate).

237. See generally Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (stating that "procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation"); Panitch, supra note 4, at 572-73 (recognizing the undesirability of requiring double consent; initial consent to begin IVF and continued consent throughout the IVF process).
Examining Disputes over Ownership Rights

arise while the embryos exist in the cryopreserved state. Matters regarding reproductive choice deserve time and care to ensure that the participating parties are informed and that their intentions are clearly manifested in contingency agreements. The utility of these agreements, however, lies in resolving later disputes over whether the parties will become parents. The principles of contract law allow gamete-providers to stipulate as to their future interests; but, states also have an interest in protecting potential children from harm associated with forcing parenthood upon unwilling participants. This state interest often runs directly counter to the desire of one party to become a parent and may raise constitutional concerns. New Hampshire’s requirement of judicial preauthorization of consent agreements is a start to accord IVF documents more weight, but it remains to be seen whether even judicial recognition of IVF agreements can withstand a donor’s constitutional claim to avoid unwanted parenthood. As a result, IVF donors must be aware, when they sign prior consent documents, that their contractual intent may be superceded by state and/or constitutional law, even if their intentions are jointly decided and expressed clearly at the time of their participation in the procedure.