THE FROZEN ONES: DISPUTES, DIVORCES, AND DISPOSITIONS

Sara Murray[*]

Abstract

Couples who may have been unsuccessful in their efforts to conceive naturally have found ways to parenthood through assisted reproductive technologies. In vitro fertilization is one of the most complex processes these couples pursue, and it involves creating an embryo outside of the human body and then inserting it into the woman with the hopes of successful implantation. Under the circumstances, many embryos may be created and then frozen—or cryopreserved—to prolong the availability of the process to the couple for months or even years. However, a conflict can arise if the couple gets divorced, which begs the question: what happens to the frozen embryos?

The answer to this question begins with how the state defines an "embryo" because this makes a difference regarding legal rights and the type of law to be applied. Embryos are generally defined as either property, human life, or an interim category between the two. Once an embryo is defined, a state court must then determine which approach it will use to answer the disposition question. There are three main approaches: the enforcement of informed consent agreements, the contemporaneous mutual consent approach, and the balancing competing interests test. Regarding how to define an embryo, this Note argues that states should place embryos in the interim category to respect their potential for human life. Furthermore, this Note advocates for states to require the donor parents to complete multiple informed consent agreements before starting the cryopreservation process. These forms should specifically address the couple's disposition preference for any remaining frozen embryos in the event of a divorce. Since many couples who sign these forms may not realistically consider the possibility of divorce, this Note argues that changed circumstances should permit a court to reconsider the enforceability of such an agreement.

* J.D. 2023, University of Florida Levin College of Law; B.S. 2020, University of Florida. I wish to thank Dean Laura Rosenbury for advising me on this topic and for guiding me throughout the research and writing process. I sincerely thank all of the editors of the *Florida Law Review* for their tremendous efforts and dedication to improving this Note during the editing process. I would also like to thank Michael for always believing in me. I dedicate this Note to my parents, Richard and Judy, for their overwhelming love, support, and encouragement.

INTRODUCTION

Consider the following scenario. Richard and Judy are newly married and have recently graduated from college. They are ready to start their lives together. Richard is in a medical residency program studying to become an obstetrician-gynecologist, and Judy has her dream job of working in graphic design. After taking some time to settle into their new careers and the married life, they decide to try to start a family. Months of trying turn into years of trying, and the pregnancy tests keep coming back negative. So, Richard and Judy begin infertility treatments while also inquiring into the adoption process. Eggs are taken from Judy and sperm are taken from Richard to create embryos. These embryos are then frozen and stored for months while each cycle is conducted.

Again, the results are negative. This is disappointing to the couple,[1] and starting the adoption process seems like a more promising

1. *See* Jeanne Sager, *What Are the 2021 Fertility Statistics I Need to Know About?*, COFERTILITY, https://cofertility.com/fertility-statistics/ [https://perma.cc/K5QZ-Q3ML] (explaining

opportunity. With a major move to a new city approaching, the couple decides to take their chances and inserts all six of their remaining embryos with the hopes that just one would be successful. Luckily for me and my twin brother, we get to call these two people Mom and Dad. But not all stories have such a happy ending.

While the act of starting (or adding to) a family can be a quick and easy task for some, it can be a lengthy and emotionally exhausting[2] journey for others.[3] One in eight American couples, just like Richard and Judy, experience complications with fertility.[4] As science has advanced tremendously over the years, many different methods of assisted reproduction have emerged to provide more couples and individuals with the opportunity of having a child of their own.[5] Unfortunately, divorce can certainly complicate these matters. While people do not get married and start a family with the intention of eventually getting divorced, this happens quite often today.[6] A divorce proceeding can be a painfully emotional process with the separation of assets, the division of finances, and the arrangements of child custody.[7]

---

that each in vitro fertilization cycle has a 30% chance of successfully implanting and developing into a baby).

2. *See* Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 30 (2008) ("The emotional and psychological devastation wrought by the recognition or diagnosis of infertility cannot be overstated. Numerous studies have reported that the inability to reproduce takes a severe toll on both men and women."); *see also* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (elaborating that the emotional and physical trauma from the IVF process can be more severe for women than men).

3. Between 12–15% of couples are unable to naturally conceive a baby after one year of unprotected sex, and 10% of couples are unable to naturally conceive a baby after two years of unprotected sex. Sager, *supra* note 1; *see also* Daar, *supra* note 2, at 21 (discussing the complexity of assisted conception compared to natural conception).

4. *See* Sager, *supra* note 1.

5. *See* Anna Stolley Persky, *Deep Freeze: Contentious Battles Between Couples over Preserved Embryos Raise Legal and Ethical Dilemmas*, 102 A.B.A. J. 47, 48–49 (2016) ("It has been nearly 40 years since Louise Joy Brown, the world's first IVF baby, was conceived. Since then, the number of people attempting IVF and other assisted reproductive technologies has multiplied, as the methods have grown increasingly successful."); Daar, *supra* note 2, at 30 (explaining that the increased efforts of singles and same-sex couples using assisted reproduction technology has facilitated access to a nontraditional path to parenthood); MAUREEN MCBRIEN & BRUCE HALE, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 1 (3d ed. 2018) ("Advances in the science of reproductive technology in recent decades have made the potential for procreation of children a reality for thousands of people who in prior times would be childless.").

6. Jenny Gross & Maria Cramer, *The Latest Issue in Divorces: Who Gets the Embryos?*, N.Y. TIMES (Apr. 3, 2021), https://www.nytimes.com/2021/04/03/health/IVF-frozen-embryo-disputes.html [https://perma.cc/V6DX-RWB7]; *see also Marriage and Divorce*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nchs/fastats/marriage-divorce.htm [https://perma.cc/V2TK-E3TP] (stating that in 2020, the rate of divorce was 2.3 per 1,000 people in forty-five reporting states and D.C.).

7. *See* Gross & Cramer, *supra* note 6.

This Note seeks to resolve the ongoing problems regarding the disposition of frozen[8] embryos in divorce proceedings. Creating an embryo combines the genetic material of two individuals together,[9] so legal disputes can obviously arise between a couple who has remaining frozen embryos stored for future use.[10] As the Tennessee Supreme Court noted:

> [G]iven the relevant principles of constitutional law, the existing public policy of [states] 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 to the question we now face.[11]

Federal law is lacking to resolve the question regarding the disposition of frozen embryos in the event of divorce.[12] State laws governing the issue of frozen embryo disposition vary,[13] and only a few states have actually enacted legislation on the matter.[14] Thus, family law judges have largely handled these matters and "have had to wing it, with predictably differing approaches."[15] Many fertility clinics advise in vitro fertilization (IVF) patients about their disposition options before treatment begins and request them to sign consent forms concerning the custody of their embryos should the couple encounter death, divorce, or nonpayment.[16] These forms may act as a procedural safeguard to assist courts in divorce proceedings should the forms be deemed valid.[17]

---

8. "Frozen" and "cryopreserved" will be used interchangeably in this Note.

9. *See* Gross & Cramer, *supra* note 6.

10. *See* Ashley Alenick, Note, *Pre-Embryo Custody Battles: How Predisposition Contracts Could Be the Winning Solution*, 38 CARDOZO L. REV. 1879, 1881 (2017) ("[L]egal issues arise when a couple has opted to divorce, and disagree about the disposition of the frozen pre-embryos that remain following IVF. . . . [C]ourts are not united in their approaches for deciding such disputes."); *see also* Michael T. Flannery, "*Rethinking" Embryo Disposition Upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 233 (2013) (stating that problems regarding the disposition of frozen embryos can emerge when a couple did not contractually express their intent for disposition prior to divorce or when public policy dictates such contract is unenforceable).

11. Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992).

12. *See* Persky, *supra* note 5, at 50.

13. Gross & Cramer, *supra* note 6.

14. *See* Persky, *supra* note 5, at 50.

15. *Id.* at 50–51 ("[A]t least 10 state courts have addressed disputes over custody and the future of frozen embryos, with varying legal theories and results. . . . [Dr. Arthur Caplan, the head of the Division of Bioethics at New York University's Langone Medical Center, says,] 'How the embryos will be treated can depend upon the whim of the judge—and the luck of the draw.'").

16. Anna Hecker, *What Should I Do With My Unused Embryos?*, N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/2020/04/15/parenting/fertility/ivf-unused-frozen-eggs.html [https://perma.cc/P5SS-6GXV]; *see* discussion *infra* Section II.B.1.

17. *Cf.* Persky, *supra* note 5, at 52 (noting that courts have not consistently followed the consent agreements signed at fertility clinics).

This Note ultimately argues that states should classify frozen embryos in the interim category between property and life. Furthermore, all states should enact legislation requiring married couples undergoing IVF to sign a preemptive agreement about embryo disposition in the event of a future legal separation. If such a written agreement is not signed prior to cryopreservation or there are post-signing changed circumstances, courts should question the enforceability of such agreements between the divorcing couple.

To begin, Part I of this Note will provide background information about IVF and cryopreservation, disposition options for remaining embryos, the right to procreate, and the unresolved definition for human life. Part II will address the legal challenges regarding IVF and cryopreservation and explain the various ways courts have classified frozen embryos—as human beings, as property, or as an interim category between the two.[18] Part II will also compare the three main approaches that state courts use when addressing the issue of embryo disposition in divorce proceedings. Finally, Part III recommends that model laws defining an embryo and requiring multiple consent forms be created so states, which mostly lack governing law, can adopt universal legislation and avoid potential statewide inconsistencies. In the event such legislation is not adopted by a state, Part III comments on a state court's role in making these decisions and proposes a practical solution to the disposition issue.

I. BACKGROUND

Family law, including the dissolution of marriage, generally falls under the purview of state law, so the regulations of one state may vastly differ from those of another state.[19] Since not all courts see eye-to-eye in the realm of family law, it follows that not all states agree on how to distribute the assets or property created in a marriage. Moreover, divorce

18. Cynthia S. Marietta, *Frozen Embryo Litigation Spotlights Pressing Questions: What Is the Legal Status of an Embryo and Can It Be Adopted?*, HOUS. J. HEALTH L. & POL'Y HEALTH L. PERSPS. 1, 5 (2010), https://law.uh.edu/healthlaw/perspectives/2010/marietta-embryolegal.pdf [https://perma.cc/B79H-44GZ] ("Depending on the language in various state statutes, judicial opinions, or policies held by professional organizations, embryos have been categorized as either property, human beings, or in a class somewhere in between, deserving special respect and protection because of their potential to become persons.").

19. *See* Linda D. Elrod, *The Federalization of Family Law*, A.B.A: HUM. RTS. MAGAZINE (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/ [https://perma.cc/5AB3-3ESS] (explaining that state legislatures have the power to define a "family" and regulate marriages, separations, adoptions, the welfare of children, child support, and property rights); Ronna L. DeLoe, *How Divorce Varies by State*, LEGALZOOM (May 2, 2022), https://www.legalzoom.com/articles/how-divorce-varies-by-state [https://perma.cc/62WE-GQES].

proceedings require special considerations where children are concerned since discussions of custody, support, and alimony are necessary.[20] But what if the children are not yet born—or even conceived?

The most advanced and complex method of assisted reproductive technology (ART) is IVF.[21] According to the CDC's most recent report on fertility clinic success rates, about 2% of annual births in the United States can be attributed to the use of ART,[22] which is about 74,000 births a year.[23] Despite accounting for only 2% of annual births, it is somewhat surprising that one-third of American adults report either personally using ART or knowing someone who has used it to try to conceive a child.[24] Thus, ART may have a small impact on the overall number of births, but the impact of the technology has touched the lives of millions.[25]

A. *In Vitro Fertilization*

In vitro fertilization is "the most effective form of assisted reproductive technology"[26] and is often offered as a treatment to help

20. *See Special Circumstances in Divorce*, JUSTIA (Sept. 2022), https://www.justia.com/family/divorce/special-circumstances-in-divorce/ [https://perma.cc/R69R-7G7B].

21. *See* U.S. DEP'T OF HEALTH AND HUM. SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, 2019 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC AND NATIONAL SUMMARY REPORT 2 (2021), https://www.cdc.gov/art/reports/2019/pdf/2019-Report-ART-Fertility-Clinic-National-Summary-h.pdf [https://perma.cc/XU4X-ZEL2] (defining ART as "all fertility treatments in which either eggs or embryos are handled outside a woman's body. . . . [ART procedures] do NOT include treatments in which only sperm are handled (such as intrauterine insemination) or procedures in which a woman takes drugs only to stimulate egg production without the intention of having eggs surgically retrieved").

22. *State-Specific Assisted Reproductive Technology Surveillance*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 27, 2021) [hereinafter *State-Specific ART*], https://www.cdc.gov/art/state-specific-surveillance/index.html [https://perma.cc/669T-Z444].

23. *See* Sager, *supra* note 1.

24. *See* Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/ [https://perma.cc/94BX-398U]; *State-Specific ART*, *supra* note 22 ("ART-conceived infants account for a small proportion of all infants born . . . .").

25. *See* Lindsey Jacobsen et al., *How IVF Has Redefined the Modern Family*, GOOD MORNING AM. (Apr. 25, 2019), https://www.goodmorningamerica.com/news/story/ivf-redefined-modern-family-61969890 [https://perma.cc/YYV2-W5DV] (estimating that IVF has played a role in the creation of over eight million babies globally).

26. *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 10, 2021), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/DP6N-WGN5].

people with infertility[27] or genetic concerns to conceive a child.[28] To date, over one million babies have been created through the use of IVF in the United States.[29] The IVF process involves multiple complex procedures beginning with the extraction of mature eggs from a female's ovaries followed by the fertilization of those eggs with a male's sperm in a laboratory setting.[30] Then, a fertilized egg—now referred to as an "embryo"[31]—is transferred to a female's uterus with hopes of a successful implantation.[32] If the embryo implants into the uterine lining, then the embryo may develop into a baby.[33] Because women are administered medications to increase the number of eggs produced from their ovaries during this process, there is potential to create many viable embryos.[34] Medical professionals may transfer more than one embryo into the uterus during each cycle, but this increases the likelihood of having "multiples."[35] Since most doctors obey guidelines limiting the

27. *See How Common Is Male Infertility, and What Are Its Causes?*, NAT'L INSTS. OF HEALTH (Nov. 18, 2021), https://www.nichd.nih.gov/health/topics/menshealth/conditioninfo/infertility [https://perma.cc/VB4C-6ZJW] ("Infertility is defined clinically in women and men who cannot achieve pregnancy after 1 year of having intercourse without using birth control, and in women who have two or more failed pregnancies."); *see also* Daar, *supra* note 2, at 23–24 (describing the ways in which both males and females are affected by infertility).

28. *See In Vitro Fertilization (IVF)*, *supra* note 26; *see also* Jacobsen et al., *supra* note 25 (explaining that while IVF may have been originally created as a process to help people with infertility, the procedure "has expanded to allow people to think beyond the traditional family and carve a new path to parenthood").

29. Sager, *supra* note 1.

30. *In Vitro Fertilization (IVF)*, *supra* note 26 ("The procedure can be done using a couple's own eggs and sperm. Or IVF may involve eggs, sperm or embryos from a known or anonymous donor. In some cases, a gestational carrier—someone who has an embryo implanted in the uterus—might be used.").

31. *See id. But see* Persky, *supra* note 5, at 50 (highlighting the importance of language in the debate regarding frozen embryos). "Embryo" can be a general term used to describe the fertilized combination of sperm and egg, but other names are also used. *Id.* "They may be called *zygotes* (the early combination of an egg and sperm), *pre-embryos* (a fertilized ovum before implantation) or simply *embryos* (generally post-implantation)." *Id.* (emphasis added). From this point forward, this Note will use the term "embryo" when referring to the fertilized combination of an egg and a sperm, rather than any other term, except in quoted language.

32. *See In Vitro Fertilization (IVF)*, *supra* note 26 (explaining that this process is a "cycle," and one cycle usually takes about two to three weeks with the potential to require more than one cycle).

33. *See id.*

34. *See id.* ("Multiple eggs are needed because some eggs won't fertilize or develop normally after fertilization.").

35. *See id.* (stating that the number of embryos transferred into the uterus is dependent on the woman's age and number of eggs previously retrieved); *State-Specific ART*, *supra* note 22 ("ART contributed to 10.6% of all multiples (twins, triplets, etc.) born in the United States."). Recall my parents' fertility journey and their election to transfer six embryos, which increased their chance of having multiples—and they had twins. *See supra* Introduction.

number of embryos that can be transferred to avoid multiple gestations, the IVF process may leave couples with leftover embryos.[36]

B. *Cryopreservation: The Process of Freezing Embryos*

The overproduction of embryos is a common consequence of IVF, and couples are often left with remaining embryos after they stop the process.[37] Embryos may be frozen because the couple cannot decide what to do with the extras after their IVF journey ends.[38] However, some couples decide at the outset of the process to freeze their embryos for later use.[39] The technique of freezing these extra embryos is called cryopreservation.[40] For this process, eggs are extracted and either fertilized or left unfertilized[41] and then frozen to be transferred into the uterus at a later date.[42] Extra embryos can be frozen for many years, but not every embryo will survive the freezing and thawing procedures.[43] The length of time that an embryo can be safely stored and still be of use is unknown, but it is thought to be decades.[44] It is currently estimated that about 620,000 embryos are cryopreserved in the United States.[45] This number is expected to grow as science advances, as the standard number of embryos transferred in a given cycle is limited, and as more people pursue infertility treatments.[46] Cryopreservation has the benefit of reducing costs for the couple because the woman does not need to

36. *See In Vitro Fertilization (IVF)*, *supra* note 26.

37. *See* Alyssa Lechmanik, Note, *The Battle Over the Embryo: How West Virginia Should Legally Define the Embryo and Regulate Embryo Adoption*, 116 W. VA. L. REV. 701, 706 (2013).

38. *Id.* at 707.

39. *See In Vitro Fertilization (IVF)*, *supra* note 26 (noting that the process of freezing embryos is a common decision for some women with cancer who are about to start radiation or chemotherapy since cancer treatments can affect fertility); *Embryo Freezing (Cryopreservation)*, CLEV. CLINIC (Feb. 17, 2022), https://my.clevelandclinic.org/health/treatments/15464-embryo-cryopreservation [https://perma.cc/R4Y8-296V] (listing other reasons a couple may choose to freeze and store embryos for future use, such as an upcoming military deployment).

40. For a detailed description of the cryopreservation process and the two different freezing methods (vitrification and slow freezing), see *Embryo Freezing (Cryopreservation)*, *supra* note 39.

41. This Note does not focus on arguments concerning *unfertilized* eggs that have been frozen because those eggs are likely beyond the scope of this Note and are generally regarded as the biological property of the *female* from whom the eggs were removed. *See, e.g.*, FLA. STAT. § 742.17(1) (2022) ("Absent a written agreement, any remaining eggs or sperm shall remain under the control of the party that provides [their respective] eggs or sperm.").

42. *In Vitro Fertilization (IVF)*, *supra* note 26.

43. *Id.*; *Embryo Freezing (Cryopreservation)*, *supra* note 39 (adding that scientists continue to research whether a fresh or frozen embryo has a better chance of developing into a pregnancy).

44. *See* Hecker, *supra* note 16.

45. *Id.*

46. Marietta, *supra* note 18, at 7–8.

undergo further egg retrievals for each attempted cycle,[47] and delays in the process can potentially increase the likelihood of pregnancy.[48] Conflicts between a husband and wife may arise, which prompts those couples to face the question of what to do with—and ultimately decide the fate of—their remaining cryopreserved embryos.[49]

C. *Disposition Options for Remaining Embryos*

The estimated abandonment rate for embryos in the United States ranges from 1% to 24%,[50] and maintaining cryopreservation storage can be quite costly.[51] Consequently, couples have four options for the disposition of their extra frozen embryos rather than abandoning them once finished with IVF.[52] The first method is to allocate custody of the remaining embryos to one of the two parties,[53] and this method will be explored in depth throughout the remainder of this Note. The second method is to thaw and destroy the remaining embryos, thereby providing closure to the donors that a biological child will not be in this world unbeknownst to them.[54] The third method is to donate the remaining embryos to another ART couple in need, but "one of the nation's largest fertility cryopreservation facilities . . . reports that only [one] percent of clients who pulled embryos from storage [in 2019] did so to donate."[55] The fourth and final method is to donate them to science for research purposes.[56] However, not many research programs in the United States accept donated embryos (unless they carry a genetic disease) because the programs use their own embryo bank and stem-cell lines.[57]

---

47. *See In Vitro Fertilization (IVF)*, *supra* note 26 ("Having frozen embryos can make future cycles of IVF less expensive and less invasive.").

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

49. Lechmanik, *supra* note 37, at 707.

50. Hecker, *supra* note 16 ("The American Society for Reproductive Medicine defines [abandonment] as five years of no contact despite repeated attempts, but some clinics consider embryos abandoned after as little as 90 days of nonpayment for storage.").

51. *See* Mary Pflum, *Nation's Fertility Clinics Struggle with a Growing Number of Abandoned Embryos*, NBC NEWS (Aug. 12, 2019, 4:34 AM), https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806 [https://perma.cc/YP82-EPNB] (describing the storage fees for frozen embryos as different for each clinic, but the yearly costs range from around $500 to $1,000 or more).

52. *See* Hecker, *supra* note 16; Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 80 (2002).

53. Shapo, *supra* note 52, at 80.

54. *But see* Hecker, *supra* note 16 (elaborating that, on the other hand, some couples may find it difficult to destroy their "hard-won embryos").

55. *See id.*

56. *See id.*

57. *Id.*

D. *The Right to Procreate*

The U.S. Supreme Court has stated that procreation is a fundamental right, but this was decided before conception through means other than traditional sexual intercourse—such as ART and IVF—were known.[58] In 1942, the Court declared that a state statute calling for the sexual sterilization of habitual offenders violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[59] The Court noted that this case was "touch[ing] a sensitive and important area of human rights," and that the Oklahoma law denied some people "a right which is basic to the perpetuation of a race—the right to have offspring."[60] The legislation to sterilize certain individuals was unlawful because the right to procreate is "fundamental to the very existence and survival of the race."[61] The Court thereby denied the state the power to interfere with an individual's "*natural* ability" to have offspring.[62] The emergence of ART at the end of the twentieth century challenged this traditional view and has called the basic civil right of procreation into question as medical professionals assist people in their efforts to conceive.[63]

E. *The Absent Definition for Human Life*

If one were to ask their peers, parents, or physicians when "human life" begins, the likelihood of a uniform answer is quite doubtful. A person's morals, religious views,[64] upbringing and experiences, and familiarity with science all influence a person's subjective definition of when human life starts.[65] Similarly, the U.S. Supreme Court has refused

---

58. *See* Daar, *supra* note 2, at 19 ("Justice Douglas' world view of human conception entailed a single scenario in which one man and one woman melded their gametes inside the woman's body to produce a child.").

59. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536–37, 541 (1942).

60. *See id.* at 536.

61. *See id.* at 541.

62. Daar, *supra* note 2, at 21.

63. *See id.* at 19–21.

64. *See* Roe v. Wade, 410 U.S. 113, 160–61 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (discussing various religious views concerning the existence of human life); Alenick, *supra* note 10, at 1882 (explaining that a debate about frozen embryos can implicate a person's religious beliefs because embryos represent potential life, and evoke concerns about privacy rights, because of the relation to procreation); MCBRIEN & HALE, *supra* note 5, at 6 ("[S]ome religions currently seem hostile to the use of assisted reproduction as a means of procreation in the context of family relationship, since that technology is not based on religious doctrine.").

65. *See* Persky, *supra* note 5, at 49 (statement of Professor Kimberly Mutcherson) ("Battles over frozen embryos ask 'big existential questions about the nature of life.'"); MCBRIEN & HALE, *supra* note 5, at 12 ("The absence of comprehensive legislation on ART is due in part to the fact that some people continue to have moral, social, or religious objections to nonsexual reproduction.").

to clearly define, or provide a uniform standard for, this same question.[66] In *Roe v. Wade*,[67] the Court acknowledged the controversy but declined to make any concrete determinations by explaining:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[68]

Despite the case presenting this question, the Court did not need to answer it to resolve what was actually at issue in *Roe*.[69] The Court formerly held that a state law limiting abortion for only "*life-saving*" procedures on behalf of the mother violated the Fourteenth Amendment's Due Process Clause.[70] Thus, a female's right to seek an abortion was implicit in the right to privacy protected by this clause in the U.S. Constitution.[71] Although the Court avoided defining the start of human life, the Court admitted that the law has never viewed the unborn as a person.[72]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[73] the Court mentioned that federal law "affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing, and education."[74] Regarding these matters, the Court stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the

66. *See Roe*, 410 U.S. at 159–60 (noting the "wide divergence of thinking on this most sensitive and difficult question").

67. 410 U.S. 113.

68. *Id.* at 159.

69. *See id.* at 162 ("[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.").

70. *Id.* at 164.

71. History.com Editors, *Roe v. Wade*, HISTORY (June 24, 2022), https://www.history.com/topics/womens-rights/roe-v-wade [https://perma.cc/QS8D-QS2P]. *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2234 (2022) (overturning *Roe* and holding that there is no longer a constitutional right to an abortion).

72. *See Roe*, 410 U.S. at 162; Lechmanik, *supra* note 37, at 720 (reasoning the Court's acceptance of a legal standard permitting an abortion until the end of the first trimester was because "no evidence shows the unborn is human").

73. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (eliminating the trimester distinctions used in *Roe* and the use of strict scrutiny for evaluating the government's regulation of abortions).

74. *Id.* at 851 (citing Carey v. Population Servs. Int'l, 431 U.S. at 678, 685 (1977)).

State."[75] Thus, the Court continued its refusal to make a legal determination for the beginning of human life and instead explained these choices as central to personal dignity and autonomy warranting states' respect and the Fourteenth Amendment's protection.[76]

II. LEGAL ISSUES AND DISPUTES REGARDING EMBRYOS

The "modern acceptance of 'assisting' human reproduction is related in different ways to the evolution of the modern family and the liberal meaning of marriage that has marked that evolution."[77] The "traditional" family consisted of two married heterosexual individuals living in the same household with their biological children.[78] Now, that average, traditional model has emerged and changed into many different forms of families[79]—creating the idea of a "modern family."[80]

Modern Family star Sofia Vergara found herself in the middle of a lawsuit regarding frozen embryos she created through IVF with former fiancé Nick Loeb.[81] Loeb sought custody of the embryos with plans to eventually use a surrogate, but Vergara wanted the embryos to remain frozen in storage.[82] The couple had previously signed a contract at the fertility clinic in which they both agreed the embryos could only be used if both parties consented.[83] To rule in favor of Loeb, the Los Angeles

75. *Id.* at 851.

76. *See id.* at 851. *But see* Anthony Jose Sirven, Note, *Undue Process: A Father's Proprietary Interest in an Embryo and Its Clash with* Casey, 68 FLA. L. REV. 1469 1473–85 (2016) (arguing for a reexamination of *Casey* by reason of a father's due process rights associated with the classification of embryos as property). Furthermore, at the time this Note was written, *Roe* and *Casey* were still good law. Nonetheless, the central thesis of this Note has not changed by the overturning of these two cases. As of now, the controversies (other than abortion) implicated by these two cases, such as the defining moment of human "life," are still intact but could change.

77. MCBRIEN & HALE, *supra* note 5, at 5; *see also* Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 225 (1998) ("The advent and swift expansion of reproductive technology beginning in the late 1970s accelerated the transformation of the family by undermining sacred assumptions about the reproductive process.").

78. Dolgin, *supra* note 77, at 229.

79. *See id.* at 228 (explaining some of the various forms of the "modern family": married persons, unmarried persons, same gender parents, one adult parent and a child, multi-generational families, and stepfamilies).

80. *See id.* at 229 ("[T]he biological truths which once firmly anchored familial relationships have been challenged through the startling development and acceptance of assisted reproductive technology beginning in the late 1970s."); MCBRIEN & HALE, *supra* note 5, at 6–7.

81. Gina Vivinetto, '*Modern Family' Star Sofia Vergara Sued by Her Own Frozen Embryos*, TODAY (Dec. 8, 2016, 7:32 AM), https://www.today.com/health/sofia-vergara-sued-her-own-frozen-embryos-t105728 [https://perma.cc/56ES-JVWJ].

82. *See* Persky, *supra* note 5, at 53.

83. *Id.*

Superior Court would have needed to declare the contract as void,[84] and the court did not do so.[85]

In addition to the California lawsuit, Loeb and a Louisiana pro-life group filed a suit in Louisiana against Vergara in an attempt to gain custody of two frozen embryos[86] by creating a trust to provide the embryos with legal standing.[87] Apparently, Louisiana law allows an embryo to sue a person.[88] Similar to the case in California, ruling in favor of Loeb and the embryos would have required the Louisiana state court to declare that the consent agreement signed at the fertility clinic was inconsequential.[89] Ultimately, the court ruled against Loeb and dismissed the case.[90] "Vergara's case[s] [are] part of a very controversial area in reproductive law. Advances in technology have made it more affordable for couples to freeze their eggs, leading to more disputes over who owns them after divorce or breakups."[91]

A. *Legal Classifications for an "Embryo"*

As mentioned above, Louisiana provides an embryo with legal status,[92] but not all states agree with such a legal classification for an embryo.[93] Without a uniform standard,[94] courts have fashioned three legal classifications for embryos by interpreting state statutes, court

84. *See id.*

85. *See* Ally Mauch, *Sofia Vergara Wins Court Battle: Judge Rules That Ex Nick Loeb Can't Use Embryos Without Consent*, PEOPLE (Mar. 3, 2021, 1:59 PM), https://people.com/tv/sofia-vergara-judge-rules-ex-nick-loeb-cant-use-embryos-without-consent/ [https://perma.cc/M9A6-54BL] (adding that the court granted Vergara a permanent injunction thereby stopping Loeb from using their embryos in the future without her permission).

86. Vivinetto, *supra* note 81 (reporting that Loeb named the embryos Emma and Isabella, perhaps in an effort to "garner sympathy from the public and the courts"); Loeb v. Vergara, 326 F. Supp. 3d 295, 299–300 (E.D. La. 2018).

87. Vivinetto, *supra* note 81; Mauch, *supra* note 85.

88. *See* Marietta, *supra* note 18, at 5 ("Louisiana unequivocally provides that an embryo is a juridical person—meaning that it has legal status and can be represented by an attorney in legal proceedings."); Vivinetto, *supra* note 81 (statement of Lisa Bloom, NBC News, Legal Analyst) ("Louisiana's special legal protections for embryos could sway the case in Loeb's favor."). To understand the legal status of an embryo in Louisiana, see LA. STAT. ANN. § 9:124 (2022).

89. Vivinetto, *supra* note 81.

90. *See* Mauch, *supra* note 85.

91. Vivinetto, *supra* note 81.

92. *See supra* note 88 and accompanying text.

93. *See* Marietta, *supra* note 18, at 5 ("The legal status of an embryo is not universally clear.").

94. *See* Alenick, *supra* note 10, at 1882 (stating that the controversies surrounding the nature of embryos "may be at the core of why the courts have yet to establish a uniform legal standard for disposing of frozen pre-embryos despite the compelling need for one"); Persky, *supra* note 5, at 50 (statement of Steven H. Snyder, Former Chair, A.B.A Section of Fam. L.'s Assisted Reprod, Techs. Comm.) ("As long as we don't have legislation in place, the courts are going to be all over the map.").

decisions, and professional organization policies.[95] Perhaps this indecision is because state legislatures want to avoid the topic because discussions about frozen embryos are connected to controversial debates regarding abortion.[96] Or, maybe state legislatures are wary to decide the disposition of frozen embryos because the topic is a "relatively new family law issue and tends to be overlooked in the larger battles over assisted reproduction."[97]

The current inconsistencies amongst states regarding the disposition of embryos detrimentally affects both potential children and potential parents. Defining and categorizing the term "embryo" is important because language defines legal status and can determine a person's (or potential person's) legal rights.[98] The first category some courts use is to view an embryo as property that is essentially "no different from any other human tissue."[99] The second category some courts use is to view an embryo as a human being and thus afford it the same rights as a legal person.[100] Lastly, and most commonly, courts have placed embryos in a classification between property and life—an "interim category"—because embryos have the *potential* to become a human being and thus deserve respect.[101] With this last view, an embryo is not just considered human tissue because of its symbolic meaning and potential for life; however, an embryo is also not considered a human being because it has not developed the characteristics of a legal person.[102] Thus, it is an interim category. Because of the conflicting legal classifications for embryos

95. Marietta, *supra* note 18, at 5.

96. *See* Persky, *supra* note 5, at 49. *But see* Caroline Lester, *Embryo 'Adoption' Is Growing, But It's Getting Tangled in the Abortion Debate*, N.Y. TIMES (Feb. 17, 2019), https://www.nytimes.com/2019/02/17/health/embryo-adoption-donated-snowflake.html [https://perma.cc/WXM3-SJNW] (explaining that IVF and donated embryos have become more popular among couples who oppose abortion).

97. Persky, *supra* note 5, at 49–50 (statement of Steven H. Snyder).

98. *See* Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992).

99. *See id.* at 596. Courts in New York and Texas have "applied contract law, instead of family law, and looked to the intent of the parties to determine the disposition of the embryos, thus implying the embryos were 'property' to be transferred by contract." Marietta, *supra* note 18, at 5.

100. *See* Marietta, *supra* note 18, at 5 ("Embryos are not regarded as 'persons' under federal law. . . . Nevertheless, a handful of states have enacted statutes that either expressly or impliedly characterize the legal status of an embryo as a person."); *see also Davis*, 842 S.W.2d at 596 ("This position entails an obligation to provide an opportunity for implantation to occur and tends to ban any action before transfer that might harm the preembryo or that is not immediately therapeutic, such as freezing and some preembryo research.").

101. *See, e.g.*, *Davis*, 842 S.W.2d at 596 ("[T]he preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons."); *see also* Lechmanik, *supra* note 37, at 712 (stating courts that follow this approach often rely on contract law when determining custody of embryos, which is similar to the property approach).

102. *Davis*, 842 S.W.2d at 596.

amongst the states, "many predict the issue [of disposition] will ultimately be decided by the U.S. Supreme Court."[103]

B. *Court Analyses of the Disposition of Embryos in Divorce Proceedings*

When a couple that previously created frozen embryos decides to divorce, American courts disagree on the resolution regarding the disposition of these embryos.[104] There are three main analytical approaches that courts have implemented when deciding this dispute:[105] the contractual enforcement approach, the contemporaneous mutual consent approach, and the balancing interest approach.[106] The choice of which approach to apply depends on the facts of a given case and on the policies of the state whose court is hearing the case.[107]

1. Contractual Enforcement: Informed Consent Agreements

The first approach to explore is the enforcement of informed consent agreements. The couple signs a consent agreement at the fertility clinic before undergoing the IVF process, and it includes a clause regarding the disposition of embryos upon divorce.[108] Many clinics require couples to sign these consent agreements to inform the couple about the process and risks associated with IVF and to learn the couple's intent for disposition.[109] Florida is one of the few states that has enacted legislation requiring consent agreements to be signed prior to undergoing the IVF process.[110] Under Florida law, a couple and their treating physician must sign an agreement regarding the disposition of embryos in the event of divorce, death, or other unanticipated circumstances.[111] Without a written agreement in Florida, "decisionmaking authority regarding the disposition of preembryos shall reside jointly with the commissioning

---

103. Ariana Eunjung Cha, *Who Gets the Embryos? Whoever Wants to Make Them into Babies, New Law Says*, WASH. POST (July 17, 2018, 4:37 PM), https://www.washingtonpost.com/national/health-science/who-gets-the-embryos-whoever-wants-to-make-them-into-babies-new-law-says/2018/07/17/8476b840-7e0d-11e8-bb6b-c1cb691f1402_story.html [https://perma.cc/M88C-G999]; *see also* Elrod, *supra* note 19 ("[C]ongressional legislation [and] decisions of the U.S. Supreme Court . . . have 'federalized' more and more areas of family law traditionally left to the states. . . . As a result, federal courts now hear a growing number of family law cases, especially those that involve complex interjurisdictional . . . issues.").

104. Alenick, *supra* note 10, at 1884–85.

105. *E.g.*, *id.* at 1885.

106. *E.g.*, Flannery, *supra* note 10, at 237–38.

107. *Id.* at 239.

108. Alenick, *supra* note 10, at 1887 (noting some courts recognize an exception if one of the spouses cannot become a parent without the frozen embryos).

109. Shapo, *supra* note 52, at 81.

110. *See id.* at 82.

111. FLA. STAT. § 742.17 (2022).

couple."[112] However, it is unclear whether the agreement is binding just between the couple and the treating physician or also between the couple themselves.[113] Moreover, this statute does not address the problem of persistent disagreement between the couple regarding their respective disposition preferences.[114]

In *Kass v. Kass*,[115] an ex-wife filed suit against her ex-husband for custody of five cryopreserved embryos they created through IVF while married.[116] The ex-husband objected and sought to enforce the agreement the couple had signed before starting the cryopreservation process.[117] In this agreement, the couple agreed to the following:

> In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to . . . [examine the pre-zygotes for] biological studies and . . . dispose[] of [them] . . . for approved research investigation as determined by the IVF Program.[118]

When a document clearly expresses the parties' intentions, a court should interpret the document in such a way that the purpose and language of the agreement is enforced.[119] The Court of Appeals of New York, the state's highest court, applied this principle and ruled that the consent agreement was binding because the couple mutually intended for their frozen embryos to be donated for research purposes in the event of divorce.[120] The enforcement of the agreement was proper because the couple "manifested their intention, [so] the law will honor it."[121] The court ultimately enforced the agreement to reduce confusion, increase reproductive autonomy, and provide consistency to IVF programs.[122]

2. Contemporaneous Mutual Consent Approach

The mutual consent approach, which is less strict than the contractual agreement approach, permits parties to change their minds after signing

---

112. FLA. STAT. § 742.17(2) (2022).

113. *See* Shapo, *supra* note 52, at 82.

114. *See id.*

115. 696 N.E.2d 174 (N.Y. 1998).

116. *Id.* at 177 (explaining that the ex-wife's reasoning for sole custody was to use these embryos in another implantation procedure).

117. *Id.* at 176–77.

118. *Id.*

119. *Id.* at 181.

120. *See id.* at 178, 180–81 ("Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.") (citing Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

121. *See id.* at 182.

122. A.Z. v. B.Z., 725 N.E.2d 1051, 1056 (Mass. 2000).

a disposition agreement due to changed circumstances, including divorce.[123] In other words, the donors must both consent at the same time—or *contemporaneously*—to allow a party to use the frozen embryos regardless of a signed prior agreement. However, this approach appears to not be popular as only a few courts have implemented it.[124] One such court was the Supreme Judicial Court of Massachusetts in *A.Z. v. B.Z.*[125] In this case, a husband and wife experienced fertility issues and pregnancy complications early in their marriage.[126] After years of fertility treatments, the couple successfully conceived twins and froze the remaining embryos for future use.[127] A few years later and before separation, the wife thawed and implanted one of their remaining embryos without her husband's knowledge or consent.[128] The couple divorced soon after—leaving four frozen embryos in storage.[129]

Prior to each treatment, the fertility clinic required the former couple to fill out several consent forms.[130] While only the wife's signature was needed for most forms, any forms regarding the cryopreservation of embryos needed the signatures of both the husband and the wife.[131] One such form concerned the disposition of cryopreserved embryos under certain events such as separation and death.[132] When the couple completed their first form, both of them signed and agreed that the embryos would be given to the wife upon separation.[133] For each treatment thereafter, the husband signed a blank form, and the wife subsequently filled in the "agreed-upon" terms for disposition before adding her signature.[134] The terms that the wife later wrote in were similar to those in the first form.[135]

---

123. Flannery, *supra* note 10, at 254–55.

124. *See id.* at 254 (claiming at least two courts have followed the contemporaneous mutual consent approach).

125. 725 N.E.2d at 1051.

126. *See id.* at 1052 (explaining the wife suffered an ectopic pregnancy resulting in a miscarriage and also underwent fertility treatments, including IVF).

127. *Id.* at 1053.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1053–54 ("Each consent form explains the general nature of the IVF procedure and outlines the freezing process, including the financial cost and the potential benefits and risks of that process.").

132. *See id.* at 1054 ("Under each [event] the consent form provides the following as options for disposition of the preembryos: 'donated or destroyed—choose one or both.' A blank line beneath these choices permits the donors to write in additional alternatives not listed as options on the form, and the form notifies the donors that they may do so."). The couple could change their minds after signing as long as that they agree, in writing, on the new terms. *Id.*

133. *Id.*

134. *See id.*

135. *Id.* ("In each instance the wife specified in the option for '[s]hould we become separated,' that the preembryos were to be returned to the wife for implantation.").

Massachusetts's highest court declared the cryopreservation consent form was unenforceable because it did not sufficiently represent the intent of both parties regarding disposition for four reasons.[136] First, the purpose of the form was to (1) explain the cryopreservation process and (2) inform the clinic about the couple's preference for disposition if, together, they no longer planned to use the frozen embryos.[137] Nothing on the form or in the record suggested that the former couple considered the form binding if a dispute about disposition later developed.[138] Second, the consent form did not include a time restriction, and this indicated to the court that the couple did not intend for the form to control disposition four years after its signing.[139] Third, the language of the form referred to separation, not divorce—these two terms have different legal implications.[140] Lastly, the form could not be a binding separation agreement because it lacked provisions regarding custody, child support, and alimony should the wife have a child from using one of the frozen embryos.[141] By employing the contemporaneous mutual consent approach, the court ultimately refused to force one of the donors into parenthood against his will.

3. Balancing Competing Interests Test

What happens if there is no signed consent agreement between the parties regarding the disposition of embryos? Should one party's rights prevail over the other's? The third approach—the balancing interests test—was created in *Davis v. Davis*.[142] There, the court weighed the facts of the case and the parties' individual preferences regarding disposition of the embryos.[143]

In *Davis*, a married couple had been unsuccessful in their efforts to conceive naturally, so they turned to IVF.[144] Before starting treatments, the couple did not discuss or sign an agreement about the disposition of

136. *Id.* at 1056.

137. *Id.*

138. *Id.* (suggesting instead that the form simply appeared to define the relationship between the two donors for the clinic's understanding).

139. *Id.* at 1056–57.

140. *Id.* at 1057 ("Because divorce legally ends a couple's marriage, [the court] shall not assume, in the absence of any evidence to the contrary, that an agreement on this issue providing for separation was meant to govern in the event of a divorce."). Moreover, because the wife wrote in the preference for disposition *after* the husband had signed, this instilled doubt in the court as to whether the husband's true intentions were properly conveyed. *Id.*

141. *See id.*; DeLoe, *supra* note 19.

142. 842 S.W.2d 588 (Tenn. 1992).

143. Flannery, *supra* note 10, at 236.

144. *Davis*, 842 S.W.2d at 591.

any remaining frozen embryos upon divorce.[145] The first attempt at transferring an embryo did not result in a pregnancy, and the remaining embryos were cryopreserved.[146] The husband filed for divorce before the next transfer attempt, and "the divorce proceedings were complicated only by the issue of the disposition of the 'frozen embryos.'"[147] The ex-wife wanted custody over the frozen embryos to use them to achieve pregnancy after the divorce, but the ex-husband preferred to keep them frozen until he decided whether to become a father outside of marriage.[148] By the time the case was on appeal, the parties' positions had changed because both had remarried.[149] It is worth noting that the parties' new legal positions did have an impact on the outcome of the case.[150]

"One of the fundamental issues the inquiry poses is whether the preembryos in this case should be considered 'persons' or 'property' in the contemplation of the law."[151] The trial court ruled that the embryos were "children in vitro," and the ex-wife was awarded custody because it was "in the best interest of the children."[152] However, the appellate court reversed and correctly stated that embryos are not "persons" under Tennessee law.[153] The Tennessee Supreme Court faced the issue of genetic parenthood and questioned how to resolve the dispute between the feuding former couple with opposite positions.[154] Ultimately, the state's highest court decided to balance the interests of the party that desired procreation against those of the party hoping to avoid procreation.[155] Use of the frozen embryos would have thrusted "unwanted parenthood," financial obligations, and psychological effects upon the

145. *Id.* at 590, 592. Moreover, there were no Tennessee statutes on point regarding the disposition of embryos at that time. *Id.* at 590.

146. *See id.* at 592.

147. *Id.*

148. *Id.* at 589.

149. *Id.* at 590. The ex-wife had since moved and no longer wished to use the remaining embryos herself, instead hoping to donate them to a couple in need. *Id.* On the other hand, the ex-husband strongly opposed donation and insisted on discarding the remaining embryos. *Id.*

150. *Id.*

151. *Id.* at 594.

152. *Id.*

153. *Id.*

154. *See id.* at 602–03 ("Previously, courts have dealt with the child-bearing and child-rearing aspects of parenthood. Abortion cases have dealt with gestational parenthood. In this case, the Court must deal with the question of genetic parenthood. . . . [A]n interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood. The technological fact that someone unknown to these parties could gestate these preembryos does not alter the fact that these parties, the gamete-providers, would become parents in that event, at least in the genetic sense. The profound impact this would have on them supports their right to sole decisional authority as to whether the process of attempting to gestate these preembryos should continue.").

155. *Id.* at 603.

ex-husband.[156] However, refusing to allow donation of the frozen embryos suggested to the ex-wife that her IVF efforts were wasted.[157] The court declared that, after balancing the two interests, the ex-husband's interest to avoid procreation was more significant than the ex-wife's potential emotional burden.[158]

Even though the *Davis* court balanced the interests of the two parties, it mentioned that disputes regarding the fate of the frozen embryos should only be resolved in this manner if no written agreement between the couple exists.[159]

The *Davis* court established, in dicta, the following guiding principles for the balancing interests test.[160] First, the party whose interest is to avoid procreation should succeed as long as the opposing party can become a parent through a reasonable alternative.[161] If the party whose interest is to use the disputed embryos cannot do so by other means, then their position should be given considerable weight.[162] Lastly, if the party's interest is to donate the disputed embryos, then the objecting party—here, the ex-husband—clearly has the greater interest and should succeed as a result.[163]

III. A CALL FOR UNIFORMITY

This Note advocates for the creation (and adoption) of uniform model laws to better regulate fertility clinics and provide guidance with the IVF process. It is important to address the question regarding the disposition of frozen embryos as the law concerning new reproductive technologies continues to develop.[164] The differences among the states related to divorce laws, classifications for embryos, and approaches for disposition put quarreling spouses in quite the predicament. As the unique issue regarding embryo disposition advances slowly through the courts, it is

156. *Id.* at 603. As a child himself, the ex-husband experienced the consequences of his parents' divorce and thus opposed parenting a child who did not live with its two parents. *Id.* at 603–04. He was also opposed to donation of the embryos for the same reason should that couple also divorce. *Id.* at 604.

157. *Id.* at 604.

158. *Id.* ("If she were allowed to donate these preembryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it. . . . Donation, 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."). The state supreme court mentioned it could have ruled differently had the ex-wife wanted to use the frozen embryos herself and if she could not become a mother through any other reasonable means. *Id.*

159. *See id.* (stating that if a prior written agreement does exist, then it should be followed).

160. *See id.*

161. *See id.*

162. *Id.*

163. *Id.*

164. *See id.* at 590 (listing this as one of the reasons the Supreme Court of Tennessee granted review in *Davis*).

obvious that confusion, complications, and emotions will increase when cryopreserved embryos are involved. Even more so, what happens when a couple relocates? For example, a Georgia couple starting a family undergoes the beginning stages of IVF but suddenly moves to Texas and puts the remaining embryos in cryopreservation storage. When one spouse files for divorce in Texas, a major question arises: which state's law will govern the disposition of the frozen embryos still in Georgia?

Perhaps the easiest answer is the best answer: a national standard, or in the alternative, a clear choice of law rule.[165] Congress could issue federal legislation based on the fundamental rights to form and raise a family pursuant to the Fourteenth Amendment. Alternatively, the U.S. Supreme Court could decide a case touching on the constitutionality of a state statute or a state court's decision regarding the disposition of cryopreserved embryos and establish a federal precedent.

However, since it seems unlikely that Congress or the Supreme Court will address this matter in the near future, this Note advocates for the creation of uniform model laws pertaining to this issue and encourages each state to adopt the model legislations. A body, such as the Uniform Law Commission,[166] could prepare model statutes with the goal of achieving consistency amongst the states without constitutional implications. Should this be accomplished, states should either alter their current laws to be in compliance or turn to the formulated model laws when drafting legislation and when deciding cases.

A. *A Universal Recognition of Embryos in the Interim Category*

Since many states do not have legislation on the issue of embryo disposition,[167] this Note recommends that model laws be drafted to establish a uniform definition for an "embryo" to reduce confusion and prevent conflicts of laws. The variation among the states may lead to future legal problems not yet seen in the courts. Referring to the example given above, Georgia and Texas could have different definitions for embryos and thus different ways of deciding the fate of the frozen

165. *See* Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998) (finding a "need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes").

166. *See generally* Memorandum from the Joint Ed. Bd. for Unif. Fam. L. to the ULC Comm. on Scope & Program (Nov. 30, 2018), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=324180e7-0408-9fdf-28a6-bdec13bb7fbb&forceDialog=0 [https://perma.cc/MLW2-UFAL] (reporting that a ULC Committee focused on family law voted to recommend the selection of a study committee to explore the practicability and need for a uniform or model law governing the disposition of embryos in the event of divorce, separation, or death, yet no further action has occurred).

167. *See supra* notes 12–15 and accompanying text.

embryos.[168] Then, the issue turns into a conflict of laws problem rather than focusing on the substance of the dispute. At the very least, the couple should agree on which state's law should prevail and include such a provision in the consent agreement form that the parties will sign before starting the cryopreservation process.

The states should adopt a single uniform definition for an embryo to solve these potential jurisdictional issues. As an attempt to blend both sides of the debate—pro-life versus pro-property—the model law should view embryos in the interim category because it recognizes the two sides without favoring or quashing one's viewpoints more than the other.[169] Cryopreserved embryos do have the potential for life and thus deserve respect,[170] but these embryos understandably are not entitled to the same legal rights as those who have been born. Such embryos have not yet developed, and *might* not develop at all, into a legal person. To equate these frozen embryos with the same status of people who have already been born weakens the significance of legal personhood. However, given the possibility to become a legal person more so than sperm and eggs alone, cryopreserved embryos should be granted a classification honoring this potential.

B. *Separate Consent Forms for IVF and for Disposition*

This Note advocates for the creation and adoption of model laws requiring separate informed consent forms for IVF procedures and for disposition agreements. Fertility clinics often provide the donor couple with forms to sign before a procedure, but some clinics combine the forms for IVF and the forms for disposition.[171] While it may be more efficient for fertility clinics to combine these forms, the clinics should not include in the same form both information concerning disposition of frozen embryos and information explaining the medical procedures. Combining these two standard forms "mixes a medical process meant to communicate information to the patient before a procedure with a legal process meant to protect the clinic against potential litigation . . . [and]

168. *See supra* Part III. While these states were chosen at random, they have similar yet different legal definitions for embryos. *See* Marietta, *supra* note 18, at 5–6 ("Texas has criminal and civil statutes that define a person as including an unborn child at every stage of gestation from fertilization until birth. Georgia was the first state to enact an embryo adoption law, implying that embryos are human beings even though the language in the statute does not expressly state so."); TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (West 2021); TEX. PENAL CODE ANN. § 1.07(26) (West 2021); GA. CODE ANN. § 19-8-41 (West 2022). For purposes of this Note, the states were merely used as examples.

169. *See* discussion *supra* Section II.A.

170. *See supra* notes 101–02 and accompanying text.

171. I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, HASTINGS CTR. REP. 13, 16 (2016).

bind the two reproductive partners in the case of a potential dispute upon dissolution of their relationship."[172]

Couples starting their journey to parenthood may not even consider the possibility of separation or divorce when signing the clinic's forms. Like any other medical procedure, the donor couple should be informed of the risks and benefits of IVF. However, unlike other medical procedures, IVF patients must think about where their biological components or genetic material will be stored post-procedure. Because not every couple will choose to freeze their embryos, it makes sense to separate the consent forms for IVF and the consent forms for embryo disposition. Thus, two separate model laws distinguishing between the two types of forms and requiring both (if applicable) would be optimal.

A fertility clinic should strongly encourage a couple contemplating the freezing of any remaining embryos from IVF to seek legal advice before signing any disposition agreements. To provide informed consent, the clinic should give both donor parents a full disclosure of their rights and explanations of their options regarding disposition. Merely checking one of two boxes provided on the standardized form does not inform the couple of the options available to them. Perhaps providing the couple with time to discuss their agreement and then allowing them to write in a designated solution themselves (after speaking with counsel) would better serve this purpose. Moreover, this Note suggests that the disposition agreement include a duration provision to serve as a safeguard in divorce disputes, and this will encourage couples to regularly update the future status of their cryopreserved embryos to reflect any changes in their relationship.

C. *Enforceability of Disposition Agreements Before Cryopreservation*

It is reasonable for states to impose a requirement on couples to sign disposition agreements prior to cryopreservation as a safeguard for future disputes, like Florida has done.[173] Disposition agreements of frozen embryos "keep[] with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition."[174] This Note suggests that two sections be included in the required consent forms prior to cryopreservation: (1) what happens to the remaining embryos in the event of death, nonpayment, etc., and (2) what happens to the remaining embryos in the event of a divorce. The first section is for disposition while the couple is still legally together, whereas the second is for when they are legally separated. Moreover, the forms should allow the potential

172. *Id.*

173. *See supra* notes 109–14 and accompanying text.

174. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

parents to change their agreement while the embryos remain frozen as long as the agreement is disseminated in writing.[175] If the couple never separates, then the disposition agreement serves as an extra protection for future planning; if the couple does separate, then the preemptive consent form provides a baseline for the couple and the state court. Should the divorce proceeding be amicable (and where preferences have not changed), nothing should prevent the former couple from relying on the disposition agreement as a binding contract, especially if the parties sought legal counsel when executing the forms.

However, public policy dictates that a donor be able to change their mind once the circumstances under which the agreement was executed have changed and parenthood is no longer desired.[176] The ending of a marriage is such a significant changed circumstance because of the high emotions involved between the former spouses. This Note's next suggestion will likely stir up debate as it contradicts common principles of contract law. However, it makes sense given the uniqueness and longevity of cryopreservation compared to IVF generally or even natural conception.[177] Family planning is not like a normal business or real estate transaction where contracts tend to remain enforceable when unfortunate facts are later revealed. Going through assisted reproduction is an intimate personal process that can result in life, and this consequence should be given extra consideration when determining the enforceability of disposition agreements.

If consent forms regarding disposition are required before cryopreservation, then why should they not always be binding? If the couple agreed on disposition preferences specifically in the event of divorce as suggested above, why should that be questioned? Perhaps the couple was not able to change their disposition agreement, or maybe one spouse was unfaithful and wanted the frozen embryos as a way to "trap" the filing spouse. Imagine that one of the partners encounters unexpected infertility, and the frozen embryos are their only viable chance at parenthood. Thus, disposition agreements should serve as a guidepost with potential for enforcement but also allow for selective "vetoes" with

175. *See id.* ("[T]he parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.").

176. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000) (noting the hesitancy of courts to nullify contracts based on public policy, but "the public interest in freedom of contract is sometimes outweighed by other public policy considerations [and] in those cases the contract will not be enforced").

177. *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) ("[T]he uncertainties inherent in the IVF process itself are vastly complicated by cryopreservation, which extends the viability of [embryo] indefinitely and allows time for minds, and circumstances, to change.").

good reason.[178] This type of analysis is best seen as a hybrid between *Davis* and *A.Z.*[179] This Note recommends that courts consider these special vetoes on public policy grounds and "the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship."[180] Moreover, should the court grant custody of the frozen embryos to one spouse based on a special veto, the other spouse should not face any legal consequences or obligations to that child, if so desired, in accordance with public policy.

D. *A State Court's Decision*

If states do not agree on adopting model uniform laws regarding the disposition of frozen embryos in divorce proceedings, state courts will continue to handle this issue on a case-by-case basis. If so, then the court should follow the contemporaneous mutual consent approach found in *A.Z.* where both parties must agree to the use of the remaining embryo(s) by one of the parties or else neither party receives custody. However, the court in *A.Z.* did not address what happens to the remaining embryos when neither party can use them.

This Note recommends that any cryopreserved embryos that their owners cannot use be destroyed or donated to research. Donation to another couple would, in a sense, still make the donors (genetic) parents but without any involvement. However, both the destruction of embryos and a donation to research will not result in a life for the embryo, so the public policy argument still stands because the donors would not become genetic parents. While destruction provides closure to the couple, donating any unusable embryos to science could lead to many developments within the realm of assisted reproduction or cryopreservation and show that the efforts by the male and female donors were not wasted. Yet, given the fact that not many facilities accept donated embryos,[181] the likely solution for courts will be to destroy the embryos in a timely manner once the parties have exhausted all appeals. Unless the need for embryos increases within the scientific community in the future, then courts should prefer destruction.

---

178. *See id.* (listing death, divorce, disappearance, incapacity, aging, and the creation of other children as some examples of circumstances a couple may encounter).

179. *See Davis*, 842 S.W.2d at 604 (explaining that the court did not intend to establish the creation of an automatic veto in disposition cases); *A.Z.*, 725 N.E.2d at 1058 (noting that courts are hesitant to invalidate a contract unless there is a violation of public policy); Cohen & Adashi, *supra* note 171, at 17 ("The contemporaneous consent approach purports to honor the current views of the parties, but in fact it puts in place a veto rule that cannot be overridden: no use of embryos by either party, despite what was agreed to previously, if one party vetoes it now.").

180. *A.Z.*, 725 N.E.2d at 1059.

181. *See supra* notes 56–57 and accompanying text.

CONCLUSION

Due to the increased number of people beginning IVF and the mass amounts of cryopreserved embryos, states should address the question regarding disposition of frozen embryos in divorce proceedings sooner rather than later. Few states have legislation on the matter, so while there is the opportunity, a set of model laws should be established to avoid more confusion and inconsistency across the country. One such model law should classify embryos in the interim category in-between property and life, which is already the majority view among the states.

Other model laws should provide that the state require couples going through IVF to sign consent forms for the procedures and consent forms for disposition before cryopreservation. Included in the disposition forms should be a written agreement between the parties regarding their intentions for disposition in each event of death, divorce, etc. However, couples should know and understand that these forms are binding only to an extent, as special changed circumstances can call into question the enforceability of these agreements. Given the uniquely intimate nature of these situations, the donor parents should retain as much decision-making authority as possible (rather than doctors or the fertility clinic) since they are the genetic providers of the embryos in dispute. However, the state will ultimately have the final say should the couple continue to disagree. In such cases, the divorcing couple must both consent to allocating embryos to one party or else the embryos should be destroyed in a timely manner. The creation and further adoption of model laws will encourage uniformity, avoid variations across the country, and prevent potential issues with jurisdiction.