

You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce

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INTRODUCTION

More and more couples are delaying starting a family.¹ Because fertility declines with age,² delaying childbirth increases the likelihood that couples will have to make use of assisted reproductive technologies such as in vitro fertilization (“IVF”) to fulfill their hopes of having children biologically related to at least one of them. As might be expected in a country with a relatively high divorce rate, the increased use of IVF³ has led and will continue to lead to more and more couples having to decide what to do with remaining frozen embryos upon dissolution of their marriages.⁴

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1. See, e.g., Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman’s The Autonomy Myth*, 93 CAL. L. REV. 1285, 1319 n.142 (2005) (book review) (“Many use contraception to limit the size of their families, and many delay or forgo childbearing because of a lack of resources, a reluctance to make tradeoffs, or concerns about giving their children the right start in life.”); Fotini Antonia Skouvakis, Comment, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 109 PENN ST. L. REV. 885, 885 (2005) (“Currently, 14% of couples in the United States are facing problems with infertility. Because many women are opting to postpone motherhood, this number is increasing.”).

2. Jessica L. Hawkins, Note, *Separating Fact from Fiction: Mandated Insurance Coverage of Infertility Treatments*, 23 WASH. U. J.L. & POL’Y 203, 206 (2007) (“Fertility . . . decreases with age.”).

3. See Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN’S L.J. 163, 175 (2007) (“[There is a] dramatic increase in the success rate and decrease in the cost has led to a significant rise in the demand for IVF treatments.”).

4. Cf. Judith F. Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches*, 29 J.L. MED. & ETHICS 197, 197 (2001) (“But

While some divorcing couples have little or no difficulty in deciding who should control the disposition of their cryogenically preserved embryos, others must rely on the courts to determine who will have final say over how or whether those embryos will be used. State courts have suggested a variety of ways to resolve such conflicts, ranging from enforcement of prior agreements to balancing the needs and desires of the parties to requiring contemporaneous consent before implantation can take place. Regrettably, because the courts analyzing these issues tend not to give adequate weight to how related family law issues are resolved and because the courts have not adequately considered some of the practical implications of their positions, both the reasoning and the results in these cases are all too often anomalous.

Part I of this article discusses *Davis v. Davis*⁵ and *Kass v. Kass*,⁶ in which the highest courts of Tennessee and New York respectively stated that initial agreements regarding the disposition of frozen embryos are enforceable. These cases illustrate the possible heartbreak that can be caused either when couples fail to make agreements regarding the disposition of their frozen embryos or when they make agreements without carefully considering the possible difficulties that might have to be confronted in the future. Part II discusses some of the subsequent decisions in which state courts have made clear that frozen embryos cannot be

with over 100,000 embryos in frozen storage in the United States and a divorce rate of 40 to 50 percent, it is not surprising that disputes over the disposition of these embryos are arising, causing the legal landscape surrounding these technologies to continue to expand.” (footnotes omitted)); Note, *Developing a Legal Framework for Resolving Disputes Between “Adoptive Parents” of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes between Progenitors*, 49 B.C. L. REV. 529, 532 (2008) [hereinafter Note, *Developing a Legal Framework*] (“The combination of the increasing use of embryo donation and a divorce rate in our country as high as fifty percent makes it likely that a divorce between a couple who has received or ‘adopted’ frozen embryos could occur and eventually be litigated.”); Note, *The Uncertainty of Embryo Disposition Law: How Alterations to Roe Could Change Everything*, 40 SUFFOLK U. L. REV. 485, 486 (2007) [hereinafter Note, *The Uncertainty of Embryo Disposition Law*] (“The increased use of IVF in conjunction with this high divorce rate will likely result in increased litigation regarding the disposition of excess cryogenically preserved embryos.”).

5. 842 S.W.2d 588 (Tenn. 1992).

6. 696 N.E.2d 174 (N.Y. 1998).

used if one of the progenitors objects, initial agreement to the contrary notwithstanding. These decisions not only reflect a preference against implantation but also create the opportunity to game the system at one of the worst possible times. Part III discusses two recent intermediate appellate decisions in which the courts seem to revert to the earlier *Davis-Kass* model whereby initial agreements are enforceable. The Article concludes that while the judicial enforcement of initial IVF agreements has its own difficulties, these pale in comparison to the difficulties posed by some of the competing approaches.

I. CONTRACT ENFORCEMENT

Two opinions issued by the high courts of Tennessee and New York dealing with the disposition of frozen embryos indicate that agreements made at the time the couple enters into an IVF program are enforceable. Where no prior agreement has been made, however, a number of factors might be considered, including the benefits conferred and burdens imposed on the respective parties should the frozen embryos be implanted and lead to a live birth. These cases adopt a model that provides guidance to the parties and the courts, and makes clear that the failure to give careful consideration to future possibilities might result in severe disappointment.

A. Davis

The seminal case in this area is *Davis v. Davis*,⁷ in which the Tennessee Supreme Court was asked to decide which member of a divorcing couple should control the disposition of the frozen embryos⁸ the couple had created.⁹ Initially, Mary Sue wanted the embryos for her own post-divorce use, but Junior objected because of his ambivalence about becoming a non-marital parent.¹⁰ Later, she changed

7. 842 S.W.2d 588.

8. The *Davis* court frequently but not exclusively used the term “embryo” after noting that “[t]here was much dispute at trial about whether the four-to-eight-cell entities in this case should properly be referred to as ‘embryos’ or as ‘preembryos,’ with resulting differences in legal analysis.” *Id.* at 593.

9. *Id.* at 589.

10. *Id.*

her mind. She did not want to use the embryos herself but, instead, wanted to donate them to a childless couple.¹¹ Junior adamantly opposed the donation, preferring instead that the embryos be discarded.¹²

A factor that could have played an important role in the resolution of this conflict would have been any initial agreement regarding the control of the embryos in the event of divorce. Regrettably, the Davises never reached such an agreement.¹³ Indeed, it is not even clear that post-divorce control of the embryos was ever discussed.¹⁴

The Tennessee Supreme Court was faced with a difficult decision, which was made even more difficult by the lack of statutory authority or case law to serve as a guide.¹⁵ When analyzing whose wishes should control, the *Davis* court suggested that the first matter to be decided was the status of the embryo—was it a person or property?¹⁶ Presumably, this was important, at least in part, because of Junior's announced desire to discard the embryos. If the embryos were legal persons, the conditions under which they could be discarded would be rather limited.¹⁷

While recognizing that embryos “are accorded more respect than mere human cells because of their burgeoning potential for life,”¹⁸ the *Davis* court rejected that embryos should be classified as persons. After all, the court noted, “even after viability, they are not given legal status equivalent to that of a person already born.”¹⁹ Because “abortion may be chosen to save the life of the mother,”²⁰ the

11. *Id.* at 590.

12. *See id.*

13. *See id.*

14. *See id.* at 592.

15. *See id.* at 590.

16. *Id.* at 594.

17. For example, Louisiana imposes limitations on the destruction of embryos. *See* LA. REV. STAT. ANN. § 9:129 (2000) (“A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person.”).

18. *Davis*, 842 S.W.2d at 595.

19. *Id.*

20. *Id.*

court implied that Tennessee law did not treat the fetus as a person.

Yet, abortion jurisprudence may be much less helpful than first appears when seeking to determine the legal protections owed to frozen embryos. While the *Davis* court was correct that the United States Supreme Court held in *Roe v. Wade*²¹ that the fetus is not a person for Fourteenth Amendment purposes²² in the context of a challenge to the constitutionality of a Texas abortion prohibition,²³ such a holding does not settle the status of a fetus or embryo outside of the abortion context.²⁴ As the *Davis* court recognized,²⁵ Louisiana accords special protection to embryos by statute.²⁶ However, if a sister state can offer embryos significant protections, abortion guarantees

21. 410 U.S. 113 (1973).

22. *Id.* at 158.

23. *See id.* at 116.

24. *See, e.g.*, Diane K. Yang, *What's Mine is Mine, but What's Yours Should also Be Mine: An Analysis of State Statutes that Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 619 (2002) ("Under current caselaw, states can define preembryos and fetuses as persons with protective rights so long as their interpretation does not interfere with a woman's bodily integrity.").

25. The *Davis* court wrote:

A Louisiana statute entitled "Human Embryos," among other things, forbids the intentional destruction of a cryopreserved IVF embryo and declares that disputes between parties should be resolved in the "best interest" of the embryo. 1986 La. Acts R.S. 9:121 *et seq.* Under the Louisiana statute, unwanted embryos must be made available for "adoptive implantation."

842 S.W.2d at 590 n.1; *see also* LA. REV. STAT. ANN. § 9:131 (2000) ("In 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.").

26. *See* LA. REV. STAT. ANN. § 9:129 (2000), which states:

A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person. An in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person.

Id.

notwithstanding,²⁷ then Tennessee's protections for frozen embryos might be significant as well.

There are at least two distinct difficulties posed by analyzing the status of frozen embryos in light of abortion jurisprudence. First, the potential conflict between a pregnant woman and an embryo or fetus developing inside of her simply is not at issue when the focus of concern involves who should have control over the disposition of frozen embryos. Because the bodily autonomy of a woman is not impacted by frozen embryos existing outside of her,²⁸ it is not at all clear that abortion jurisprudence has much to say about the status of frozen embryos.

Second, personhood might be conferred as a matter of constitutional or statutory law. While the Fourteenth Amendment to the United States Constitution does not accord personhood to the fetus or embryo,²⁹ an entirely separate question is whether a state law (or state constitution) accords such a status to an embryo or fetus, especially if the conferral of that status would not impinge on existing abortion rights.

Ironically, the *Davis* court noted that Tennessee law provides that "an attack or homicide of a viable fetus may be a crime but abortion is not,"³⁰ apparently believing that the State's not making abortion a crime establishes that fetuses "are not given legal status equivalent to that of a person already born."³¹ But an equally if not more plausible reading of Tennessee law would be that the viable fetus is

27. *But see* 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, 186 (1993) ("This Comment concludes that regulations prohibiting the discard of preembryos violate the biological donors' right to procreative liberty and, absent a compelling state interest, are unconstitutional.").

28. *See* *Kass v. Kass*, 696 N.E.2d 174, 177 (N.Y. 1998) ("[A] woman's right to privacy and bodily integrity are not implicated before implantation occurs."); *Davis*, 842 S.W.2d at 601 ("None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here.").

29. *See* *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

30. *Davis*, 842 S.W.2d at 595 (quoting *Davis v. Davis*, 1990 WL 130807, at *2 (Tenn. Ct. App. Sept. 13, 1990)).

31. *Id.*

accorded personhood to the extent that doing so would not compromise abortion rights.

That said, embryos and viable fetuses are not equivalent,³² and it may well be that the status of personhood is not afforded to embryos either by Tennessee statute or by the Tennessee Constitution.³³ However, such a conclusion could only be reached after doing further analysis and cannot be justified simply by pointing to the State's failure to criminalize something such as abortion that the Federal Constitution protects.

The *Davis* court not only rejected that embryos are persons, but also rejected that they are property.³⁴ Instead, they "occupy an interim category that entitles them to special respect because of their potential for human life."³⁵ The Davises' interest in the embryos was "not a true property interest,"³⁶ although Junior and Mary Sue did "have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."³⁷ Ultimately, the court suggested that Junior could not be forced to become a father against his will, especially given Mary Sue's wish to donate the embryos to a needy couple rather than use them herself.³⁸

The *Davis* court characterized the status of the embryo as one of the "fundamental issues"³⁹ of the case and offered an extensive discussion of how the embryo should be

32. See *Roe*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.")

33. Cf. *Davis*, 842 S.W.2d at 602 (discussing Tennessee's public policy and constitutional law regarding "potential human life").

34. See *id.* at 597.

35. *Id.*

36. *Id.*

37. *Id.*

38. See *id.* at 604 ("[I]f the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.")

39. *Id.* at 594.

classified.⁴⁰ Yet, the court's emphasis on the importance of that issue was somewhat misleading, because the status of the embryo played a relatively minor role in the analysis.

Certainly, it might be claimed, the court's holding that the embryos were persons *might*⁴¹ have prevented both Junior and the fertility clinic from disposing of the embryos.⁴² However, it should not be thought that the court's finding that embryos were persons would have led to implantation and, eventually, a live birth. Even if the court had made a finding of personhood, the court might not have given Mary Sue custody of the embryos, given Junior's initial position that he did not want the embryos implanted until he was comfortable bringing children into the world and his further claim that were the embryos successfully implanted he would seek custody of any children produced.⁴³ Rather, the more likely result would have been that the court would have ordered that the embryos remain frozen until the Davises could agree about their use. Thus, the court might have reasoned that while the embryos could not be destroyed because they were persons, there was no immediate duty to implant them, especially because a custody battle would likely take place were the implantation to result in the birth of a child.

The intermediate appellate court suggested that the embryos were property,⁴⁴ but nonetheless held that they had to remain frozen until the Davises could agree about their use.⁴⁵ Yet, if a court could find that the embryos had to remain frozen until both of the Davises could agree about their disposition whether the embryos were classified as persons or property, then a court presumably could reach that same conclusion were the embryos classified as a

40. *See id.* at 594-97.

41. *But see infra* notes 50-53 and accompanying text (noting that the embryos might not have been viable when the Tennessee court issued its opinion).

42. The *Davis* court authorized the clinic to dispose of the embryos. *See* 842 S.W.2d at 605 ("[T]he Knoxville Fertility Clinic is free to follow its normal procedure in dealing with unused preembryos, as long as that procedure is not in conflict with this opinion.").

43. *See id.* at 604.

44. *See id.* at 596.

45. *See id.* at 598.

special kind of property or, perhaps, as occupying some interim category.

To make matters even more confusing, one might imagine a different court awarding some or all of the embryos to Mary Sue whether they were characterized as persons or property. Suppose that the embryos were characterized as persons. A court might reason that keeping the embryos frozen would in effect be denying them the opportunity of developing. Arguably, because a parent might have her children taken away from her were she denying them the opportunity to develop and instead were treating them in a way that would result in their destruction,⁴⁶ a parent who was denying the embryos the opportunity to develop could have them taken away from her.⁴⁷ Thus, a court might have held that the embryos had to be awarded to Mary Sue or her designate, since this would be the only way that the embryos might eventually flourish.

Suppose, instead, that the embryos were treated as some kind of property or, perhaps, as occupying a special category. In that event, the court might find that they should be split between the Davises. Indeed, were the embryos treated as unique and nonfungible, it would seem especially important that Mary Sue be awarded at least some of them. Thus, because the value of the embryos might well not be captured by assigning a particular dollar amount to them, the best way to account for their special nature might seem to be to allow each parent to have at least some of them.⁴⁸

The claim here is not that the *Davis* court was wrong to refuse to award the embryos to Mary Sue so that they could be donated to another couple, but merely that the status of the embryos did little work. Indeed, the status of the

46. See, e.g., *In re Jayde M.*, 827 N.Y.S.2d 786, 787-88 (App. Div. 2007) (upholding termination of parental rights where home had been unsafe and children had been neglected).

47. Cf. *Davis*, 842 S.W.2d at 598 (noting that the appellate court had in effect given Junior the power to assure that the embryos would be discarded).

48. Cf. I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1186 (2008) ("Contracts relating to frozen preembryos seem like the paradigmatic case where specific performance is appropriate. These contracts cover unique subject matter, [and] they do not represent a case where it will be difficult to determine if the contract has been performed . . .").

embryos might do even less work now, given some of the technological advances that have recently been made.

At the time that *Davis* was decided, frozen embryos could not remain viable indefinitely—after two years,⁴⁹ the likelihood that the embryos could be thawed, implanted, and lead to a live birth was very low. When one considers that the embryos at issue in *Davis* were about three-and-a-half to four years old,⁵⁰ it seems quite unlikely that their having been implanted would have resulted in the birth of a child. Indeed, the *Davis* court criticized the intermediate appellate court because “the true effect of the intermediate court’s opinion [was] to confer on Junior Davis the inherent power to veto any transfer of the preembryos in this case and thus to insure their eventual discard or self-destruction.”⁵¹

Yet, at least two points might be made about the supreme court’s criticism of the intermediate appellate court. First, the state supreme court also gave Junior the power to assure that the embryos would be discarded or destroyed⁵²—if that was a defect in the lower court’s decision, then it was also a defect in the supreme court’s decision.⁵³ Second, delaying a decision for several years was the functional equivalent of causing the embryos to be discarded or destroyed *because of the state of then-current technology*. If cryopreservation technology improved, then maintaining the status quo, even for several years, would be distinguishable from causing the embryos to be destroyed.

49. *Davis*, 842 S.W.2d at 598.

50. The decision was handed down on June 1, 1992, and the embryos were cryopreserved early in December, 1988. *Id.* at 588, 592 (“After fertilization was completed, a transfer was performed as usual on December 10, 1988; the rest of the four-to eight-cell entities were cryogenically preserved.”).

51. *Id.* at 598.

52. *See id.* at 604.

53. *Cf.* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1069 (1996) (“To allow the person who does 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.” (emphasis omitted)).

Currently, frozen embryos can be stored for ten years or longer and still remain usable.⁵⁴ This technological improvement has important implications. First, it means that delaying implantation for even several years is not the equivalent of conferring on one of the parties the power to assure that the embryos will be discarded or destroyed. On the contrary, they might still be viable and could still be implanted were Junior to die⁵⁵ or were he subsequently to have a change of heart. Were the embryos thawed out and destroyed, a subsequent change of heart would be of no avail.

Yet, improvements in cryotechnology also mean that even were the embryos persons for purposes of state law, there still would be no need to implant them immediately. Delaying their implantation for even several years, could not be likened to treating them in a way that would cause their destruction. Indeed, even Louisiana law does not require that embryos be implanted by a certain time,

54. See Susan B. Apel, *Disposition of Frozen Embryos: Are Contracts the Solution?*, VT. BUS. J., Mar. 2001, at 29, 29 (“With the passage of the last twenty years, the ‘shelf life’ of frozen embryos—the period during which embryos can be frozen and still remain viable—has been proven to be longer than originally thought. While some early estimates ranged from two to three years, scientists now believe that frozen embryos can be kept for at least ten years, and probably longer.”).

55. It is simply unclear whether the court would have permitted Mary Sue to donate the embryos were Junior no longer alive to object. Some states might. See FLA. STAT. § 742.17(3) (2008) (“Absent a written agreement, in the case of the death of one member of the commissioning couple, any eggs, sperm, or preembryos shall remain under the control of the surviving member of the commissioning couple.”). For an argument that she should not have been permitted to make use of them, see Carl H. Coleman:

When one of the parties is no longer able to indicate an opinion about the disposition of the embryos, whether because of death, disappearance, or loss of decision-making capacity, the law should respect the most recent expression of that person’s wishes.

. . . .

. . . [T]he right to control the use of one’s embryos after death is at least as important as the right to direct the posthumous disposition of one’s property, which society has historically recognized through the enforcement of wills.

Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 113 (1999).

instead suggesting that they should be donated once they are renounced by the genetic parents.⁵⁶ However, the law does not specify what should be done if the parent neither renounces nor affirmatively chooses to implant, but instead simply claims to want to delay until he or she is ready to have the embryos implanted.⁵⁷

One infers that factors other than the status of the embryo played a very important role in the resolution of the *Davis* case. For example, the Tennessee Supreme Court believed that recognizing the embryos as persons “would doubtless have had the effect of outlawing IVF programs in the state of Tennessee,”⁵⁸ although the court failed to explain why that was so. The most that the court would offer by way of explanation was to point to Louisiana law, which (1) “forbids the intentional destruction of a cryopreserved IVF embryo and declares that disputes between parties should be resolved in the ‘best interest’ of the embryo,” and (2) requires that “unwanted embryos . . . be made available for ‘adoptive implantation.’”⁵⁹ The court implied that no more needed to be said regarding why the IVF program could not survive were embryos considered persons.

Adopting the Louisiana approach would *modify* many existing IVF programs in that couples considering what to do in the event of divorce would not have the option of directing that any remaining frozen embryos be destroyed.

56. See LA. REV. STAT. ANN. § 9:130 (2000), which states:

If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum.

Id.

57. The law does suggest that the embryos’ rights must be protected but does not spell out what this means. See LA. REV. STAT. ANN. § 9:126 (2000) (“A court in the parish where the in vitro fertilized ovum is located may appoint a curator, upon motion of the in vitro fertilization patients, their heirs, or physicians who caused in vitro fertilization to be performed, to protect the in vitro fertilized human ovum’s rights.”).

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

59. *Id.* at 590 n.1 (quoting LA. REV. STAT. ANN. § 9:121 (1986)).

However, that might not lead to the end of those programs, since couples might well decide to take part in an IVF program even knowing that they would have to promise either to implant all of their frozen embryos or, instead, to donate any remaining frozen embryos to another couple in need.

Some IVF program participants would want to donate unused frozen embryos to others,⁶⁰ and so would not be deterred by such a requirement. Other participants would prefer not to be required to donate unused embryos, perhaps because they would prefer to be able to make that choice for themselves or because they would prefer not to have a stranger raising their (genetic) children.

Consider the Andersons, who have been trying to have a child for several years but have been unable to do so. They enter into an IVF program. Alice Anderson has a large number of eggs harvested to increase the likelihood that she and her husband might eventually have a child.⁶¹ The eggs are fertilized with Alex Anderson's sperm, resulting in several viable embryos. A few are implanted, and the rest are frozen.

60. See Note, *Developing a Legal Framework*, *supra* note 4, which explains:

For IVF participants who no longer wish to use their remaining frozen embryos for implantation, but who nevertheless want to preserve the unique potential that embryos have for life, embryo donation offers a desirable alternative. Embryo donation may also be an attractive option for potential donors who want to help other infertile couples share in the joys of parenthood.

Id. at 549-50 (footnotes omitted).

61. See generally Yang, *supra* note 24, at 591-92 ("Because only about one in every four preembryos implanted results in a successful pregnancy, the unavoidable result of IVF is the creation of extra preembryos. These surpluses are cryopreserved to ensure that there are enough preembryos for use in future implantation." (footnotes omitted)); Skouvakis, *supra* note 1, at 888 ("Because of the expense and inconvenience of extracting an egg for IVF, couples prefer to extract a large number of eggs at once so that the 'extra' eggs will be readily available if the first implantation fails."); Note, *Developing a Legal Framework*, *supra* note 4, at 534 ("Because a pregnancy often does not result and the process of removing eggs from a woman's ovaries is time-consuming, expensive, and physically painful, many more eggs are often removed and fertilized than can be safely implanted at one time. The remaining embryos are often frozen using a process called cryopreservation that allows for the possibility of a significant lapse of time between conception and pregnancy.").

Suppose that Alice and Alex are fortunate—Alice becomes pregnant and is able to carry the fetus to term. Suppose further that the Andersons do not want to have any additional children and also do not want to have another couple raising their biological children. If they had their choice, the remaining frozen embryos would simply be discarded. That said, however, the state's having offered a constrained set of choices—either do not participate or participate but agree that all viable embryos will be used by someone—might not have been enough to dissuade the Andersons from participating in the program, especially because they might have been desperate to have a child genetically related to one or both of them.⁶²

That couples might still choose to participate in an IVF program with a constrained set of choices would not establish that it would be wise public policy to set up a program with those constraints. Further, it might well be that some couples would instead make use of IVF programs in other states if the latter programs did not impose similar constraints, even though enrolling in a program in another state would add to the already significant costs associated with such programs.⁶³ But it is not at all clear that a state's

62. See Ruth Lynn Deech, *Clones, Ethics and Infertility or Sex, Sheep, and Statutes*, 2 QUINNIPIAC HEALTH L.J. 117, 127 (1999) (“Many childless couples are desperate.”); cf. Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 924 (2000) (“[T]he effort to promote informed and considered medical decision-making is seriously hindered by the emotional vortex in which reproductive medicine occurs.”); Melissa Boatman, Comment, *Bringing up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce*, 37 U. BALT. L. REV. 285, 304 (2008) (“Few anticipate that they will be faced with infertility issues, and when one encounters them, there is little in the way of preparation for the roller coaster ride of emotions one experiences. Patients often feel as if they lack control of their lives or as if they are failures; depression rates are high and marital troubles sometimes develop in these situations. Often, infertile women seek treatment ‘at all costs’ with total disregard for the ultimate price they may pay emotionally, physically, and financially.”).

63. See Melissa E. Fraser, Note, *Gender Inequality in In Vitro Fertilization: Controlling Women's Reproductive Autonomy*, 2 N.Y. CITY L. REV. 183, 195 (1998) (“The cost of IVF has been estimated to be between \$67,000 and \$114,000.”). But see Shelly R. Petralia, Note, *Resolving Disputes over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 133 (2002) (“[C]ouples are limited in choosing another clinic because of geographical constraints and the limited number of IVF clinics in existence.”).

imposing constraints on a program and thereby creating an incentive for at least some couples to participate in IVF programs in other states would be enough to cause a local IVF program to founder.

A related difficulty is suggested for those states imposing such constraints on their IVF programs. Suppose that a couple entered into an IVF program understanding that the state required that all viable embryos be implanted in someone. However, the couple then wished to have their frozen embryos transferred to an IVF facility in another state where the couple had moved to take advantage of a job opportunity. Suppose further that the latter state did not require that all viable frozen embryos be implanted. Would the state imposing the limitation attempt to limit the transfer of the embryos to a facility in that other state for fear that the embryos might eventually be discarded rather than implanted?⁶⁴

One factor emphasized by the *Davis* court was that very important interests of the adults were at least potentially implicated—the court noted that “the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.”⁶⁵

64. See, for example, *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989), which involved a couple seeking to have their frozen pre-zygote transferred from a Virginia to a California IVF facility where they lived. See *id.* at 422. In *York*,

[t]he plaintiffs, Steven York, M.D. and Risa Adler-York (the Yorks), are the progenitors of the cryopreserved human pre-zygote (the pre-zygote) at issue in this case. The plaintiffs seek the release and transfer of the pre-zygote from the defendant The Howard and Georgeanna Jones Institute For Reproductive Medicine (Jones Institute) in Norfolk, Virginia to the Institute for Reproductive Research at the Hospital of the Good Samaritan located in Los Angeles, California. The defendants have refused to consent to an inter-institutional transfer of the pre-zygote.

Id. However, Virginia did not have a statute like Louisiana’s limiting what could be done with the embryos. At issue in *In re Busalacchi*, No. 59582, 1991 WL 26851, at *1 (Mo. Ct. App. Mar. 5, 1991) was whether Peter Busalacchi could have his daughter Christine, a 20-year-old woman allegedly in a permanent vegetative state, moved from a Missouri facility to a Minnesota facility. The father made clear that he wanted to move his daughter “to a state where it is clear that he has the ability to stop the life-sustaining medical treatment that he initially authorized for her recovery.” *Id.* at *4.

65. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992).

A separate question was whether this right to procreational autonomy had been triggered in the instant case.

The *Davis* court suggested that “an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood.”⁶⁶ Thus, the court recognized that an individual can have an interest in avoiding genetic parenthood, even if he would not acquire any legal responsibilities toward any child produced as a result of implantation. The court took seriously that an individual might suffer emotionally were he to know that a child biologically related to him was being raised by strangers, referring to “the relative anguish of a lifetime of unwanted parenthood.”⁶⁷ Indeed, the court discussed the “profound impact” that permitting implantation might have.⁶⁸

Some commentators question whether someone like Junior Davis would indeed suffer emotional harm were he to know that he was the genetic parent of someone existing elsewhere—after all, many semen donors do not suffer emotional scars.⁶⁹ Yet, someone who donates semen knowing that it will be used by someone else is not in the same position as someone who produces semen so that he can father a child with his partner.⁷⁰

The point here is not that all individuals who are the genetic parents of children raised by strangers nonetheless

66. *Id.* at 603.

67. *Id.* at 601.

68. *See id.* at 603; *see also* Cohen, *supra* note 48, at 1145 (“[A]n individual who contemporaneously opposes implantation of a preembryo is harmed when a preembryo is implanted and successfully carried to term, even when he is not obligated to bear the burden of gestational or legal (and consequently financial) parenthood.”).

69. *See* Ellen Waldman, *The Parent Trap: Uncovering the Myth of “Coerced Parenthood” in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1049 (2004) (“These studies, which delve into the psycho-social ramifications of sperm donation, suggest that most sperm donors are relatively unconcerned with the offspring their semen creates.”); Boatman, *supra* note 62, at 312 (“Studies have found that the majority of sperm donors are little concerned with the end result of their donations, even with the strong possibility that the end result is a biologically-related child.”).

70. *See* Boatman, *supra* note 62, at 312 (“There is an acknowledged difference between anonymous sperm donors and spouses who enter into the ART process with the hope of conceiving a child.”).

feel strong ties to those children,⁷¹ but merely that it is eminently plausible to believe that someone might feel this way.⁷² However, the *Davis* court did not analogously consider whether the right to be a genetic parent might also suffice to trigger constitutional guarantees, even if the child would be raised by others. Perhaps that is because Mary Sue wanted to donate the embryos purely out of altruism and did not feel that there would be any particular positive impact on her in knowing that she was a genetic parent. On the other hand, it may be that Mary Sue valued being a genetic parent, and wanted to donate the embryos to another couple because Junior would then not then face potential financial responsibility as the legal father.⁷³ Indeed, she might have preferred to raise the child or children herself, but might also have believed that Junior would only consent to implantation were he assured that he would be a legal stranger to any children resulting from the implantation. In any event, regardless of why Mary Sue wanted to donate the embryos, someone else might want to donate them precisely because she would receive psychic benefit just from knowing that she had become a genetic parent.

That someone might feel this way seems plausible. For example, while many egg donors feel good about having

71. *See id.* (“These studies reveal that when parents and children are separated by distance, and when parents are no longer in a romantic relationship with one another, bonds between parents and their biological offspring are minimal at best.”).

72. A separate question is whether a progenitor wishing to block implantation would have to offer concrete evidence of harm before such wishes would be granted. For such a suggestion, see Waldman, *supra* note 69, at 1061-62 (“A spouse who seeks to block such usage should be required to offer concrete evidence of harm apart from the generalized assertions of psychological harm to which the courts have, thus far, been so receptive.”).

73. *Cf.* OHIO REV. CODE ANN. § 3111.97(D) (LexisNexis Supp. 2008) (“A donor shall not be treated in law or regarded as a parent of a child born as a result of embryo donation. A donor shall have no parental responsibilities and shall have no right, obligation, or interest with respect to a child resulting from the donation.”); FLA. STAT. ANN. § 742.14 (West 2005) (“The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.”).

given their eggs to others,⁷⁴ some say that they would like to know whether the eggs resulted in live births.⁷⁵ Presumably, at least some of those who want to know whether children resulted from the donations would take pleasure in knowing that children had indeed been born from those eggs. That pleasure might result from knowing that one had helped others in need but also might result from knowing that one has a genetic connection to other living beings in the next generation.

Suppose, then, that Mary Sue had wanted to be genetically connected to a child in the world but could not sustain a pregnancy and could not afford to hire a surrogate. If indeed Junior and Mary Sue were equal in the eyes of the law, as the *Davis* court suggested,⁷⁶ then one would expect that Mary Sue's right to be a genetic parent, even if that genetic parenthood was not accompanied by legal rights or obligations, would also have been enough to trigger constitutional guarantees.

Even were Mary Sue's interest in being a genetic parent to trigger constitutional guarantees, that would not settle whether she, rather than Junior, should have been given custody of the embryos, although it presumably would have made her case stronger. Yet it was not clear that the court was weighing the right to be a genetic parent as heavily as the right *not* to be a genetic parent,⁷⁷ notwithstanding the court's claim that it was treating the gamete providers equally.⁷⁸ After noting that the decision about whether to grant Mary Sue custody of the embryos would have been more difficult had she wanted to use them herself, the *Davis* court cautioned that it would not have been willing to

74. Cf. Alanna Winter & Judith C. Daniluk, *A Gift from the Heart: The Experiences of Women Whose Egg Donations Helped Their Sisters Become Mothers*, 82 J. COUNS. & DEV. 483, 492 (2004) (discussing a study in which many donors report having positive feelings about their donations and would be willing to donate again).

75. See *id.* at 484 (noting a preference among donors to know whether children were born of their donations).

76. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) ("Mary Sue Davis and Junior Lewis Davis must be seen as entirely equivalent gamete-providers.").

77. Cf. Daar, *supra* note 4, at 201 ("On balance, it appears that in the world of assisted reproductive technologies, the perceived harm of forced parenthood outweighs any harms arising from the deprivation of reproductive rights.").

78. See *Davis*, 842 S.W.2d at 601.

override Junior's wishes unless Mary Sue had had no other reasonable options.⁷⁹ Yet that means that Mary Sue's interest in being a genetic parent combined with her interest in nurturing a child biologically related to her might not have overcome Junior's interest in not being a genetic parent.

As to whether the *Davis* court was weighing the interest in not being a genetic parent too heavily, this would depend upon how the court spelled out which options for Mary Sue would have been reasonable. For example, the *Davis* court understood that her having to undergo another egg retrieval would be painful, but did not believe that the painfulness of the procedure would render the option unreasonable.⁸⁰ Suppose, however, that it was also true that because Mary Sue was now older, there was a decreased likelihood that any harvested eggs would eventually result in a live birth.⁸¹ That factor would make it less reasonable for her to undergo additional attempts to harvest eggs, although there is reason to think that the *Davis* court would not have considered it sufficiently unreasonable to justify granting her custody of the embryos. For example, after noting that there might be reasons precluding Mary Sue from going through the entire process again, the court offered the consolation that "she could still achieve the child-rearing aspects of parenthood through adoption."⁸² Yet the whole

79. *Id.* at 604.

80. *Id.*

81. *Cf.* Colker, *supra* note 53, at 1073 ("As women age, their fertility declines Thus, a woman who harvests a healthy egg while she is in her early thirties and fertilizes it with a man's sperm has a much greater chance of pregnancy and a healthy birth than a woman in her late thirties or even early forties."); John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1015 (2001) ("After the age of thirty-eight or forty, the quality of oocytes is so poor that IVF has a very low chance of success. A woman who had agreed to undergo IVF only on condition that she could use or donate all embryos and is now over forty would have a good claim that she has no other chance for reproduction.").

82. *Davis*, 842 S.W.2d at 604; *see also* Tracey S. Pachman, *Disputes over Frozen Preembryos & the "Right Not to Be a Parent,"* 12 COLUM. J. GENDER & L. 128, 131 (2003) ("[Noting that the court's willingness to allow her to have the embryos] 'only if she could not achieve parenthood by any other reasonable means' . . . leaves open to speculation whether adoption or costly medical procedures would be considered 'reasonable means' by which a woman could achieve parenthood." (quoting *Davis*, 842 S.W.2d at 604) (emphasis added)).

focus of discussion had been on the genetic parenting interests of the parties, so the court's noting that adoption would still be an alternative, while true, seems to undercut the claim that the Davises were being treated equally as gamete providers.

Perhaps the *Davis* court was relying on the special circumstances suggested by Junior's history—the court noted that “[i]n light of his boyhood experiences, Junior Davis is vehemently opposed to fathering a child that would not live with both parents.”⁸³ Yet, there was no reason *ex ante* to believe that a couple wishing to make use of the embryos would be particularly likely to divorce. Indeed, ironically, when the last eggs were harvested from Mary Sue,⁸⁴ the Davises' marriage had not been particularly stable,⁸⁵ and Junior had been hoping that their relationship would be improved by the birth of a child.⁸⁶ But if he was willing to bring a child or children into a relationship based on the *hope* that doing so would improve the relationship, he must not have been inalterably opposed to permitting children genetically related to him to be brought into a home where the adults might eventually part ways.

Mary Sue had testified that she had not been aware that there were problems in their marriage,⁸⁷ and *might* have felt differently about going through the IVF procedure if she been aware of how Junior had felt.⁸⁸ But Junior knew that the marriage was rocky, and it thus seems surprising that the *Davis* court uncritically accepted his claims about

83. *Davis*, 842 S.W.2d at 604.

84. *Id.* at 592 (“[O]n their last attempt, on December 8, 1988, the gynecologist who performed the procedure was able to retrieve nine ova for fertilization.”).

85. *Id.* (“Junior Davis filed for divorce—in February 1989. He testified that he had known that their marriage ‘was not very stable’ for a year or more.”).

86. *Id.*

87. *Id.*

88. The *Davis* court explained:

Mary Sue Davis's testimony is contradictory as to whether she would have gone ahead with IVF if she had been worried about her marriage. At one point she said if she had known they were getting divorced, she would not have gone ahead with it, but at another point she indicated that she was so committed to the idea of being a mother that she could not say that she would not have gone ahead with cryopreservation.

Id. at 592 n.10.

the importance of his genetic children being raised in a home with two parents.

At least two points might be made about the *Davis* court's analysis of how Junior would feel were Mary Sue or someone else to use the embryos. First, his actions during the marriage belied his commitment to never wanting to father children who might not be living in a two-parent home. Second, even were it true that Junior or someone like him might feel badly about being genetically connected to a child raised by others, the court seemed unwilling to consider that an analogous argument might be made about the feelings of the parent who wants the embryos donated, i.e., that he or she might feel terribly were the embryos discarded rather than given the opportunity to flourish.

In *Gonzales v. Carhart*,⁸⁹ the Court emphasized that women who had abortions might feel regret.⁹⁰ The difficulty there was not that the Court was wrong⁹¹—it seems reasonable to believe that some women regret their decisions to abort,⁹² but that the Court seemed to ignore that women might regret *not* having had an abortion. Even were it appropriate for the state to decide what is best for women rather than let the women decide for themselves,⁹³ it is not clear why the Court should only consider the feelings

89. 550 U.S. 124 (2007).

90. *Id.* at 159 (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”).

91. Justice Ginsburg implied that the Court was simply wrong about this. *See id.* at 183 (Ginsburg, J., dissenting) (“[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence . . .”).

92. *See, e.g.*, Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1394 (2008) (“Some women surely do regret having abortions.”); Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451, 1491 n.181 (2008) (“This is not to say that no woman regrets an abortion . . .”).

93. Cheryl Hanna, *Beechman v. Leahy and the Doctrine of Hypocrisy*, 32 VT. L. REV. 673, 675-76 (2008) (“Saving women from regret, as Kennedy essentially argues, justifies overriding an informed decision a woman makes in consultation with her doctor. Such reasoning, as Justice Ginsburg argues in dissent, strikes a blow to women’s autonomy, undermining their ability to make life decisions for themselves.”).

of some women, especially when the potential objects of regret included not only whether to have an abortion but also which type of abortion to have.⁹⁴ So, too, the *Davis* court seemed to ignore the feelings of individuals that might have militated against the result reached by the court.

The *Davis* court explained that a much different result would have been reached had the Davises initially agreed about the disposition of the embryos in the event of divorce.⁹⁵ Had there been such an agreement, it would have been enforceable, subject only to their both agreeing to modify it.⁹⁶ Thus, although *Davis* apparently weighs the right not to be a genetic parent more heavily than the right to be a genetic parent, the court implied that such a weighing would be triggered only when there had been no agreement in the first place about the disposition of the embryos in the event of divorce.

B. Kass

The New York Court of Appeals followed the *Davis* court's lead in emphasizing the importance of the initial agreement. In *Kass v. Kass*,⁹⁷ the New York court was asked to determine who should have custody of five frozen pre-zygotes⁹⁸ that had been created during the Kassess' marriage.⁹⁹ This time, however, there had been an agreement that in the event of divorce the pre-zygotes would be donated to the IVF program for approved purposes.¹⁰⁰ The difficulty was that these pre-zygotes

94. *Cf. Gonzales*, 550 U.S. at 184 (Ginsburg, J., dissenting) (“[T]he Court deprives women of the right to make an autonomous choice, even at the expense of their safety.”).

95. *Davis v. Davis*, 842 S.W.2d 588, 598 (Tenn. 1992).

96. *See id.* at 597.

97. 696 N.E.2d 174 (N.Y. 1998).

98. The *Kass* court explained its use of the term “pre-zygote”: “We use the parties’ term ‘pre-zygotes,’ which are defined in the record as ‘eggs which have been penetrated by sperm but have not yet joined genetic material.’” *Id.* at 175 n.1. A zygote is only one cell. *See Davis*, 842 S.W.2d at 593.

99. *Kass*, 696 N.E.2d at 175.

100. *Id.*

represented Maureen Kass's only chance for genetic parenthood.¹⁰¹

The initial agreement suggested that “[i]n the event of divorce . . . legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.”¹⁰² The immediately preceding sentence clarified the parties’ intentions, specifying that the “frozen pre-zygotes will not be released from storage for any purpose without the written consent of *both* of [the parties], consistent with the policies of the IVF Program and applicable law.”¹⁰³ After having agreed to divorce, Steven and Maureen had each signed a statement saying that the pre-zygotes “should be disposed of [in] the manner outlined in [the] consent form and that neither Maureen Kass[,] Steve Kass, or anyone else will lay claim to custody of these ‘pre-zygotes.’”¹⁰⁴ However, less than two months later, Maureen sought sole custody of the pre-zygotes so that they could be implanted in her.¹⁰⁵

The New York court found that “the parties clearly expressed their intent that in the circumstances presented the pre-zygotes would be donated to the IVF program for research purposes.”¹⁰⁶ The court noted that individuals might change their minds after having made an agreement—cryopreservation can preserve the embryos for an extended period, and circumstances can change greatly over time.¹⁰⁷ However, the possibility that conditions might change made it all the more important for the initial agreement to be informed and deliberate—the *Kass* court emphasized “the need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and

101. *Id.*

102. *Id.* at 176.

103. *Id.*

104. *Id.* at 177 (first and third alterations in original).

105. *Id.*

106. *Id.* at 178.

107. *Id.* at 180.

appreciated.”¹⁰⁸ Were such agreements enforceable only when the parties continued to agree with what had been originally decided, the agreements would be of relatively little use—either the parties would continue to agree about the disposition of the embryos and there would be no challenge to the enforcement of the agreement or, if one of the parties had had a change of heart, the original agreement would be of no use in determining what to do.¹⁰⁹ Presumably many couples who could not agree about the disposition of their embryos would ask the courts to settle their dispute.¹¹⁰

A variety of issues raised in *Davis* were not addressed in *Kass*, e.g., how much weight to place on the fact that one of the individuals would be precluded from becoming a genetic parent were the court to honor the other gamete provider's wish not to be a parent. The *Kass* court did not have to do the potentially difficult balancing of the implicated interests,¹¹¹ precisely because there had been a pre-existing agreement. Indeed, both the *Davis* and *Kass* courts suggested that prior agreements are enforceable unless both parties subsequently agree about a different course of action. However, other ways of approaching the enforceability of such contracts are not only conceivable but have been adopted by different state courts.

108. *Id.* at 179.

109. *Id.* at 180.

110. See Yang, *supra* note 24, at 629 (“By encouraging IVF participants to sign enforceable agreements, courts would no longer be called upon each time a dispute arises.”); see also Robertson, *supra* note 81, at 993 (“Advance directives and contracts for future disposition of embryos provide a convenient and reasonable way to resolve questions of embryo disposition when the couple is unavailable or unable to agree. They enable the gamete providers to control those choices by advance commitment, rather than permit other decisionmakers to decide.”); *id.* at 1003 (“[Discussing the] social welfare and efficiency gains for both parties and society from enforcing contractual precommitments.”).

111. *Kass*, 696 N.E.2d at 180 (“To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.”).

II. THE ENFORCEABILITY OF CONTRACTS AFTER A CHANGE OF HEART

Anticipating that there would be many cases in which parties might change their minds over the proper disposition of frozen embryos after much time had passed or, perhaps, if the circumstances had substantially changed, the *Kass* court suggested that the initial agreement should specify what was to happen were circumstances to change. Other courts have taken a different approach, holding that a former agreement between members of a couple about the disposition of their embryos would only be enforceable if no one had since had a change of heart.¹¹² The first state supreme court to adopt this approach in the context of frozen embryos was the Supreme Judicial Court of Massachusetts in *A.Z. v. B.Z.*¹¹³

A. *A.Z.*

At issue in *A.Z.* was the enforceability of an agreement between members of a divorced couple about the use of remaining frozen embryos.¹¹⁴ *B.Z.* and *A.Z.* had successfully used IVF previously and had had twin daughters.¹¹⁵ At that time, some of the pre-embryos were frozen for future use.¹¹⁶

112. Susan B. Apel explains:

Cases following *Kass* in relatively rapid succession took a decidedly different view on the issue of contract enforceability; in failing to uphold the contracts, the courts became the arbiters of disputes over what should happen to the embryos. The courts articulated the “no forced parenthood” argument as a primary principle of resolving these disputes.

Susan B. Apel, *Cryopreserved Embryos: A Response to “Forced Parenthood” and the Role of Intent*, 39 FAM. L.Q. 663, 665 (2005).

113. 725 N.E.2d 1051 (Mass. 2000).

114. *Id.* at 1052 (“*B.Z.*, the former wife (wife) of *A.Z.* (husband), appeals from a judgment of the Probate and Family Court that included, inter alia, a permanent injunction in favor of the husband, prohibiting the wife ‘from utilizing’ the frozen preembryos held in cryopreservation at the clinic.”) (footnotes omitted).

115. *Id.* at 1053.

116. *Id.*

Three years after the birth of their daughters, B.Z. had one of the frozen preembryos thawed and implanted without informing her husband.¹¹⁷ He learned of this through a notice from his insurance company.¹¹⁸ Relations between the husband and wife then deteriorated and the couple eventually divorced.¹¹⁹

When entering the program, B.Z. and A.Z. both signed certain forms specifying that the embryos would be returned to the wife for implantation should the couple separate.¹²⁰ At each of the subsequent egg retrievals, the husband and wife signed additional consent forms.¹²¹ In all of these subsequent signings, A.Z. signed a blank form that was later filled in by B.Z.¹²² However, the directions in the later forms were “substantially similar”¹²³ to those contained in the first form.

Express language of the agreement notwithstanding, the court was “dubious at best that [the forms] represent[ed] the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them.”¹²⁴ The court noted that “[t]he form [did] not state, and the record [did] not indicate, that the husband and wife intended the consent form to act as a binding agreement between them should they later disagree as to the disposition,” and construed the form as being “intended only to define the donors’ relationship as a unit with the clinic.”¹²⁵

Yet, it is utterly implausible to interpret the language at issue as merely intended to govern the relationship between the clinic and the donors as a unit, since it described the then-current intention to give the ex-wife the

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1054.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1056.

125. *Id.*

embryos for her own use should the couple later separate.¹²⁶ Perhaps that intention rested on the implicit assumption that the embryos could be implanted post-separation only if the couple had not previously been able to use IVF successfully. However, even were that accurate, the agreement would not merely have been meant to govern the relationship between the clinic and the donors. Instead, it would have been meant to govern what would be done with the embryos in the event of separation, although it would not have been intended to cover a case in which the embryos were going to be implanted even after other children had been born.¹²⁷

The A.Z. court noted that the consent form did not contain a “duration provision.”¹²⁸ Because the wife was seeking to enforce the agreement four years after it had been made and against her ex-husband’s wishes, the court refused to “assume that the donors intended the consent form to govern the disposition of the frozen preembryos four years after it was executed, especially in light of the fundamental change in their relationship (i.e., divorce).”¹²⁹ Yet, it is not uncommon for couples to be deciding what to do with frozen embryos four years after their creation,¹³⁰ so the lack of a duration provision should not have militated against enforcement in this particular case, given when that enforcement was sought.

Certainly it is fair to point out that there had been a fundamental change in the couple’s relationship—they had divorced. As a general matter, couples creating embryos together might anticipate that the embryos would be used

126. See Daar, *supra* note 4, at 198 (“[The A.Z. court’s] interpretation seems an illogical departure from the very purpose of contractual agreements, i.e., to anticipate and govern the future conduct of the parties.”).

127. Cf. Cohen, *supra* note 48, at 1194 (“My own sense is that the balance of interests favors use when an individual has no genetic children but not when he or she has more than one . . .”).

128. A.Z., 725 N.E.2d at 1056.

129. *Id.* at 1057.

130. See Robert Plocheck, *Magazines*, DALLAS MORNING NEWS, July 29, 2006, at 4H (“[The] average IVF couple . . . has seven frozen embryos in storage; on average, the embryos have been stored for four years.”).

only while the couple remained together.¹³¹ However, the agreement at issue in *A.Z.* had specifically discussed what should be done in the event that the couple separated, so it could not be claimed that the couple had not even considered what to do in the event that their relationship did not last.

The *A.Z.* court understood that this eventuality had been contemplated within the agreement, but noted that separation and divorce have “distinct legal meanings,” and refused to accept that “an agreement on this issue providing for separation was meant to govern in the event of a divorce.”¹³² But this kind of analysis contradicted the spirit, if not the letter, of other portions of the opinion. If the agreement was merely designed to reflect the intentions of the parties and was not designed to be a legally binding agreement, one would not expect the parties to take the special care required to distinguish between separation and divorce. There was no evidence that the parties were legally trained, and they might simply have been considering what to do if they were still together versus what to do if they were living apart, i.e., had separated.

Indeed there is something disquieting about the court’s implicit position. Suppose that an individual agrees that his wife can have custody of the frozen embryos they have created, even should the couple separate. According to the reasoning announced by the court, the likelihood that such an agreement would be enforced should depend upon when she sought to enforce the agreement—her chances should be much better if she seeks the embryos before the divorce is final, even if she is irrevocably committed to securing the divorce regardless of whether or when implantation takes place.

It may well be that the *A.Z.* court was offering these kinds of arguments as rationalizations for a result that it clearly wanted to reach. The court noted that “even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement

131. See Coleman, *supra* note 55, at 83 (“[I]t is important to keep in mind the context in which the embryos were originally created—a mutual undertaking by the couple to have children together.”).

132. *A.Z.*, 725 N.E.2d at 1057.

that would compel one donor to become a parent against his or her will.”¹³³ The court believed that its holding otherwise would amount to “forced procreation,”¹³⁴ which would be against public policy.

Yet, there are a multitude of reasons why this is not forced procreation, as if this were a real-life version of a Margaret Atwood novel.¹³⁵ A.Z. had voluntarily contributed his sperm to fertilize his wife’s eggs,¹³⁶ and had agreed that she could use the frozen embryos for implantation in the event of their separation. Further, there is no reason to believe that he could have avoided parental responsibility had B.Z.’s last pregnancy attempt been successful.¹³⁷ Indeed, one infers from the opinion that B.Z.’s attempt to become pregnant again, without even having mentioned this to A.Z., may have contributed to the breakdown of the marriage—the court noted that relations between A.Z. and B.Z. deteriorated around the time that he learned from his insurance company that she had tried without success to have another child.¹³⁸ However, the court did not elaborate. There was no discussion in the opinion whether, for example, A.Z. and B.Z. had discussed having more children prior to her last attempt and A.Z. had been adamant in not wanting more or whether B.Z. had sensed that their marriage was in trouble and she had wanted to become pregnant again as a way of salvaging the marriage. Or it

133. *Id.*

134. *Id.* at 1057-58.

135. See generally MARGARET ATWOOD, *THE HANDMAID’S TALE* (Anchor Books 1998) (1986) (describing a world with forced surrogacy).

136. See Daar, *supra* note 4, at 199 (“[T]he intent to parent has been expressed by the voluntary surrender of gametes.”).

137. See MASS. GEN. LAWS ch. 209C, § 6(a) (2007) (“[A] man is presumed to be the father of a child . . . if: (1) he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce . . .”).

138. The A.Z. court explained:

She did so without informing her husband. The husband learned of this when he received a notice from his insurance company regarding the procedure. During this period relations between the husband and wife deteriorated. The wife sought and received a protective order against the husband under G.L. c. 209A. Ultimately, they separated and the husband filed for divorce.

A.Z., 725 N.E.2d at 1053 (footnote omitted).

may be that B.Z. anticipated that the relationship would soon end and she wanted to become pregnant again before the relationship was officially over. All that is clear is that the relationship faltered around the time that A.Z. learned about the attempt to have another child.

Suppose that the A.Z. court had enforced the initial agreement and had awarded B.Z. the remaining embryos. Suppose further that she had become pregnant and given birth to a child post-divorce. A.Z. might well have been held financially responsible for the child. Relatively few states expressly relieve the former spouse of financial responsibility in this kind of situation.¹³⁹ Without such an

139. See Cohen, *supra* note 48, at 1124 (“[T]hree states (Texas, Washington, and Colorado) have statutes specifying that if a fertilized preembryo is implanted *after* the parties divorce, a former spouse who contributed genetic material is not deemed to be the *legal* parent of any resulting child if the former spouse does not contemporaneously consent.”). For Colorado’s stance, see COLO. REV. STAT. § 19-4-106(7)(a)-(b) (2008), which states:

(a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a dissolution of marriage, the former spouse would be a parent of the child.

(b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos.

Id. For Texas’s stance, see TEX. FAM. CODE ANN. § 160.706(a)-(b) (Vernon 2007), which states:

(a) If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record . . . that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child.” (b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record kept by a licensed physician at any time before the placement of eggs, sperm, or embryos.

Id. For Washington’s stance, see WASH. REV. CODE § 26.26.725 (2008), which states:

(1) If a marriage is dissolved before placement of eggs, sperm, or an embryo, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

expressly recognized exception, A.Z. might be treated as would any other individual who divorced his wife after conception had already taken place.¹⁴⁰ Certainly all else being equal, it would be in the child's interest to have both her mother and her father supporting her, even if her parents were no longer living together. Further, the case law in other areas involving unwilling parents supports the imposition of such an obligation.

B. *On Being an Unwilling Parent*

In *A.Z.*, there was no evidence that A.Z. had somehow been deceived into providing his sperm so that B.Z.'s eggs could be fertilized.¹⁴¹ Nor was there any evidence of his having been deceived into signing the original agreement giving his wife custody of any remaining frozen embryos in the event that the couple separated. In other cases, individuals who had not wanted to become fathers were nonetheless held financially responsible for their children, even if they had been deceived into becoming fathers, for example, because they had falsely been told that contraception was being used.¹⁴²

(2) The consent of the former spouse to assisted reproduction may be revoked by that individual in a record at any time before placement of eggs, sperm, or embryos.

Id.

140. *See, e.g.*, *L.W.K. v. E.R.C.*, 735 N.E.2d 359, 366 (Mass. 2000) (“[T]he Legislature has imposed an explicit duty on parents who divorce and those who give birth to children out of wedlock to support their minor child until they attain their majority.”).

141. *Cf.* Colker, *supra* note 53, at 1069 (“In the frozen embryo context, the initial desire to donate gametes is for a very clear purpose—to become parents—rather than, for example, for sexual satisfaction.”).

142. In *Beard v. Skipper*, the court explained: “Defendant contends that plaintiff’s misrepresentation as to her use of birth control can be used as a mitigating factor when computing defendant’s contribution towards the child support obligation where each parent is financially able to bear the full cost of child support. [The court] disagree[s].” 451 N.W.2d 614, 614 (Mich. Ct. App. 1990). In *L. Pamela P. v. Frank S.*, the court explained:

The father’s novel theory that he is constitutionally entitled to a diminution of his responsibilities to the child because the mother’s fraud and deceit deprived him of his ‘procreative freedom’ . . . has no basis in the statute and, indeed, is not germane to the inquiry at hand.

Consider, for example, *Stephen K. v. Roni L.*,¹⁴³ in which it was alleged that Roni had falsely claimed to be taking birth control pills and that Stephen had relied upon that representation when having sexual relations with her.¹⁴⁴

Assuming the father's allegation that he was deceived to be true, how does it logically follow that the child should suffer?

451 N.Y.S.2d 766, 767 (App. Div. 1982) (citation omitted). In *Wallis v. Smith*, the court explained:

Wallis and Smith . . . agreed that Smith would use birth control pills. Wallis and Smith further agreed that their sexual intimacy would last only as long as Smith continued to take birth control pills because Wallis made it clear that he did not want to father a child. Wallis participated in contraception only passively; he relied on Smith to use birth control and took no precautions himself.

As time went by, Smith changed her mind. She chose to stop taking birth control pills, but never informed Wallis of her decision. Wallis continued their intimate relationship, and Smith became pregnant. Smith carried the fetus to term and gave birth to a normal, healthy girl on November 27, 1998.

22 P.3d 682, 683 (N.M. Ct. App. 2001). In *Henson v. Sorrell*, the court explained:

Prior to the beginning of their sexual relationship Sorrell informed Henson that she was taking birth control pills. According to the trial record and exhibits, Sorrell was experienced with a variety of birth control methods and had been taking birth control pills since December 1994. However, in late June 1995 Sorrell stopped taking birth control pills because she was experiencing side effects associated with the contraceptive. Sorrell admits that she did not inform Henson about stopping the birth control pills, and the parties did not engage in any alternative form of birth control.

. . . As would be expected, Sorrell became pregnant shortly after she stopped the birth control pills, and gave birth to a child in March 1996. There is no contention in this appeal that Henson is not the father of that child.

No. 02A01-9711-CV-00291, 1999 WL 5630, at *1 (Tenn. Ct. App. Jan. 8, 1999); see also Colker, *supra* note 53, at 1069 ("If a man and woman have intercourse, and the woman deceives the man into thinking that she is using birth control, we do not allow the man to exercise a veto over her desire to carry a pregnancy to term. In fact, we even impose child support on him, despite the possible fraud.").

143. 164 Cal. Rptr. 618 (Ct. App. 1980).

144. *Id.* at 619 ("The cross-complaint alleged that Roni L. (Roni), the child's mother, had falsely represented that she was taking birth control pills and that in reliance upon such representation Stephen engaged in sexual intercourse with Roni which eventually resulted in the birth of a baby girl unwanted by Stephen."). Also see *Inez M. v. Nathan G.*, where the court noted:

The California appellate court deciding the case seemed to accept that Roni had lied to Stephen,¹⁴⁵ but held as a matter of public policy that she should not be held financially responsible for that deception.¹⁴⁶ The court rejected that Stephen had been tricked into fathering an unwanted child,¹⁴⁷ reasoning that he could have taken “precautionary measures”¹⁴⁸ had he been so inclined. Stephen was obligated to pay child support, and Roni did not have to reimburse him for any portion of those payments.¹⁴⁹

In *L. Pamela P. v. Frank S.*,¹⁵⁰ a man tried to avoid his child support obligation by asserting in his defense that the mother had deliberately and falsely claimed to be using contraception.¹⁵¹ The New York Court of Appeals rejected that such a defense, even if true,¹⁵² would excuse the

That first night, according to Respondent, he relied on Petitioner’s representation that she “took birth control pills” and refrained from purchasing further contraceptive protection. Respondent testified that he also relied upon Petitioner’s statements during their earlier conversations that she had had two abortions, that she was not ready for children, and that she was totally committed to her career.

451 N.Y.S.2d 607, 608 (Fam. Ct. 1982). However, the Petitioner’s testimony in *Inez* conflicts with Respondent’s testimony.

She testified that she had discontinued the use of “birth control pills” some years earlier upon medical advice, and she denied advising Respondent of her use of such contraception. Indeed, she further testified she was unable to use an intrauterine device because of a fibroid condition and relied upon “foam” or similar contraception.

Id. at 608.

145. *Stephen K.*, 164 Cal. Rptr. at 620 (“[A]lthough Roni may have lied and betrayed the personal confidence reposed in her by Stephen . . .”).

146. *Id.* at 621.

147. *Id.*

148. *Id.*

149. *See id.* at 619.

150. 449 N.E.2d 713 (N.Y. 1983).

151. *Id.* at 714 (“The issue on this appeal is whether a father, whose paternity of a child has been established, may assert, as a defense to his support obligation the deliberate misrepresentation of the mother concerning her use of contraception.”).

152. *Id.*

individual from paying child support.¹⁵³ The court explained that

respondent's constitutional entitlement to avoid procreation does not encompass a right to avoid a child support obligation simply because another private person has not fully respected his desires in this regard. However unfairly respondent may have been treated by petitioner's failure to allow him an equal voice in the decision to conceive a child, such a wrong does not rise to the level of a constitutional violation.¹⁵⁴

Given this jurisprudence, it was at the very least surprising that the *A.Z.* court would justify its holding by suggesting that it would not enforce the contract against him because that would "require him to become a parent over his present objection to such an undertaking."¹⁵⁵ In many cases in which men were required to take on the obligations of parenthood against their will, it was at least claimed that there would have been no sexual relations in the first place but for the explicit assurance that conception could not occur. In contrast, conception was the goal in *A.Z.*—the desire not to be a parent was only manifested after conception had already taken place.

153. *Id.*

154. *Id.* at 716. Also see *Wallis v. Smith*, where the court explained:

As time went by, Smith changed her mind. She chose to stop taking birth control pills, but never informed Wallis of her decision. Wallis continued their intimate relationship, and Smith became pregnant. Smith carried the fetus to term and gave birth to a normal, healthy girl on November 27, 1998.

22 P.3d 682, 683 (N.M. Ct. App. 2001). Additionally, the court in *Wallis* explained that, "this case boils down to whether sound public policy would permit our courts to require Smith to indemnify Wallis for child support under the circumstances of this case." *Id.* at 684. The *Wallis* court then concluded that, "[m]aking each parent financially responsible for the conception and birth of children also illuminates a strong public policy that makes paramount the interests of the child." *Id.* Similarly, the court in *Hughes v. Hutt* reasoned:

[T]he possibility of fabricated accusations, the less than certain effectiveness of birth control methods, and the fact that claims like appellant's, if successful, could result in the denial of support to innocent children whom the Support Law was designed to protect, all illustrate that allegations of a mother's failure to use birth control have absolutely no place in a proceeding to determine child support.

455 A.2d 623, 625 (Pa. 1983).

155. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000).

The cases involving the unwilling fathers are distinguishable in that none of these individuals would face the prospect of becoming a father years after conception had taken place.¹⁵⁶ It is perhaps for this reason that the A.Z. court worried about the lack of a duration clause in the agreement. Yet, good drafting would avoid the difficulties envisioned by the court—there could be a clause suggesting that the embryos could not be implanted after a certain number of years or, perhaps, were the couple to separate.

Suppose that the duration problem could not be solved by better drafting. Even so, it is not as if the duration problem does not arise in other contexts. For example, a father might be asked to pay years of child support that he had wrongly assumed would never be requested.¹⁵⁷ Indeed, an individual donating sperm to help create a child might be found liable for child support years later.¹⁵⁸

A.Z. was on notice that his agreeing to allow B.Z. to have control of the embryos should the couple separate might result in his becoming a non-marital father. Individuals who had even less reason to believe that their sexual relations might result in the birth of a child have nonetheless been held to be legally responsible for the children biologically related to them. For example, one individual had paternal obligations imposed, because semen allegedly produced during oral sex was then vaginally implanted, resulting in a live birth.¹⁵⁹ A separate issue

156. See Apel, *supra* note 112, at 679 (“One of the especially burdensome aspects of attaching legal paternity to any subsequently produced offspring is that embryos can be kept in a cryopreserved state for at least a decade, if not longer.”).

157. See, e.g., Child Support Enforcement Div. of Ala. v. Brenckle, 675 N.E.2d 390, 391 (Mass. 1997) (enforcing child support order requiring him to pay support owed since 1979).

158. See Lucy Carne, *Must Pay Support 18 Yrs. Later; Sperm Wail by Donor*, N.Y. POST, Dec. 2, 2007, at 4 (“A sperm donor who sent gifts signed ‘Dad’ to his biological son has been slapped with a child-support order, 18 years after helping his friend get pregnant.”); Vic Vela, *Sperm Donor Ordered to Pay Child Support: Appeals Court Says Man’s Active Parenting Role Makes Him Liable*, ALBUQUERQUE J. (N.M.), July 31, 2008, at A1. *But see* Ferguson v. McKiernan, 940 A.2d 1236, 1238 (Pa. 2007) (enforcing an agreement between sperm donor and donee that donor would not be held responsible for supporting any child born of the donation).

159. See *State v. Frisard*, where the court explained:

would be whether such an unwilling father would have a cause of action for intentional inflictions of emotional distress.¹⁶⁰

The A.Z. court's announced unwillingness to force someone to become a parent against his will, if taken to the extreme, could result in manifest injustice. Consider, for example, Carol, who knew that she had only a short amount of time before she would no longer be able to produce eggs, e.g., because she would have to undergo chemotherapy or radiotherapy that would make her sterile. Because eggs did not freeze nearly as well as embryos,¹⁶¹ she asked her boyfriend, David, to provide sperm so that embryos might be created and frozen. He assured her that he understood her situation, and would never object to her implanting any of the embryos thereby created. Were Carol to have successful treatment and then wish to make use of the embryos, it would be manifestly unjust to allow her ex-boyfriend David to refuse to have the embryos implanted because he did not wish to become a genetic parent. After all, but for David's promise that the embryos could be used, Carol might have gotten sperm from an anonymous donor.

The evidence of paternity consisted of plaintiff's affidavit in which she named defendant as the father of the child, admitted that she had sexual intercourse with him in September of 1983, and further claimed that she did not have sexual intercourse with any other man thirty days prior to or thirty days after the date of conception which was estimated to be September 1, 1983. In addition, the results of the blood testing showed a 99.9994% probability of paternity as compared to an untested, unrelated, random person of the Caucasian population. Moreover, defendant's own testimony showed that he had some sort of sexual contact with plaintiff around the time frame of alleged conception, although he denied that they had sexual intercourse.

694 So. 2d 1032, 1035-36 (La. Ct. App. 1997).

160. See *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb. 22, 2005) ("On or around February 19, 1999, and March 19, 1999, defendant 'intentionally engaged in oral sex with [plaintiff] so that she could harvest [his] semen and artificially inseminate herself,' and 'did artificially inseminate herself.'" (alterations in original)). The court remanded the case, permitting his suit for intentional infliction of emotional distress to proceed. *Id.* at *1, 6.

161. At one point, frozen embryos could be stored much longer than frozen eggs. See *Yang*, *supra* note 24, at 592 ("While eggs can only be frozen for a short time, preembryos and sperm can be stored indefinitely.").

Such a case would not appropriately be described as simply a battle between two progenitors, one but not the other wanting to be a parent.¹⁶² Rather, by promising that the embryos could later be used, David induced Carol to forego any other ways whereby she might create embryos.¹⁶³ While some commentators believe that it would be unlikely in such a scenario that the embryos would not be implanted,¹⁶⁴ those cases requiring contemporaneous consent for implantation counsel otherwise and, indeed, implantation was not permitted in the case in Great Britain upon which this hypothetical was based.¹⁶⁵

There are other ways in which detrimental reliance issues are implicated in the context of the creation of embryos. Harvesting eggs involves a variety of risks,¹⁶⁶ and

162. One commentator seems not to appreciate the detrimental reliance aspect of such a case. See Tim Annett, Commentary, *Balancing Competing Interests over Frozen Embryos: The Judgment of Solomon?* *Evans v. United Kingdom*, 14 MED. L. REV. 425, 429 (2006) (“[The argument that the woman should be allowed to implant in this case] is problematic because it rests on the dubious premise that men have a lesser interest in what happens to their gametes than women do with their gametes.”).

163. Compare this to Ellen Waldman, who explains:

With embryos already safely retrieved and fertilized, women are insulated from fear about their waning capacity to produce viable eggs. Secure in the knowledge that the embryos exist for future use, their owners need not take additional precautions such as freezing eggs or retrieving additional eggs for fertilization with anonymous donors.

Waldman, *supra* note 69, at 1055.

164. See Robertson, *supra* note 81, at 1021 (“It is unlikely that the gamete or embryo providers will be able to revoke their consent if the recipient has significantly relied on the other’s promise to provide gametes for their reproductive use.”).

165. See April J. Walker, *His, Hers or Ours?—Who Has the Right to Determine the Disposition of Frozen Embryos after Separation or Divorce?*, 16 BUFF. WOMEN’S L.J. 39, 53-55 (2008) (discussing the case of Natalie Evans and Howard Johnson, upon which this hypothetical is based).

166. See Shelly R. Petralia, who explains:

The risks associated with the medication the woman must consume prior to and after egg retrieval include bruising and soreness with any injectable medications as well as ovarian hyperstimulation syndrome which “can lead to dehydration, large amounts of fluid accumulation in the abdominal and lung cavities, blood clotting disorders, and kidney damage.”

a woman might not be willing to undergo those risks unless she had had assurance that any frozen embryos created could eventually be used by her.¹⁶⁷

Of course, if she knew *ex ante* that any assurances made would be unenforceable, then it might be *less* reasonable to rely on them.¹⁶⁸ However, in many if not most of these cases, the promises are being made by a romantic partner, which presumably would provide some independent reason to believe that the promises would be honored in the future. Further, the notice argument cuts both ways. Were it clear that such promises were enforceable, an individual would be more careful before inducing someone else to detrimentally rely on the promise that the embryos would be available for implantation at a later date.

In cases involving a subsequent change of mind regarding the use of the embryos, it simply will not do to point out that the partner who now blocks implantation of

Petralia, *supra* note 63, at 107-08 (citation omitted); *see also* Ellen Waldman, who explains:

To induce production of a large number of eggs, donors are injected intramuscularly with hormones, known as gonadotropins, during a process known as super-ovulation induction. Typical side-effects from this process include breast tenderness, fluid retention, mood swings, irritability, and abdominal discomfort. More threatening is the risk of ovarian hyperstimulation syndrome ("OHSS"), which occurs in 1 to 2% of patients undergoing super-ovulation induction. OHSS is a severe condition, which can lead to breathing difficulties, temporary kidney non-function, and arterial and venous thrombosis. In some instances, it can be life-threatening. Additionally, exposure to gonadotropins has been associated with slightly elevated risks of breast-cancer

Waldman, *supra* note 69, at 1053 (footnotes omitted).

167. *See* Cohen, *supra* note 48, at 1166 ("[S]ome individuals are unwilling to bear the financial costs or health risks of IVF in the first place without assurance that preembryos not immediately implanted will be available for future use . . .").

168. *See* Carl H. Coleman, who explains:

The problem with the reliance argument, however, is that the law protects reliance only if it is "reasonable" to rely on a commitment in a particular case. If it were clear that decisions about the future disposition of frozen embryos were not enforceable, it would no longer be reasonable to rely on the enforceability of disposition decisions made in advance.

Coleman, *supra* note 55, at 123-24.

the frozen embryos did not cause the other partner to lose his or her procreative capacity.¹⁶⁹ The frozen embryos might well have been created with both parties knowing that one of the partners would lose his or her procreative capacity in the future, whether because of cancer treatments or simply growing older. Precisely because both parties knew at the time the initial agreement was made that naturally occurring conditions would prevent the creation of the embryos in the future, the claim that the individual now blocking use of the embryos has no responsibility for the other's plight is at the very least disingenuous.

Advances in egg-freezing technology might ameliorate some of the difficulties pointed to here.¹⁷⁰ For example, someone like Carol,¹⁷¹ who knew that she would soon lose her ability to produce eggs, would be able to freeze her eggs—she would not then need someone else's permission to use them in the future as she might were she to have created frozen embryos. Further, more generally, women without romantic partners¹⁷² might well take advantage of egg-freezing during their most fertile years.¹⁷³ However, members of a *couple* using IVF to have a child together

169. See Carl H. Coleman, who argues:

It is not as if the partner who objects to the use of the embryos was the cause of the other partner's inability to have genetic offspring. Rather, the inability to have children is the result of external [sic] factors, such as age or physiological impairment. The objecting partner should not be forced to experience the burdens of unwanted genetic parenthood to remedy a situation he did nothing to create.

Id. at 83-84.

170. See Steve Connor, *Frozen Embryos: The Future for IVF*, INDEPENDENT (United Kingdom), Jan. 13, 2009, at 1 ("But the advances made at the Oxford Fertility Unit (OFU) will make freezing eggs a more attractive proposition for many couples. The procedure reduces the need for repeated cycles of hormone therapy and egg extraction, which can be unpleasant and result in serious side-effects such as polycystic ovary syndrome.").

171. See *supra* text accompanying note 161.

172. *Freeze Frame: Women Wait for 'Mr Right'*, CANBERRA TIMES, Oct. 31, 2006, at 5 ("Career women who want a family are choosing to freeze their eggs for later use in order to remove the pressure to find Mr Right, research shows.").

173. Mark Henderson, *Boost for Women Keen to Put Family on Ice*, TIMES (London), June 17, 2008, at 3 ("These advances may encourage more women to freeze eggs as a way of preserving their fertility, which starts to decline steeply when from the mid-thirties.").

would create embryos, and would presumably freeze any extra viable embryos for future implantation should the need arise.¹⁷⁴ Thus, even with technological advances in the cryopreservation of eggs, the difficulties pointed to here will likely continue to be litigated in the future.

Where the intentions of the parties were clear at the time the embryos were made, and there had been detrimental reliance on a promise made at that time, a strong argument can be made that the promise should be enforceable. Sometimes, however, it is rather difficult to determine exactly what the parties promised each other. This lack of clarity may put the courts in a very difficult position, as was illustrated in a New Jersey case.

C. J.B.

In *J.B. v. M.B.*,¹⁷⁵ the New Jersey Supreme Court was asked to decide who would have the right to determine the disposition of frozen embryos. J.B. and M.B. had difficulty conceiving and decided to make use of IVF.¹⁷⁶ They created eleven preembryos, four of which were implanted.¹⁷⁷ The remaining embryos were frozen.¹⁷⁸

A daughter was born to them in March, 1996, but they separated later that year.¹⁷⁹ At that point, J.B. informed M.B. that she wanted the remaining preembryos discarded.¹⁸⁰ M.B. claimed that prior to undergoing the IVF

174. Compare this to Steve Connor, who explains:

Women having IVF treatment on the NHS should as a matter of routine be offered the chance to freeze their "spare" embryos instead of discarding them because it was safer and more cost effective than repeatedly using fresh embryos, Dr Child said. Findings from the study suggested that if embryo freezing was more common at NHS hospitals, its use might avoid the expense and, more importantly, the risks of over-stimulating the production of further eggs by hormones, which can lead to fertility complications.

Connor, *supra* note 170, at 1, 4.

175. 783 A.2d 707 (N.J. 2001).

176. *See id.* at 709.

177. *See id.* at 710.

178. *See id.*

179. *See id.*

180. *See id.*

procedure they had agreed that any unused preembryos would not be destroyed, but would be used by J.B. or donated to an infertile couple.¹⁸¹ J.B. denied that any such understanding had been reached.¹⁸²

The *J.B.* court believed it unnecessary to remand the case to determine whether the couple in fact had agreed that the embryos would not be destroyed, reasoning that even if it were “possible to enter into a valid agreement at that time irrevocably deciding the disposition of preembryos in circumstances such as we have here, a formal, unambiguous memorialization of the parties’ intentions would be required to confirm their joint determination.”¹⁸³ Because there was nothing written to that effect, the court saw no need for a remand.

Certainly, having the individuals state their intentions in writing at the time that they enroll in a program can prevent a variety of problems from occurring later. Memories are not infallible in the best of circumstances, and the pressures and emotions associated with a divorce would only exacerbate the difficulties in accurately representing previous intentions. Yet, the court was not implying that it would have required donation or implantation had there been a writing indicating the parties’ former intentions. On the contrary, the *J.B.* court adopted the *A.Z.* approach, suggesting that it would “enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.”¹⁸⁴

The court rejected that M.B.’s right to procreate would be denied by allowing the embryos to be discarded, both because he already was a father, and because he could make use of IVF again if necessary.¹⁸⁵ The court contrasted M.B.’s situation with J.B.’s, noting that her right not to be a parent might be lost through embryo donation, because successful implantation “would result in the birth of her biological

181. *Id.*

182. *Id.* at 712.

183. *Id.* at 714.

184. *Id.* at 719.

185. *Id.* at 717.

child and could have life-long emotional and psychological repercussions.”¹⁸⁶ Of course, it was somewhat misleading to suggest that J.B.’s right not to be a parent was at issue, since she already was a parent. Rather, at issue was her right not to be a parent again or, perhaps, her right not to have a biological child of hers raised by a stranger.

Perhaps the court was correct to consider the psychic repercussions of having “been forced to become a biological parent against his or her will,”¹⁸⁷ although it was unclear why the *J.B.* court was unwilling to give much weight to the negative psychic effects on M.B. that might be caused by the embryo destruction. Suppose, for example, that destroying the embryos would cause him to have repeated nightmares where the frozen pre-embryos (each perhaps having a face like his daughter’s) would call out for him to save them. Add to this the fact that M.B. testified that he had strong religious objections to the destruction of the pre-embryos,¹⁸⁸ and it would not seem implausible that he might have had life-long emotional difficulties caused by the court granting J.B.’s request. Those difficulties might be exacerbated if for some reason he subsequently lost his ability to father a child.

It is hard to fathom why “forced” genetic parenthood would necessarily be more damaging psychologically than would one’s losing the opportunity to be a genetic parent. Presumably, for some, being a genetic parent against one’s current wishes would be quite damaging, although for others it would not. The same might be said for someone who was deprived of the opportunity of being a genetic parent. Further, for some, the initial hurt would never disappear, whereas for others it would dissipate over time. Precisely because the reactions to being an unwilling genetic parent of a child raised by someone else would vary greatly, both at a particular point in time and across time, such feelings do not provide a plausible justification for a rule giving the unwilling progenitor veto power over the

186. *Id.*

187. *Id.* at 718.

188. *See id.* at 710.

wishes of the other progenitor.¹⁸⁹ But this is the effect of the rule suggested by the *J.B.* court.¹⁹⁰

Nor can such a requirement be justified by claiming that this is simply a rule supporting responsible parenting,¹⁹¹ as if the refusal to allow implantation would be for the sake of the child.¹⁹² On the contrary, in most if not all cases it would be better for the child if the embryo were implanted. Those wishing to implant the embryos might well be very responsible parents who would help the child flourish and, in any event, the issue implicated does not involve which home would best promote the interests of the child¹⁹³ but whether the child will exist at all. While there may be ways to justify adoption of the contemporaneous consent model, appeal to the best interests of the child should not be among them. In most if not all cases, it would be better for the child to live than never to exist,¹⁹⁴ so using

189. Some commentators seem to believe that the fact that some might feel this connection to their genetic children justifies never implanting embryos against the wishes of one of the progenitors. *See, e.g.,* Coleman, *supra* note 55, at 107 (“That a person could be absolved of the legal and financial obligations of biological parenthood is not an adequate response. For some people, it may be impossible to have genetic offspring and remain indifferent to their predicament.”).

190. *See* Waldman, *supra* note 69, at 1032-33 (“With varying degrees of insincerity and ingenuity, the courts have actively worked to avoid creating unwanted genetic ties. They have stressed the burdens of ‘forced parenthood’ while dismissing the hardships associated with creating existing embryos and the hurdles blocking the way to parenthood through other means.”); Note, *The Uncertainty of Embryo Disposition Law*, *supra* note 4, at 498 (“Although the courts have differing opinions on how to resolve disputes over embryos, one clear principle has emerged: a court will not force parenthood on an unwilling party.”).

191. *See* Coleman, *supra* note 55, at 107 (“[A]n inalienable rights approach also would promote the value of parental responsibility.”).

192. *See id.* at 108 (“[I]t is not the exchange of money per se that creates the risk of commodification but the application of the rules of market place transactions to fundamental decisions about a child’s fate.”).

193. *See id.* (“The idea that ‘a deal’s a deal,’ when applied to decisions about the custody of a child, treats the parent-child relationship like an ownership interest in property rather than a human connection between two living beings.”).

194. For a discussion of some of the kinds of cases in which children might have been better off never having been born, i.e., wrongful life cases, see generally Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and*

the interests of the child as a reason to justify a policy precluding implantation simply is not credible.

While the best interests test presumably would counsel in favor of implantation, that test may not be especially helpful in resolving other disputes in this area. On a best interests analysis, what role should a biological connection to the embryo play in the right to decide the disposition of those embryos? That issue, among others, was raised in a case decided by the Washington Supreme Court.

D. Litowitz

In *Litowitz v. Litowitz*,¹⁹⁵ the Washington Supreme Court was asked to determine who should have custody of two cryopreserved embryos. Becky had a hysterectomy shortly after she and David had their first child together, leaving her unable to produce eggs or carry a fetus to term.¹⁹⁶ Nonetheless, Becky and David created five embryos, using eggs from a donor and his sperm.¹⁹⁷ Three of those embryos were implanted in a surrogate, resulting in the birth of a daughter.¹⁹⁸ The two remaining embryos were cryopreserved.¹⁹⁹

The contract signed with the egg donor specified that the intended parents (the Litowitzes) had the sole right to determine the disposition of the eggs.²⁰⁰ The agreement between the Clinic and the Litowitzes stated that after the frozen embryos had remained with the clinic for five years, they would be thawed and destroyed unless the Clinic and both Litowitzes agreed that the frozen embryos should remain frozen for a longer period.²⁰¹

the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?, 64 MO. L. REV. 29 (1999).

195. 48 P.3d 261 (Wash. 2002).

196. *Id.* at 262.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 263.

201. *Id.* at 263-64.

The Litowitzes separated before the birth of their daughter.²⁰² In the dissolution proceedings, David said that he wanted custody of the frozen embryos so that he could donate them to another couple, and Becky said that she wanted them so that she could have them implanted in a surrogate and then raise the child or children herself.²⁰³ Using a best interest analysis, the trial judge awarded the embryos to David, reasoning that it would be better for the child to be raised by a couple than by a single parent.²⁰⁴

The agreement between the fertility center and the Litowitzes was dated March 25, 1996,²⁰⁵ and the trial court decision was issued December 11, 1998.²⁰⁶ The decision handed down by the Washington Supreme Court was dated June 13, 2002.²⁰⁷ This last date is important, because more than five years had passed between the time the agreement with the clinic was signed and the time that the high court issued its opinion.²⁰⁸ The Washington Supreme Court noted that the frozen embryos might not even exist²⁰⁹—no evidence was presented that the contract had been extended²¹⁰ and the contract had specified that absent a request to extend the cryopreservation the embryos would be thawed and not allowed to develop further after five years had elapsed.²¹¹ However, if they did exist, the court held that they must be thawed and destroyed per the contractual instructions.²¹² Thus, the Washington Supreme Court did not grant the requested relief of either Becky or

202. *Id.* at 264.

203. *See id.*

204. *See id.*

205. *Id.* at 263.

206. *Id.* at 264.

207. *Id.* at 261.

208. *Id.* at 268-69.

209. *Id.* at 269.

210. *Id.*

211. *See id.* at 269.

212. *See id.* at 271. In his dissenting opinion, Judge Sanders writes that “the majority’s disposition apparently calls for the destruction of unborn human life even when, or if, both contracting parties agreed the preembryos should be brought to fruition as a living child reserving their disagreement over custody for judicial determination.” *Id.* at 274 (Sanders, J., dissenting).

David, opting instead to order that neither be given custody of the embryos.

There are at least two reasons why the court's disposition of the case was less than satisfying. First, it may well be that the Litowitzes had agreed to extend the cryopreservation of the two remaining pre-embryos, at least until a final determination on the merits had been made. The court might not have been informed of that agreement, because the issue before the court was who would have custody of the embryos rather than whether they should be destroyed. Yet, if the cryopreservation period had in fact been extended, then the court would have decided that the embryos should be destroyed, contrary to the intentions of the parties and the contractual language itself.

Second, the Litowitzes sought a court determination of custody long before the five years had elapsed, and it might be thought that their having sought court intervention would itself toll the five-year deadline.²¹³ Thus, even if they had not formally agreed to extend the deadline, one might infer such a desire both because they had sought a custody determination long before the deadline and because neither had requested that the embryos be destroyed. That the court nonetheless ordered their destruction has led some commentators to read the decision as manifesting a strong bias against implantation.²¹⁴

It may be, however, that the court did not have a bias against implantation but, instead, was deciding the case this way so that it would not be forced to face other issues. For example, Becky had argued that she stood in the shoes of one of the progenitors by virtue of contract, although the court refused to address that issue.²¹⁵ The court agreed that Becky and David had equal rights to the eggs,²¹⁶ but did not agree that they therefore had equal rights to the pre-

213. See *id.* at 272 (“[T]he contract *still* would not support the majority’s outcome because the contractual time period was tolled by the timely commencement of this litigation as a matter of law.”).

214. See Waldman, *supra* note 69, at 1032 (“The court’s contrived reading of the fertility clinic forms reveals its determination to reach the desired goal of embryo destruction.”).

215. See *Litowitz*, 48 P.3d at 271.

216. *Id.* at 267.

embryos.²¹⁷ Nonetheless, by issuing a ruling that did not reflect the wishes of either party, the court reserved for another day which, if any, progenitor rights could be acquired by contract. Further, by not awarding the pre-embryos to anyone, the court was not forced to address, even implicitly, whether a best interest analysis would be appropriate when determining who would receive the pre-embryos. Nor was the court forced to decide how heavily a genetic connection would be weighed in such a best interest analysis or whether a constructive genetic connection (via contract) would be treated as if it were an actual genetic connection in a best interest analysis. Nor was the court forced to decide whether placement would be better with a single parent (who had an actual or constructive genetic connection to the embryos) rather than with a couple with no such connection. All of these questions would be left to be decided at a later date.

It is difficult to know how to read *Litowitz*. On the one hand, it is the only state supreme court opinion to order the destruction of frozen embryos when neither of those entitled to make a decision about the disposition of the embryos wanted that result. On the other hand, it might be that both of these decisionmakers would have preferred the destruction of the embryos to the other individual's being awarded custody of the embryos. The court's claim to have been enforcing the contract or simply carrying out the wishes of the couple was not credible, although the court did manage to avoid the thorny questions that would have been raised had it been forced to make a custody determination.

E. Witten

Some of the questions that the Washington court went out of its way to avoid were discussed by the Iowa Supreme Court in *In re Marriage of Witten*,²¹⁸ where the court was asked to determine which member of a divorcing couple should have custody of the remaining frozen embryos.²¹⁹ Tamera wished to have the embryos implanted in herself or

217. *Id.* at 268 (“Under that contract, Petitioner and Respondent would have equal rights to the eggs. But the egg donor contract does not relate to the preembryos which resulted from subsequent sperm fertilization of the eggs.”).

218. 672 N.W.2d 768 (Iowa 2003).

219. *Id.* at 772-73.

in a surrogate so that she might have a genetically related child.²²⁰ While Tamera was adamant in her opposition to the embryos' destruction, she was unwilling to donate them to someone else.²²¹ Trip, her ex-husband, did not want the embryos destroyed, but also did not want his ex-wife to use them.²²² He did not oppose donating the embryos to another couple,²²³ but did not seem to want to become a father himself.²²⁴

After discussing differing models of how to decide who should be awarded custody of embryos,²²⁵ the court rejected that the best interests test was appropriate, reasoning that "the factors that are relevant in determining the custody of children in dissolution cases are simply not useful in determining how decisions will be made with respect to the disposition and use of a divorced couple's fertilized eggs."²²⁶ For example, the court noted that the best interests standard seeks to maximize physical and emotional contact between the child and each of her parents,²²⁷ whereas at issue here was "whether the parties will be parents at all."²²⁸ The court further noted that it would be at best premature to decide which parent could "most effectively raise the child when the 'child' is still frozen in a storage facility."²²⁹ The court was correct that various factors that would be relevant in a best interest analysis were simply unknown at this stage. For example, there would be no evidence regarding which parent had a closer bond with the child or which parent would be more likely to provide a home in which the child would thrive.

220. *Id.* at 772.

221. *Id.* at 772-73.

222. *Id.*

223. *Id.*

224. *Id.* at 780 ("Tamera contends the contract at issue here violates public policy because it allows a person who has agreed to participate in an in vitro fertilization program to later change his mind about becoming a parent. . . . [W]e accept Tamera's assertion for purposes of the present discussion . . .").

225. *See id.* at 774.

226. *Id.* at 776.

227. *Id.* at 775.

228. *Id.*

229. *Id.*

Yet, the court's point was somewhat misleading—the comparative parenting skills of the progenitors was not really at issue in *Witten*, since there was no indication that Trip wanted to be a parent. Rather, were a comparative analysis appropriate, it would presumably have been between Tamera and the potential adoptive parents to whom Trip would be willing to donate the embryos.

Suppose that Tamera and Trip were not divorcing and that they had wanted to make use of the embryos that they had created. There would be no call for use of a best interests analysis, comparing the parenting abilities of Tamera and Trip to the parenting abilities of potential adoptive couples. Rather, Tamera and Trip would have been allowed to have the embryos implanted.

Here, Trip manifested no interest in being a parent himself. He was willing to donate the embryos, so he clearly did not believe that he would suffer great harm by being the genetic parent of a child raised by someone else. Given this set of desires, it is not at all clear why Tamera's desire to raise the child whom she would have helped to create should not have outweighed his desire for her not to be the parent. There was no indication that she would have been a bad parent, and his objections might have had nothing to do with the interests of the child. Indeed, he could have been objecting to her being the parent as a way of getting back at her for acts she committed during the marriage that he believed were wrong or unfair.

After ruling out use of a best interest analysis, the *Witten* court considered whether the initial agreement should be enforced.²³⁰ Regrettably, while the agreement with the facility discussed what should be done with the embryos in the event that one or both of the parties died, it did not expressly address what should be done in the event of divorce.²³¹ Nonetheless, the court interpreted the general provision governing the release of embryos to control, whether or not the marriage was intact.²³² That provision stated that “the embryos would not be transferred, released,

230. *See id.* at 776.

231. *Id.* at 773.

232. *Id.*

or discarded without ‘the signed approval’ of both Tamera and Trip.”²³³

Tamera had argued that her right to bear children should override the prior agreement.²³⁴ The court agreed that the initial agreement should not be enforced,²³⁵ although that ruling did not mean that Tamera would be able to implant any of the seventeen embryos at issue.²³⁶ Rather the court took seriously that enforcing an agreement entered into at some prior time would not give adequate weight to the difficulties involved in predicting how the individuals would feel sometime in the future.²³⁷ The court then discussed whether contracts should be enforceable if one of the parties has had a change of heart,²³⁸ reaching the conclusion that “judicial enforcement of an agreement *between a couple* regarding their future family and reproductive choices would be against the public policy of this state.”²³⁹ The court described the model it was proposing—“the requirement of contemporaneous mutual consent”:²⁴⁰

Under that model, no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors. If a stalemate results, the status quo would be maintained. The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs.²⁴¹

Applying the model to the case at hand, the court noted that the parties could not reach a mutually satisfactory agreement.²⁴² The court concluded that this meant that

233. *Id.*

234. *Id.* at 774.

235. *See id.* at 782.

236. *See id.* at 772 (“At the time of trial seventeen fertilized eggs remained in storage at the University of Nebraska Medical Center (UNMC).”).

237. *See id.* at 777 (quoting passages from two law review articles with approval).

238. *Id.* at 773-74.

239. *Id.* at 782.

240. *Id.* at 783.

241. *Id.*

242. *Id.*

nothing could be done with the embryos until an agreement had been reached, with the party or parties opposing destruction being responsible for the costs of continuing the cryopreservation.²⁴³

At least one issue raised by the possibility that the status quo would have to be maintained for the indefinite future was that the facility would have to preserve the embryos indefinitely.²⁴⁴ However, the court was not imposing an additional obligation on the facility²⁴⁵ but instead was merely suggesting that the facility was bound by the original contract.²⁴⁶

Arguably, the interests of an individual who has no other way of becoming a genetic parent and who is willing to shoulder all of the responsibilities of parenthood²⁴⁷ should outweigh the interests of someone who does not care what happens to the embryos as long as his former partner does not get them.²⁴⁸ But the *Witten* court rejected that courts should perform such a balancing test, arguing that it was inappropriate to “substitute the courts as decision makers in this highly emotional and personal area.”²⁴⁹

Witten is unusual in a few respects. For example, many of the other cases involved one individual asserting the

243. *See id.*

244. *See id.*

245. *See id.* at 783 n.4 (“We do not mean to imply that UNMC’s obligation to store the embryos extends beyond the ten-year period provided in the parties’ contract.”).

246. The *Witten* court cautioned:

Our decision should not be construed, however, to mean that disposition agreements *between donors and fertility clinics* have no validity at all. We recognize a disposition or storage agreement serves an important purpose in defining and governing the relationship between the couple and the medical facility, ensuring that all parties understand their respective rights and obligations.

Id. at 782.

247. *See id.* at 772 (“[Tamara] testified that upon a successful pregnancy she would afford Trip the opportunity to exercise parental rights or to have his rights terminated.”).

248. *See Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (“The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means.”).

249. *Witten*, 672 N.W.2d at 779.

right not to be a genetic parent and the other individual wanting either to use or donate the embryos. Here, the individual opposing his partner's control of the embryos did not assert the right not to be a genetic parent—on the contrary, he was willing to be a genetic parent as long as his ex-wife would not be raising the child.

There was no discussion in the opinion regarding why Trip was opposed to his ex-wife parenting their children. One cannot tell, for example, whether Trip had reservations about Tamera's parenting abilities or whether, instead, he was simply being vengeful. Regardless of why in fact Trip opposed Tamera being a parent, it should be clear that the *Witten* opinion puts someone like Trip in a particularly powerful position. For example, the court said that the party opposing destruction of the embryos would bear the costs of their cryopreservation.²⁵⁰ Someone who wanted to get back at an ex-spouse might well say that he or she had no interest in cryopreserving the embryos, thereby shifting the costs to his or her ex-spouse. Further, one could imagine such a person imposing continuing psychic damage by hinting that he or she might consent to the ex-spouse's use of the embryos sometime in the future—the ex-spouse might well continue to be on an emotional rollercoaster when considering the possibility of finally becoming a parent. Or the embryos might in effect be held hostage—they would be released for use only if the ex-spouse were willing to give up something valuable in return, for example, in a property settlement or in exchange for more favorable support terms. The potential abuses of the contemporaneous consent requirement have been ignored by the courts, which may be one of the reasons that there had been a trend in favor of its adoption. That said, however, that trend was rejected in two recent decisions for reasons totally unrelated to the potential abuses that might occur.²⁵¹

III. A RETURN TO THE *DAVIS-KASS* MODEL?

While there have been several decisions adopting the contemporaneous consent model, two recent intermediate appellate decisions may indicate that the pendulum is

250. See *id.* at 783.

251. See *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006); *In re Marriage of Dahl*, 194 P.3d 835 (Or. Ct. App. 2008).

swinging back towards the *Davis-Kass* model. In both of these cases, the initial agreements were enforced, although it is obviously too early to tell whether they are indicative of a new trend. In any event, some of the facts included in these cases are indicative of why the contemporaneous consent model should not be adopted.

A. Roman

In *Roman v. Roman*,²⁵² a Texas appellate court addressed whether Randy or Augusta Roman was entitled to the remaining frozen embryos that the couple had created.²⁵³ The cryopreservation agreement included a provision that the embryos would be discarded in the event of divorce.²⁵⁴

Augusta wished to have the embryos implanted so that she could have biological children.²⁵⁵ She was awarded the embryos by the trial court and Randy appealed,²⁵⁶ although Augusta stated that he would have had no rights or responsibilities with respect to any children born.²⁵⁷

The *Roman* court summed up the case law from other jurisdictions by noting “an emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of the agreement.”²⁵⁸ However, because Texas was not bound by those decisions, the court attempted to discern local public policy in this area of law.²⁵⁹

252. 193 S.W.3d 40 (Tex. App. 2006).

253. *See id.* at 41-42. The court explained why it would use the term “embryo,” explaining that, “[a]lthough ‘preembryo’ is a medically accurate term for a zygote, or fertilized egg, that has not been implanted in a uterus, we will use the term embryo for linguistic convenience.” *Id.* at 41 n.1.

254. *Id.* at 42.

255. *Id.* at 43.

256. *Id.* at 41.

257. *Id.* at 43.

258. *Id.* at 48.

259. *See id.*

The court noted that according to Texas law a former spouse will not be considered the parent of a child born through an IVF procedure taking place after the divorce unless the ex-spouse expressly consented to being considered a parent of the child, notwithstanding the divorce.²⁶⁰ Even if the ex-spouse were to consent, that consent could be withdrawn any time before the embryos were implanted.²⁶¹ Thus, Texas law obviates the need for a court to weigh whether it is more important for a child to be supported by an unwilling parent than to respect the wishes of the progenitor to have no connections to the child, instead expressly stating that no such obligations will be imposed unless affirmatively accepted.²⁶²

The court also considered state policy with respect to gestational surrogacy agreements. Texas law “specifically authorizes a gestational mother, her husband if she is married, each donor, and each intended parent to enter into a written agreement that relinquishes all parental rights of the gestational mother and provides that the intended parents become the parents of the child,”²⁶³ although Texas law also permits the gestational surrogate, her husband, and either of the intended parents to terminate the agreement, as long as the termination occurs prior to the pregnancy.²⁶⁴ Thus, Texas public policy expressly countenances use of IVF procedures, although a surrogate could not be forced to participate against her will.

260. The *Roman* court quoted Texas law, pointing out:

“[I]f a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child.”

Id. at 49 (quoting TEX. FAM. CODE ANN. § 160.706(a) (Vernon 2002)).

261. *See id.* (“This section also provides that consent of the former spouse may be withdrawn at any time before the placement of eggs, sperm, or embryos.” (citing TEX. FAM. CODE ANN. § 160.706(b) (Vernon 2002))).

262. *Cf. supra* notes 141-54 and accompanying text (discussing obligations imposed on unwilling parents).

263. *Roman*, 193 S.W.3d at 49 (citing TEX. FAM. CODE ANN. § 160.754(a) (Vernon Supp. 2005)).

264. *See id.* (citing TEX. FAM. CODE ANN. § 160.759(a) (Vernon Supp. 2005)).

After explaining the implications of these laws, the court unexceptionally noted that “the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo’s disposition in the event of a contingency, such as divorce, death, or changed circumstances.”²⁶⁵ However, surprisingly, the court concluded that “allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, *subject to mutual change of mind, jointly expressed*, best serves the existing public policy of this State and the interests of the parties.”²⁶⁶

Yet, the court did not offer a plausible construction of the laws that it had just recounted. Certainly, the court was correct to suggest that Texas law permitted IVF agreements to be made. Yet, when deciding between (1) enforcing the initial agreement, and (2) requiring contemporaneous consent, the relevant question is not whether IVF agreements are ever enforceable, but whether an initial IVF agreement should be enforced when one of the parties has since had a change of heart. Given that Texas law (1) allows an individual to withdraw from a surrogacy agreement, thereby making it a nullity, and (2) allows a former spouse to have a change of heart and not be legally recognized as a parent in a case involving post-divorce implantation, it would seem that Texas law does not require enforcement of initial agreements. On the contrary, in both of the scenarios discussed by the court, Texas law does not enforce the original agreement if *one* of the parties has had a change of heart and, thus, Texas law is less plausibly construed as requiring a *mutual* change of mind for an agreement to be invalidated.

That said, the claim here is not that Texas law requires implementation of the contemporaneous consent model. For example, while Texas law permits an ex-spouse to withdraw his or her consent to being a parent as long as that revocation of consent occurs prior to implantation of the embryo, Texas law does not require consent of the ex-spouse in order for implantation to occur post-divorce. Thus, Texas law would seem compatible with either a model requiring contemporaneous consent or a model in which the initial agreement would be enforceable.

265. *Id.* at 49-50.

266. *Id.* at 50 (emphasis added).

Suppose that the *Roman* court had held that Texas followed the apparent trend and required contemporaneous consent for implantation to occur. Then, the provisions regarding the imposition of parental responsibility might be read as removing one of the stumbling blocks to gaining contemporaneous consent—Tom might be willing to permit his ex-spouse to have the embryos implanted as long as he could be confident that he would not have to take on any parental responsibilities should the implantation lead to a live birth.

The *Roman* court rejected the contemporaneous consent model, instead opting for the *Davis-Kass* model in which the initial agreement is enforceable. Given the latter model, the provisions regarding the imposition of parental responsibility serve a few purposes. For example, a possible stumbling block to entering into such an agreement in the first place is removed—one knows that even if one enters into an IVF agreement one will still be able to reassess whether one wants to be a parent if the relationship between the adults breaks down prior to implantation. Further, this provision prevents a court from imposing parental obligations on an unwilling ex-spouse when implantation occurs post-divorce.²⁶⁷

The agreement entered into by the Romans stated that if they were to divorce, the embryos would be discarded.²⁶⁸ Yet another provision specified that the embryos should be destroyed if the husband and wife could not agree about the disposition of the embryos.²⁶⁹ It might seem, then, that the initial agreement covered the situation at hand. First, the couple was divorcing, so that justified destruction of the embryos. Second, prior to the time at which their divorce was granted, the couple was married but unable to agree about the disposition of the embryos, which provided an independent justification for destroying the embryos.

Yet there was another provision in the document that made the appropriate disposition much less clear-cut. The language in the initial document was ambiguous with

267. See *supra* note 139 and accompanying text (noting this provision among others and suggesting that a court might impose such obligations absent express law to the contrary).

268. *Roman*, 193 S.W.3d at 51.

269. *Id.*

respect to whether both parties had to agree before any changes to the agreement could be made. The agreement read: “We agree and acknowledge that we are voluntary participants, but we understand that we are free to withdraw our consent as to the disposition of our embryo(s) and to discontinue participation by requesting relocation of our embryo(s) to another suitable location at any time without prejudice.”²⁷⁰

While it is clear that the couple could together subsequently decide that the directions about the disposition did not reflect their current wishes, the language left open whether a change of heart by *one* of the individuals would suffice to alter the agreement. Ironically, the court interpreted that section as permitting “a party to withdraw consent to assisted reproduction procedures.”²⁷¹ However, the court noted:

Neither Randy nor Augusta withdrew consent to the provision in the embryo agreement that the frozen embryos were to be discarded in the event of divorce. Nor did they withdraw consent to the provision within section 11 of the embryo agreement—that if the parties could not agree on the disposition of the embryos, the frozen embryos were to be discarded. Rather, their embryos were still in the program, and the embryo agreement was still in effect when the parties divorced.²⁷²

The court may have been correct that Augusta had not informed the clinic in writing that the agreement no longer reflected her wishes, but it seems clear that Augusta had changed her mind. For example, at trial Augusta rejected that the embryos should be destroyed—instead, she said that she wanted to use them herself. It is hard to understand how she could be understood to be consenting to their destruction when she was instead requesting that they be awarded to her. At the very least, she had implicitly withdrawn her consent to their destruction before the divorce had been granted.

Even if it were correct that she had not withdrawn her consent to the embryos’ destruction at the time of the divorce, she was clearly withdrawing her consent post-

270. *Id.* at 51-52.

271. *Id.* at 54.

272. *Id.*

divorce. But Texas law does not require that individuals withdraw their consent to an assisted reproduction agreement before they divorce. On the contrary, as the court pointed out, Texas law permits individuals to withdraw their consent to a proposed disposition as long as the relevant procedure has not yet been initiated.²⁷³

Even if the court had recognized that Augusta had withdrawn her consent to the destruction of the embryos, that would not have resolved all of the relevant concerns. A separate issue would have been what to do with the embryos. Perhaps, following *Witten*, they should have continued to be cryopreserved. Or, perhaps, a balancing test should have been performed, following the example set by the *Davis* court. Indeed, arguably, the case before the *Roman* court was analogous to the case before the *Davis* court in that in neither case was there an enforceable agreement before the court. In *Davis*, there had been no discussion of what to do in the event of divorce, and in *Roman* the consent to the previous agreement had been withdrawn.

Yet there may have been good reason for the *Roman* court to be reluctant to do a balancing test. In *Davis*, the court was able to talk about Junior's great reluctance to bring children into the world whom he was not parenting.²⁷⁴ But in *Roman* it was unclear whether Randy had strong feelings about not having his genetic children in the world when he would not be there to father them or whether, instead, he was simply being spiteful.²⁷⁵ Indeed, in all of the other cases involving pre-embryos, implantation had been attempted, even if unsuccessfully. *Roman* is the *only* case among these in which the embryos had been created but never implanted.²⁷⁶ The court did not elaborate on why Randy had revoked his consent to implantation.²⁷⁷ All that

273. *Id.* (citing TEX. FAM. CODE ANN. § 160.706(b) (Vernon 2002) (“[C]onsent . . . may be withdrawn . . . at any time before the placement of eggs, sperm, or embryos)).

274. *See supra* notes 83-88 and accompanying text (discussing Junior's claimed aversion to bringing children into the world under the existing conditions).

275. *See Roman*, 193 S.W.3d at 54 (“[T]here was evidence that Randy had been upset with Augusta in the two years prior to the scheduled implantation . . .”).

276. *See id.* at 42.

277. *See id.*

is clear is that thirteen eggs were harvested from Augusta, six of which were successfully fertilized with Randy's sperm, three of which were cryopreserved, but none of which were implanted.²⁷⁸

Roman raises a variety of questions. Suppose, for example, that the initial agreement had instead stated that Augusta would have control of the embryos in the event of divorce. It is unclear whether such an agreement would be enforceable or whether, instead, an explicit or implicit revocation of consent to such an agreement prior to the divorce would nullify the agreement.

Some of the language of the *Roman* decision suggests that an initial decision to give custody to Augusta would have been enforceable, given the court's citing *Davis* and *Kass* with approval,²⁷⁹ including the following passage from *Kass*:

Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.²⁸⁰

Further, it should be noted that after considering the trend in other states to require contemporaneous consent,²⁸¹ the *Roman* court rejected that approach and instead opted for enforcement of the initial agreement.²⁸² Had the court believed, for example, that an individual should never be forced to be a parent against his or her will, the court would presumably have opted for the contemporaneous consent requirement. Thus, while *Roman's* requiring destruction of the embryos might seem to be in line with those cases upholding the rights of an individual not to be a parent, *Roman* suggests that the right not to be a parent might not win the day if the initial agreement had been written differently. The same might be said of a recent Oregon case.

278. *See id.*

279. *See id.* at 45-46.

280. *Id.* at 46 (quoting *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998)).

281. *See id.* at 45-48.

282. *See id.* at 50.

B. Dahl

In *In re Marriage of Dahl*,²⁸³ an Oregon appellate court examined a trial court's disposition of six frozen embryos in a marriage dissolution.²⁸⁴ The wife, Laura, testified that she and her husband, Darrell, intended to use the embryos to create a child for themselves and not to use them were the marriage to end.²⁸⁵ She further claimed that it was her understanding that if she and her husband disagreed about the disposition of the embryos, "she would have sole and exclusive right to direct [Oregon Health and Science University] to transfer or dispose of the embryos."²⁸⁶

The husband remembered things quite differently. For example, he claimed that his signature on the agreement with OHSU had not been notarized and that he had signed the last page of the document without reading it.²⁸⁷ He testified that "the 'embryos are life,'"²⁸⁸ and he "opposed their destruction or donation to science because 'there's no pain greater than having participated in the demise of your own child.'"²⁸⁹ He wished to donate the embryos to someone else trying to conceive.²⁹⁰

Laura offered a number of arguments to support her contention that the embryos should not be donated. While in effect asking that the original agreement be enforced,²⁹¹ she also asserted her right not to be a genetic parent.²⁹²

283. 194 P.3d 834 (Or. Ct. App. 2008).

284. *See id.* at 836 ("Soon after, the parties decided to dissolve their marriage. The parties reached an agreement on all matters pertaining to the dissolution of their marriage except for one: the disposition of six frozen embryos that remained from the IVF process.").

285. *Id.* at 837.

286. *Id.*

287. *See id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *See id.* at 838.

292. *See id.* at 837 ("[Laura] stated that, if she were to produce more children genetically, she would not want someone other than her to raise them."); *id.* at 838 ("[Laura] argues that, even if the embryos are subject to court disposition as property, the court cannot award decision-making authority in a way that could

As an initial matter, the trial court found that the parties had signed the agreement while a notary was present,²⁹³ suggesting that the husband simply had an inaccurate memory of what had happened.²⁹⁴ The signed agreement “evinced the parties’ intent . . . at the time that they participated in the creation of the embryos,”²⁹⁵ although a separate issue was whether such an agreement was enforceable.

Like the *Davis* court,²⁹⁶ the *Dahl* court wrestled with how to classify the embryos. The husband argued that he should be awarded the embryos because that would be “a just and proper distribution of the parties’ property,”²⁹⁷ whereas the wife claimed that the embryos were not property and thus could not be distributed in a dissolution proceeding.²⁹⁸

Rather than try to decide the correct way to characterize the embryos themselves, the court shifted its focus, instead discussing “whether the contractual right to dispose of frozen embryos is ‘personal property’ for purposes of the statute.”²⁹⁹ While not entirely confident that the shift to the right to dispose of the embryos solved all difficulties,³⁰⁰ the court nonetheless found that this right to control the disposition of the embryos did fit within the broad statutory definition of property.³⁰¹ Otherwise, the

result in the birth of a child over the objections of a source of the genetic material.”).

293. *Id.* at 837.

294. *Id.* at 837.

295. *Id.* at 841.

296. *See supra* notes 16-48 and accompanying text (examining the *Davis* discussion of whether embryos should be considered property).

297. *Dahl*, 194 P.3d at 837.

298. *See id.*

299. *Id.* at 838.

300. *See id.* at 838 (“Notwithstanding the apples-to-oranges comparison between appreciation of assets and an intangible contractual right to dispose of frozen embryos”); *id.* at 839 (“We acknowledge that there is some inherent awkwardness in describing those contractual rights as ‘personal property’”).

301. *Id.* at 838.

court suggested, the trial court would not have had the power to distribute them.³⁰²

The intermediate appellate court next sought to determine what would be a “just and proper’ division” under the statute.³⁰³ This was no easy task, at least in part, because this was not like other kinds of property allocations, since “[t]he division of property rarely gives rise to this level of deeply emotional conflict”³⁰⁴ While recognizing that “some properties are unique and personally meaningful,”³⁰⁵ the court nonetheless suggested that in most cases “a decision to award particular property to a party generally can be considered to be a decision that is ultimately measured in monetary (or equivalent) value.”³⁰⁶ But the court cautioned that “the contractual right to direct the disposition of embryos cannot reasonably be viewed that way”³⁰⁷ Precisely because the right to direct the disposition of the embryos could not reasonably be monetized, Oregon “case law controlling the just and proper distribution of property in a marital dissolution proceeding—all of which addresses the distribution of property to which some sort of monetary value can be ascribed—offers little assistance in [the] task here.”³⁰⁸ The court then looked to legal authority from elsewhere.³⁰⁹

The difficulty with the approach adopted by the Oregon court was not in considering cases from other jurisdictions, but in thinking that those cases would be helpful in addressing the particular issue of concern before the Oregon court. None of the other jurisdictions had characterized the right to control the disposition of the embryos as property that was subject to a just and proper distribution, so it would be surprising were their analyses helpful on that point. Indeed, precisely because the other jurisdictions had not considered what would constitute a just and proper

302. *Id.*

303. *Id.* at 839.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

distribution, it is not surprising that there was no discussion in the other cases that spoke to this issue.

The case that came closest to offering a relevant discussion was *Davis*, where the Tennessee Supreme Court found that the embryos were neither “‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect”³¹⁰ and that the progenitors had an “interest in the nature of ownership.”³¹¹ However, the *Davis* court refused even to consider how these ownership interests might be distributed most equitably. Instead, the court favored the right not to be a parent where there had been no initial agreement covering the circumstances at hand.³¹²

Were a court to try to address what would constitute a fair distribution, one of the first questions would be whether at issue was the right to control the disposition of *all* of the embryos or, instead, whether several rights were at issue, each of which would involve control over an individual embryo. Were it conceptualized as the right to control the disposition of all of the embryos, then it is not clear how this property could be distributed justly. Perhaps a court would adopt the *Witten* waiting approach and suggest that because each party would have the right to control the disposition of *all* of the embryos, nothing could be done absent an agreement by the parties with respect to the course of action to be taken.

Such a disposition would require that the status quo be maintained indefinitely, because neither could dispose of the property without the other’s consent. This non-divisible right to control the disposition of all of the embryos might be likened to property held in tenancy by the entirety, where each member of a couple has an undivided interest in the property as a whole.³¹³

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

311. *Id.*

312. See *supra* notes 80-95 and accompanying text.

313. See *Wehrheim v. Brent*, 894 S.W.2d 227, 228-29 (Mo. Ct. App. 1995) (“Where property is owned in tenancy by the entirety, each spouse is seized of the whole or entirety and not of a share or divisible part. Each spouse owns an undivided interest in the whole of the property and no separate interest.” (citing *Stafford v. McCarthy*, 825 S.W.2d 650, 656 (Mo. Ct. App. 1992))); *Smith v. Smith*, No. M2004-00257-COA-R3-CV, 2005 WL 3132370, at *5 (Tenn. Ct. App. Nov. 22, 2005) (“In a tenancy by the entirety, each spouse is considered to be

Yet, it might be noted that a tenancy by the entireties will be dissolved upon divorce, and the property will be distributed fairly in accord with local law.³¹⁴ Perhaps, then, the right to control all of the embryos should be modified so that a fair distribution can be achieved. However, it would be quite unclear what a fair distribution would look like. Suppose that there were an even number of embryos. Should they be divided up evenly? Even were it clear that this would be the fairest distribution of the remaining embryos if they were all of the same quality, a more difficult assessment would be necessary were the embryos to vary in quality.³¹⁵ For example, suppose that certain embryos, if implanted, would be more likely to result in a live birth. Who should get those?

Consider two progenitors, one asserting the right to be a parent and the other asserting the right not to be a parent. Each would claim that it was imperative that he or she receive the highest quality embryos so as to maximize the likelihood that he or she would (or would not) become a parent. If the right to be a parent and the right not to be a parent are of equal constitutional weight, then *perhaps* those rights cancel each other out and the progenitors should be treated equally—the embryos of highest quality should be distributed equally. Of course, there would be other ways to understand what was fairest, depending on whether (1) the individual seeking control of the embryos wanted to use them herself or donate them to someone else

the owner of the entire property rather than of a share or a divisible part of it.” (citing *Grahl v. Davis*, 971 S.W.2d 373, 378 (Tenn. 1998)).

314. See, for example, *In re Hope*, where the court explained:

The disposition of tenancy by the entireties property upon a divorce is governed by D.C. Code Ann. § 16-910 (1981). As relevant here, unless the parties had entered into “a valid . . . agreement . . . disposing [of] the property,” upon the entry of a final decree of divorce the court would have been required, under § 16-910(b), to distribute tenancy by the entireties property “in a manner that is equitable, just and reasonable, after considering all relevant factors.”

231 B.R. 403, 413 (Bankr. D.D.C. 1999).

315. Cf. Marvin F. Milich, *In Vitro Fertilization and Embryo Transfer: Medical Technology + Social Values = Legislative Solutions*, 30 J. FAM. L. 875, 879 (1991) (“[S]cientists have learned that in the IVF procedure, as in natural reproduction, embryos with serious chromosomal abnormalities are weeded out by natural selection, usually within the first eight weeks of pregnancy.”).

or if (2) the individuals seeking the embryos had other ways of becoming a genetic parent, etc.

Even were the embryos to be distributed equally because, for example, each of the progenitors wanted to implant the embryos, the quality of the embryos might not be particularly accommodating. Suppose, for example, that the quality of the differing embryos were to fall along a continuum, one being very good, two being good, three being fair, etcetera. It might be very difficult to assess whether, for example, one very good embryo should be treated as the equivalent of two good ones or, perhaps, three fair ones.

The above discussion of fairness does not take into account any initial understandings of the parties. Even were it possible to devise a fair method of distribution where the parties had said absolutely nothing about what they would want in the event of a divorce,³¹⁶ it is not at all clear that such a system would be fair if it did not give effect to the original expectations, needs, and hopes of the parties. Presumably, the parties themselves would be better able to judge their own needs and desires, especially when not clouded by the emotions that might arise in the context of a divorce. It is perhaps for this reason among others that the *Dahl* court concluded that “the general framework set forth by the courts in *Davis* and *Kass*, in which courts give effect to the progenitors’ intent by enforcing the progenitors’ advance directive regarding the embryos, is persuasive.”³¹⁷ Precisely because of the difficulties in assessing the value of the right to control the disposition of the embryos and in discerning what would be a just distribution of those rights, the least unfair approach would be to rule in light of the considered and informed wishes of the progenitors that had been stated before the possible difficulties associated with divorce clouded matters even further.

CONCLUSION

Several courts have been asked to resolve disputes about the control of frozen embryos upon divorce. Differences among the factual settings notwithstanding,

316. The *Davis* court attempted to achieve a result that it believed fair where there were no provisions upon the event of divorce. See *Davis*, 842 S.W.2d at 603-04.

317. *In re Marriage of Dahl*, 194 P.3d 834, 840 (Or. Ct. App. 2008).

there have been two noteworthy similarities among the opinions. First, none of the courts awarded the embryos to someone seeking to have them implanted—indeed, in *Litowitz*, where the individuals were contesting who would be allowed to implant the embryos rather than whether they would be implanted at all, the Washington Supreme Court nonetheless ordered the embryos destroyed. Second, many of the opinions were not well-reasoned, reaching results either by ignoring or mischaracterizing factors that would have led to a contrary conclusion.

The courts' reluctance to deal directly with the implicated issues is unsurprising. There is no clearly correct answer, and any disposition is likely to result in severe disappointment for someone. Nonetheless, as a matter of public policy and fundamental fairness, certain ways of resolving these disputes are preferable to others.

Couples entering into an IVF program may well have been trying to conceive for years. They may be desperate. Further, they may not be able to anticipate all of the potential difficulties that they will face. Nonetheless, they are working together to achieve a long-sought goal and are not adversaries. Statements made at this time are presumably more likely to reflect the parties' wishes, desires, and values than would the statements made during or in anticipation of a possibly contentious divorce.

Several supreme courts have emphasized that parties may well not know how they will feel in the future and thus initial agreements regarding the disposition of embryos should not be given effect. But the inability to predict the future does not preclude the enforcement of other kinds of agreements, for example, prenuptial agreements.

While it might be pointed out that prenuptials are limited in scope and cannot, for example, specify who will have custody of any children born of the marriage,³¹⁸ that is precisely because such an agreement would not give adequate weight to the interests of the child. But in most if not all cases, it makes no sense to justify the refusal to

318. See *Edwardson v. Edwardson*, 798 S.W.2d 941, 946 (Ky. 1990) ("While it may go without saying, we observe that antenuptial agreements may apply only to disposition of property and maintenance. Questions of child support, child custody and visitation are not subject to such agreements . . .").

permit embryo implantation by appealing to the interests of the child that might thereby come into existence.

Courts using the contemporaneous consent model give each progenitor a powerful bargaining chip at a time when individuals might very well be tempted to punish their soon-to-be ex-spouses. As a matter of public policy, this makes no sense and may invite individuals to hold hostage their ex-partner's ability to parent a biologically related child in order to punish or to gain other advantages.

It seems reasonable to believe that some individuals would never want to bring a child into this world to be parented by someone else. Indeed, they might well have initially entered into an IVF program based on the assurance that this would never happen. To require such individuals to become genetic parents might well induce them never even to try to become parents, to the detriment of themselves, their would-be children, and society itself. Yet, for others, it seems clear that being a genetic parent of a child raised by others would not only not be a harm but might be a positive good. The individuals themselves would best be able to determine how they feel.

While individuals may change their minds over time, members of the couple can agree to modify their agreement to take account of their changing views. Suppose, however, that both members of the couple cannot agree about the changes that should be made to the agreement. It is then at least tempting to say that, for example, an individual can choose post-divorce not to have any connection with any children born, even if that person is not allowed to change the agreement so as to block the use of the embryos.

Asking courts to devise a fair distribution of remaining embryos may simply be too difficult even when there has been no prior agreement because, for example, the remaining embryos differ in quality. But asking courts to devise a fair distribution *notwithstanding the prior agreement* is to impose an even more difficult task; so this method should not be adopted. But what is even worse than the fair distribution model is to give a possibly antagonized ex-spouse the power to either block parentage or to name the price that potential parentage will cost. While the enforcement of initial agreements is not without its drawbacks, for example, because of the difficulties involved in foreseeing both what will happen and how one will feel in the future, it is immensely preferable to the other possible methods of distribution currently discussed.