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Comments: Bringing up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes after Divorce

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BRINGING UP BABY: MARYLAND MUST ADOPT AN EQUITABLE FRAMEWORK FOR RESOLVING FROZEN EMBRYO DISPUTES AFTER DIVORCE

I. INTRODUCTION

In 2002, about sixty-two million women of reproductive age were living in the United States.[1] Of these sixty-two million women, roughly 10% of them sought medical advice for fertility-related problems at some point in the past.[2] As a result of the prevalence and success of modern assisted reproductive technology (ART)[3] and in vitro fertilization (IVF),[4] more than 48,000 children were born in 2003.[5] In addition to live births, the increased use of ART had precipitated the storage of over 400,000 frozen embryos[6] by 2003.[7]

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1. *See* Centers for Disease Control and Prevention, Assisted Reproductive Technology: Home, http://www.cdc.gov/art/index.htm (last visited Feb. 21, 2008).
2. *Id.*
3. Generally,

   > ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. They do NOT include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.

   Id. (emphasis in original).
4. "In vitro fertilization (IVF), [is] the oldest and most well-known of . . . [ART] technologies . . . ." IVF "involves medically stimulating the ovaries to produce eggs. These eggs are then removed from the woman's ovaries where they are placed in a culture, fertilized with sperm, incubated for several days, and then transferred into the uterus." Ellen A. Waldman, *Disputing Over Embryos: Of Contacts and Consents*, 32 ARIZ. ST. L.J. 897, 902–03 (2000).
5. *See* Centers for Disease Control and Prevention, Assisted Reproductive Technology (ART) Report: Introduction to the 2003 National Report, http://www.cdc.gov/art/art2003/nation.htm (last visited Feb. 21, 2008) ("The 122,872 ART cycles performed . . . in 2003 resulted in . . . live births [of] 48,756 infants.").
6. "The term 'frozen embryos' . . . is the term of art denoting cryogenically-preserved preembryos." Jennifer Marigliano Dehmel, Comment, *To Have Or Not To Have: Whose Procreative Rights Prevail In Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1377 n.4 (1995). In this Comment, the term "embryo" and "preembryo" will be used interchangeably.

While the use of ART was increasing, divorce rates remained high on both a national and local level.[8] In the United States, 3.6 million divorces occurred during 2005.[9] In Maryland, the divorce rate was nearly 50% in the year 2005.[10]

It is a logical assumption that a portion of the stored embryos are the result of divorced spouses who are unable to come to an agreement regarding the disposal of or use of the frozen embryos. The dearth of legislation and consistent judicial guidelines governing such claims hampers resolution to the dispute of frozen embryos after divorce.[11] Only a handful of states have passed legislation governing how frozen embryos should be handled once a marriage ends.[12] Maryland is not one of these states.

Additionally, judicial approaches to settling disposition disagreements vary widely from state to state and "are insufficient to provide individuals and the courts with a means of regulating the disputes."[13] One court, in an embryo disposition dispute, noted that the ever-increasing number of cases dealing with the disposition of frozen embryos after divorce "will unquestionably spark further progression of the law."[14] That court also warned that such laws must provide "clear, consistent principles to guide parties in protecting their interests and resolving their disputes."[15]

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7. Rick Weiss, *400,000 Human Embryos Frozen in U.S.*, WASH. POST, May 8, 2003, at A10. This estimate was based on a survey of nearly all fertility clinics located in the United States. *Id.*
8. *See* MARTHA L. MUNSON & PAUL D. SUTTON, CTRS. FOR DISEASE CONTROL AND PREVENTION, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2005 6 (2006).
9. *Id.* at 1.
10. *See id.* at 6.
11. Nicole L. Cucci, Note, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. REV. 417, 438–39 (1998); Kellie LaGatta, Comment, *The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation*, 4 FLA. COASTAL L.J. 99, 99 (2002).
12. *See, e.g.*, CAL. PENAL CODE § 367g(b) (West 1999 & Supp. 2007) (requiring written permission from the gamete provider before using frozen embryos); FLA. STAT. ANN. § 742.17(2) (West 2005 & Supp. 2006) (empowering both gamete providers with equal decision making authority over frozen embryo disposition); LA. REV. STAT. ANN. §§ 9:121–9:133 (2000 & Supp. 2007) (terming frozen embryos biological human beings that may not be intentionally destroyed); OKLA. STAT. ANN. tit. 10, § 556(A)(1) (West 2000) (requiring written consent from both gamete providers before allowing the transfer of frozen embryos).
13. LaGatta, *supra* note 11, at 115.
14. Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).
15. *Id.*

With this in mind, Maryland must enact legislation and create a fair and consistent judicial approach to resolving embryo disputes. Although Maryland courts have yet to see an embryo disposition case, given the statistics of the rising instances of ART,[16] such a case is inevitable.

This Comment will analyze current judicial trends in assisted reproduction and their inherent gender biases. While this Comment will not assert that any one approach is more favorable than another, it will offer suggestions on how to mitigate the disparate impact on women inflicted by these current approaches.[17] It is the author's hope that these approaches, when thoughtfully employed, will provide a fair outcome for all parties involved in embryo disposition disputes.

Part II will provide an overview of the most widely employed judicial approaches to embryo disposition disputes.[18] In particular, Part II.A will address the most prevalent theory to embryo dispute resolution: the contractual theory;[19] Part II.B will discuss the contemporaneous consent model;[20] and Part II.C will discuss the balancing/best interest test.[21]

Part III of this Comment will touch briefly on the current legislative approaches to governing embryo dispute cases,[22] although it is not the core subject of this Comment. The author feels, however, that ultimately Maryland will have to create a legislative solution to this dilemma, and thus an awareness of current legislative trends is helpful.

Part IV will provide an overview of the four most common categories of legal status applied to frozen embryos.[23] Though some analysis is provided in this section, in-depth discussion is outside the scope of this Comment. The author believes, however, that in order to properly address frozen embryo disputes, courts must have a framework in place by which the legal status of the embryos can be analyzed.

Part V will then discuss weaknesses in the most common judicial approach, the contractual theory, and also discuss varying problems

16. Dehmel, *supra* note 6, at 1377.
17. *See infra* Parts V.B–C.
18. *See infra* Part II.
19. *See infra* Part II.A.
20. *See infra* Part II.B.
21. *See infra* Part II.C.
22. *See infra* Part III.
23. *See infra* Part IV.

with the balancing/best interest test.[24] Specifically, Part V.A addresses the failure of the contractual theory to yield equitable results.[25] Part V.B focuses on inherent gender bias in today's current application of the balancing/best interest test.[26] Part V.C discusses how the "right not to parent" results in unfair outcomes to women.[27] Throughout Part V, this Comment will introduce suggested modifications to these approaches that would result in more equitable judicial decisions.

Although this Comment focuses on the disparate effect on women of the current judicial approaches and offers a framework more favorable for the unique position of women in reproduction, the author does not intend to suggest that infertile men have less of a right to frozen embryos created by their gametes than do infertile women. As this scenario is encountered less often in such cases,[28] it is outside the scope of this Comment.

II. BACKGROUND

When faced with the problem of the disposition of frozen embryos after divorce, courts have primarily relied on three approaches when rendering their decisions: the contractual approach; the contemporaneous mutual consent model; and the balancing/best interest test.[29]

A. The Contractual Approach

The contractual approach asserts that any agreements entered into at the time of ART treatment should be considered valid and binding "so long as they do not violate public policy."[30] By honoring contracts entered into prior to treatment advocates argue that it endows individuals with the power to make personal decisions, and so keeps personal decision making outside the reach of the state or

24. *See infra* Part V.
25. *See infra* Part V.A.
26. *See infra* Part V.B.
27. *See infra* Part V.C.
28. *See* Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1061 (2004) (arguing that when "treatment for prostate cancer or other illnesses . . . [impairs or destroys] a man's reproductive capacity," and "a man's interest in using existing embryos to achieve genetic parenthood is as compelling as that of the aging divorcee who can no longer produce viable eggs").
29. Witten v. Witten, 672 N.W.2d 768, 774 (Iowa 2003).
30. *Id.* at 776 (citing Lowitz v. Lowitz, 48 P.3d 261, 271 (Wash. 2002); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

the courts.[31] This approach is considered the "currently prevailing" form of analysis.[32] Scholarly criticism of this analysis nevertheless exists because some argue it fails to "protect[] the individual and societal interests at stake."[33]

1. Case Law

a. Roman v. Roman

Roman v. Roman,[34] a case of first impression for the Texas Court of Appeals, involved the disposition of three frozen embryos created by the parties after many unsuccessful attempts to achieve pregnancy by other means.[35] In this case, both the husband and wife signed an "Informed Consent for Cryopreservation of Embryos" at the fertility clinic before undergoing any procedures.[36] This "embryo agreement," as the court called it, contained a clear term in which both parties agreed to destruction of the embryos if the parties divorced.[37]

After the parties filed for divorce they participated in mediation to resolve the issues surrounding the divorce.[38] They were successful in all areas except for the disposition of the three frozen embryos, which the trial court ultimately awarded to the wife.[39] The Court of Appeals of Texas, First District, anticipating that legislation would eventually provide an answer to the issue at hand, confined its analysis to whether the embryos were properly awarded to the wife in light of the written agreement.[40]

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31. *Id.* at 776–77 (quoting *Kass*, 696 N.E.2d at 180).
32. *Id.* at 776 (citing *Lowitz*, 48 P.3d at 271; *Kass*, 696 N.E.2d at 180; *Davis*, 842 S.W.2d at 597).
33. *Id.* at 777 (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88–89 (1999); Christina C. Lawrence, Note, *Procreative Liberty and the Preembryo Problem: Developing a Medical and Legal Framework to Settle the Disposition of Frozen Preembryos*, 52 CASE W. RES. L. REV. 721, 729 (2002)).
34. 193 S.W.3d 40 (Tex. App. 2006). In addition to the contractual approach model, the court also seems to acknowledge the contemporaneous mutual consent model when it subjects the authority of an embryo agreement contract to "mutual change of mind." *Id.* at 50. The thrust of the court's analysis, however, is that "[a]bsent ambiguity, [the court] interpret[s] a contract as a matter of law." *Id.*
35. *Id.* at 41–42.
36. *Id.*
37. *Id.*
38. *Id.* at 43.
39. *Id.*
40. *Id.* at 45.

Texas law, the court noted, is rather contradictory with regard to the issue of parenthood, consent, and ART.[41] The law requires both the consent of the husband and wife before undergoing ART procedures, yet concedes that "a child may be born without the husband's consent."[42] More importantly, the court noted, is the absence of any legislation specifically addressing how best to "determine the disposition of the embryos in case of a contingency such as death or divorce."[43]

Given the lack of legislation or case law on point, the court looked to the state's gestational agreements and case law from other jurisdictions for guidance.[44] In light of its findings, the court found in favor of the husband and, hence, for the destruction of the embryos.[45]

In support of its decision, the court stated 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 the state of Texas.[46]

The court also refused to imply language and meaning to the contract that was not already within its four corners;[47] the court thus did not take into consideration that a party's decision to sign an agreement was not "fully considered" at the time it was signed.[48] Rather, the court focused on the clarity of the language of the embryo agreement[49] and, embracing the mantra of the *Kass* court, asserted that such agreements "should thus be 'presumed valid and should be enforced as between the progenitors.'"[50]

b. Kass v. Kass

In *Kass v. Kass,*[51] the Court of Appeals of New York ruled on the disposition of five embryos created during a marriage.[52] After the marriage ended in divorce, the wife claimed that the embryos were

41. *Id.* at 49.
42. *Id.*
43. *Id.*
44. *See id.* at 49–50.
45. *Id.* at 55.
46. *Id.* at 50.
47. *Id.* at 52.
48. *Id.* at 53.
49. *Id.* at 52.
50. *Id.* at 50 (quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998)).
51. 696 N.E.2d 174 (N.Y. 1998).
52. *Id.* at 175.

"her only chance for genetic motherhood."[53] In contrast, the husband argued that use of the embryos would impose upon him the "burdens of unwanted fatherhood."[54] Additionally, the husband asserted that the parties had agreed, in the event of the couple's divorce, that the embryos would be donated to the IVF program for research purposes.[55]

Before cryopreservation of the embryos occurred, the couple signed several forms relating to disposition of the embryos, including a statement which read: "In the event of divorce, we understand that 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."[56]

The New York State Supreme Court awarded custody to the wife after determining that the wife, as a female, has "exclusive decisional authority over the fertilized eggs" just as she would over a "nonviable fetus."[57] The New York Supreme Court, Appellate Division, Second Department, however, reversed this decision, holding that a woman's bodily integrity was not implicated prior to implantation and that the parties had a valid agreement regarding the disposition of the embryos.[58] As a result, the appellate division held that this agreement should govern.[59]

The Court of Appeals of New York agreed with the appellate division and clearly affirmed its decision that "a woman's right of privacy or bodily integrity" are not implicated "in the area of reproductive choice."[60]

The court's analysis focused more on the agreement that had been signed by the parties prior to the divorce and less on any implications the decision may have had with regard to rights of privacy and bodily

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 176; *see also id.* at 175 n.1 (defining eggs that are fertilized but do not yet contain the genetic material from the sperm as pre-zygotes).
57. *Id.* at 177.
58. *Id.*
59. *Id.*
60. *Id.* at 179. The court also quickly dispensed with any argument that the frozen embryos were entitled to Constitutional protection, emphasizing that the embryos were not "recognized as 'persons' for constitutional purposes." *Id.* (citing Roe v. Wade, 410 U.S. 113, 161–62 (1973) (indicating that "unborn [children] have never been recognized in the law as . . . whole" persons, and thus are not afforded all constitutional protections)).

integrity.[61] The court held that disposition agreements such as the one at issue between Mr. and Mrs. Kass should "generally be presumed valid and binding" and completely enforceable in any eventual dispute.[62]

The court noted the importance of encouraging the involved parties to clearly think through all possible contingencies before signing disposition agreements but acknowledged "the extraordinary difficulty" in fully understanding the implications of unknown future events.[63] Regardless of a party's inability to foresee events related to marriage and disposition, the Court of Appeals of New York held that where parties have "clearly manifested their intention, the law will honor it."[64]

B. The Contemporaneous Mutual Consent Model

The contemporaneous mutual consent model is similar to the contractual approach in that it asserts that parties who contribute frozen embryos should make decisions regarding the disposition of those embryos, and each party is entitled to "an equal say in how the embryos should be disposed."[65]

In a manner different from the contractual theory, however, this approach gives substantial weight to the idea that people are likely to change their minds about disposition after the embryos have been frozen.[66] It is thus "impossible" to expect a person to make a rational and binding choice prior to freezing the embryos.[67] This approach acknowledges that the decisions regarding disposition have "lifelong consequences for a person's identity and sense of self."[68] This model therefore suggests that parties may only use, donate, or destroy the

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61. *See id.* at 179–80.

62. *Id.* at 180 (citing Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (holding "that an agreement regarding disposition of any untransferred preembryos in the event of contingencies . . . should be presumed valid" and enforceable); John A. Robertston, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 463–69 (1990) (analyzing the implications and enforceability of joint directives for the disposition of embryos)).

63. *Id.* The court additionally noted that the parties' wishes regarding disposition of the embryos, as expressed prior to the eruption of a dispute, should always be "uppermost in the analysis" of disposition disagreements. *Id.* The court also stated that if such agreements are only enforceable while parties continue to agree, then they become ineffectual. *See id.*

64. *Id.* at 182.

65. Witten v. Witten, 672 N.W.2d 768, 777 (Iowa 2003).

66. *Id.* at 777–78.

67. *Id.* at 777.

68. *Id.* at 778.

embryos if both parties agree.[69] As a result, agreements into which parties enter prior to the creation of the embryos are not binding.[70]

1. Case Law

a. A.Z. v. B.Z.

In *A.Z. v. B.Z.*,[71] the parties attempted to conceive naturally shortly after marriage.[72] After the wife suffered an ectopic pregnancy and underwent the removal of her left fallopian tube,[73] however, the couple sought fertility treatment in order to become pregnant.[74] Eventually, the couple succeeded, and the wife gave birth to twin daughters.[75] During the final fertilization attempt, several excess embryos were not implanted in the wife's womb and were frozen for potential future use.[76]

When the couple filed for divorce several years later, the excess frozen embryos became the subject of dispute.[77] Before each treatment, the couple had signed numerous consent forms regarding the disposition of the embryos in case of death or divorce.[78] The wife modified the initial form to state that she, upon separation, would retain the rights to the frozen embryos.[79] The husband signed this consent form as well.[80] Subsequent consent forms, however, were blank when signed by the husband and then modified later by the wife to read exactly as the initial consent form read, which granted the wife custody of any frozen embryos.[81]

The court noted that this case was the first in which an embryo agreement granted one party the right to use the embryos for personal implantation.[82] The court, however, doubted the enforceability of the agreement for several reasons: the lack of evidence showing that the

69. *Id.*
70. *Id.*
71. 725 N.E.2d 1051 (Mass. 2000).
72. *Id.* at 1052.
73. *Id.* "An ectopic pregnancy is one that occurs outside the uterus, the normal locus of pregnancy." *Id.* at 1052 n.6 (citing STEDMAN'S MEDICAL DICTIONARY 488 (25th ed. 1990)).
74. *Id.* at 1052.
75. *Id.* at 1053.
76. *Id.*
77. *See id.* at 1052–53.
78. *See id.* at 1053–54.
79. *Id.* at 1054.
80. *Id.*
81. *Id.*
82. *Id.* at 1056.

couple intended the consent form to be a binding agreement; the change in circumstances created by the birth of their daughters; and the lack of clarity in the meaning of the words "become separated" used in the consent form.[83]

Even if the consent form had been unambiguous, however, the court stated that it would still refuse to enforce such an agreement based on public policy.[84] The court stated:

> [W]e conclude 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 that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well-established that courts will not enforce contracts that violate public policy.[85]

In order to determine public policy, the court turned to legislation for guidance.[86] It noted that Massachusetts legislation barred contracts forcing people into familial relationships—a parent/child relationship, even absent an emotional bond, is one such relationship.[87] In sum, the court stated that to force the unwilling husband into fatherhood would not be "an area amenable to judicial enforcement."[88]

C. The Balancing/Best Interest Test

The balancing or best interest test weighs the interests of both parties, while rejecting the necessity of mutual consent and contractual enforcement.[89] This approach asserts that where parties are in disagreement as to the disposition of frozen embryos, courts

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83. *See id.* at 1056–57.
84. *Id.* at 1057–58.
85. *Id.* (footnote omitted) (citing Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841, 844–45 (1st Cir. 1997), *abrogated on other grounds by* E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 61 (2000); Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 662 N.E.2d 1015, 1017 (Mass. 1996); Commonwealth v. Henry's Drywall Co., 320 N.E.2d 911, 915 (Mass. 1974)).
86. *Id.* at 1058.
87. *See id.* at 1058–59.
88. *Id.* at 1057–58.
89. *See* Witten v. Witten, 672 N.W.2d 768, 779 (Iowa 2003) (citing J.B. v. M.B., 783 A.2d 707, 718–19 (N.J. 2001)).

are to look at the parties individually and evaluate each party's own interest in either the preservation or destruction of the embryos.[90]

1. Case Law

a. J.B. v. M.B.

In *J.B. v. M.B.*,[91] a married couple learned that the wife had a condition that would make it difficult for her to conceive.[92] The couple sought medical treatment and successfully conceived a child after in vitro fertilization.[93] The facility that conducted the treatment required the husband and wife to sign a consent form prior to treatment.[94] The form stated that, in the event of divorce, "all control, direction, and ownership" of the resulting embryos would belong to the fertility clinic unless otherwise determined by a court order.[95]

Upon separation, the couple had seven embryos in storage at the fertility clinic.[96] Consequently, the wife sought a court order from the Supreme Court of New Jersey requiring that the embryos be destroyed, arguing that she had "endured the in vitro [fertilization] process" in order to use them "in the context of an intact family."[97] The husband filed a counterclaim requesting that the court allow the embryos to be donated to other infertile couples.[98]

The parties offered very different bases for their claims.[99] The husband asserted that the destruction of the embryos "violated his constitutional rights to procreation and the care and companionship of his children."[100] He argued that these constitutional rights outweighed his wife's "right not to procreate because her right to bodily integrity [was] not implicated."[101] Conversely, the wife argued that New Jersey public policy prevented forcing individuals into familial relationships.[102]

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90. *Id.* (citing *J.B.*, 783 A.2d at 719).
91. 783 A.2d 707 (N.J. 2001).
92. *Id.* at 709.
93. *Id.* at 709–10.
94. *Id.*
95. *Id.* at 710.
96. *Id.*
97. *Id.*
98. *Id.*
99. *See id.* at 712.
100. *Id.*
101. *Id.*
102. *Id.*

While the court found that the signed consent form did not clarify the original intent of the parties,[103] it noted that the "thrust" of the agreement was that the fertility clinic "obtains control over the preembryos unless the parties choose otherwise in writing, or unless a court specifically directs otherwise."[104] Because there was no separate writing memorializing the parties' intentions, the court found that it was within its own jurisdiction to determine the fate of the embryos.[105]

The court acknowledged the novelty and complexity of the case, noting that medical advancements in ART have outpaced legal advancements on the issue.[106] Likewise, it recognized that at the time parties enter into embryo agreements, a couple is unlikely to anticipate the possibility of divorce.[107] The court further stated that both parties provide necessary biological material for the creation of the embryos and, as such, decisions regarding disposition should be made jointly.[108]

To reach its decision in favor of the wife's request to destroy the embryos, the court noted that the husband's ability to procreate was not limited by the destruction of the embryos because his fertility was not impaired; his constitutional rights were thus spared.[109] Conversely, the wife's right not to procreate might be lost through donation of the embryos, as she would be forced to become a biological mother against her will.[110] The court refused to saddle the wife with the burden of knowing she might have biological children living without her knowledge, if the embryos were donated.[111]

Although the court acknowledged the arguments for enforcing embryo agreements, it felt that the "better rule" was to allow such agreements to be subject to change.[112] The court focused on the

103. *Id.* at 713.

104. *Id.*

105. *See id.* at 714–15.

106. *See id.* at 715. The court stated that "there are few guideposts for decision-making. Advances in medical technology have far outstripped the development of legal principles to resolve the inevitable disputes arising out of the new reproductive opportunities now available." *Id.*

107. *Id.*

108. *See id.* (citing Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (finding that both members of a couple have an interest in the disposition of their embryos); Coleman, *supra* note 33, at 83 (arguing that both the male and female donor should have mutual decision-making authority over embryo's disposition)).

109. *Id.* at 717.

110. *Id.*

111. *See id.*

112. *Id.* at 719 (stating that either party should be allowed to change his or her mind up until the destruction or implantation of the frozen embryos).

public policy of limitations on contracts involving family relationships and argued that public policy would be furthered by allowing a party to back out of a decision regarding future embryo use.[113] The court noted that, although the courts consider them conditional, most embryo agreements will govern so that clinics and parties would be able to rely on the enforcement of their terms.[114]

The court specifically refused to address the issue of how a claim would be resolved if an infertile party wanted, against the wishes of his or her partner, to use frozen embryos in order to become a biological parent.[115]

b. Davis v. Davis

The balancing/best interest test was clearly illustrated in *Davis v. Davis*.[116] In *Davis*, upon the dissolution of their marriage, the parties were unable to agree on the disposition of seven frozen embryos created during the marriage.[117] After the trial court granted "custody" to the wife, Mary Sue, on the basis that the embryos were human beings and could not be destroyed, the husband, Junior Lewis, appealed.[118] The intermediate appellate court overruled the trial court and stated that there was "no compelling state interest" in forcing parenthood on an unwilling partner, and as a result, the parties should have joint control.[119] Mary Sue sought review by the Supreme Court of Tennessee, which granted certiorari, not because it disagreed with the decision of the appellate court, "but because of the obvious importance of the case in terms of the development of law regarding the new reproductive technologies, and because the decision of the Court of Appeals [of Tennessee] does not give adequate guidance to the trial court in the event the parties cannot agree."[120]

Although the *Davis* court stated that embryo agreements into which parties enter should be "presumed valid," it simultaneously

113. *Id.*
114. *Id.*
115. *Id.* at 720.
116. 842 S.W.2d 588 (Tenn. 1992). The Supreme Court of Tennessee balanced the parties' interests by considering "the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions." *Id.* at 603. The *Davis* case also addressed whether frozen embryos are persons or property. *Id.* at 594–97. This secondary issue is beyond the scope of this Comment.
117. *Id.* at 589.
118. *Id.*
119. *Id.*
120. *Id.* at 590.

acknowledged that such agreements are so emotionally charged that they are nearly impossible to enter into with truly informed consent.[121] The court also briefly acknowledged that in some situations, estoppel by the party wishing to utilize the frozen embryos may be a plausible argument.[122]

Ultimately, the court found that the resolution to the instant problem "turn[ed] on the parties' exercise of their constitutional right to privacy."[123] The *Davis* court noted that the U.S. Supreme Court had implied this right to decide "whether to bear or beget a child."[124] Using this approach for the instant case, the court looked at the balance between the parties' rights to have children and their rights not to have children.[125] The court then stated that in vitro fertilization was a scenario ripe with "inherent tension" between these two rights.[126]

The *Davis* court, although it acknowledged that the wife was affected to a much a greater extent than her husband by the IVF process, refused to afford her greater influence over the fate of the embryos than that of her husband.[127] The court reasoned that the parties should be viewed in light of the possibility of their potential parenthood—both the happiness it involves for the party who desires it, and the burden it imposes for the party who does not.[128] Under this approach, the court felt the parties should be viewed "as entirely equivalent gamete-providers."[129]

The *Davis* court also noted that not only were the parties' decisions regarding procreation immune from outside interference, but that Tennessee's interest in encouraging procreation was not sufficient to override an individual's choices regarding procreation.[130]

Ultimately, the court embraced a balancing approach to determine whose rights should prevail.[131] The court looked at whether the wife should prevail in her desire to procreate or whether the husband

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121. *Id.* at 597.
122. *See id.* at 598.
123. *Id.*
124. *Id.* at 600 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (recognizing that "[t]he decision whether or not to beget or bear a child is . . . [a] constitutionally protected choice[]").
125. *Davis*, 842 S.W.2d at 601.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 602.
131. *Id.* at 603.

should be allowed to avoid unwanted procreation.[132] To determine whose interest was greater, the court addressed the possible burdens imposed on the husband should he become a father.[133] The court listed possible burdens imposed on the husband, which included: the psychological results of unwanted fatherhood stemming from the divorce of his parents and the financial burdens of caring for a child.[134] Additionally, the court pointed out that if the embryos were used by another infertile couple, the husband would spend his life wondering if he was a biological parent.[135] The court felt that the resulting situation would defeat the husband's "procreational autonomy" and bar him from developing a relationship with any subsequent children.[136]

On the other hand, the court only realized one burden imposed on the wife—if the wife were unable to prevail in her desire to donate the pre-embryo to another infertile couple, she would only face the knowledge that the extensive IVF treatment she underwent had been for naught.[137] The court noted, however, that if the wife had been seeking the pre-embryos for her own personal use, and she were unable to become a parent by other "reasonable means," then the outcome of this case would have been less clear.[138]

III. LEGISLATIVE APPROACHES

A. Current Trends in Legislation

The existence of state legislation governing embryo disposition disputes is sparse.[139] Even those states that have legislation in place, with regard to embryo disposition agreements, avoid establishing the validity and enforceability of such agreements;[140] current legislation

132. *Id.*
133. *Id.*
134. *Id.* at 603–04.
135. *Id.* at 604.
136. *Id.*
137. *Id.*
138. *Id.*
139. *See* LaGatta, *supra* note 11, at 107–08.
141. *Id.* The article notes that as of 2002, "only six states—Florida, Kansas, Kentucky, Louisiana, New Hampshire, and Pennsylvania—[had] legislation specifically attempting to resolve the problems associated with IVF." *Id.* at 108; *see also* FLA. STAT. § 742.17 (2005 & Supp. 2006); KAN. STAT. ANN. § 65-6702 (2002); KY. REV. STAT. ANN. § 311.715 (West 2006); LA. REV. STAT. ANN. §§ 9:122–133 (2000 & Supp. 2007); N.H. REV. STAT. ANN. §§ 168-B:13–15 (LexisNexis 2001 & Supp. 2007)); PA. CONS. STAT. ANN. §§ 3212(e), 3216(c) (West 2000). At that time, Florida and New Hampshire required parties seeking IVF treatment to sign

fails to address the rights of parties involved in embryo disposition disputes.[141]

Another weakness in state legislation regarding embryo disposition is that the laws vary greatly from state to state.[142] This results in increasing "difficulty in determining the rights to frozen embryos and determining the enforceability of agreements concerning the disposition of unused embryos."[143] As a result of such legislative inconsistencies, some scholars call for a "[f]ederal uniform policy" with regard to the disposition of frozen embryos after divorce.[144]

Moreover, some state laws regarding embryo disposition implicate larger issues, such as the question of when life begins.[145] For example, "Louisiana law adamantly prohibits the destruction of viable embryos because the legislature considers the embryos to be human beings."[146] Similarly, "Kentucky . . . [has enacted laws] prohibit[ing] the intentional destruction of an embryo."[147] Critics of IVF-related legislation assert that "[f]etal personhood" laws deprive women of equality in the eyes of the law.[148] As a result, feminist critics of personhood laws worry that rights are being taken "away

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disposition forms. *Id.* at 109; *see also* FLA. STAT. § 742.17 (2005 & Supp. 2006); N.H. REV. STAT. ANN. § 168-B:21 (LexisNexis 2001).

141. LaGatta, *supra* note 11, at 108; *see also* FLA. STAT. § 742.17 (2005 & Supp. 2006); KAN. STAT. ANN. § 65-6702 (2002); KY. REV. STAT. ANN. § 311.715 (West 2006); LA. REV. STAT. ANN. §§ 9:122–133 (2000 & Supp. 2007); N.H. REV. STAT. ANN. §§ 168-B:13–15 (LexisNexis 2001 & Supp. 2007); PA. CONS. STAT. ANN. §§ 3212(e), 3216(c) (West 2000).

142. LaGatta, *supra* note 11, at 108.

143. *Id.*; *see also* Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death or Other Circumstances*, 87 A.L.R. 5th 253, 261 (2001) (discussing the birth of law that can be used to determine the enforceability of embryo agreements).

145. LaGatta, *supra* note 11, at 111. Author, Kellie LaGatta, asserts that a federal regulation governing the disposition of frozen embryos in dispute would "help to prevent [and resolve] later disagreements without interfering with fundamental rights of reproductive autonomy." *Id.* at 112.

145. *See id.* at 108; *see also* LA. REV. STAT. ANN. §§ 9:123–133 (2000 & Supp. 2007).

146. LaGatta, *supra* note 11, at 109; *see also* LA. REV. STAT. ANN. §§ 9:122–133 (2000 & Supp. 2007).

147. LaGatta, *supra* note 11, at 108; *see also* KY. REV. STAT. ANN. § 311.715 (West 2006).

148. Lisa McLennan Brown, *Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization*, 13 AM. U. J. GENDER SOC. POL'Y & L. 87, 103–04 (2005).

from women in the reproductive choice arena, instead of increasing joint decision-making."[149]

Proponents of federal legislation argue that increased joint decision-making will be overcome by "careful legislation."[150] This legislation, scholars assert, should require counseling prior to undergoing IVF treatment; such a requirement would force "parties to seriously think" about the repercussions of their decisions.[151] Arguably, such legislation would encourage shared decision-making over the fate of the embryos, thus equalizing the power of the parties.[152]

IV. THE LEGAL STATUS OF FROZEN EMBRYOS

A. Current Approaches to Classifying the Legal Status of Frozen Embryos

Before a court tackles the problem of who should have control over the disposition of frozen embryos after divorce, it is imperative that the court determine under which legal "classification" the embryos fall.[153] There are four such classifications that have been developed: the "right-to-life" approach; the "current constitutional view of the Supreme Court"; the "special respect" approach; and the "private property view."[154]

The right-to-life classification is the most restrictive of the classifications concerning the rights of progenitors, and it endows the embryo its own set of "full rights and protections."[155] This approach has sparked concern and criticism from feminist scholars.[156] These critics worry that by endowing embryos with personhood rights, the

149. *Id.* at 104. The author further notes that "legislation . . . enacted so far consistently has regulated the actions of women and reinforced the status quo instead of undermining it." *Id.*

150. LaGatta, *supra* note 11, at 113.

151. *Id.* at 114.

153. *Id.* The author also notes that "subjective judicial discretion" would be solved by federal legislation and advocates following the lead of other nations, such as Australia and the United Kingdom, which have enacted such laws. *Id.* at 115.

153. Dehmel, *supra* note 6, at 1382.

154. *Id.* at 1382–83. The "current constitutional view of the Supreme Court" is encompassed in *Roe v. Wade*, 410 U.S. 113, 157 (1973).

155. Dehmel, *supra* note 6, at 1382 (quoting Jennifer L. Carow, Note, Davis v. Davis*: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 538 (1994)). The author also notes that this stance is currently embraced by the Roman Catholic Church. *Id.* at 1382 n.41.

156. *See* Brown, *supra* note 148, at 91–92.

liberty interests gained by women in *Roe v. Wade* are severely undermined.[157]

The current constitutional view of the Supreme Court, on the other hand, does not view an embryo as a legal person.[158] The effect of this view is that a fetus is not afforded rights until it has undergone a live birth.[159] By extension, "frozen preembryo[s] must [also] fall short of the Supreme Court's definition of a 'person.'"[160]

The special respect classification takes into consideration the possibility that a frozen embryo may eventually develop into a human being.[161] Advocates of a special respect approach believe embryos are imbued with a "unique moral significance" that acts to remind us of the "unique gift of human existence."[162] Proponents of this classification argue that, because embryos cannot process emotion and thought, they are not individuals, and thus, embryos are not persons to be afforded the full protection such legal status would offer.[163] Critics argue, however, that a special respect framework could become "a slippery slope where preembryos and other nonviable entities consisting of human genetic material" obtain rights that outweigh those of the gamete providers.[164]

The private property approach focuses not on the embryo itself, but rather it looks to see which party may "have 'rights' or 'property' interests in them."[165] To determine those rights and interests, proponents of this classification give great weight to the procreational

157. *Id.* at 91. For example, Louisiana state law defines "an in vitro fertilized human ovum [as] a biological human being" and specifically rejects the argument that frozen embryos are property. LA. REV. STAT. ANN. § 9:126 (2000). The law also states that identified gamete providers retain all rights as parents of the fertilized ovum, but if the gamete providers "fail to express their identity," then the embryos must be protected until "adoptive implantation can occur" in order to "protect the in vitro fertilized human ovum's rights." *Id.*

158. Dehmel, *supra* note 6, at 1383. This is the approach currently held by the United States Supreme Court. *Id.*

159. *Id.* (quoting *Roe*, 410 U.S. at 160–62).

160. *Id.*

161. *Id.*

162. *Id.* (quoting John Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 447 (1990)).

163. *See id.* at 1383–84. The author also notes that the special respect approach has gained the most popularity and support both internationally and in the United States. *Id.* at 1384.

164. 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, 892 (2005).

165. Dehmel, *supra* note 6, at 1384.

rights of the gamete providers.[166] Additionally, this approach instills equal rights in gamete providers because the embryos are not yet implanted in a woman's body; the private property approach, therefore fails to implicate bodily integrity issues.[167] The "private property" approach has been criticized for its classification of frozen embryos as mere chattel and for failing to provide any legal protection to the embryos.[168]

The importance of establishing a consistent judicial classification for frozen embryos is illustrated by *Davis v. Davis*.[169] The *Davis* dispute was heard in three levels of the court system in Tennessee, and each court used "an entirely different legal analysis" to determine the status of the embryos.[170] The result was that each court reached a different outcome: the trial court labeled the embryos "'children, in vitro' and awarded custody of them to the mother"; the court of appeals suggested the embryos were property and granted joint custody; and the Tennessee Supreme Court held that the embryos were "neither persons nor property, but rather entitled to 'special respect.'"[171]

V. ANALYSIS

A. Debunking the Myth of Fairness in the Contractual Theory

Although the contractual theory appears to be a favorite among courts today,[172] it arguably fails to yield equitable results in embryo dispute cases. The reasons for this potential inequity are myriad: first, parties rarely can fully appreciate the impact of their decisions when the agreements are signed, given the highly emotional circumstances of the agreement;[173] second, parties rarely anticipate

166. *Id.*; *see also* York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989) (upholding an embryo disposition agreement which called the frozen embryos "property").

167. Dehmel, *supra* note 6, at 1385.

168. Skouvakis, *supra* note 164, at 891.

169. 842 S.W.2d 588, 590 (Tenn. 1992).

170. Vincent F. Stempel, *Procreative Rights in Assisted Reproductive Technology: Why the Angst?*, 62 ALB. L. REV., 1187, 1192 (1999).

171. *Id.* at 1192–93.

172. *See* Witten v. Witten, 672 N.W.2d 768, 776 (Iowa 2003). As of 2000, the only state to endorse contractual ordering for the disposition of embryos was Florida. Florida, however, does not dictate the form or substance of such agreements. Brown, *supra* note 148, at 105; *see also* FLA. STAT. ANN. § 742.17 (West 2005).

173. *See* J.B. v. M.B., 783 A.2d 707, 715 (N.J. 2001); *see also* Christi D. Ahnen, Comment, *Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?—An Analysis of* Davis v. Davis, York v. Jones, *and State Statutes Affecting Reproductive Choices*, 24 CREIGHTON L. REV. 1299, 1346 (1991).

that their marriages will end in divorce;[174] and third, although embryo agreements may be presumed valid, such agreements are often complex and unclear.[175] The following analysis will focus on the first and third reasons.

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.[176] 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.[177] Often, infertile women seek treatment "at all costs" with total disregard for the ultimate price they may pay emotionally, physically, and financially.[178] Given these facts, the notion that a person could enter into an embryo agreement with a full appreciation of its effects is highly doubtful.[179]

There are also difficulties inherent in obtaining informed consent from patients in the substantive form of embryo agreements.[180] For example, although such agreements were originally intended to inform patients of potential outcomes of the medical procedures in which they were to undergo, the actual result has been one in which patients simply sign a form that "overstates the patient's exercise of conscious will."[181] Medical forms such as embryo agreements are often filled with incomprehensible medical and legal language and are presented to patients for their signature without attempts to engage the patients in "thoughtful deliberation and dialogue."[182] Again, under these circumstances, it appears to be nearly impossible for a patient to be truly informed about his or her decisions.

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174. *J.B.*, 783 A.2d at 715.

175. Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 469–70 (1999).

176. *See* Waldman, *supra* note 4, at 923.

177. *See id.*

178. *Id.*

179. New Hampshire stands alone in that its legislation regarding the disposition of embryos requires gamete donors to undergo counseling before beginning the IVF process. The law requires "judicial preauthorization" for the approval of disposition agreements. *See* Brown, *supra* note 148, at 105; *see also* LaGatta, *supra* note 11, at 109.

180. Waldman, *supra* note 4, at 924–25.

181. *See id.* at 920–21; *see also* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 933 (1994) (arguing that "the usefulness of informed consent depends on a meaningful *dialogue* between physician and patient," although "the minimally necessary ingredients of such a dialogue . . . are usually absent in most clinical situations").

182. *See* Waldman, *supra* note 4, at 921.

When such contracts or embryo agreements are entered into, a court's decision to enforce them is arguably unconscionable.[183] This is not only the result of the fragile emotional and physical state of the patient at the time the agreement is entered into,[184] and the murky language within the document,[185] but it also results from the general disparity in the reproductive abilities of the parties.[186] Women are most often the infertile patient and are most often the party who finds herself "in the twilight of her reproductive years" without a viable option for postponing biological parenthood.[187] Men, on the other hand, are often able to reproduce well into their seventh decade.[188] Disparity in bargaining power may arise because a woman might feel she has no other option than to sign an embryo agreement, in light of her limited reproductive window, even if the terms of the agreement are contrary to her true wishes.[189]

The family law section of the American Bar Association first recognized the tremendous psychological effect of infertility in 1999 in its publication of a proposed Assisted Reproductive Technologies Model Act (the Act).[190] In a section devoted entirely to the psychological effects of ART, the authors of the Act address the need for in-depth psychological counseling by qualified medical personnel before a patient and her partner enter into any embryo agreement.[191] The purpose of requiring such extensive psychological support for patients is to bolster the embryo agreements into which these patients may eventually enter.[192] Specifically, the authors of the Act state that

183. *See id.* at 926. Critics have also called automatic enforcement of such contracts not "entirely sensible" given the added complexity of "contract ambiguity, changed circumstances and public policy responses to contracts surrounding reproduction." *See* Daar, *supra* note 177, at 469.

184. *See* Waldman, *supra* note 4, at 922–24.

185. *Id.* at 921.

186. *See id.* at 928.

187. *Id.*

188. Waldman, *supra* note 28, at 1061.

189. *See* Waldman, *supra* note 4, at 926–28; Coleman, *supra* note 33, at 97–101.

190. *See* AMI S. JAEGER ET AL., ASSISTED REPRODUCTION AND GENETIC TECHNOLOGIES COMMITTEE, FAMILY LAW SECTION, AMERICAN BAR ASSOCIATION, ASSISTED REPRODUCTIVE TECHNOLOGIES MODEL ACT 10 (1999), http://www.abanet.org/family/committees/ART_modelact1299.pdf (last visited Oct. 28, 2007).

191. *Id.* at 23. The Act states that patients should be counseled by medical personnel who have qualifications including a "graduate degree in a mental health profession; . . . training in the medical and psychological aspects of infertility; . . . [and a] minimum of one year experience in infertility counseling." *Id.*

192. *Id.* at 23, 25.

counseling "provides a template to ensure informed consent for legal agreements."[193]

The contractual theory also raises an additional problem. Courts that have addressed embryo agreements in disposition cases have generally used two very different approaches. Courts have either enforced the contract as valid (generally where the agreement has been to dispose of the embryos) or refused to enforce embryo agreements where the agreement permits the use of the embryos by one party while the other party wishes to see the embryos destroyed.[194]

This dichotomy of the nationwide judicial approaches to contractual ordering becomes evident when the decision in *A.Z. v. B.Z.* is viewed in light of *Kass v. Kass* and *Roman v. Roman*. In all three cases, the parties had signed embryo agreements that clearly stated the respective parties' wishes with regards to the disposition of any unused frozen embryos in the case of death or divorce.[195]

A.Z. is factually distinguishable, however, from the other cases, in that the *A.Z.* embryo agreement awarded custody of the embryos to the wife in case of divorce,[196] whereas the other cases involved agreements consenting to the destruction of the embryos.[197] In *A.Z.*, the court refused to honor the agreement, whereas in the latter cases, the courts enforced the agreements.[198]

These differing outcomes suggest that, although, courts have historically asserted that legally binding embryo agreements should govern, courts do not consistently enforce such agreements. This phenomenon causes parties to perceive that embryo agreements are ineffectual and that courts will not always honor their contractual wishes.[199]

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193. *Id.* at 23.

194. Waldman, *supra* note 4, at 899; A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000).

195. *A.Z.*, 725 N.E.2d at 1051; Kass v. Kass, 696 N.E.2d 174, 176 (N.Y. 1998); Roman v. Roman, 193 S.W.3d 40, 42 (Tex. App. 2006).

196. *A.Z.*, 725 N.E.2d at 1054.

197. *Kass*, 696 N.E.2d at 175; *Roman*, 193 S.W.3d at 42.

198. *A.Z.*, 725 N.E.2d at 1057; *Kass*, 696 N.E.2d at 180; *Roman*, 193 S.W.3d at 50.

199. *See* Skouvakis, *supra* note 164, at 889. One reason courts may be hesitant to refuse enforcement of an embryo disposition agreement is that the court would be required to then decide the legal status of the embryo. "Case law and state legislation have developed three legal status categories of preembryos: (1) life; (2) property; and (3) something in between deserving special respect." *Id.* Each category offers unique judicial challenges wrought with moral, ethical, and legal implications that complicate an embryo agreement analysis. *Id.*

The proposed Act of the American Bar Association offers a different solution to cases of divorce where partners differ in their desires regarding the disposition of their frozen embryos.[200] The Act proposes that if the parties agreed to implantation of embryos prior to the divorce or separation (in the event of non-married gamete providers), the party who wishes to use the embryos may do so without the unwilling partner being viewed as a legal parent.[201] This approach would permit the infertile patient to pursue biological parenthood without implicating the former partner's wish to avoid parenthood.

In evaluating embryo agreements, courts have also considered public policy; for example, finding all contracts creating familial relationships void.[202] Regardless of the courts' varied approaches, no court has considered the extreme hardship that is placed on the woman undergoing fertility treatment when evaluating embryo agreements.[203] Some feminist scholars argue that the result is unfair enrichment to the male gamete provider, who bears little burden in the production of the embryos, yet retains most of the control.[204]

Courts generally have denied this "sweat equity" argument and instead have chosen to view male and female participants in ART as equals in the production of the embryos.[205] This is because opponents argue that:

> Although a woman's physical contribution to the creation of an embryo may be greater than that of a man, it is undertaken voluntarily and without assurances of ever successfully becoming pregnant. Moreover, "the burdens of unwanted genetic parenthood will last a lifetime. As such, they will greatly outweigh either partner's short-term physical investment at the time the embryos were initially created."[206]

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200. ART MODEL ACT, *supra* note 190, at 41.

201. *Id.*

202. Tracey S. Pachman, *Disputes Over Frozen Preembryos & the "Right Not to Be a Parent,"* 12 COLUM. J. GENDER & L. 128, 132 (2003).

203. *Id.* at 151–52.

204. *See id.* at 152.

205. *See* Fazila Issa, Note, *To Dispose or Not to Dispose: Questioning the Fate of Frozen Preembryos After a Divorce in* J.B. v. M.B., 39 HOUS. L. REV. 1549, 1581 (2003).

206. Kimberly Berg, Note, *Special Respect: For Embryos and Progenitors,* 74 GEO. WASH. L. REV. 506, 527 (2006) (footnotes omitted) (quoting Coleman, *supra* note 33, at 86).

Additional criticism may exist for the sweat equity theory because it always allows the woman to prevail, even if the male partner is the infertile patient.[207] It may be useful, therefore, to consider the female partner's sweat equity only if she is the infertile patient and would potentially be forced to endure further ART procedures if the existing embryos were destroyed.

B. The Inherent Bias Against Women and Infertile Persons in the Courts' Current Approach to Embryo Disposition

When faced with determining the fate of frozen embryos after divorce, courts generally have concluded that the right to avoid procreation outweighs the right to biological parenthood.[208] The general result of this approach has been disparate in that the male litigant has prevailed in destroying the embryos in four out of five such cases.[209]

The *Davis* court, for example, admitted that had Ms. Davis wished to use the embryos for herself, the case would have been "closer" and ultimately stated that Ms. Davis still had the right to achieve parenthood through adoption.[210] Additionally, the court further qualified Ms. Davis's rights to the embryos by stating that the case would only be close if she could not become a mother by "any other reasonable means."[211]

One problem with the *Davis* court's analysis is its failure to define reasonable means,[212] although the court suggests that adoption may be one such reasonable option for Ms. Davis to achieve parenthood.[213] The problem with the suggestion of adoption as a panacea to a party's inability to experience parenthood is its failure to account for the challenges that a single person who attempts to adopt might face.[214] For example, many adoption agencies have guidelines excluding applicants based on age, marital status, and income.[215] As a result, most single, older women are unable to adopt a healthy child.[216] Because of these barriers, adoption is often not a

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207. *See* Shana Kaplan, Note, *From A To Z: Analysis of Massachusetts' Approach to the Enforceability of Cryopreserved Pre-Embryo Dispositional Agreements*, 81 B.U. L. REV. 1093, 1114 (2001).
208. *See* Pachman, *supra* note 202, at 132.
209. *Id.* at 133.
210. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
211. *Id.*
212. *See id.*
213. *Id.*
214. *See* Waldman, *supra* note 28, at 1056.
215. *Id.* at 1058.
216. *See id.* at 1056–57.

"comparable alternative" to allowing a woman the use of her own embryos.[217]

Courts also appear to disregard the considerably greater investment female litigants have in the ART process.[218] Rather, the courts appear to simply assume that adoption or further infertility treatment is a suitable alternative to a woman's use of the frozen embryos.[219] The ART process, however, poses greater risks to the health of the women who undergo it, as opposed to men, whose participation requires little in the way of sacrifice.[220] Also, women's fertility begins to decline as early as their twenties, so that by the time a marriage is dissolved, the female litigant's ability to reproduce is likely severely impaired.[221] Conversely, men generally produce motile sperm well into their seventh decade.[222]

When courts ignore the biological differences between men and women and refuse to include them when balancing the interests of the parties, the ultimate result is gender discrimination.[223] Some courts attempt to protect themselves from this accusation by citing rights to privacy and avowing the protection of personal privacy.[224] Alternatively, some courts have argued that because a frozen embryo is not incorporated into a human body, neither reproductive nor privacy rights are involved.[225] Regardless of a court's reasoning for setting aside the biological differences of the gamete providers, the result is that the courts ignore the vital fact that parties do not view

217. *Id.* at 1059. The author also states that the "[j]udicial affinity for this 'solution' reveals both insensitivity to the frozen embryo litigants' parental aspirations and a profound inattention to the real-world barriers that threaten their fulfillment." *Id.*

218. *Id.* at 1052.

219. *Id.*

220. *Id.* at 1052–53 (arguing that women face a "more arduous" process because "[a]ll that is required [of men] is a private room, an empty jar and, perhaps, a Playboy magazine or video.").

221. *See id.* at 1054–55.

222. *Id.* at 1061. If a man is unable to reproduce biologically because of illness such as prostate cancer, his right to frozen preembryos is "as compelling as that of the aging divorcee who can no longer produce viable eggs." *Id.*

223. Pachman, *supra* note 202, at 146–47.

224. Davis v. Davis, 842 S.W.2d 588, 598–600 (Tenn. 1992). In the *Davis* case, for example, the court wrote extensively on the importance of personal autonomy as a fundamental human right as expressed in both federal and state law. *See id.* The court focused specifically on procreational autonomy and acknowledged that although it is "inherent in our most basic concepts of liberty," its protection under federal law is "no longer entirely clear." *Id.* at 601.

225. Kass v. Kass, 696 N.E.2d 174, 177, 179 (N.Y. 1998).

procreation in the same light, and therefore, do not have an "equal interest in the disposition of their frozen embryos."[226]

Another ramification of the failure to allow for biological differences is that infertile women suffer the most dramatic impact.[227] It appears that courts feel as though a woman's right to reproduce and her right to bodily integrity attach only at the onset of physical pregnancy.[228] Pregnancy, denied to infertile women, becomes the "gatekeeper for reproductive rights."[229] In order to avoid this discrimination against infertile women, courts should view pregnancy as a process that encompasses not only the physiological side of pregnancy,[230] but all the myriad aspects of pregnancy, including the preembryo stage.[231] In this way, infertile women will be afforded the same rights to privacy and reproduction as fertile women, and they will have "equal access to procreational autonomy."[232]

Additional support for the argument that infertile women, and men, should be afforded equal access to procreational autonomy can be found in the landmark case *Bragdon v. Abbott*.[233] In *Bragdon*, the U.S. Supreme Court addressed the issue of whether the ability to reproduce was a "major life activity" as defined under the Americans with Disabilities Act.[234] With regard to that issue, the Court held:

> We have little difficulty concluding that [reproduction is a major life activity]. As the [United States] Court of Appeals[, First Circuit] held, "[t]he plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." Reproduction falls well within the phrase "major life

226. *See* Brown, *supra* note 148, at 103.

227. *See id.* The author notes that the *Kass* decision, although advancing gender equality, did so at the expense of infertile women. *Id.*

228. *Id.* at 100–01; *see also* Daar, *supra* note 175, at 465 (noting that a pregnant woman has the right to control her embryo based on the protection offered by *Roe v. Wade*, whereas a woman undergoing ART does not). A woman with embryos in storage will lose control over her embryos over the objection of the male partner because the courts title the right not to procreate a compelling state interest. *Id.*

229. Daar, *supra* note 175, at 458.

230. *Id.* at 462.

231. *Id.*

232. *Id.* at 465.

233. 524 U.S. 624 (1998).

234. *Id.* at 638–41.

> activity." Reproduction and the sexual dynamics surrounding it are central to the life process itself.[235]

Although the case does not address the issue of infertility directly, by analogy the infertile person, like the HIV-positive patient who cannot procreate due to her physical limitations, should be included in the purview of the ADA.[236]

Another way to provide equal protection to infertile women is to cease viewing differently the rights surrounding "coital reproduction" and "noncoital reproduction."[237] Fundamental rights would then attach to the individual with frozen embryos in storage in the same way they attach to a pregnant female or a person desiring to use birth control.[238] If the fundamental rights afforded pregnant women were also given to infertile persons, the state could not interfere with their choice to utilize frozen embryos to achieve pregnancy.[239] Any rule that prevented an infertile person from achieving pregnancy with her frozen embryos would be subject to strict scrutiny.[240]

C. The Fallacy of the "Right Not to Parent" Argument

A common thread among judicial decisions in embryo disposition cases is the right to avoid unwanted parenthood.[241] This "judicial presumption" asserts that the spouse who opposes use of the embryos will automatically be psychologically connected to any resulting offspring based solely on their biological connection.[242] The result for the unwilling parent, courts feel, is one of two options: either the

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235. *Id.* at 638 (third and fourth alterations in original) (quoting Abbott v. Bragdon, 107 F.3d 934, 939–40 (1997)).

236. Kevin Yamamoto & Shelby A. D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93, 102 n.38 (2001) (noting that *Bragdon* indicates that infertility might be covered by the ADA).

237. Daar, *supra* note 175, at 463–64.

238. *See id.*

239. *See id.* at 464–65.

240. *See id.*

241. *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000) (refusing, as a matter of public policy, to enforce an embryo disposition agreement that would force an unwilling husband to become a father); J.B. v. M.B., 783 A.2d 707, 717 (N.J. 2001) (arguing that the fundamental right not to procreate meant refusing to force an unwilling woman into biological parenthood through donation of her embryos); Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (finding that the right to procreate and the right to avoid procreation were of equal significance in deciding on the disposition of embryos). For a full discussion of these cases, *see supra* Parts II.B.1, II.C.1.

242. Waldman, *supra* note 28, at 1027.

parent will feel forced to create a relationship with the child, which will thereby be at the parent's own psychological and emotional cost, or the parent will reject the child and experience "a permanent and agonal sense of loss."[243]

This presumption is easily rebutted, however, with current studies on sperm donation and the modern fatherless family.[244] 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.[245] These findings would indicate that biology alone does not create paternal ties.[246]

There is an acknowledged difference between anonymous sperm donors and spouses who enter into the ART process with the hope of conceiving a child.[247] Studies show, however, that even when children are created willingly, biological ties are not indicative of parental attachment.[248] 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.[249] These studies reveal that parental attachment is "socially enacted" and not biological; therefore, as biology should not be the basis for rendering judicial decisions.[250]

It is ironic that, whereas courts will enact the "unwilling parent" analysis when rendering decisions regarding the use of frozen embryos, these same courts disregard this notion if a party becomes an unwilling parent through intercourse.[251]

For example, in *L. Pamela P. v. Frank S.*,[252] a man was held to be responsible for the welfare of a child created by a sexual relationship with the mother, even though the mother lied about her use of contraception.[253] The court held that although the respondent had the "constitutionally protected right" to make a choice regarding becoming a father, that right extended to preventing state interference in whether or not a person chooses to use birth control.[254] The court

243. *Id.* at 1027–28.
244. *See id.* at 1028, 1040–41, 1049.
245. *See id.* at 1049–51.
246. *See id.* at 1028–29.
247. *See id.* at 1052.
248. *See id.* at 1041–49.
249. *See id.* at 1041–45.
250. *See id.* at 1041–49.
251. *See* Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992).
252. 449 N.E.2d 713 (N.Y. 1983).
253. *See id.* at 716.
254. *Id.* at 715–16.

declined to extend the constitutional protection to include how people related privately with one another and the conduct in which they chose to engage.[255]

This decision, which is still good law, seems counter to the rulings in the frozen embryo dispute cases in that it clearly does not give a parent, even one who is deceived into becoming a parent, the right not to be one.[256] Current family law states that "[e]ven if a father [does] not consent to the conception or the gestation of the child," he still must take on the responsibilities of fatherhood.[257] By contrast, at common law, a father was not required to assume the responsibilities of his offspring even though a mother was required to assume such responsibilities.[258] At common law, therefore, an unwilling father, like the parties in modern frozen embryo cases, had the right "not to parent" if he so pleased.[259] It would appear that the modern judicial approach encompassing the "right not to parent," then, is antiquated and gender-biased.

When justifying the use of the right not to parent analysis, some courts have invoked the spirit of a woman's right to have an abortion.[260] Arguably, when a woman is given the right to end her pregnancy, she is awarded the right not to parent.[261] Proponents of the right not to parent theory feel that if an embryo may be implanted against a male partner's wishes, then the female's rights become superior, and thus gender bias is born.[262]

The converse argument, however, is that *Roe v. Wade* encompasses a woman's right to bodily integrity, and fails to address her right not to be a parent.[263] As one scholar states:

> [T]he fact that these burdens [associated with bearing an unwanted child] may be overcome by the interests of the state, which has no biological connection or presumed obligation to support the unwanted child, suggests that, apart from doing as she chooses with her own body, a woman has little, if any, right not to be a parent.[264]

255. *Id.* at 716.
256. *See id.* at 714–16.
257. Pachman, *supra* note 202, at 143.
258. *Id.* at 143–44.
259. *See id.* at 143.
260. *See id.* at 144–45.
261. *See generally* Roe v. Wade, 410 U.S. 113 (1973).
262. *See* Dehmel, *supra* note 6, at 1401–02.
263. Pachman, *supra* note 202, at 144.
264. *Id.*

VI. CONCLUSION

Even though courts nationwide have used varied approaches in their analyses of frozen embryo dispute resolution, none have addressed the particular needs of the party who is at the most disadvantage—the infertile patient. Most often this is the female whose ability to procreate may not only be limited by medical reasons, but by the simple virtue of her narrow window of time for reproduction.

The current application of the contractual theory gives little weight to the physical and emotional stress patients are under when signing convoluted embryo agreements that will alter the rest of the patient's life. Likewise, the balancing/best interest test, though gender neutral on the surface, is riddled with gender bias against women, and in particular infertile women.

It is vital that Maryland adopt an equitable judicial framework for resolving embryo disposition disputes so that when cases inevitably end up in Maryland's courtrooms for resolution, guidance is available to aid in rendering truly fair results.

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